

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, :
 : PCA Case No.
 Claimants, : 2016-17
 :
 and :
 THE DOMINICAN REPUBLIC, :
 :
 Respondent. :
 :
 -----x Volume 3

ORAL HEARING

Wednesday, September 5, 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 8:34 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 If we can start with the--Mr. Kay, good morning.
3
4 THE WITNESS: Good morning.
5 PRESIDENT RAMÍREZ HERNÁNDEZ: If you can read the
6 piece of paper you have before you, I guess.
7 THE WITNESS: Are we live?
8 PRESIDENT RAMÍREZ HERNÁNDEZ: Yeah, right. Live
9 and broadcasting.
10 THE WITNESS: Perfect. Declaration for witness.
11 PRESIDENT RAMÍREZ HERNÁNDEZ: Wait. You have an
12 Expert Declaration. I think it's the expert.
13 (Comments off microphone.)
14 THE WITNESS: There we are.
15 PRESIDENT RAMÍREZ HERNÁNDEZ: Yeah, please.
16 THE WITNESS: Okay. Declaration for expert.
17 I solemnly declare upon my honor and upon my
18 conscience that I shall speak the truth, the whole truth,
19 nothing but the truth, and that my statement will be in
20 accordance with my sincere belief.
21 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you, Mr. Kay.
22 ERIC KAY, CLAIMANT'S WITNESS, CALLED
23 DIRECT EXAMINATION
24 BY MR. BALDWIN
25 Q. Good morning, Mr. Kay.

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1 A. Good morning.
2 Q. You have that binder in front of you, that white
3 binder. In that binder are the two reports you submitted
4 in the case. Can you verify that those are your reports?
5 A. So two reports. And we have estimate of slopes,
6 A. We have comparative slope analysis under B. And under
7 C we have proposed upper road. One page--oh, no. It's on
8 the reverse. I apologize.
9 Q. Okay. And, Mr. Kay, do those reports represent
10 your observations and opinions in this case?
11 A. They do.
12 Q. And is there anything that you would like to
13 change in those reports?
14 A. At this point, no.
15 MR. BALDWIN: Okay. Thank you. With that,
16 Mr. Kay has a presentation to provide.
17 DIRECT PRESENTATION
18 THE WITNESS: I believe in the beginning starting
19 out with the name. The name that appears on the prior
20 slide, Eric L. Kay--if you'd like to roll back for a
21 second, please, there. That Expert Presentation of Eric L.
22 Kay. My full name is Eardley Eric Lestock-Kay. I practice
23 under the name of Eric L. Kay. Okay. If you would go back
24 to our slide now.
25 My company is Kay Associates, providing expert

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1 consulting and engineering services. Kay Associates was
2 borne out of a need that developed. I was building with
3 machinery, forest roads, and through that process it came
4 that there was confusion in governing agencies, confusion
5 between different sciences of how things were to progress
6 forward in environmentally safe and sound forest roads.
7 From that machine work, I evolved into the
8 engineering side of the business. From the engineering
9 side of the business, I wrote books/articles, and I ended
10 up hanging out a shingle as Eric Kay Forest Road
11 Consultant, providing expertise, working as a facilitator,
12 providing expert consulting and engineering services. I
13 have significant experience engineering and constructing
14 mountain and forest roads.
15 I have consulted in North America, South America,
16 other parts of the world. I have experience in project
17 management, logistics, including cost control, forecasting,
18 training and worker safety. I was asked. And I conducted
19 slope measurements in various projects in and around
20 Jarabacoa.
21 Every property that I surveyed within that
22 mountain valley has significant slopes exceeding
23 60 percent. And those properties and lands had constructed
24 roads and houses on land where slopes, again, were
25 exceeding the 60 percent.

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1 I am of the firm opinion that both roads and
2 houses can be built on slopes exceeding 60 percent if
3 certain measures are taken. If protective and sound
4 engineering practices are not taken, significant
5 environmental harm could result.

6 As I stated in my Second Report, the following was
7 observed at projects in and around Jarabacoa. I start with
8 the first slide of a picture of Aloma Mountain,
9 developments in place. And if you look at the two
10 buildings, you'll see that they are on the edge of a slope,
11 of a steeper slope. You can see the basement, the lower
12 part of the building.

13 If you could run to the next slide.

14 Aloma Mountain, there's a number of roads. There
15 are steep slopes. The arrow is pointing to a slope, for
16 instance, in the region of minus 97 percent. The whole
17 process of this is to run A, B, C. And those were part of
18 my Reports where I did numerous examples of other
19 properties within the valley. And the idea here is to take
20 a look at: Is there something magical and different
21 between one particular project?

22 You can pick any one. Should any one be
23 particular as different that does not contain something
24 that the others don't?

25 If we go to our next slide, Slide B, Jarabacoa

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1 Mountain Garden. Within that picture, you'll see two slope
2 failures involved that are having a resultant effect.
3 Jarabacoa Mountain Garden. I brought this one up to
4 describe the relationship of fill slopes, cut slopes, and
5 road bed fill.

6 So my expertise, roads, slope stability. The fill
7 slopes on the road on the outside bottom edge of the road
8 where the material has been taken--cut out of the
9 mountainside, deposited on the outside, that can be
10 unstable if it is too steep, if it's been placed over top
11 of the original vegetation, for instance. Cut slopes where
12 it's cut into the edge of the slope, if those are
13 over-steep, they can be unstable.

14 So in the engineering phase, we would take care
15 and attention to ensure that we do not have erosion of
16 sediment from rainfall, from unprotected soils, that the
17 ground at the top of that slope up on top there cannot
18 slide down.

19 The road bed fill. When you construct a road, you
20 excavate the material out of the road bed and then put
21 competent material within the road bed to support your
22 traffic load. In steeper ground, care needs to be taken.
23 I mentioned earlier placing site cast material over native
24 vegetation. Care must be taken not to do the same within a
25 road.

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1 The blue line that I represented on there--and
2 this picture of Jarabacoa Mountain Gardens was for example
3 only, rather than specific instances at this location. And
4 I talk of--typically, let's say that material was placed on
5 the left-hand side of that blue line. And if it had been
6 placed over organic fill, then what we see in the road is a
7 crescent-shaped failure that starts to show up. Vegetation
8 starts to grow in those cracks because there's water in
9 there to provide growth for the vegetation.

10 Those instances, if they're not--care is not
11 taken, the material that's placed is not placed in
12 subsequently compacted layers, then we can look for further
13 troubles in the maintenance of the road. We can look for
14 further troubles of the road itself being an initiator of
15 cause of a more extensive disturbance lower down the hill.

16 Next slide, please.

17 The miscellaneous projects here. Mirador del
18 Pino. The house is built upon a steep slope. The
19 constructors of the house have taken great care and
20 attention to provide proper support under the house.

21 Again, we have steep slopes down below the houses.
22 And one initial here, when we take a look at a slope, we
23 have a slope that has an average percentage of steepness.
24 Within that slope, there's benches. These houses have been
25 placed upon a natural bench within the slope. So, again, a

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1 stable location to work from.

2 Next slide, please.

3 As we run through, we see examples again and
4 again. Alta Vista. And again, please. Paso Alto. A road
5 constructed. And time has taken its toll in weathering
6 back the cut slope. Quintas del Bosque, a road constructed
7 through steep terrain.

8 My opinion earlier. Yes, with proper care and
9 attention, stable roads can be built. Stable roads are
10 built. We take a look at the road between Jarabacoa and
11 Constanza, built through extremely tough and steep country.

12 Rancho Guaraguao. Steep cut slopes but cut into a
13 soil that is standing up and relatively competent.
14 Vegetation is taking over. But the trouble is, when the
15 vegetation itself is relied upon, the vegetation can--when
16 it oversaturates with water, then the extra weight can
17 strip the vegetation off the slope.

18 Agricultural projects are effects on slopes. This
19 is on the road between Jarabacoa and Constanza. JDD, Phase
20 2 road. The road that I was commissioned to plan the
21 construction of for Phase 2 could have been built in a
22 carefully controlled and supervised manner. That manner
23 includes a comprehensive water management plan, a
24 comprehensive engineering plan.

25 The advanced technology that was part of Michael

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1 Ballantine's plan to construct this road would have
2 provided more integrity than what we saw in the Phase 1
3 road.

4 Overall, Phase 2 road would be more secure and
5 provided more integrity. I just repeated myself. I
6 apologize. Get ahead of things.

7 As I stated in my Second Report, I was able to
8 make some observations about Aloma Mountain. In 2017 I
9 noted that development work was still continuing within the
10 mountain. I also noted that they had cut down mature trees
11 over a wide area. I also observed there were agricultural
12 activities taking place on land that was in excess of
13 60 percent. I included pictures of this in my Second
14 Report.

15 Mr. Navarro's testimony. I reproduced the overall
16 slope analysis that was done by Mr. Navarro. Included that
17 as B in my report. Jamaca de Dios, JDD, Phase 2 project,
18 and other permitted projects. The consequence here was to
19 take a look at the comparison in a detailed manner.

20 Mr. Navarro is incorrect that the Phase 2 road
21 would have included more switchbacks. My Phase 2
22 road--wrong there. The Phase 2 is more gentle than Phase
23 1. My Phase 2 road would have been engineered with a large
24 sweeping curve over distance and gentle grades.

25 Here are some pages from within that second 2

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1 report. And comparing the different projects. And if we
2 run to the very last column on the slopes greater than
3 60 percent, we see summaries of 14, 14, 19, 16, 20, 19, and
4 so on down the line. And there's a breakout and a bit of
5 explanation about those two models that are included in
6 that on the second slide, if you would, please.

7 Those two readings that we saw for each product
8 were taken from two different models. The engineering.
9 The first, the SRTM, Shuttle Radar Topography Mission, was
10 flown by NASA in around 2010. And it took an analysis of
11 the topography. The ASTER was the Advanced Spaceborne
12 Thermal Emission Reflector. The instruments that did the
13 reading was a Japanese instrument. And that took place
14 over two years in '98 and '99. I'm sorry. The
15 shuttle--the SRTM was run around 2000. I said 2010. I was
16 wrong on that. I apologize.

17 I'll be glad to take any questions from the
18 Tribunal.

19 PRESIDENT RAMÍREZ HERNÁNDEZ: Not at this stage.

20 Mr. Herrera, I think, will do the cross.

21 MR. HERRERA: Thank you very much, Mr. President.

22 CROSS-EXAMINATION

23 BY MR. HERRERA:

24 Q. Mr. Kay, good morning. My name is Raúl Herrera,
25 and I will be conducting your examination this morning.

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1 You'll be provided a binder of documents to which I will
2 turn and cite. I would ask that one of us speak at a time
3 to ensure that the interpreters and stenographers hear all
4 of our comments.

5 A. Okay. I have to apologize. In my work in
6 forestry, I was also a heavy equipment operator. I was
7 also a driller blaster. And in the blasting process, twice
8 I damaged my ears with explosions. And so is there a way
9 that we could turn up the volume on his microphone? Would
10 that be--

11 (Comments off microphone.)

12 BY MR. HERRERA:

13 Q. Can you hear me now?

14 A. Great. Great solution.

15 Q. Outstanding.

16 (Comments off microphone.)

17 THE WITNESS: Thank you kindly. Great.

18 BY MR. HERRERA

19 Q. Thank you.

20 Mr. Kay, you were acting as an independent expert
21 for Michael and Lisa Ballantine in this arbitration;
22 correct?

23 A. That is for the purposes of this Court. I am here
24 as an independent expert. My duty is towards the Court.

25 Q. The Tribunal?

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1 A. Correct.

2 Q. Yeah. And you're acting as an expert in what
3 field exactly?

4 A. My company and myself specialize in forest and
5 industrial roads and everything that encompasses them.

6 So, first, we need to pay attention to soils. We
7 need to pay attention to water.

8 Q. Thank you.

9 A. Soils and water in the wrong mixture can be bad.
10 Done in the right way, it can be good. A little bit of
11 water will help compaction.

12 Q. Thank you, Mr. Kay. You've provided more
13 information in your presentation this morning than you did
14 in your--either of your two Expert Reports. Are you
15 supplementing your expert opinion with your presentation?

16 MR. HERRERA: Mr. President, could I ask what--he
17 didn't point out what the extra information was. I'm
18 curious. He said he's just introduced additional
19 information. Could he say what he views as additional from
20 his Expert Reports?

21 PRESIDENT RAMÍREZ HERNÁNDEZ: I had the same
22 comments. Because I don't know whether some of the
23 pictures that were there were on the record or not.

24 MR. HERRERA: Yes, the photos taken are the same.
25 There was the commentary that--

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1 PRESIDENT RAMÍREZ HERNÁNDEZ: The question is
2 whether the pictures that you showed or any other part of
3 your presentation was already--or you could point us to an
4 exhibit that was already produced. Am I--
5 MR. HERRERA: It was the explanation that was
6 provided. But let's--we'll move on.
7 BY MR. HERRERA:
8 Q. Mr. Kay, your First Expert Report that you
9 submitted in this arbitration is limited to five pages;
10 correct?
11 A. That-- Lets go back¹ and have a look. How's that?
12 Q. Please do. It's your First Report dated--
13 A. Okay. Yes, we have before us a document that is
14 five pages.
15 Q. Well, it's actually four pages. The first page is
16 a cover page. So it's a four-page report. Thank you, sir.
17 A. Great.
18 Q. And you, in your First Report, Mr. Kay, offer no
19 citations or exhibits of any kind attached to that First
20 Report; correct?
21 A. That is correct,²
22 Q. In your First Report, you refer to events in which

¹ English Audio Day 3 at 00:33:25
² English Audio Day 3 at 00:33:50

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1 you had a direct participation; correct?
2 A. Could you explain that a little more for me,
3 please? A direct participation in--how do you mean that?
4 Q. Certainly. Mr. Kay, your Report refers to your
5 work in connection with the existing lower mountain road at
6 Jamaca de Dios. And I'm taking you to Paragraph 3 of your
7 Report--First Report.
8 Paragraph 2, "I personally reviewed the slope
9 conditions and climate."
10 "I first visited the project May of 2006,"
11 Paragraph 3.
12 Paragraph 4, "I introduced a new road structure."
13 So my question was that your First Report refers
14 to events in which you had a direct participation; correct?
15 A. Yes, sir.
16 Q. Thank you.
17 But it does not include a statement whereby you
18 swear that the information contained therein is the truth;
19 correct?
20 A. You're going to have to run that one by me again.
21 I'm not quite sure what you're asking.
22 Q. Mr. Kay, I'm asking a simple question. Generally,
23 these sorts of reports--
24 A. The question is simple.
25 Q. --have a statement that you are providing an

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1 opinion that is truthful, that you swear that the
2 information contained therein is the truth. Is that stated
3 in your First Report?
4 You don't need to look at counsel, sir. I'm
5 asking you a question.
6 A. You did. You're asking if it's contained in the
7 Report?
8 Q. Yes, sir.
9 A. You have read the report?
10 Q. Your First Report, Mr. Kay, does it state--
11 A. And you have read it?
12 Q. Pardon?
13 A. And you have read it?
14 Q. Sir, I'm asking the questions. If you have a
15 question, you can maybe direct it to the President of the
16 Tribunal but--
17 A. Yeah. Can you repeat the question again?
18 Q. Certainly.
19 Your First Report does not contain a statement
20 whereby you swear that the information contained therein is
21 the truth; correct?
22 A. There is--there is no such statement within this
23 document.
24 Q. Thank you, Mr. Kay.
25 A. Is that what you're asking?

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1 Q. Yes, sir.
2 A. If you've looked there and you've seen it isn't
3 there, then yes.
4 Q. Thank you.
5 A. It's a redundant question.
6 Q. Mr. Kay, were you paid for the preparation of this
7 First Report?
8 A. Yes.
9 Q. Were you paid in cash or in kind?
10 A. Neither.
11 Q. You were not paid?
12 A. In check.
13 Q. You were paid in--okay. Thank you.
14 And were you also paid for the Second Report that
15 you produced?
16 A. That would be correct, sir.
17 Q. Mr. Kay, you did not attach a résumé or a
18 curriculum vitae to either of your reports; correct?
19 A. Correct.
20 Q. So let me ask you a few questions about your
21 professional background.
22 A. By all means.
23 Q. Mr. Ballantine in his statements, and the
24 Claimants' in their pleadings, refer to you repeatedly as
25 "the Ballantines' engineer." Are you an engineer?

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1 A. I am not a licensed engineer in Canada. I am a
2 facilitator.

3 Q. I'll ask you about that. Thank you, sir.

4 A. Great.

5 Q. You are acting as an expert in this hearing today
6 in what capacity? What field exactly are you an expert on?

7 A. I repeat again: roads, slope stability, water
8 management.

9 Q. Mr. Kay, what sort of academic training do you
10 have?

11 A. Not all that much.

12 Q. Could you elaborate on that question, sir?

13 A. By all means.

14 I came to the forest industry as a road builder
15 operating heavy equipment in digging into the ground,
16 moving material, constructing good, sound, well-engineered
17 roads.

18 Through that process operating that heavy
19 equipment, I gained extra expertise and knowledge and
20 training. I attended training courses at universities and
21 colleges, short sessions. I went to seminars. I had
22 mentor training with my supervisors, with company
23 engineers. And from there, I graduated and moved
24 eventually into engineering within forestry as a practice
25 based upon my experience that I had gained, practical

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1 experience on the ground.

2 And from that process, I ended up writing a set of
3 three books. I was asked to--commissioned to publish a
4 number of articles for forestry and mining trade magazines
5 through the years. From those, I was asked by the
6 University of British Columbia to participate in putting
7 together a training program for the forest industry.

8 And that training program was to take the people
9 with--doing the machine work, it was to take the engineers,
10 it was to take the supervisors, it was to take the company
11 presidents, the guy on the end of the shovel, put them
12 together in the same room and get them to agree and talk
13 the same language to get a job done.

14 Q. Thank you for that, Mr. Kay.

15 Just on your comments. When you indicated working
16 as a road builder, could I ask, was that an operator of
17 heavy equipment, pile drive, the driver of the bulldozer?

18 A. You can certainly ask.

19 Q. Which of those functions--

20 A. Every one of those.

21 Q. All of them. Great.

22 A. And then plus a whole bunch more. My
23 classification as operator under the IWA, International
24 Woodworkers of America, I was classified as a camp
25 handyman.

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1 Q. Great.

2 A. And what that did is not a regular machine
3 operator to one simple phase. I was able to step onto a
4 log loader. I was able to step onto a yarding machine to
5 yard the logs--

6 Q. Great.

7 A. --down the hill. I was able to step into the low
8 beds, large trucks, and load the equipment on, drive it
9 over those narrow, windy mountain roads.

10 Q. Thank you for that, Mr. Kay.

11 I noticed that you had--you mentioned a particular
12 license as a vehicle license.

13 A. Pardon?

14 Q. There's a reference to a license, a driver's
15 license, in your--

16 A. Class 1 driver's license?

17 Q. Class 1?

18 A. Yes.

19 Q. Mr. Kay, you indicated when you graduated. Were
20 you using that term for purposes of graduated to a new
21 position or graduated from an academic institution?

22 A. Use it in the terminology of progressing.

23 Q. Progressing. Thank you very much for that,
24 Mr. Kay.

25 A. Yep.

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1 Q. Did you go to college? Do you have a college
2 degree? Did you graduate from college?

3 A. I do not have a degree.

4 Q. And you've explained--

5 A. But--

6 Q. --you have a lot of--

7 A. I am an instructor, college instructor and
8 university instructor.

9 Q. Yes, sir.

10 Mr. Kay, you said you're the President of Kay
11 Associates; correct?

12 A. That is correct, sir.

13 Q. How many associates work with you at Kay
14 Associates, sir?

15 A. My company, Kay & Associates, is formed in the
16 sense that when I take upon a job--Mr. Ballantine for
17 instance. My job for Mr. Ballantine required the service
18 of other specialists within certain fields. Those specific
19 people we engaged and hired. They do not work as employees
20 within my company. I engage the person necessary. You
21 have experts on soils. You are a geoscientist. It goes on
22 through the process.

23 I need a biologist. I go out and I select the
24 right biologist, not just--it needs to be somebody I can
25 work with.

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1 Q. Yes. Thank you, Mr. Kay.
 2 And I suppose--Mr. Kay, is that the--I was going
 3 to ask you later, but I'll ask you now. Is that then the
 4 definition of "facilitator" which you referred to earlier?
 5 A. That is correct. Yes.
 6 Q. Thank you, sir. I appreciate that.
 7 A. You can also use the word "organizer." Get the
 8 job done.
 9 Q. Mr. Kay, Kay & Associates' main offices are in the
 10 Canadian Province of British Columbia; correct?
 11 A. Correct.
 12 Q. Are you registered in the Association of
 13 Professional Engineers and Geoscientists of the Province of
 14 British Columbia?
 15 A. I could not be registered within it.
 16 Q. Thank you.
 17 A. Although however--but--
 18 Q. Are you registered in the--
 19 A. But--
 20 Q. Yes, sir.
 21 A. --I could have challenged the exam for
 22 professional engineer back in 1998. The forestry
 23 industry--the forest industry evolved, and we were going to
 24 specific professions. I chose not to take upon that role
 25 as professional engineer. Because what was happening was

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1 expertise was being looked for in separate fields. I
 2 talked earlier of biology. You talked of a geoscientist.
 3 So we needed those specific ones.
 4 A professional engineer was too broad a term.
 5 Q. Mr. Kay, I appreciate that.
 6 A. Great.
 7 Q. We'll come back to--
 8 Are you registered in the Dominican Association of
 9 Engineers, Architects and Surveyors?
 10 A. No, sir.
 11 Q. Mr. Kay, you provided engineering services to
 12 Jamaca de Dios; correct?
 13 A. I provided services to Jamaca de Dios.
 14 Q. No. I asked, Mr. Kay, if you provided engineering
 15 services to Jamaca de Dios. Would you respond to that
 16 question?
 17 A. In my statement, it was worded that way.
 18 Q. Which way, Mr. Kay?
 19 A. That I provided a set of service. Let's go back
 20 and look at it.
 21 BY MR. HERRERA:
 22 Q. Mr. Kay, I'm asking you a question. We'll turn to
 23 your paragraphs where you do describe what you did. But my
 24 question is simply: You were providing engineering
 25 services to Jamaca de Dios; correct?

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1 A. That would be correct.
 2 Q. Not correct; is that correct? Your answer is no?
 3 Mr. Kay, the question is were you--
 4 A. I answered you, yes, sir.
 5 Q. What was the answer?
 6 A. I'm sorry. I answered you yes.
 7 Q. You did provide engineering services to Jamaca de
 8 Dios? Is that your answer?
 9 A. My company Kay Associates provided engineering
 10 services to Jamaca de Dios.
 11 Q. Mr. Kay, you're here in your capacity as an
 12 expert.
 13 A. Correct.
 14 Q. So I'm asking you in your capacity as an expert,
 15 did you provide engineering services to Jamaca de Dios?
 16 A. My company Kay and Associates provided, through
 17 me, services to Jamaca de Dios.
 18 Q. Did you personally provide engineering services?
 19 A. I think what you're progressing to is did I act as
 20 a professional engineer? Is that where you're trying to
 21 go?
 22 Q. Respond to that question, then. That's--
 23 A. No.
 24 Q. No. Thank you, sir.
 25 Mr. Kay, in your report on Page 3, First Report,

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1 Page 3--Page 2, Paragraph 3, you state that you "formed a
 2 plan involving both immediate and staged improvements to
 3 upgrade this road to the engineering standards of North
 4 American mountain roads"; correct?
 5 A. That is correct, sir.
 6 Q. If you did not provide engineering services to
 7 Jamaca de Dios in your personal capacity, did you
 8 misrepresent your role in the services that you were
 9 providing in your report to this Tribunal?
 10 A. You're going to have to run that question by me
 11 again. That sort of went . . .
 12 Q. I'll break that--unpack that for you, then.
 13 Mr. Kay, you stated you did not provide engineering
 14 services to Jamaca de Dios; correct?
 15 A. Professional engineering services; correct. I
 16 think that's where you're--
 17 Q. Well, let me ask the question again. Did you
 18 provide engineering services personally to Jamaca de Dios?
 19 MR. BALDWIN: Mr. President, this has been asked
 20 and answered. He said yes, he did. And then he said no,
 21 he--when asked about whether he acted as a professional
 22 engineer, he said no. This is in the testimony.
 23 BY MR. HERRERA:
 24 Q. Okay. So let me ask you the second part of that
 25 question that you wanted me to unpack for you. Did you

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1 misrepresent your role and the services you provided in
2 your expert report?
3 A. I don't like your word "misrepresent." That--I
4 don't misrepresent myself personally.
5 Q. Okay. But you did not provide engineering
6 services; correct?
7 A. You had that earlier.
8 Q. Thank you.
9 Mr. Kay, you were initially contacted by Michael
10 Ballantine for works related to the road at Jamaca de Dios
11 sometime prior to May 2006; correct?
12 A. That's correct.
13 Q. Do you recall when Mr. Ballantine first contacted
14 you for such purpose?
15 A. Yes.
16 Q. When was that, sir?
17 A. Around--in 2004.
18 Q. And in what capacity were you contacted by
19 Mr. Ballantine in 2004?
20 A. As a person with experience in building roads in
21 steep mountain terrain.
22 Q. And, Mr. Kay, when were you first engaged by
23 Mr. Ballantine?
24 A. I believe 2006, we first visited the project.
25 Q. And who referred you to Mr. Ballantine in 2004

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1 when you first established contact with him?
2 A. I can't answer you that, sir. I don't know.
3 Q. Did he contact you or--
4 A. No. He con--
5 Q. He did contact you; correct?
6 A. That is correct, sir.
7 Q. Mr. Kay, would you say that you and the
8 Ballantines are friends?
9 A. Through our association over the years, yes.
10 Q. Mr. Kay, after the Ballantines contacted you in
11 regards to their existing road and you first visited the
12 Jamaca de Dios area in May of 2000--after he contacted you,
13 you then visited the Jamaca de Dios area in 2006--May 2006;
14 correct?
15 A. Correct.
16 Q. When and for what were you hired for the Phase 1
17 road project?
18 A. I was hired to advise.
19 Q. And that's as indicated that--where you formed a
20 plan involving both immediate and stage improvements to
21 upgrade this road; correct, to engineering standards?
22 A. That's what the words say, sir.
23 Q. Yes, sir.
24 And in February 2008 and in March 2009, you
25 supervised the planned stages of road improvement--

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1 A. You're reading from where now?
2 Q. Paragraph 5, First Report.
3 A. Okay. Thank you.
4 Q. In February 2008 and March 2009, you supervised
5 the planned stages of road improvement works in the Phase 1
6 project; correct?
7 A. That is correct, sir.
8 Q. And would you say you were a supervisor, then, in
9 that capacity?
10 A. That would be correct.
11 Q. Yes, sir.
12 And how many times did you travel to the Dominican
13 Republic, Mr. Kay, while overseeing the road improvement
14 project?
15 A. In February and March, that is traveling twice.
16 Q. Every year? How often for that road improvement
17 project that you were overseeing, how many times did you
18 travel to the Dominican--
19 A. Two.
20 Q. Twice.
21 And you were paid for the road improvement
22 supervision work?
23 A. That's correct, sir.
24 Q. Independent of the payment for your preparation of
25 the Reports that you submitted?

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1 A. That would be correct, sir.
2 Q. Yes, sir.
3 When was that road improvement project, which you
4 were supervising, completed, Mr. Kay?
5 A. In, that would be--I went in March 2009. I was
6 there for about a month or so. So within a month.
7 Q. Within a month. It was in 2009, or within a month
8 of 2000--you were supervising the planned stages of road
9 improvement works, you said, in February 2008 and
10 March 2009?
11 A. That is correct.
12 Q. And it was completed--
13 A. In that period.
14 Q. In that period. So March of 2009?
15 A. Within that period.
16 Q. Within that period.
17 You stated, Mr. Kay, in your First Report that
18 when you first visited Jamaca de Dios in May 2006--and I'll
19 take you to Paragraph 3 of your First Report--you examined
20 the topographical features of both Phase 1 and the upper
21 mountain project you call Phase 2; correct?
22 A. That is correct, sir.
23 Q. And when you undertook that examination and visit,
24 did you walk around Phase 2--you walked around Phase 2;
25 correct?

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1 A. That would be correct, sir.

2 Q. At that time, did you know that the plan was to
3 build residential housing projects at those sites?

4 A. "At those sites." Would you please define what
5 you mean by "those sites"?

6 Q. Yes, sir. In Phase 2.

7 A. In Phase 2, yes.

8 Q. Mr. Kay, could I direct your attention on the
9 binder in front of you, sir, there is an Exhibit C-031.
10 This is a document, C-031.

11 A. And that is located where?

12 Q. It's in the binder--

13 A. I gotcha.

14 Q. --that is in front of you, sir, that we provided
15 you.

16 This exhibit lists dates that the Ballantines
17 state that they purchased lands that would
18 become--developed as the site for the new project. And if
19 you go to III on that page, note the date of purchase is
20 August 17, 2009; correct?

21 A. Well, you're reading from the document. Yes, it's
22 correct, sir.

23 Q. I just need you to answer, Mr. Kay. That's part
24 of the exercise here. I'll ask, and you answer.

25 Mr. Kay, were you aware that the Ballantines in

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1 May of 2006 had not yet purchased all of the Phase 2 land?

2 A. That is information that's proprietary to
3 Mr. Ballantine that I was not involved in, so I don't know.

4 Q. Mr. Kay, I'm just asking that--it's stated here
5 the Ballantines produced this document and you indicate
6 that you walked into the area that is now Phase 2, to an
7 earlier question that I asked you. And my question is:
8 How would you have examined/walked the area when the land
9 wasn't even purchased by--

10 MR. ALLISON: Objection. Mischaracterizes the
11 exhibit. Are you talking specifically about the 22,000
12 square meters of Federico Abreu or the 140,000 meters that
13 were part of the original Jamaca de Dios purchase which is
14 also listed on that chart cited to the purchases up above?

15 PRESIDENT RAMÍREZ HERNÁNDEZ: Counsel, I think the
16 question was all of them, whether that happened after the
17 date. So I don't see any wrong with the question.

18 MR. ALLISON: Okay. But he characterized it: How
19 did you walk into Phase 2 if they hadn't purchased any of
20 the land? And that mischaracterizes the exhibit in front
21 of him.

22 MR. BALDWIN: I'm sorry, Mr. President. Just to
23 be clear because, Mr. Herrera is bringing this up. If you
24 look at the exhibit and it's confusing, you know,
25 especially to someone who didn't prepare it and is not

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1 involved in it, there certainly were lands purchased from
2 '09 after. But there's 140,000 square meters that were
3 part of Phase 2 that were already purchased from the
4 earlier title and so were there in 2009.

5 PRESIDENT RAMÍREZ HERNÁNDEZ: But to be frank, I
6 don't see any point there because I think the question was
7 if the land was not purchased--all the land in Phase 2,
8 how--was directed at that. So I don't see any problem with
9 the question.

10 Answer, please.

11 THE WITNESS: You say I can't answer your
12 question. Maybe I can put an analogy--

13 PRESIDENT RAMÍREZ HERNÁNDEZ: Repeat the question,
14 Counsel.

15 BY MR. HERRERA:

16 Q. Mr. Kay, at an earlier question--well, in your
17 Report--your First Report, you said--

18 A. Pardon me a moment, sir. I was just talking
19 there.

20 The--when I go to buy a house--I haven't bought it
21 yet--I go to look at the house first. Could this be what
22 Mr. Ballantine was doing? I don't know. I have no
23 knowledge whether he purchased it, whether he owned it,
24 whether we're looking at it. As a speculative issue, that
25 was not my job.

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1 Q. Mr. Kay, thank you for that.

2 Again, as I mentioned earlier, I'll ask the
3 questions and ask you to respond. The question was, how
4 could you have--how did you--well, I know how you walked
5 around on your two--how did--did you know--when you say you
6 inspected/examined Phase 2 in May of 2006, how would you
7 have done that if Mr. Ballantine had not purchased all of
8 the area for Phase 2 at that time?

9 A. I can't answer your question. I don't know.

10 Q. Don't know. Okay.

11 Mr. Kay, in February of 2011, you were engaged by
12 Mr. Ballantine to formulate a road engineering design for
13 the upper mountain project; correct?

14 A. What are you referring to at this point? May I
15 ask?

16 Q. Paragraph 7 of your First Report.

17 A. First Report?

18 Q. Yes, sir. We're all going to--yes, First Report.
19 Page 4, Paragraph 7, "In February of 2011, I was
20 engaged by Mr. Ballantine to formulate a road engineering
21 design for the Phase 2 upper road expansion project."

22 Correct? Is that--

23 A. That is correct, sir.

24 Q. Yes. Your answer is?

25 A. That is correct, sir.

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1 Q. Yes. Thank you.
 2 And you accepted--when you were engaged by
 3 Mr. Ballantine, you were accepted for that engagement;
 4 correct?
 5 A. You're referring to Sentence 7?
 6 Q. Yes, Paragraph 7, sentence--
 7 A. Yes.
 8 Q. Yes.
 9 And it was to formulate a road engineering design
 10 for the upper mountain project; correct?
 11 A. That is what the words say, sir.
 12 Q. Yes, sir.
 13 Mr. Kay, when you analyzed the land on which the
 14 roads were to be constructed, you believed that the
 15 conditions of the terrain, types of soils, and weather
 16 conditions were crucial topographical features that needed
 17 to be taken into account; correct?
 18 A. You're reading where now, sir?
 19 Q. Paragraph 3 of your First Report.
 20 A. So we're going backwards. Paragraph 3. Go ahead.
 21 Q. When you analyzed the land on which the roads were
 22 to be constructed, do you believe that the conditions of
 23 the--you state: "In examining the topographical features
 24 of both Phase 1 and Phase 2," you paid particular attention
 25 to "terrain, types of soils, and weather conditions," as

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1 they were "crucial topographical features that needed to be
 2 taken into account"; correct?
 3 A. That is correct, sir.
 4 Q. You also believe that the slope conditions and the
 5 climate of the site were important factors to consider when
 6 building a road; correct?
 7 A. That is correct.
 8 Q. And slope instability is a major concern when it
 9 comes to building a road on mountains; correct?
 10 A. The two go together, yes.
 11 Q. And water and humidity of the soil are important
 12 conditions to take into account for building--
 13 A. You're reading that word from where? You're
 14 using--
 15 Q. I'm asking you a question, Mr. Kay.
 16 A. Using the word "humidity"?
 17 Q. Water and soil composition/moisture are important
 18 conditions to take into account for building a road?
 19 A. Yeah. You threw "humidity" in there. It is humid
 20 in Washington, D.C.
 21 Q. Of course.
 22 A. Different ballgame.
 23 Q. Thank you for that, Mr. Kay.
 24 And this is particularly important because the
 25 area where Jamaca de Dios is located is subject to large

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1 rain events; correct?
 2 A. You're reading now from where?
 3 Q. Paragraph 3, where you indicate in your report
 4 that you--"strong focus on improved surface water
 5 management."
 6 And then in Paragraph 6, you again talk about,
 7 "Most critically, we focused on water management"; correct?
 8 A. Your question was?
 9 Q. This is an important issue.
 10 A. Your question?
 11 Q. Beginning with water management and stability of
 12 the soil, because the area where Jamaca de Dios is located
 13 is subject to a large--to large rain events; correct?
 14 A. Go back to the original statement. I think you
 15 added "large rain events" in your own words.
 16 Q. Well, I'm asking the question, Mr. Kay. If your
 17 answer is--answer the question then, sir.
 18 I'm asking you: Is this important because Jamaca
 19 de Dios is located in an area with significant rainfall?
 20 A. That is correct.
 21 Q. Thank you, sir.
 22 And, in fact, in Paragraph 6, Mr. Kay, you
 23 specifically state in your First Report, "Road surface
 24 water was directed to the ditches of sufficient width and
 25 depth." And that last sentence reads, "In areas of

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1 erodible soil, the ditches were armored with rocks embedded
 2 in cement"--
 3 A. He talks in the last sentence and yet the first
 4 sentence is highlighted? I'm not following.
 5 Q. Mr. Kay, just--the last sentence of Paragraph 6.
 6 A. There we go. You've got it now.
 7 Q. "In areas of erodible soil, the ditches were
 8 armored with rocks embedded in cement to better ensure the
 9 project's water management integrity during 'large rain
 10 events.'"
 11 A. Correct.
 12 Q. That's a term you used; correct?
 13 So there are large rain events in Jamaca de Dios;
 14 correct?
 15 A. Everywhere in the world as well, sir.
 16 Q. Thank you, Mr. Kay.
 17 Mr. Kay, in light of your acknowledgment a moment
 18 ago about the weather conditions in the Jamaca de Dios
 19 area, did you prepare a multi-year rain intensity
 20 calculation on overall water basin design to manage the
 21 stormwater in Phase 1?
 22 A. I did not formulate a formal design, no. But one
 23 has to look at what happened in the past to be able to
 24 forecast what is going to happen in the future.
 25 Q. That's--

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1 A. We look at--it's--
 2 Q. That makes a lot of sense.
 3 A. Good common sense.
 4 Q. But you did not formally prepare this calculation
 5 or design--
 6 A. That is correct, sir.
 7 Q. Did you prepare it informally?
 8 A. Your funny comment there, that's--I stated a
 9 little bit earlier that you take a look at what happened in
 10 the past and--
 11 Q. Okay.
 12 A. --use that to forecast what could we expect in the
 13 future?
 14 The evidence is laid out by mother nature herself.
 15 Q. Mr. Kay--
 16 A. In the ground.
 17 Q. Thank you, sir.
 18 A. On the ground.
 19 Q. Mr. Kay, water running at the outside edge of a
 20 road increases soil water saturation and consequently
 21 saturated soils are more unstable; correct?
 22 A. Yes. Yes.
 23 Q. Yes. Thank you, sir.
 24 When you visited Jamaca de Dios in 2006, Michael
 25 Ballantine had already begun constructing a road; correct?

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1 A. 2006, a road was already constructed, yes.
 2 Q. Was it completed?
 3 A. No.
 4 Q. What advanced stage of road completion was that
 5 road in when you got involved in May 2006?
 6 A. The basic road was in place.
 7 Q. But it was not completed; correct?
 8 A. That's correct.
 9 Q. Mr. Kay, in your report, in Paragraph 3--report,
 10 First Report, you explained that you were hired to upgrade
 11 and improve that road so that it would comply with the
 12 standards used in North American mountain roads; correct?
 13 A. Correct.
 14 Q. And as part of those improvements, you introduced
 15 road support structures and internal subsurface water
 16 drainage management systems to the existing road; correct?
 17 A. That's correct.
 18 Q. Mr. Kay, to measure internal subsurface water
 19 drainage management systems, did you undertake perforations
 20 in the area?
 21 A. Perforations? What do you mean by "perforations"?
 22 Q. Into the soil to determine the subsurface water
 23 that you were seeking to manage?
 24 A. Did drill test holes, you're asking? I did not
 25 drill test holes.

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1 Q. You did not. Thank you.
 2 Your improvements to the existing road included
 3 widening it so that "two large trucks could transit
 4 unencumbered in both directions"; correct?
 5 A. That was Mr. Ballantine's--yes.
 6 Q. Your improvements to the existing road was for
 7 that purpose; correct?
 8 A. Yes.
 9 Q. Thank you. Earlier--
 10 A. Where are you reading from? Could you run that
 11 back to where you're quoting from?
 12 Q. Paragraph 4 of your First Report, Mr. Kay. First
 13 sentence.
 14 A. Great.
 15 Q. Do you see that? Okay. And you answered
 16 "correct" to that question; correct?
 17 A. I'm just waiting for your highlighting there, sir.
 18 Q. No. I'll ask. Your improvements to the existing
 19 road included widening it so that "two large trucks could
 20 transit unencumbered in both directions"; correct?
 21 A. Correct.
 22 Q. Thank you. Earlier, you stated that the works
 23 related to the improvements on the first road were
 24 completed in--between 2008 and 2009; correct?
 25 A. You're referring now to--

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1 Q. I had asked you a question earlier, sir. When
 2 were those road improvements completed for which you went
 3 to Jamaca de Dios in 2006, and you said 2008/2009; correct?
 4 A. We answered affirmative earlier.
 5 Q. I'm asking the question, sir.
 6 A. Great.
 7 Q. It was your plan to employ the engineering
 8 practices used on the lower road to extend the road to the
 9 upper part of the mountain; correct?
 10 A. Correct.
 11 Q. And it was your plan, then, to build the upper
 12 mountain road so that "two large trucks could transit
 13 unencumbered in both directions" as well; correct?
 14 A. Correct.
 15 Q. Mr. Kay, would you agree that conditions of the
 16 soil in Jamaca de Dios change as the elevation changes?
 17 A. Soils change, yes. But it's not related solely to
 18 elevation.
 19 Q. The question is: Would you agree that conditions
 20 of soil in Jamaca de Dios change as the elevation changes?
 21 Yes or no?
 22 A. The soils' conditions change, but it is not
 23 predicted or not solely dictated by elevation.
 24 Q. Mr. Kay, let me take you to R-1--is your
 25 answer--not solely. Let me take you to 103, R-103. It's

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1 the Environmental Impact Study that Jamaca de Dios
2 submitted when it filed for a permit for its housing
3 development on the lower part of the project.

4 If I--if you turn to Page 38, sir. The pages are
5 on the bottom right corner of the page. Are you there,
6 sir?

7 A. Yes.

8 Q. So if you go to that paragraph entitled
9 "Geological and Topographic Characteristics of the Land,"
10 midway through, it says, "At the top of the hill at an
11 altitude of 970 meters, the soils have more clayey
12 consistency with numerous gullies, which are evidence of
13 the natural erosion that is known to have occurred there."

14 It states that; correct?

15 A. That is that statement, yes.

16 Q. And it's a statement by the environmental
17 consultants to Jamaca de Dios?

18 A. Correct.

19 Q. Do you disagree with the assessment of these
20 environmental consultants in terms of their description of
21 the soil at 970 meters, Mr. Kay?

22 A. No, I do not.

23 Q. Thank you, sir.

24 Mr. Kay, you were present when the Ministry's
25 technicians inspected Jamaca de Dios to assess its

1 application for a permit to develop a project of the upper
2 part of the mountain; correct?

3 A. Do you have a date on that one?

4 Q. February 2011.

5 A. Great. Yes.

6 Q. And as of June 2011, there had been slope failures
7 or landslides in Jamaca de Dios; correct?

8 A. You'd have to show me what you're referring to on
9 that. I can't answer your question.

10 Q. Sir, I'm asking you a question.

11 A. I don't know.

12 Q. You don't know if in June 2011 there had been
13 slope failures or landslides in Jamaca de Dios? That's the
14 question.

15 A. No, because I don't know what you're referring to.

16 Q. I'm asking you a question.

17 A. I said no, sir.

18 Q. I would ask you to go to Document R-269 in your
19 binder, which is a document prepared by you and submitted
20 to Mr. Ballantine in June 2011. R-269.

21 Do you see it there in your binder, sir?

22 A. Not finding it yet. There we are.

23 Q. My colleague will--there you go.

24 Mr. Kay, the first paragraph of that memo states,
25 "Bio-Engineering"--this is your document; correct? Do you

1 recognize the document?

2 A. I do, sir.

3 Q. It states, "It is strongly recommended to urgently
4 undertake a program of bioengineering for slope stability
5 for all slope areas that are showing signs of soil
6 movement."

7 A. That is correct, sir.

8 Q. Let me finish reading, sir, and then I'll ask you
9 a question.

10 "Bioengineering will stabilize small slope
11 movements that block ditch lines and send water across the
12 road to areas that may be adversely affected, and
13 misdirected water has the potential to cause erosion damage
14 and to oversaturate sensitive slopes."

15 It concludes by stating, "These seemingly
16 innocuous and minor events have the capacity to misdirect
17 water to areas of high concern (danger areas)."

18 Correct?

19 A. Correct.

20 Q. Mr. Kay, why would you urgently--strongly
21 recommend to Michael Ballantine to urgently undertake a
22 program of bio-engineering for slope stability for the
23 slope areas that are showing signs of soil movement if
24 there had not been any slope failures or landslides?

25 A. There's two words within that document that--where

1 these seemingly innocuous and minor events are not
2 landslides, sir. Those--

3 Q. And--

4 A. I'm sorry. Go ahead.

5 Q. And that's the point, Mr. Kay. Don't you say that
6 the seemingly innocuous and minor events have the capacity
7 to misdirect water to areas of high concern, and in
8 parentheses you state "danger areas."

9 That's--that's my point, Mr. Kay.

10 A. Your point is well-taken.

11 Q. So my question is, why would you strongly
12 recommend to Mr. Ballantine to urgently--

13 A. Your point is well taken--

14 Q. Yes, sir.

15 A. --in that soil erosion can be prevented by
16 stabilizing the soil itself by using plants to provide that
17 stabilization.

18 Q. Mr. Kay, the question was, why would you strongly
19 recommend to Michael Ballantine to urgently undertake a
20 project, as you've identified here, if there had not been
21 any slope failures or landslides?

22 A. It's prevention, it's not repair, when you say
23 "had been."

24 Q. Mr. Kay, you do state that it was for all slope
25 areas that are showing signs of soil movement. That's in

1 the first statement--first sentence of your statement.
 2 What is--
 3 A. Soil movement is erosion of sediment off the
 4 slopes.
 5 Q. Mr.--okay. But you didn't say "soil erosion."
 6 You said "soil movement"; correct? That's what's stated
 7 here.
 8 A. Those soils are moving down the slopes, yes.
 9 Q. Okay. Thank you for that, Mr. Kay.
 10 Turning to your second report, the explanation and
 11 your opinion and findings is--
 12 PRESIDENT RAMÍREZ HERNÁNDEZ: What paragraph,
 13 Counsel? What paragraph are you referring to?
 14
 15 BY MR. HERRERA:
 16 Q. Oh, no. I was just going to ask him, as I did in
 17 the First Report, that his second report is all of three
 18 pages; correct?
 19 A. Let me take a quick look.
 20 MR. HERRERA: Sorry, Mr. President.
 21
 22 BY MR. HERRERA:
 23 Q. Your opinion and findings are three pages long;
 24 correct? That is, they start on Page 2, 3, and 4?
 25 A. Just hang on. I haven't got the right section

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1 here, sir.
 2 Yes. It's ending in number 4.
 3 Q. And it's a three-page expert report? The first
 4 page is--thank you, sir.
 5 You include numerous photographs as exhibits of
 6 your Second Expert Report; correct?
 7 A. Exhibit B, that is correct, sir.
 8 Q. You also state that you conducted visits to Jamaca
 9 de Dios and other sites in the Dominican Republic to
 10 examine the slopes for various projects; correct?
 11 A. You're reading from where?
 12 Q. Page 2 of--paragraph 2 of your second report.
 13 "During these visits I worked directly with a
 14 drone operator, and I visited Jamaca de Dios and other
 15 sites in the Dominican Republic."
 16 Correct? You do state that you conducted visits
 17 to Jamaca de Dios and other sites; correct?
 18 A. That is correct.
 19 Q. Thank you, sir.
 20 Were the slope measurements taken by you on
 21 location, Mr. Kay?
 22 A. The slope measurement--some slope measurements
 23 were taken on location. Other slope measurements were
 24 derived from the photographs.
 25 Q. Mr. Kay, did you explain in your second report to

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1 which specific projects you had specific access on location
 2 and those to which you did not?
 3 A. Run that by me again?
 4 Q. Did you explain in this Report which projects you
 5 had access to and specifically visited on location and
 6 those that you did not?
 7 A. That is not stated in the Report, sir.
 8 Q. Thank you.
 9 Did you explain and describe when the visits were
 10 performed?
 11 A. Are we referring to a line?
 12 Q. You indicate that, "In preparation of this report,
 13 I conducted visits to Jamaca de Dios."
 14 And I'm asking, in the extensive photographs that
 15 you provide in Annex A, whether you state the dates when
 16 those visits were performed as to those that you visited
 17 and had access to.
 18 A. The answer to that would be within the
 19 photographs. A number of them are dated.
 20 Q. A number of them.
 21 Mr. Kay, if I could ask you then to turn to
 22 Annex B and look for some of these photographs with dates,
 23 because I failed to find any, or on a number of them.
 24 But let's just turn to Page 10, Aloma Mountain.
 25 Is there a date on 10--page 10--the photograph on Page 10,

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1 or--you know, or, you know 6, 7, 11, 12, 13? Are there any
 2 dates on those?
 3 And I ask about Aloma Mountain, Mr. Kay, because I
 4 assume you visited that project; correct?
 5 A. I did not physically.
 6 Q. That's the question. That's the--that's the
 7 thrust of my question, Mr. Kay.
 8 Did you state which of the projects you visited
 9 and had access to? And then I asked you whether you had
 10 dates as to those visits, and you said you did. And I'm
 11 asking you whether you find any dates on the description of
 12 the projects.
 13 A. One thing I could answer to you--
 14 Q. That's--no, no. That's the question first, sir.
 15 Are there dates--no, no. Are there dates to the--
 16 A. If we take a look within the file name or on the
 17 number, sometimes the date is incorporated there.
 18 Q. I'm asking you about those that don't have dates,
 19 sir. That's--
 20 A. Would you like me to look through here and tell
 21 you which ones do or don't?
 22 Q. No, sir. I'm asking the questions.
 23 Are there dates on--let's go on.
 24 A. We can take the time and go through the document.
 25 Q. Okay. So let's--so, Mr. Kay, in Paragraph 2 of

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1 your second report, you also state that "I obtained
2 pictures of various houses, roads, and flora and fauna in
3 various mountain projects around Jarabacoa"; correct?
4 A. That's what the words state, yes.
5 Q. Did you measure the slopes in those other mountain
6 projects yourself using a clinometer, Mr. Kay?
7 A. As stated earlier, that some I did directly
8 measure and others were--measurements were derived from
9 photographs.
10 Q. But you did not specify those with which you used
11 and measured?
12 A. That's not stated within this document, sir.
13 Q. Thank you, sir.
14 Did you take the position that accurate slope
15 measurements could be--well, did you take these pictures
16 yourself, Mr. Kay?
17 A. These--some are my pictures.
18 Q. Mr. Kay, you did not identify those pictures that
19 were taken by you--photographs taken by you or not;
20 correct?
21 A. That is correct, sir.
22 Q. And did you describe in your second report which
23 slopes had been measured by means of photographs and which
24 had not?
25 A. No, sir.

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1 Q. Mr. Kay, if we turn to Exhibit A of your
2 Report--Second Report, there's a first page, there's a
3 statement there--
4 A. Give me a second.
5 Q. --referring to you in the third person, signed by
6 you, that says, "Mr. Kay was supplied a set of site
7 photos."
8 Let me speak into the mic, sir.
9 In Annex A of your Second Report, it states the
10 following about methodology in bold: "Mr. Kay was supplied
11 a set of site photos and/or data of the areas to use as
12 study material."
13 Correct?
14 A. Where are you going from here first? Which
15 document? Which book?
16 Q. Mr. Kay, we're in your second report, Annex A.
17 A. That's what I'm asking you.
18 PRESIDENT RAMÍREZ HERNÁNDEZ: In the white binder,
19 you look at Tab A and there you have it.
20 THE WITNESS: Thanks for your help.
21 BY MR. HERRERA:
22 Q. Everything I'm referring to, sir, in that white
23 binder that we provided to you at the outset of the
24 examination.
25 MR. HERRERA: I think you may need to help him

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1 please, Kaila.
2 (Comments off microphone.)
3 BY MR. HERRERA:
4 Q. So, Mr. Kay--
5 A. Thanks for the help.
6 Q. Mr. Kay, in Exhibit A of your Second Report, it
7 states under Methodology, "Mr. Kay was supplied a set of
8 site photos and/or data of the areas to use as study
9 material"; correct?
10 A. Correct.
11 Q. Who provided you with those photographs, site
12 photos?
13 A. The operator of the drone unit and drone operator.
14 Q. And, Mr. Kay, did you verify in some manner that
15 the photographs, in fact, corresponded to the locations
16 that they were supposed to represent?
17 A. Correct.
18 Q. Did you--that's a question. Did you verify?
19 A. Correct.
20 Q. You did? Yes or no, sir.
21 A. I'm sorry. I'll speak into the microphone. It
22 might help. Correct.
23 Q. Correct is yes?
24 A. When I went to school, yes.
25 Q. So you verified that the photographs, in fact,

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1 corresponded to the locations that they were supposed to
2 represent?
3 Let me ask you, Mr. Kay, if we turn to Page 13 of
4 your Annex A entitled "Aloma Mountain."
5 Are you there? Yes?
6 A. Yes.
7 Q. Mr. Kay, there are no GPS coordinates on this
8 page; correct?
9 A. Correct.
10 Q. Mr. Kay, if we turn to Page 14, there are no GPS
11 coordinates on that page either; correct?
12 A. What page were you on now?
13 Q. If we go to Page 14. Just turn the page, sir.
14 A. 14. Thank you.
15 Q. There are no GPS coordinates on that--
16 A. Correct.
17 Q. --where the slope is measured.
18 If we turn to Page 15, the next page--
19 A. Correct.
20 Q. --there are no GPS coordinates either; correct?
21 And we could move on, Mr. Kay. Well, let's go to
22 18, Page 18. And I could go through, Mr. Kay, Page 19, 20,
23 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 34, 35, 36, and
24 I could go on, sir, 41, 56, 58, 59, all the way
25 through--there are 63 photographs in your exhibit of slope

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1 conditions without any coordinates; correct?
 2 A. That is correct.
 3 Q. So it would be impossible to verify what you have
 4 stated here in 63 photographs of slope conditions
 5 throughout these numerous projects; correct?
 6 A. Incorrect.
 7 Q. Sorry, sir?
 8 A. No.
 9 Q. How could I verify what you have stated here of
 10 slope conditions without any coordinates?
 11 A. You have a photograph of the actual location.
 12 Q. Sir, there are no--
 13 A. You can walk there and go see it.
 14 Q. Mr. Kay, you've provided an expert report.
 15 A. Correct.
 16 Q. And you have 63 photographs in this expert report.
 17 A. It is my statement that those photographs
 18 represent that area.
 19 Q. And the measurements that you depict in each
 20 photograph; correct?
 21 A. The measurements are given at the bottom of the
 22 page, yes.
 23 Q. On Page 4 of Exhibit A of your second report, you
 24 include a photograph of Aloma Mountain; correct?
 25 A. Yes.

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1 Q. Which, in fact, you--
 2 A. You're talking second report?
 3 Q. Yes, sir.
 4 A. We're getting--
 5 Q. We're still on the second report.
 6 PRESIDENT RAMÍREZ HERNÁNDEZ: Go to the same
 7 binder, in the white binder, A, Page 4.
 8 THE WITNESS: There we are. Great.
 9
 10 BY MR. HERRERA:
 11 Q. In Exhibit A, page 4, you include a photograph of
 12 Aloma Mountain; correct?
 13 A. That is correct.
 14 Q. That photograph has a house and two other
 15 structures; correct?
 16 A. It has a number of structures.
 17 Q. Sir, I'm asking you a specific question, and I'd
 18 ask you to answer the question.
 19 That photograph has a house and two other
 20 structures; correct?
 21 MR. BALDWIN: Mr. President, I can see four
 22 structures in this picture. So if he wants to ask about
 23 it--
 24 MR. HERRERA: Well, let me restate that, then.
 25 BY MR. HERRERA:

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1 Q. There are--there's a house and two shacks or two
 2 other buildings; correct?
 3 A. There are a number of buildings in that picture.
 4 Q. How many?
 5 A. You or I cannot attest to whether it is a house or
 6 what is the use of the building.
 7 Q. Okay. So, Mr. Kay, if we go to Page 5 of that
 8 report, it's "House Construction," and Page 6 and 7 are
 9 also--they show houses; right? Or some structure?
 10 A. Housing construction.
 11 Q. Housing construction.
 12 A. Maybe attach the i-n-g after the name. It might
 13 help a bit. How's that?
 14 Q. But, Mr. Kay, there--this is the only housing
 15 construction in Aloma Mountain; correct?
 16 A. As far as I know, correct.
 17 Q. That's what I'm asking, sir.
 18 And, Mr. Kay, what you have here are basically the
 19 same structures taken from different angles; correct?
 20 A. That would be correct.
 21 Q. Mr. Kay, you indicated in your commentary this
 22 morning that your opinion is that any road can be built,
 23 but you're not a biologist nor an environmental engineer
 24 qualified to opine on the environmental impact of building
 25 roads; correct?

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1 A. Not correct. By my experience, that--
 2 Q. Mr. Kay, in addition to being a supervisor of the
 3 planned stages of road improvement works in Phase 1, you
 4 were also engaged to act as a senior project manager
 5 overseeing the development and engineering of Jamaca de
 6 Dios' upper mountain housing project; correct?
 7 A. You're referring to where now, sir?
 8 Q. Let's go to your First Report.
 9 A. Great.
 10 Q. Page--Paragraph 10.
 11 Do you see that, sir?
 12 A. Yes, I do.
 13 Q. Thank you.
 14 And you would have been paid for that work;
 15 correct?
 16 A. That is correct.
 17 Q. And your report also states in Paragraph 10 that
 18 you would have been a senior project manager of the
 19 Paso Alto project if you had--if it had been acquired;
 20 correct?
 21 A. That is correct.
 22 Q. And, again, you would have been paid for that
 23 work; correct?
 24 A. That is correct.
 25 Q. And as part of those engagements, you fully

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1 intended to move to Jarabacoa during the development of the
2 new project; correct?
3 A. That is correct.
4 Q. So you have a vested interest in this project
5 going forward, given your various anticipated roles;
6 correct?
7 A. No. I think you made a little misinterpretation
8 there. You're saying that I am--you're inferring that I am
9 moving to the Dominican Republic my whole household. That
10 is an inference that is not correct, that I am moving.
11 Attending for the duration or periods of the project to
12 supervise it.
13 Q. Thank you, sir.
14 A. It is what I do in my company.
15 Q. The denial, Mr. Kay, of the upper mountain project
16 permit by the Ministry--sir?
17 A. I'm--
18 Q. I'm asking you a question.
19 --adversely affected you, then from a financial--
20 A. You're reading from where?
21 Q. No, sir. I'm just asking you a question.
22 A. Okay.
23 Q. The denial of the upper mountain project permit
24 adversely affected you from a financial standpoint;
25 correct?

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1 A. Okay. Could you--your hand is on your mouth.
2 Could you state that again, please? I didn't quite hear
3 that accurately.
4 Q. As you're aware, the upper mountain project, Phase
5 2, was denied by the Ministry?
6 A. Yes.
7 Q. And my question, Mr. Kay, is if the denial of that
8 permit for that project adversely affected you from a
9 financial standpoint in light of the roles that you would
10 have had?
11 A. That's correct.
12 Q. And as a result of that, Mr. Kay, do you think it
13 would be said that you're not independent of the
14 Ballantines?
15 A. Run that one by me again?
16 Q. As a result, do you think that it could be said
17 that you are not independent of the Ballantines?
18 A. Okay. We've got us some double negatives in
19 there.
20 Q. Sir, just asking--
21 A. It's not clear. I'm sorry.
22 Q. Are you independent of the services provided to
23 Mr. Ballantine, Jamaica de Dios?
24 A. Can I just rephrase--or phrase what you said?
25 You're saying that I am independent from

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1 Mr. Ballantine, my company? Yes.
2 Q. Mr. Kay, you have provided an independent Expert
3 Report in this proceeding.
4 A. That's correct.
5 MR. HERRERA: I think I'm concluded,
6 Mr. President. Thank you.
7 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you, Counsel.
8 Any redirect?
9 MR. BALDWIN: Just very brief, Mr. President.
10 REDIRECT EXAMINATION
11 BY MR. BALDWIN:
12 Q. Mr. Kay, I'm not--I'm hopefully not going to force
13 you to give away your age here, but I am curious as to how
14 long--
15 A. You're welcome to.
16 Q. --how many years you've been involved in some
17 aspect of building, constructing, consulting, on forest
18 roads?
19 A. Since 1984.
20 Q. 1984. Okay.
21 So, that's--well, anyway--I'm lawyer, so I won't
22 try to calculate it. Thank you.
23 A. A number of years will be great.
24 Q. Okay. Mr. Herrera talked to you about some of the
25 issues of clay. There's one clay here and different--maybe

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1 perhaps a different clay in different parts of Jamaica de
2 Dios. Also talked about rain events and some of those
3 other issues.
4 Are you able to talk about whether or not those
5 same issues that he talked about, water events, water
6 erosion, soil stability, are also applicable to the other
7 projects that have been discussed in this case?
8 A. That is fully correct.
9 Q. Are they all subject to the same types of water
10 events?
11 A. Yes. They're in the same climate zone.
12 Q. I'd just like to take you back to two pictures
13 here. If you could go to your Annex A for your second
14 statement, the one that has all the pictures.
15 MR. BALDWIN: And Trevor, if we could--oh, you
16 don't have the connection. Sorry.
17 Does the Tribunal have it in front of them?
18 Okay. Don't worry about it, Trevor. We'll just
19 go to this.
20 BY MR. BALDWIN:
21 Q. If we could just go to Page 109 of that first
22 annex to your second report.
23 Do you have it?
24 A. (Indicating.)
25 Q. Annex A?

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1 A. Annex A, Page 9?

2 Q. Page 109.

3 A. 109.

4 Q. 109, yes. Sorry.

5 A. 109. My apologies.

6 Okay.

7 Q. Mr. Herrera rattled off a number of photos and

8 said this, but if we could just pick one. This is a photo

9 that was on your presentation this morning.

10 This is a photo of Quintas del Bosque?

11 A. That is correct, sir.

12 Q. And is this one that you took or--do you recall?

13 A. That would probably be my picture, yes.

14 Q. Okay. And that shows--this is a road going

15 through Quintas del Bosque?

16 A. That is correct.

17 Q. What are these--just so we know, what are these

18 like rock sort of bound together there on the side of the

19 road?

20 A. It's a form of support structure. And what it is,

21 it's a road supporting the running surface of the road.

22 And if you'll--I can stop there. I could go through what

23 components are within that structure.

24 Q. No, I think that--

25 A. That is a professionally built structure.

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1 Q. I think that's sufficient.

2 A. You can see that in the document.

3 Q. Apologies for interrupting when you were talking.

4 No. We can see that from the picture.

5 A. Great.

6 Q. What is the name of that?

7 A. Oh, gabions. Gabion baskets are what you notice

8 on there. But sandwiched between those baskets, you'll see

9 a light-colored substance, and that is called geogrid. And

10 that is a form of soil reinforcement where you lay down the

11 soils, put a layer of geogrid, a layer of soils, a layer of

12 geogrid, and it's all compacted very firmly with a machine

13 and to build a competent road in extremely deep and

14 horrible terrain.

15 Q. Thank you. And if we could go particularly to one

16 of the pictures. If we could go to Page 14, please.

17 A. 14.

18 Q. And this will be my last question. Page 14 of the

19 same exhibit.

20 Now, Mr. Herrera pointed you to this and was, I

21 think, sort of suggesting that--how are we to know that

22 this is Aloma Mountain.

23 First off, I'd like to look at the line that runs

24 through that slope. You see there's like a shadowed area

25 in the middle of that big long slope there.

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1 A. Correct.

2 Q. Do you see that? What is that area where there's

3 a line going through the middle?

4 A. That is a road constructed into the hill slope.

5 Q. Thank you. And if you look down to the bottom,

6 you see some development down there?

7 A. That is correct.

8 Q. Are those the same--is that the same development

9 that was--that you testified to earlier as being part of

10 Aloma Mountain?

11 A. That is correct.

12 MR. BALDWIN: Okay. No more questions.

13 Thank you.

14 THE WITNESS: Great.

15 PRESIDENT RAMÍREZ HERNÁNDEZ: My colleague has a

16 question.

17 QUESTIONS FROM THE TRIBUNAL

18 ARBITRATOR CHEEK: Good morning, Mr. Kay.

19 THE WITNESS: Good morning.

20 ARBITRATOR CHEEK: We could stay with this photo

21 on Page 14 that counsel was just asking about. And my

22 question is: How do you measure the slope from looking at

23 the picture?

24 THE WITNESS: I use Mother Nature to help me on

25 it. She has very nicely grown some trees upon that slope.

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1 And with the sunshine as an extra aid is casting shadows.

2 So we're able to subtend an impression of what the slope

3 is.

4 You'll notice that within that measurement of

5 minus 97 percent, you'll notice there's a little tilde.

6 What do you call the--the type thing? The tilde means it's

7 an approximation. It is not an exact measurement.

8 ARBITRATOR CHEEK: Thanks. And in your

9 experience, what's the margin of error based on that type

10 of calculation that you're describing?

11 THE WITNESS: There is not a margin as to say. It

12 is noted that this is an approximation. It's not as if

13 we--I think what you're asking there is--when I do my road

14 engineering, I use a hypsometer, a digital instrument to

15 take measurements of distance, slope, elevations. And

16 because of my receiver that my assistant is holding down at

17 the far end that I'm shooting to, that's only 4 inches in

18 size, so I'm looking at a 1 to 2 percent error in my

19 engineering factors, and I take that into consideration

20 when designing the road, that I could have a variance in

21 there.

22 ARBITRATOR CHEEK: And in your opinion, is the

23 variance similar when you're using the method you described

24 to measure the slope in the photo?

25 THE WITNESS: No. This is simply an indication

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1 that it's approximate.

2 ARBITRATOR CHEEK: Okay. Thank you.

3 THE WITNESS: Great.

4 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you very much,

5 Mr. Kay. You are now excused.

6 (Witness steps down.)

7 PRESIDENT RAMÍREZ HERNÁNDEZ: Respondent, any--I

8 wanted to take a break but--

9 MR. Di ROSA: You know, I was going to propose a

10 break because we need to move around people.

11 PRESIDENT RAMÍREZ HERNÁNDEZ: So let's take a

12 break. Let's come back at 10:35.

13 (Brief recess.)

14 PRESIDENT RAMÍREZ HERNÁNDEZ: Let's start. Good

15 morning. Good morning, Mr. Farrell.

16 THE WITNESS: Yes.

17 PRESIDENT RAMÍREZ HERNÁNDEZ: Could you please

18 read the statement.

19 MR. BALDWIN: I'm sorry. We just have

20 one--because, actually, you know, Mr. Balbuena was going to

21 be next, and we just wanted to note for the record that the

22 Parties had a discussion last night, and the Respondent has

23 withdrawn its request to examine Mr. Balbuena. That's why

24 he's not here.

25 And since we're talking about it, one other thing

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1 for the record, Minister Fernández Mirabal will likely go

2 out of order. The Parties have agreed to that if okay with

3 the Tribunal.

4 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay.

5 MR. BALDWIN: He'll go tomorrow when we can be

6 slotted in.

7 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. The Tribunal

8 appreciates the flexibility.

9 So good morning again, Mr. Farrell.

10 THE WITNESS: Good morning.

11 PRESIDENT RAMÍREZ HERNÁNDEZ: Could you please

12 read the statement of expert you have before you, please.

13 Read it out loud, please.

14 THE WITNESS: Oh, you want to read it out loud?

15 PRESIDENT RAMÍREZ HERNÁNDEZ: Yes.

16 THE WITNESS: Okay. I solemnly declare upon my

17 honor and conscience that I shall speak the truth, the

18 whole truth, and nothing but the truth, and that my

19 statement will be in accordance with my sincere belief.

20 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you very much.

21 JAMES FARRELL, CLAIMANT'S WITNESS, CALLED

22 MR. ALLISON: Thank you.

23 DIRECT EXAMINATION

24 BY MR. ALLISON:

25 Q. Mr. Farrell, if you could move your microphone a

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1 little bit closer to you, it'll be easier for the Tribunal

2 to hear you.

3 You have in front of you a white binder that

4 contains some documents. Did you submit two Expert Reports

5 in this proceeding?

6 A. Yes, I did.

7 Q. And are those Expert Reports contained in the

8 white binder in front of you?

9 A. Yes, they are.

10 Q. And I believe you prepared a brief PowerPoint for

11 the convenience of the Tribunal and the Parties.

12 A. Yes, I did.

13 DIRECT PRESENTATION

14 THE WITNESS: Good morning. My name is Jim

15 Farrell, and I was selected to be the damage expert for the

16 Ballantines. When I was asked to put this PowerPoint

17 together, I thought about the best way to communicate what

18 I did, what my conclusions were, and how best to present

19 that to the Tribunal.

20 I thought that maybe one way to do it would be to

21 take the exhibits that are in the back of my Report and

22 reproduce them and show them to you in the slides that

23 we're going to see here shortly.

24 But I thought a better way to do it would be to

25 take a look at the inputs that go into these calculations

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1 and to address those inputs so that you understood the work

2 that we did, how the--how the schedules that are in my

3 Report were prepared, and then the conclusions that come

4 from those calculations.

5 I don't want to take away anything from the

6 significance of the--the significance--excuse me--of the

7 schedules or the exhibits that are in the back of my

8 Report, but I thought that they would be better to take a

9 look at the inputs and go through those so that you

10 understand the information that was available and could be

11 used to prepare the damages that I did.

12 So saying that, let's take a look at who I am.

13 I'm a CPA, have been for over 30 years. I'm a

14 damage expert that has dealt with issues relating to

15 financial, accounting matters, economic damages, and have

16 done various studies dealing with lost profits, breach of

17 contract, real estate and construction matters, and

18 basically complex damage claims.

19 My main focus is to take economic and accounting

20 and apply an analysis to it to provide background and

21 information on financial matters as it mainly deals with

22 the damage issues in trial, arbitration, mediations, and

23 things like that.

24 I have testified in the past. I have testified

25 both in federal court here in the U.S., state court here in

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1 the U.S., and in arbitration.

2 My primary focus has been in the construction and
3 real estate industry over the last 30-some years.

4 I'm a graduate of Oregon State University who got
5 terribly beat by Ohio State last weekend.

6 I have a B.S. in accounting and an advanced degree
7 from the University of Chicago in economics. I am, as I
8 said, a CPA. I have--I'm a member of the American
9 Institute of Certified Public Accountants and the Illinois
10 Society of Certified Public Accountants.

11 If you want to see a full version of my CV, it's
12 in the reports that we just talked about. So I'm not going
13 to show those to you now. But if you want to see more
14 about who I am, you can take a look at those CVs.

15 Now, the damages that were prepared are based on
16 a--basically a damage-type methodology. I was asked to
17 take a look at the information that was available and to
18 calculate damages as the difference between the economic
19 position that they had versus what would happen if they had
20 gotten the permits from the D.R. Sorry, Dominican
21 Republic.

22 It's based on a but-for type assumption. In other
23 words, that the rejection of the Dominican Republic
24 provided a process that resulted in economic loss, and this
25 is what would have happened had it not been for that

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1 rejection.

2 I calculated those damages as of January 2014, and
3 they were based on the information that I was given, such
4 as the books and records of Jamaca, discussions with the
5 Ballantines, third-party experts, document and information
6 that was produced in this arbitration, and then my own
7 independent market research that looked at comparables and
8 other industry data that was available, either through the
9 internet or through other sources.

10 The summary of damages is what you see on here
11 now. It's basically, again, an exhibit that's in my
12 Report. It totals approximately \$39 million after taking
13 into consideration the prejudgment interest.

14 Now, what we're going to do is to go through a few
15 of these items to get a better feel, as I said, to go over
16 the inputs that go behind the damages that are on this
17 schedule. So let's take a look first at the present value
18 calculation.

19 You're going to hear a lot of conversation about
20 present value. It's basically a way to bring future cash
21 flows to the present. Again, I use 2014 as the present.
22 And it--I use what they call a build-up of the discount
23 rate.

24 And through the process that this Tribunal set up,
25 I received a Report from Mr. Hart, who is the Respondent's

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1 expert--and you'll hear from him later--who took issue with
2 some of the rates that I had used in the original Report
3 that I issued. I considered those. I thought about what
4 he was saying, and in some cases agreed with what he
5 basically said.

6 So in order to shorten the process, let's say, of
7 the arguments between the two experts--and I must say that
8 experts do disagree on discount rates. This is not
9 something that's uncommon. And people have--you would
10 think it's a relatively straightforward type of
11 calculation, but it's amazing how people have different
12 views of different things on these types of calculations.

13 So, as you can see, when you look at the--at the
14 discount factors up there on the slide, all--we basically
15 agree on everything except for the risk-free rate. I
16 believe that the risk-free rate should be based on what
17 they call a medium rate based on ten years. Mr. Hart
18 believes it should be a 20-year rate. So that creates
19 basically about a 1.27 difference between the two of us.

20 And that does have an impact on the calculations.
21 If you apply that rate to the items that Mr. Hart agrees
22 to, that difference is approximately \$600,000 that my
23 damages would go down. But I don't agree with Mr. Hart. I
24 believe that he's wrong. I think that the discount rate
25 that I use is proper and so the calculations that you're

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1 going to see in my Report are based on the discount rate
2 that you just saw of 17.7 percent, I think it was.

3 The first item that we're going to talk about--and
4 hopefully we'll do these briefly so that you can get a feel
5 for it--is Phase 2 lot sales. Now, these lots are the
6 damages that the Hart--sorry, that the Ballantines incurred
7 because of the lack of permits and being able to move
8 forward with the Dominican Republic. It's a damage that's
9 based on Phase 1 historical results.

10 Now, I understand that the Respondents have a
11 different way of characterizing Phase 1, Phase 2, Phase 3,
12 Phase 4, whatever the phases were. We use, basically, two
13 phases, Phase 1 and Phase 2.

14 Phase 1 was the original sale of what I would call
15 the lower level of the mountain. Phase 2 was the projected
16 higher-level sales of the mountain.

17 We, however, broke it down into various zones.
18 Phase 1 was broken down into roughly equal three zones: A,
19 B, and C. And you can see 32 in A, 32 in B, and 24 lots in
20 C. What we did was to take a look at the sales--the
21 average sales prices per square meter from these sales for
22 the years 2012 to 2015 to understand if there was this
23 change in sales prices as you move up the mountain.

24 And, basically, we believe there is. You can see
25 that there's a percentage increase from Zone A to B of

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1 8 percent and a percentage increase from Zone B to C of
2 120 percent.

3 But I thought the 120 percent was a little too
4 high, didn't make sense, so I elected to use what I'm
5 calling an altitude multiplier of 8 percent.

6 Now, my numbers are going to be based on what was
7 characterized yesterday by Mr. Ballantine as the real sales
8 contracts. It's the economic ones that were used to
9 provide economic benefit to Mr. Ballantine and to the
10 economic benefit, in effect, to the buyer of the property.
11 Because that's what they transferred money back and forth
12 on. So my numbers are based on those sales contracts.

13 Phase 2 lots are also--have been divided into
14 three zones. We call it D, E, and F. And, again, there's
15 28 lots in D, there's 14 lots in E, and 28 lots in F. And
16 D is the lowest level, and you basically go up the mountain
17 to F. It ends up being about 70 lots that have
18 approximately 3,000 square meters per lot.

19 We started with the sales price in Zone C and
20 looked at it--what the average sales price in 2012 was on a
21 square meter basis. And that basically was about \$59 a
22 square meter. Then we apply the 8 percent altitude
23 multiplier, because we're moving up a zone, and came with a
24 starting sales price in Zone D of \$64 per square meter.

25 That then is then moved--as you go up the

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1 mountain, you still have the 8 percent multiplier, and then
2 there's also changes in the sales prices, which we'll talk
3 about in just a second.

4 However, that--if you think about that, if you
5 keep doing that, you just keep raising the price, and it
6 just doesn't make any sense. So we basically said, no, it
7 doesn't, if you just keep adding those numbers on. So what
8 we did was to stop it or put a cap on the lot sales on a
9 price per meter--on a price per square meter of \$120, which
10 stops in basically 2017.

11 Now, we also looked at how do we distribute these
12 lots in Phase 2. Again, using the Phase 1 information in
13 2010 and 2011, we use that as a basis for allocating lots
14 into the various years and use that as a basis to calculate
15 in Phase 2 how the lots are allocated.

16 Again, based on data that was published by the
17 Dominican Republic, there was--the sales prices are also
18 raised by 10 percent on a year-by-year basis, and then we
19 included a cost of sales of basically 5 percent of the
20 sales.

21 Now, the other part that comes into the damages
22 was the cost. And we believe there was a cost. There has
23 to be a cost to move up the mountain to get these lots
24 ready for sale. And so those include the road, the water
25 system, the electrical, the engineering and architecture,

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1 internet, common areas, all the different things that you
2 might think of that might have to go into making the
3 infrastructure costs as you move up the mountain to get
4 these lots ready for Phase 2.

5 We looked again at what Mr. Ballantine spent in
6 Phase 1. We took that. We applied an 8 percent altitude
7 multiplier to basically adjust for the problems associated
8 with going up the mountain because you now have to truck
9 things up. You have to get the men up. You have to do
10 these things to get--to get up the mountain to do the work
11 that needs to be done.

12 And so we basically allocate--that's the
13 8 percent. And that's, again, allocated based on what
14 zones you are in as you move up the mountain. So each zone
15 is different from the zone previously.

16 So at the end of the day, the damages that we
17 calculated--and let me--also, before I say that, we also
18 then--once we have this stream of income or earnings, it's
19 then discounted back to 2014 using the discounted factors
20 that we just talked about. Those damages add up to about
21 \$12,800,000 rounded.

22 Next, we were told that the Ballantines expected
23 to build houses on these lots in Phase 2. So we took a
24 look at what the Ballantines lost as a result of the lack
25 of permits by the Dominican Republic for building Phase 2.

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1 Specifically, we estimated that each home would be
2 about 500 square meters. The distribution of the homes was
3 based on an 18-month cycle. In other words, we felt that
4 it took six months to close the lot and then, once you got
5 the lot closed, it would take another 12 months to build
6 it.

7 And so I might enter into a transaction today to
8 buy a lot, but the actual closing of the lot and then the
9 construction wouldn't have been--wouldn't be realized in
10 our damage calculation until 18 months later. Again, we
11 applied an 8 percent altitude multiplier to the sales
12 price, and we also applied it to the construction cost
13 associated with the houses.

14 We believe that there was an inflation in the
15 Dominican Republic. And based on 2012 to 2015 data from
16 the Dominican Republic, there is. This was a 3 percent
17 inflation which would, again, apply to the construction
18 cost side of the equation after 2015.

19 We also believe based on my experience/based on
20 the market data that we looked at that there was a profit
21 margin of about 20 percent. But what also needed to be
22 subtracted from that was the overhead that--to be incurred
23 in order to make that 20 percent happen. So the net effect
24 was a 17 1/2 percent net profit margin.

25 And then construction costs are estimated at \$850

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1 a square meter. And, again, that's based on market data
2 that we had that indicated that houses in the Dominican
3 Republic could be built for about that price. And then, of
4 course, all the inputs and things that are in my Report, I
5 believe, are supported and cited in my Report.

6 So, again, after taking into consideration the
7 discount factors, the damages for the builders is about
8 \$5 million. The next thing was the Mountain Lodge. And
9 you've heard about the Mountain Lodge. And the Mountain
10 Lodge--this consisted of, basically, 12 two-bedroom
11 apartments of about 116 square meters. It was to be
12 operated under the hotel brand of what they call the small
13 luxury hotels, and it was to be managed by a company called
14 Hospitality Management Services. The acronym--you may hear
15 me say HMS. That's what I mean. It's Hospitality
16 Management Services.

17 However, in this case the damages result from two
18 sources. One source is that the plan was to sell the
19 mountain lodges, the individual apartments, to third-party
20 investors. The second part of it was that the Ballantines
21 would manage the rental pool, and this was--which would
22 have been composed of the 12 apartments that were being
23 sold to investors. The rental pool would be managed by
24 HMS, and it was based on a fixed management fee and
25 10 percent of the earnings before taxes.

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1 At the end of the day, the third-party investors
2 would also get 60 percent of the rental pool earnings
3 before taxes.

4 Now, if we were to look at Schedule 5, this
5 represents the lodge unit sales dealing with the sale of
6 the units. Again, based on input that we have from HMS and
7 third-party analysis and review, the starting sales price
8 was about 285,000 furnished, and we increased those by
9 10 percent. We also included 5 percent sales--sorry, cost
10 of sales. Construction costs were about \$2 million, and
11 that was based upon an estimate provided by an engineering
12 firm, and the damages here would be about \$1.3 million.

13 If you move to the rental pool, again, through the
14 information that we were provided by HMS, the rental rates
15 were about \$300 per night. Those increase until we
16 stabilized at \$450 a night. We took some occupancy rates
17 of 20 percent, maximum of 55. We thought about the
18 operating costs. Those are all related based on a
19 percentage of revenue except for the energy costs, and they
20 were based on the total room revenue.

21 This is a unique one because there's a homeowners
22 association involved with this. And the maintenance
23 expenses, the roofs, the repairing, the common area, those
24 things would all be the responsibility of the individual
25 investors and/or the homeowners association.

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1 So, again, the--there is a fee to the homeowners.
2 The investors would pay an administrative fee. And at the
3 end of the day after all expenses are paid but before
4 taxes, 60 percent of the earnings went to--went to the
5 investors. That resulted in damages of about half a
6 million dollars.

7 The same concept with the lower apartment complex,
8 except it consisted of 12 units, six two-bedrooms, six
9 three-bedrooms, but the same concept. We have the
10 apartment com--the sales are based on \$1,500 a square
11 meter.

12 PRESIDENT RAMÍREZ HERNÁNDEZ: I think your counsel
13 for Claimant is concerned about the time because I think
14 you have two minutes left.

15 THE WITNESS: Okay.

16 PRESIDENT RAMÍREZ HERNÁNDEZ: So if you could wrap
17 up.

18 THE WITNESS: Sure.

19 So each one of these have a different approach.
20 And we end up with Paso Alto, which is a program that the
21 Ballantines had an executed letter of intent. In this
22 case, they were to complete the infrastructure. They were
23 to assume the debt and 25 percent of the profits went to
24 the owners. Again, using the same information, we came up
25 with the various rates.

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1 Finally, there's loss of future investment,
2 there's various ways to calculate this. You can look at
3 the continuous expenditures and promotion and marketing.
4 You can look at whether the customers have been biased.
5 There's royalty, if there's a royalty. And then you can
6 also look at the impact that the Dominican Republic's
7 actions had on the Ballantines and their future level of
8 earnings.

9 We did this based on a two-step process. We
10 figure out the earnings from the potential new
11 developments, and then we look at the residual values that
12 are resulting from the continued operations of the hotel
13 and the Mountain Lodge in the lower apartment complexes.

14 We took the hotel, we took the mountain lodge, we
15 took the residual from the apartment, used the cap rate
16 that was based on the rate of return on equity less a
17 growth rate and basically discount that back to 2014. The
18 damages from that is about 2 million 6.

19 Prejudgment interest is a 5.5 percent compounded
20 monthly based on the damages. And so the summary, again,
21 38--\$39 million after prejudgment interest. 30 million of
22 damages on the various components of the damages.

23 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you,
24 Mr. Farrell. Rest assured that, of course, your
25 presentation is part of the record, and we will take a

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1 closer look at it.

2 THE WITNESS: Thank you.

3 PRESIDENT RAMÍREZ HERNÁNDEZ: So don't worry about
4 being rushed up to finish that.

5 Mr. Di Rosa, please.

6 MR. Di ROSA: Thank you, Mr. Chairman.

7 CROSS-EXAMINATION

8 BY MR. Di ROSA:

9 Q. Mr. Farrell, good morning.

10 A. Good morning.

11 Q. My name is Paola Di Rosa. I represent the
12 Dominican Republic in this arbitration. Let me start with
13 a few preliminary matters.

14 First of all, I'm going to refer in your
15 examination from time to time to parts of your Expert
16 Reports and also to various documents that are going to be
17 in the binder that will be handed to you.

18 Sometimes--for example, when I refer to your
19 Expert Reports, I will mention something about it or quote
20 from it. You're welcome to look at the actual document if
21 you wish. But if you remember it from memory or if it's an
22 obvious thing to you, you don't have to. It's at, you
23 know, your discretion.

24 Secondly, also, because this examination is being
25 transcribed by a stenographer and because there are

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1 simultaneous interpreters, we're going to have to wait
2 until the other is finished speaking before speaking
3 because otherwise there is an overlap that is uncomfortable
4 for them.

5 And, also, you're going to have to verbalize your
6 responses. So if you shake your head or you nod, the
7 stenographer can't record it right.

8 So with that, let me start by asking you--you were
9 asked by your counsel about your--the two reports that you
10 submitted in this arbitration. And I wanted to ask you, do
11 you fully ratify the contents of those two Reports here
12 today?

13 A. Yes.

14 Q. Is this any correction that you wish to make to
15 them?

16 A. Not that I'm aware of.

17 Q. All right. Let me start by asking you a few
18 questions about methodology. First of all, did you--did
19 you attach to your First Expert Report any documents or
20 exhibits other than your own schedules?

21 A. No.

22 Q. Do you recall?

23 And what about to your Second Report, did you
24 attach any documents or exhibits to that?

25 A. There's an exhibit, yes.

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1 Q. And what does that exhibit relate to? Do you
2 remember?

3 A. I think it's a summary of the damages.

4 Q. Summary--so your own summary of the damages.

5 A. Yes.

6 Q. All right. So did you not see a need to attach,
7 for example, financial statements or financial records of
8 any sort or tax returns or any of the sorts of documents
9 that one often sees in damages expert reports?

10 A. No, I don't think that that's--would have been
11 attached to my Report. My way of doing things is to
12 incorporate those into what I call the work papers. Those
13 are produced in a file, and then they are available if
14 counsel needs them.

15 Q. Right. But you didn't affirmatively produce them
16 or attach them?

17 A. I'm sorry?

18 Q. You didn't affirmatively produce them or attach
19 them yourself? We had to ask for them, in other words.

20 A. Yes, that's the standard--that's the way I'd
21 handle those types of issues.

22 Q. I see.

23 A. I put together a work paper, and then if you want
24 to see them, then you can ask them. But you can look at
25 the Report and you can see what I did and come to some

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1 conclusions based on that.

2 Q. Right.

3 So if counsel doesn't ask for any of that, how
4 is--how does the Tribunal know what the supporting
5 documentation is for your conclusions; in other words,
6 where you drew those conclusions from? How do they
7 evaluate the accuracy of your Expert Report?

8 A. That's detailed in the Report that I have. It
9 indicates where the information came, how I went about
10 doing that calculation, or source of that information.
11 It's footnoted or it's delved in in the Report itself.
12 Excuse me. I'm sorry.

13 Q. Sure. But if it's footnoted--I mean, if it's
14 footnoted but all you're doing in the footnote is saying
15 things yourself, the question is, how does the Tribunal
16 test that? You know, how do they know it's accurate? They
17 can't; right?

18 A. No, I would disagree with you. I think it does
19 provide a basis for understanding how the calculation was
20 made and how the basis for the calculation came about.

21 Q. Right. But if your Report is a self-contained
22 universe where the only contents are what you yourself are
23 saying about things, then there's no external
24 corroboration, there's no way to evaluate whether what
25 you're saying is true or accurate.

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1 Isn't that necessarily the case?

2 A. No, I disagree with you. I think that the

3 footnote--if I say I got information from some source,

4 that's footnoted and the source can be gone to to find it.

5 So, it could be an Internet calculation. It could be a

6 multitude of things.

7 Q. All right. So, you know, in Footnote 45, for

8 example, of your First Report, you have a footnote that

9 says, "Conversations with the Ballantines."

10 I mean, you know, how is--how is the Tribunal

11 supposed to make anything of that as a source? I mean, in

12 other words, what I'm saying is they basically just have to

13 trust what you're telling them; right?

14 A. That's the information that I put into my Report

15 that I used as--it references to the construction costs

16 that were projected of being 1.7 million. That's a true

17 statement.

18 Q. Right. But the Tribunal--if you had said

19 100 million, the Tribunal has no way to know, you know,

20 where you actually got that number; right? Or, you know,

21 they have no way to confirm it.

22 A. No, that's not true. They can talk to

23 Mr. Ballantine. He sat here for a day.

24 Q. Yeah. It doesn't really work that way. But,

25 anyway, let me ask you about--

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1 MR. ALLISON: Can I object to his characterization

2 of how things work and ask him to please ask questions of

3 the witness rather than give his view on how proceedings

4 should go forward.

5 PRESIDENT RAMÍREZ HERNÁNDEZ: Could you please

6 avoid arguments.

7 BY MR. Di ROSA:

8 Q. Let me ask you a different methodological

9 question, Mr. Farrell.

10 At the top of Page 4 of your Second Report, you

11 said--

12 A. Hang on. Let me get there first. Okay.

13 Q. You're there now?

14 A. Yes, I am. Sorry.

15 Q. So there you said, "The BRG Report assumes that

16 the D.R.'s"--meaning the Dominican Republic's--"violations

17 of the DR-CAFTA Treaty caused damages to the Ballantines."

18 And I wanted to read to you a piece of a

19 treatise--a passage in a treatise that was submitted by the

20 Respondent in this arbitration which is at Exhibit R-127.

21 And you have it there. I'll quote the sentence. If you

22 feel that you have to look at it in context, that's fine.

23 The quote says--and this is a treatise by--

24 PRESIDENT RAMÍREZ HERNÁNDEZ: Sorry, Counsel.

25 Could you repeat the exhibit number?

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1 MR. Di ROSA: R-127. It's in the binder there.

2 BY MR. Di ROSA:

3 Q. This is a treatise by Robert Dunn. It's called

4 "Recovery of Damages for Lost Profits, Volume 2."

5 And the quote says, "The expert must exclude all

6 other likely causes of the business loss in order to render

7 an opinion that the cause of the loss was the Respondent's

8 wrongful act." That's at Page 648 and 649.

9 So you don't think it's part of your job as an

10 independent damages expert to actually figure out if

11 the--if the alleged government actions actually caused the

12 harm that is being claimed by, in this case, the

13 Ballantines?

14 A. No. I'm not a lawyer. This, in my mind, was a

15 legal question. And I was told to assume that--in doing my

16 calculations, I was to assume that the D.R.'s violation

17 caused damages to the Ballantines. And that's the basis

18 for it.

19 The damages that I did were all-encompassing. If

20 you don't get Phase 2 permit, the rest of the process falls

21 apart. And it made sense to me in that regard.

22 Q. So you don't apply like a rule of reason to, you

23 know, what you're being told happened and what caused the

24 harm. So, for example--you know, just to take an extreme

25 example. Say that, you know, a meteor hit the mountain and

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1 they suffered a lot of harm but they had said the harm was

2 caused by the Dominican Government. Do you just disregard

3 the meteor?

4 A. No, I would think about that. As you say, that's

5 an extreme example. And that would make sense to me. But

6 when I'm looking at damages and I was told to assume that

7 the D.R.'s violation caused the problems the Ballantines

8 had from a damage perspective and they were not able to get

9 the permits that were needed, they couldn't build the

10 buildings without the permits, they couldn't develop the

11 roads without the permits, then I was able to, in my mind,

12 come to a conclusion that they had a reasonable basis for

13 doing the calculations that I did.

14 Q. I see. So in this case, you know, you don't have

15 to test causation, if there's a meteor, you do. What about

16 like a hurricane? There's a lot of hurricanes in the

17 Dominican Republic. Still something you would consider?

18 A. Again--

19 PRESIDENT RAMÍREZ HERNÁNDEZ: I think the

20 causation question has been asked and answered.

21 MR. Di ROSA: I'm just trying to test his theory,

22 Mr. Chairman. You know, he has to draw the line somewhere,

23 I'm trying to find where he draws the line. I mean, you

24 either test causation or you don't. But, you know, what

25 he's saying is, "Well, sometimes yes; sometimes no." And I

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1 think it's--

2 PRESIDENT RAMÍREZ HERNÁNDEZ: But I believe that
3 the witness has been clear, the expert has been clear since
4 even the second submission he made saying that for his
5 assumption, causation was a legal question that was
6 supposed to be under some assumptions.

7 I don't see how probing more, the causation. I
8 think the expert has taken the view. Of course, you are
9 free to take your view on that. I mean, unless--unless you
10 tell me that there's more there, I don't see the need for
11 this line of questioning now.

12 MR. Di ROSA: We'll move on, Mr. Chairman. It's
13 just that, you know, the issue of causation is a major
14 methodological issue for a damages expert. And,
15 personally, I found it noteworthy and therefore worth
16 asking about. But, you know, we're happy to move on.

17 BY MR. Di ROSA:

18 Q. All right. You said at Page 5 of your Second
19 Report, "It is my opinion that the damage amounts I have
20 presented properly flow from the assumption that the
21 Ballantines' inability to expand their investment in the
22 D.R. was the result of the D.R.'s inappropriate refusal of
23 their environmental expert--permit"--sorry--"of their
24 environmental permit."

25 This means that all of the harm that you have

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1 assessed in this arbitration flows from the permit denial;
2 is that correct?

3 A. That's right.

4 Q. All right. Yesterday, Mr. Ballantine, when he
5 testified, he stated that his decision not to proceed with
6 the Paso Alto business opportunity was a business decision.
7 He qualified it by saying that it was a business decision
8 based on his expectation that he was going to be
9 discriminated against, and that was at the hearing
10 transcript for Day 2, Page 406.

11 MR. ALLISON: I'd request that the transcript be
12 put up so that the Tribunal can review it because I'm
13 afraid of mischaracterizations of exactly what was said.

14 MR. Di ROSA: You know, it's--let me--just to make
15 it easier, Mr. Chairman, let me pose it as a hypothetical
16 question, and then we can parse the testimony from
17 Mr. Ballantine so that we don't waste Mr. Farrell's time.

18 BY MR. Di ROSA:

19 Q. Assuming that Mr. Ballantine had indicated that it
20 was a business decision to not pursue that opportunity--and
21 we're not saying that it was, you don't have to pronounce
22 yourself on that. Just let's assume for the sake of
23 argument that that was the case.

24 Then in that case, the damages that you calculated
25 related to the Paso Alto opportunity would not have been

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1 "the result of the D.R.'s inappropriate refusal of their
2 environmental permit"; correct?

3 That's the passage I just read from your Page 5 of
4 your Second Report. Is that--

5 PRESIDENT RAMÍREZ HERNÁNDEZ: What is the
6 question? What is the question trying to get at?

7 MR. Di ROSA: He said in³ his Page 5 that the
8 damages that he has calculated flow from the D.R.'s
9 inappropriate refusal of the permit.

10 I'm asking him if it were the case that
11 Mr. Ballantine didn't pursue the--did not pursue the
12 business opportunity at Paso Alto due to a business
13 decision, then it wouldn't be due to a refusal of the
14 permit; it would be due to his own business decision.

15 PRESIDENT RAMÍREZ HERNÁNDEZ: Yeah, but you're
16 asking the expert to make assumptions on some legal or
17 factual basis.

18 MR. Di ROSA: Right. And we are assuming that for
19 the sake of argument.

20 PRESIDENT RAMÍREZ HERNÁNDEZ: And the expert has
21 told you that--what are the assumptions he's making to do
22 that? I mean, you can make an argument on that.

³ English Audio Day 3 at 2:51:04

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1 MR. ALLISON: I would also object that it's an
2 incomplete hypothetical because it doesn't include an
3 assumption or a proposition as to what motivated the
4 business decision. Was it because of the Phase 2 denial
5 permit?

6 PRESIDENT RAMÍREZ HERNÁNDEZ: Yeah.

7 MR. ALLISON: I mean, Mr. Di Rosa is free and will
8 make arguments about what a business decision means and the
9 like and in what phases.

10 But we've heard from the damage expert as to the
11 basis for his testimony.

12 PRESIDENT RAMÍREZ HERNÁNDEZ: Yeah.

13 MR. ALLISON: I think it's appropriate.

14 MR. Di ROSA: Mr. Chairman, I think it's fair to
15 test the assumptions that the expert made. You know, I
16 mean, it's going to be a very long day if I can't test him
17 on any of the assumptions he made or the statements that he
18 made and so forth.

19 PRESIDENT RAMÍREZ HERNÁNDEZ: No, I'm not saying
20 that. I'm just saying that you are--please refer to--or
21 please make the testimony of the expert refer to what he
22 said in the submissions as opposed to trying to make
23 assumptions on some legal parts that are not there.

24 MR. Di ROSA: Right. You know, the thing is,
25 though, that he stated that he made certain assumptions,

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1 and so we want to test if the outcome would be different if
2 he had made different assumptions. We think that's the
3 whole--what the whole exercise is here, is to probe, you
4 know, the soundness of Mr. Farrell's methodology. And we
5 can't get to the outer contours of that if we can't test
6 these assumptions.

7 I mean, if I have to accept his assumptions and
8 you have to accept his assumptions, then, you know, we can
9 just move on to the next witness.

10 PRESIDENT RAMÍREZ HERNÁNDEZ: But nobody is saying
11 that, Mr. Di Rosa. At the end, you can make an argument
12 based on the assumptions made by the expert, and you are
13 free to do so.

14 And I think the expert has posed what were their
15 assumptions. I mean, if you want to test hypotheticals,
16 you are free to do so. But please just refer to what--

17 MR. Di ROSA: All right. Let me short-circuit
18 that whole line of discussion by asking him a different
19 question.

20 BY MR. Di ROSA:

21 Q. If the harm to the Ballantines did not result from
22 the denial of the permit, then it would not be a legitimate
23 grounds for claiming damages; is that fair?

24 A. I'm not sure I can give you a yes or no answer on
25 that. I think you have to look at the underlying. You

1 have to evaluate it. And then based on the inputs that
2 come as to why yes or no, then you might make a decision
3 either way.

4 Q. All right. So you say that the damages you
5 calculated were the result of the inappropriate refusal by
6 the government of the environmental permit. I'm saying
7 what if it wasn't caused by that, and you're saying it
8 depends. Is that right?

9 A. I think, again, you have to look at the underlying
10 reasons why--just as Mr. Allison just indicated--the ideas
11 of what's behind the reasons why, is it a relationship, is
12 it direct--I mean, there's a lot of things that go into
13 this.

14 I was given the task of calculating damages based
15 on one assumption, that the D.R. did not provide the
16 permits. That's all.

17 Q. Correct. So I'm asking you if that assumption
18 turns out to be partially wrong or entirely wrong, then
19 that would make your calculations either partially wrong or
20 entirely wrong because you started from that. So your
21 calculations are based on that assumption. This is pure
22 logic. I mean, if we can--let me just go on to the next
23 question.

24 You say at the bottom of Page 6--here, you say--

25 A. Second Report?

1 Q. Second Report still, yes.

2 A. Okay.

3 Q. "First and foremost, just like causation, whether
4 the Ballantines mitigated their damage is an issue of fact
5 or law which will be determined by the Tribunal."

6 But then in the very next sentence at the top of
7 Page 7, you say the following: "However, it is my opinion
8 that the documentary and testimonial evidence will show
9 that the Ballantines acted appropriately with respect to
10 their investment actions and that those actions were
11 reasonable based on their prior dealings with the D.R. and
12 experience as a developer in the D.R."

13 Do you see that?

14 A. Yes.

15 Q. So first you said X issue is an issue of fact or
16 law, Y issue is an issue of fact or law.

17 But--and then, you know, and you say that you're
18 not offering an opinion on those because they're an issue
19 of fact or law and you're not qualified to offer an opinion
20 on those. But then in the very next sentence, you proceed
21 to offer an opinion.

22 Because, you know, isn't it an issue of fact
23 and/or law, potentially both, right, whether or not they
24 acted appropriately in respect to their investment actions,
25 including their dealings with the D.R.? I mean, that's a

1 factual issue; right? You know, whether--how they acted
2 and whether that action was appropriate--how they--you
3 know, what they did and how they acted and whether that was
4 appropriate is all factual and normative; isn't it?

5 I mean, it's not--you know, it's not something
6 that under your own formulation of what's appropriate and
7 not appropriate to do, that you would do. Is that wrong?

8 A. What is⁴ wrong?

9 Q. In other words, you know, you said--I mean, do you
10 agree that your general principle is that you don't
11 pronounce yourself on issues of fact or law? Is that--

12 A. I'm not here to--I'm here to provide testimony on
13 the damage aspects of this arbitration. I'm not here to
14 deal with liability issues or causation and those types of
15 issues because in my mind those are legal issues.

16 Q. What about factual issues?

17 A. Again, I can provide--use the facts that are
18 presented and incorporate them into my damage calculation,
19 if appropriate.

20 Q. Right.

21 A. And if they're not appropriate, then I can either
22 ignore them or see--I, basically, would have no opinion on
23 anything else.

⁴ English Audio Day 3 at 2:57:43

1 Q. Right. So the question is, then your assessment
2 here that they acted appropriately, is that not a factual
3 question or legal question in your mind? It's either yes
4 or no.

5 A. I don't know the answer to that because I hadn't
6 thought of it that way, whether it's factual or legal.

7 Q. Okay. So, you know, if it's based on a fact such
8 as, you know, what they--the information they submitted to
9 the Ministry--say that all the information they provided to
10 the Ministry--hypothetically, all the information they
11 provided to the Ministry was false. Do you know for a fact
12 whether it was or was not false?

13 A. No.

14 Q. So then how can you conclude that they acted
15 appropriately if you don't know what they actually did and
16 what they actually provided to the Ministry?

17 MR. ALLISON: I'm going to object to the form of
18 the question. What he says is based on his review of the
19 documentary and testimonial evidence. He's presented this
20 opinion. He's made his point that he's not here to provide
21 factual opinion. I think this line of questioning is not
22 necessary.

23 PRESIDENT RAMÍREZ HERNÁNDEZ: I disagree. I think
24 the Respondent is testing what the expert said in the
25 paragraph. So maybe you could rephrase your question,

1 counsel.

2 BY MR. Di ROSA:

3 Q. All right. Do you agree that--how--you know, what
4 they did and how they acted is a factual question?

5 A. Yes, probably.

6 Q. So when you say that they acted appropriately, you
7 are in fact pronouncing yourself on a factual question?

8 A. I'm using it in the context of my damage
9 calculation. I'm not standing here and telling you that
10 I've done a thorough evaluation of every document, every
11 evidence, et cetera. I looked at what I needed to look at
12 in order to do the damages, and that's what I kept my site
13 on.

14 Q. All right. Let me move to a different part of
15 that discussion there on Page 7. In the second paragraph
16 at the end, you state, "The BRG Report appropriately relies
17 on the Ballantines' good faith expectations that they would
18 receive the necessary permits to proceed with their Phase
19 2."

20 So, basically what you're saying here is that in
21 preparing your Report, you relied on the Ballantines' good
22 faith expectations; right? That's what it says?

23 A. Yes, that's how the damage is. It's a but-for.
24 They thought they were going to get it, and they didn't.
25 So what's the damages associated with that.

1 Q. Right. And that necessarily means, though, that
2 you relied on what the Ballantines told you were their
3 expectations, right, because by definition an expectation
4 is something that's subjective; isn't that right?

5 A. That's what the sentence says, that they had a
6 good faith expectation that they were going to get the
7 necessary--

8 Q. Well, but that's a statement of fact. I'm asking
9 you: How did you come to that conclusion that they relied
10 in good faith on the receipt of the permits? You know,
11 there you're saying something about what they thought or
12 felt. They--you know, "they relied" is a subjective thing
13 by the Ballantines. It's something you cannot know. So
14 the only way you would know it is if they told you; right?

15 Because you can't yourself, inside your brain,
16 figure out what the Ballantines are expecting; right?

17 A. Yes, you're right. I mean, we had a conversation.

18 Q. Okay.

19 A. It's throughout my Report that I had conversations
20 with the Ballantines. You even brought it up at one time,
21 dealing with conversations with the Ballantines.

22 Q. All right. Okay. So you relied on what they told
23 you about their expectations, but you went beyond that and
24 you said here that, you know, that your Report
25 "appropriately relies on their good faith expectations."

1 And how did you assess whether their expectations were in
2 fact held in good faith? Like, how do you know that?

3 A. Again, we had conversations. They indicated that
4 they were going to get the permits. They thought they were
5 going to get the permits. And accordingly, they didn't.
6 And that results in the damages that they have.

7 Q. All right. So it's basically based on what they
8 told you. Both what they expected and their assertions
9 that it was in good faith. Is that right?

10 A. Yes. And--I mean, I saw some of the documentation
11 that you've been going over the last day or two dealing
12 with permits and things--applications and things like that.

13 But basically, it's conversations with the
14 Ballantines.

15 Q. Okay. On Page 7--still the same page--in the next
16 to last paragraph, you say that your calculations were
17 "conservative."

18 And as evidence of that you point out, for
19 example, that the "BRG Report does not seek additional
20 damages sustained by the Ballantines such as builder
21 damages related to the Paso Alto project."

22 Now, is it your understanding--and we talked about
23 Paso Alto, but I'm asking you about a different aspect of
24 this project.

25 Is it your understanding that the Ballantines

1 actually incurred builder damages in connection with the
2 Paso Alto project?

3 A. No. I was told that they were going to be a
4 builder and would have had damages if they had proceeded
5 forward.

6 Q. All right. So if the project never actually got
7 started and never got off the ground and nothing was built,
8 then there were no builder damages; is that right?

9 A. Splitting of hairs, yes.

10 Q. Splitting what?

11 A. Splitting of hairs, yes.

12 Q. How is that splitting of hairs? I mean, if
13 something didn't get built, then there are no builder
14 damages.

15 A. But--

16 Q. Sort of by definition.

17 A. Sorry. I didn't mean to--

18 Q. No. You know, again, you know, it's going to be a
19 really, really long morning and afternoon, Mr. Farrell, if
20 I can't get you to accept as a basic premise. I mean, it's
21 just pure logic. If something does not get built, there
22 are no builder damages. Yes or no?

23 MR. ALLISON: Let me object to the question. His
24 Report contains an entire schedule about the builder
25 damages related to Phase 2. That wasn't built. Is his

1 argument there are no damages because it wasn't built? The
2 Phase 2 lots weren't sold. It didn't happen. There can't
3 be any damages.

4 So, he says because he couldn't sell the Phase 2
5 lots, there can't be any damages. I mean, we're asking
6 about--and he states that as pure logic.

7 MR. Di ROSA: No.

8 MR. ALLISON: This is argument.

9 MR. Di ROSA: It's not argument. I just quoted
10 from--I just quoted from Mr. Farrell's Report, and he said
11 as evidence that his Report is conservative in its
12 calculations, that he did not seek additional damages
13 sustained by the Ballantines such as builder damages
14 related to the Paso Alto project.

15 What I'm trying to establish is that if there were
16 no builder damages at all, you can't claim it as credit for
17 having been conservative in your Report. I mean, you know,
18 if the Ballantines had told you, you know, you know what?
19 I was expecting to buy half of the land in the entire
20 Dominican Republic, but they never did it. You can't then
21 say my Report was conservative because I didn't include the
22 value of half of the land in the Dominican Republic.

23 Again, just pure logic.

24 BY MR. Di ROSA:

25 Q. But isn't that right, Mr. Farrell?

1 I mean, the question, I suppose is how can you
2 claim as evidence that your Report was conservative in its
3 calculation by not calculating things that didn't happen?

4 A. I guess I'm confused too. Because my whole Report
5 is based on the idea that damages would have happened--that
6 the damages result from the inability of the Ballantines to
7 execute the building of the houses, the sale of lots. And
8 the Report--the sentence you're quoting basically--doesn't
9 say what you think it says.

10 It says that the BRG Report does not seek
11 additional damages. And we use as--builders damages as an
12 example of that.

13 So we didn't include it in our Report because we
14 didn't think they would have ended up doing that in the
15 long run. So I'm not putting together the apples and the
16 oranges that you're doing.

17 Q. All right. Let me just look at this again. I
18 don't see how I misinterpreted this. The first sentence
19 says, "The calculations presented in this report are
20 conservative." And then you go on to say immediately after
21 that, "The BRG does not seek additional damages sustained
22 by the Ballantines, such as builder damages related to the
23 Paso Alto project."

24 And then also, "Damages related to additional land
25 that the Ballantines were prepared to purchase."

1 So if it's just something that's an idea in the
2 Ballantines' heads, you can't claim that as evidence that
3 your Report is conservative, I guess, is what I'm trying to
4 get you to opine on. But I gather the answer is that you
5 don't agree.

6 A. No, I would not agree to you with that statement.

7 Q. But you also said--you also said that your whole
8 Report--at the beginning, you said your whole Report is
9 based on the idea that these damages would have happened;
10 right?

11 A. Yes.

12 Q. And you don't see a contradiction in that?

13 A. No, I do not.

14 Q. Okay. All right. Let's go to Page 8. Same
15 report, next page, third full sentence at the top. And
16 this goes back to the issue that we were just talking
17 about, about your reliance on what the Ballantines may have
18 told you. You say at the--in the third full sentence at
19 the top, "It is entirely appropriate for me to rely on
20 information provided by the Ballantines."

21 You are an independent expert; correct?

22 A. Yes.

23 Q. Or at least that's how you're being presented,
24 yes?

25 Doesn't that mean by definition that you can't

1 just rely on information provided to you by the Party that
 2 hired you without corroborating it somehow?

3 A. That's true. I agree.

4 Q. That is true. Okay. So far, we're in agreement
 5 then.

6 You justify your reliance on what the Ballantines
 7 told you by stating that "the Ballantines have a wealth of
 8 information about the losses they sustained."

9 And you were aware that you were being hired when
 10 you were hired to testify in this arbitration; right?

11 A. Yes.

12 Q. So you were aware that the Ballantines were
 13 advancing certain positions in the arbitration that they
 14 wished to substantiate, including through expert testimony;
 15 is that right?

16 A. That's right.

17 Q. So you knew that the Ballantines had a natural
 18 interest in telling you things and giving you information
 19 that might help substantiate their position. Is that not a
 20 fair assumption?

21 A. They would provide information that I could use to
 22 evaluate the damages. Yes.

23 Q. Right. But, you know, they would also have a
 24 tendency--natural tendency to give you information that was
 25 helpful to their case and maybe not give you information or

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1 put a spin on certain information that--than they
 2 would--you know, than they would if they were not in an
 3 arbitration, for example.

4 A. That's possible. But my job is to take a look at
 5 that information and go and see if there's ways to
 6 collaborate it or not to collaborate it and then make a
 7 decision as to what I think is the right answer for the
 8 damages that I calculated.

9 Q. Okay. So you do agree that you had an obligation
 10 to corroborate; correct?

11 A. I have an obligation to take a look at the
 12 information and determine whether or not I can use it or
 13 whether or not other information is more valuable than what
 14 they provide.

15 Q. All right. But--you know, so before, though, you
 16 said, quote--I'm looking at the transcript here--"But my
 17 job is to take a look"--you know, I would ask that you not
 18 look at your counsel, Mr. Farrell.

19 A. I'm not.

20 Q. Okay.

21 A. I was looking to see if it's going to show up here
 22 so I can see what you're reading.

23 Q. All right. You quoted--you know, you said, "But
 24 my job is to take a look at that information"--the
 25 information that was given to you by the Ballantines--"and

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1 go and see if there's ways to corroborate it or not
 2 corroborate it and then make a decision as to what I think
 3 is the right answer for the damages that I calculated."

4 This is just me quoting you from two seconds ago.
 5 And then I--from that I asked you, "Do you--so you agree
 6 that you had an obligation to corroborate?" And then you
 7 said something else.

8 So my question is: Do you or do you not feel like
 9 you had to corroborate the information that the Ballantines
 10 gave you?

11 A. I have to evaluate it.

12 Q. But not corroborate it?

13 A. In some cases, it would be corroborated; in some
 14 cases, it won't be. But I take the information, I evaluate
 15 it and make a decision as to how to use that information.

16 Q. All right. I showed you earlier a footnote in
 17 which you had cited to conversations with the Ballantines.
 18 Did they provide you with actual documents as opposed to
 19 just telling you stories about--or, you know, information
 20 about things orally?

21 A. Yes.

22 Q. But you just told us at the very beginning of this
 23 cross-examination that you had not attached any
 24 documentation at all, really.

25 A. As I said before, I have a set of work papers that

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1 has that collaboration or that information in it and those
 2 are then used as a back-up for the report that I issue.

3 Q. When--and you said, you know, if you ask for this
 4 information, you get it; right? That's what you said
 5 earlier?

6 A. Most--almost every case I'm in, the attorneys on
 7 the other side request the information.

8 Q. Right. Fair enough.

9 And so when we requested to produce--for you to
 10 produce the documentary evidence, did you produce any notes
 11 from your conversations with the Ballantines?

12 A. I don't know what we produced. I wasn't in part
 13 of the production. I gave the information to Mr. Allison
 14 and how he presented to you, I don't know the answer to
 15 that question.

16 Q. Would it surprise you if I told you that at the
 17 time, you said that no notes had been taken?

18 A. That's probably--in some cases, that's probably
 19 true, yes.

20 Q. In some cases. In which--I mean--

21 A. In other words, we had conversations with the
 22 Ballantines. Like the construction costs, we had
 23 conversations. That gave us a number. Later, we got the
 24 back-up for it and were provided with how to evaluate that
 25 information.

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1 Q. All right. So what I hear you saying--and maybe
2 I'm wrong again--is that you took notes on some things and
3 not others?

4 A. Yeah. Because we had a lot of conversations with
5 the Ballantines. Discussed a lot of different issues that
6 would or could or should have some impact on my damages.
7 But a lot of it had nothing to do with the damages that we
8 talked about.

9 Q. Right.

10 So you did have conversations with the Ballantines
11 and sometimes you took notes on what they told you; right?

12 A. In some cases, yes.

13 Q. Right. So that's the problem I have. Is that,
14 you know, you say sometimes you did take notes. But when
15 we asked you to produce the notes, you said that no notes
16 had been taken so that contradicts what you're telling us
17 right now.

18 A. No. Because they get incorporated in the report
19 and then that's--the information is there.

20 Q. But you didn't attach anything to your Report, you
21 just--

22 A. Yes, I did. I said I had conversations with the
23 Ballantines. The construction costs were X, Y, Z dollars.
24 That's the conversation I had.

25 Q. Right. But so my--right. I understand that. But

1 my question is: Do you--you know, you didn't attach any
2 notes that substantiate your characterization of that
3 conversation or of those conversations; right?

4 A. I didn't produce--I guess, the piece of paper
5 you're looking for that said "I had a conversation with the
6 Ballantines today for 1. whatever it was for construction
7 costs," and that's the only thing that's on that piece of
8 paper--it isn't there. Because it gets incorporated into
9 the report and it's within the report. Because the source
10 of that information was the Ballantines.

11 Q. Right. Okay. So you stated also in--same page,
12 Page 8 of the Second Report, you said, "In my opinion, I
13 had sufficient data and facts upon which to make reasonable
14 damages calculations."

15 And you still believe that?

16 A. Yes.

17 Q. Did you rely on any internal documentation or
18 spreadsheets or projections that, you know, occurred--that
19 were made prior to the alleged treaty violations? The
20 earlier documentation?

21 A. What--I'm sorry. You'll have to refresh my memory
22 on the treaty violations.

23 Q. Sure.

24 A. What date was that?

25 Q. Well--so you were asked to make calculations of

1 damages that occurred as of certain dates; right?

2 A. Yes, 2014.

3 Q. So my question is: Did you rely on any
4 documentation from the Ballantines that predated that? In
5 other words, the historical information?

6 A. Yes.

7 Q. You did. Okay.

8 And did you review the Jamaca financial--did you
9 review the financial statements? Put it that way. Start
10 with that.

11 A. Yes.

12 Q. You did.

13 Did you do that before your First Report--before
14 you issued your First Report?

15 A. No, I don't believe so. I don't think they were
16 available.

17 Q. So you didn't think it was relevant how Jamaca had
18 performed financially prior to the alleged harmful acts?

19 A. No, because I don't think that the financial
20 statements are of any value to me, even today. I was told
21 that they were being prepared on the basis of using the--I
22 think we described it as the "tax numbers" yesterday with
23 Mr. Ballantine's testimony. And that doesn't--those
24 numbers or those--those documents don't reflect the
25 economic benefits that were given to the Ballantines and so

1 they were, in my mind, not much help to me.

2 Q. I see.

3 So you did not review the financial documents from
4 anything prior to the alleged acts because they were not
5 helpful to you. But you also say that in this Report--in
6 both of your Reports, the methodology that you use was the
7 Discounted Cash Flow method; correct?

8 A. Yes.

9 Q. And you said that that was justified, and you
10 indicated that your reason for thinking that DCF was the
11 appropriate method was because you considered it
12 "appropriate to rely on the historical performance of the
13 Ballantines to predict what would happen in the future with
14 the Jamaca development."

15 Do you remember saying that? I think it's at your
16 second--Page 9 and 10 of your Second Report, if I'm not
17 mistaken. I'm just doing this from memory, so hold on.

18 Yeah, it's at the bottom of Page 9. "It is
19 appropriate to rely on the historical performance of the
20 Ballantines to predict what would happen in the future with
21 the Jamaca development."

22 But you just said that you didn't look at the
23 financial statements that predated the acts. So--you don't
24 see a contradiction there?

25 A. No, because I used the sales contracts, what,

1 again, were described as the "real sales contracts," to
2 take a look at what was taking place in the Phase 2. For
3 the other items, information was provided to me from other
4 third-party experts, and they were used for a basis to do
5 the calculation.

6 The rest of it comes from either my own analysis
7 or other experts or market research or whatever needs to be
8 done in order to put together the financial statement, the
9 damages that I've prepared.

10 Q. All right. So--and we're going to come back to
11 the issue of the contracts. But you thought that it
12 was--you thought it was okay just to rely on the contracts
13 in order to predict the profitability in the future of
14 Jamaica based on their profitability in the past. Is that
15 fair? Isn't that what the DCF does? It takes a going
16 concern and it says, okay, it was X--it had X profitability
17 during the period before the measures and then, therefore,
18 it will have X--you know, Y profitability in the future?

19 A. Yes.

20 Q. That's DCF; right?

21 The contract reflects the sale price; right?

22 A. Yes.

23 Q. When the--you know, and assuming the buyer pays
24 that sales price, that will be revenues--

25 A. Yes.

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1 Q. --correct?

2 A. Yes. I'm sorry.

3 Q. But revenues are not the same as profits; correct?

4 A. That's right.

5 Q. So you don't see a contradiction there?

6 A. No, because I--when I did my calculations, I
7 looked at what the revenue was. I looked at what I
8 believed to be the costs associated with that revenue and
9 came up with what the losses would--the damages--sorry--the
10 damages that were for the various components of my damages.

11 Q. I see. So you didn't think--you didn't think that
12 you should--that you needed to--I mean, the profitability
13 of the venture prior to the measures would have been
14 reflected in the financial statements; is that not right?

15 A. Again, I was told that the financial statements
16 were based on the tax revenue. And that does not give me
17 the information that I needed in order to take a look at
18 the earnings that I wanted to project for the damages that
19 I did.

20 Q. But if you have--you can have--doesn't
21 profitability depend on a lot of issues that you can't
22 really assess from the contracts or from, you know, cost
23 invoices and such like?

24 I mean, don't you necessarily have to look at
25 financial records and financial statements to be able to

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1 assess profitability of a venture?

2 A. Not when we're doing--we're trying to calculate
3 the damages. If I was doing financial statements, I might
4 agree with you. But we're doing damages.

5 So it's the sale, and it's the incremental costs
6 associated with those sales. And that's what I looked at
7 and was sufficiently confident that that information was
8 reflected in the damage calculations I did.

9 Q. Okay. Let me ask you this: Did you review the
10 Jamaica financial statements and financial records prior to
11 issuing your Second Report?

12 A. Again, I don't know when those financial
13 statements were issued, so I'm a little--I can't answer
14 that specifically.

15 Q. They were issue--I mean these are--

16 A. I know I've looked at them.

17 Q. Sorry. I'm interrupting you.

18 You don't know when they were issued. You know,
19 I'm talking about the historical financial statements. So
20 they were issued in the years--you know, the several years
21 before the measures; right?

22 So you can assume that there was a statement in
23 2006, 2007, 2008, and so forth; right?

24 A. Correct.

25 Q. That's when they were issued?

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1 A. Well, not necessarily. I mean, that's
2 the--2000--I mean, companies sometimes get them done a
3 month after the year ends, sometimes it will take them a
4 year.

5 Q. Once a year; right? I mean--

6 A. So it may take a while for them to be generated.
7 But they eventually get generated.

8 Q. Right. My question is: Do you not remember
9 whether you reviewed them before your Second Report or did
10 you not review them?

11 A. No, I reviewed them. I just don't remember when I
12 reviewed them. I know they weren't reviewed before my
13 First Report. But whether or not they were reviewed after
14 the Second Report, I don't know.

15 Q. Okay.

16 A. I don't remember.

17 Q. Do you remember if you relied on them in any way?

18 A. I've already testified to that, that I did not.

19 Q. All right. And so the part that troubles me about
20 that is that, you know, in his First Report--sorry. In his
21 Second Expert Report, the Dominican Republic's damages
22 expert, Mr. Hart, specifically criticized your First Report
23 for not relying on the financial statements. Do you
24 remember him doing that?

25 A. Not specifically, but that's probably the gist of

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1 his Report, yes.

2 Q. Right. And despite that criticism, you didn't

3 think it was necessary to look at the financial statements?

4 A. No. But I took a look at the financial

5 information that Mr. Hart prepared.

6 Q. Right.

7 A. And noticed that he used the financial statements,

8 as you indicate, that were issued. Those⁵ information

9 includes the tax information. When you recast them and use

10 the information that I relied on, you get completely

11 different results than what Mr. Hart, and the conclusions

12 are different, and they--my view is my margins fall within

13 the criteria of those recasted financial statements.

14 Q. Did you review the Jamaca financial statements in

15 preparation for your testimony here at this hearing?

16 A. I would have looked at them, yes.

17 Q. All right. You're a certified public accountant;

18 right? Or a CPA; correct?

19 A. Yes.

20 Q. So I assume that that means you're aware of the

21 Code of Professional Conduct of the American Institute of

22 Certified Public Accountants.

23 A. Yes.

⁵ English Audio Day 3 at 03:26:28

1 Q. The AICPA. Is that correct?

2 A. Sorry. I didn't mean to talk over you. Yes.

3 MR. Di ROSA: Excuse me just a second.

4 BY MR. Di ROSA:

5 Q. Do you believe that you left an adequate audit

6 trail for an opposing expert to test your assumptions?

7 A. I don't believe I'm required to leave an audit

8 trail. I didn't do an audit. I didn't do any assertions.

9 I did a damage calculation.

10 Q. Right.

11 A. That doesn't require an audit trail.

12 Q. Let me rephrase, then. Maybe "audit" was the

13 wrong word.

14 Did you leave enough of a trail or did you provide

15 enough information for an opposing expert to test your

16 assumptions?

17 A. Well, based on what I've read in

18 Mr. Hart's-- excuse me.

19 Q. Yes.

20 A. I'm going to do the same. Sorry.

21 Thank you.

22 Based on my reading of Mr. Hart's Second Report,

23 it appears that he was able to put together enough

24 information to understand how my damages were calculated.

25 He just uses different inputs than I did.

1 Q. Well, but that's--he based his Report on the

2 information that we requested in document production from

3 the Claimants.

4 So as a--you know, as a free-standing document,

5 your Report would not have enabled Mr. Hart or any other

6 expert to test your assumptions for the same reason that I

7 mentioned earlier that the Tribunal can't test your

8 assumptions, because you didn't attach any of the documents

9 that you relied upon.

10 A. Well, I disagree with you. I believe that the

11 sales reports have been produced. I put in my Report the

12 information as to where it came from. The documents that

13 are out there are available to your expert. Even Mr. Hart,

14 in his footnotes, indicated that he saw the information but

15 elected to ignore it.

16 Q. You yourself referenced a document called

17 "Attaining Reasonable Certainty in Economic Damages

18 Calculations," which is an AICPA Forensics and Valuation

19 Services Practice Aid, which you reference in your Second

20 Report at Footnote 3 on Page 6.

21 Do you remember that?

22 A. Yes. I know what you're talking about.

23 Q. So we appended that at R-186, and I think that's

24 in your binder. Yeah.

25 On page 13 of this document, it says, "While

1 damages experts may rely on client's representations and

2 information as part of the normal delivery of professional

3 services, it should not be done without appropriate

4 consideration. As reflected in the cases presented in this

5 chapter, a damages expert's reliance on client-supplied

6 information is frequently an issue subject to challenge in

7 litigation."

8 And you just told us that you didn't look at the

9 financial statements before preparing your First Report,

10 the historical ones. So without ever having looked at the

11 historical financial statements for Jamaca, you

12 believed--and you still believe--that your reliance on the

13 client's--you know, on the Claimants' representations on

14 the financial issues was appropriate; is that right?

15 A. I don't believe that's my testimony. I believe

16 that--

17 Q. Well, I'm asking you what you think right now.

18 A. Well, I think that's what I was trying to give

19 you, is an answer to that question. I believe that your

20 question is not accurate.

21 I believe that I said that I relied on--I had a

22 conversation with the Ballantines, who told me the basis

23 for the financial statements. I didn't believe they were

24 appropriate for the purposes of what I was going to do, and

25 so I evaluated--much like this says, I evaluated the

1 information that was provided to me.

2 I, when possible, had it reflected by doing
3 research or looking to validate the information. And from
4 that information, I did a calculation that is reflected in
5 my Report.

6 Q. You said somewhere in your Report that--you stated
7 that--well, let me ask you this, because I don't have it in
8 front of me.

9 But you did--you do believe that your Expert
10 Report has to be anchored in facts. I think that's an
11 expression that you use. Is that correct?

12 A. I don't remember that.

13 Q. You don't remember saying that?

14 A. No. You'll have to point that out to me.

15 Q. Okay. We'll look for that citation.

16 A. Okay.

17 Q. Oh, yeah. Second Report at the bottom of Page 7
18 and then top of Page 8--sorry, bottom of Page 8 and top of
19 Page 9. So I'm just going to quote it.

20 And this is--this is your Second Report; correct?
21 Is that the second one?

22 And it says, "In other words, reasonable certainty
23 is attained when the Ballantine damages are reasonable and
24 can be calculated using sound economic methodologies."

25 And then--and this is the key part. "The

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1 overarching objective is to ascertain whether the
2 approximations and assumptions that are used to calculate
3 the Ballantines' damages are anchored to the facts,
4 consistent with sound economic theory, and ultimately will
5 produce reasonable results, so my opinions are
6 appropriate."

7 So I had asked you just now whether you thought
8 that your calculations and reports should be anchored in
9 facts, and you said you didn't remember saying that.

10 Does this refresh your recollection?

11 A. Yes.

12 Q. And you did say that.

13 Do you believe it?

14 A. Yes. I said I do.

15 Q. Right. Okay.

16 A. And my opinions are appropriate.

17 Q. All right. Let me ask you, while we're on the
18 subject of the DCF and such, you--and the historical
19 performance, you didn't rely on the financial performance
20 immediately preceding the alleged government acts that
21 caused the harm?

22 MR. ALLISON: I'm going to object that that
23 mischaracterizes his testimony.

24 MR. Di ROSA: Mr. Chairman, I asked--this was just
25 a discussion we just had. I asked him, did you review the

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1 financial statements predating--do you remember that
2 discussion--the financial documents predating the alleged
3 acts, and he said that he had not.

4 MR. ALLISON: If I may, but that's not how he
5 characterized it there. He said you didn't rely on the
6 financial performance of Jamaca de Dios. He testified he
7 didn't believe that was the financial performance of Jamaca
8 de Dios and that he did rely on the data that he believed
9 was the real financial performance.

10 So it's--I want to give Mr. Di Rosa some latitude.
11 I understand he's questioning an expert, but he can't
12 mischaracterize the previous testimony.

13 MR. Di ROSA: I'll rephrase the question,
14 Mr. Chairman.

15 PRESIDENT RAMÍREZ HERNÁNDEZ: Please.

16 MR. Di ROSA: It was not my intention to
17 mischaracterize Mr. Farrell's testimony. So if I did, I
18 apologize.

19 BY MR. Di ROSA:

20 Q. My question to you is the following: Were you
21 aware when you prepared your reports that the Ballantines
22 had no experience in the real estate industry other than
23 the experience they had on the Jamaca project?

24 A. I believe that's my understanding, yes.

25 Q. That they did not have experience.

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1 And did that factor into your analysis for the
2 Expert Report? If you're--if you're evaluating
3 historical--if you're trying to project damages based on
4 lost profits in the future, did you not consider it
5 relevant that they didn't really have experience in this
6 business and that, you know, they had just started in this
7 venture a few years before?

8 So they had no established track record of
9 successful ventures in the real estate business or in any
10 business in the Dominican Republic or in any foreign
11 country, for example.

12 A. It was one of the considerations. But I think
13 that I also considered that Phase 1 was a successful
14 project. It had over \$6 million dollars⁶ of sales. They
15 had built a restaurant that was at least \$2 million
16 dollars⁷. They built roads. They built a community center.
17 They built a sales center. They had put in electrical and
18 internet and water. And basically, looked to me that they
19 had a track record in developing projects that are
20 represented in the damages.

21 And in conversations with some of the buyers in
22 the Dominican Republic, they had a good reputation that was

⁶ English Audio Day 3 at 03:38:00

⁷ English Audio Day 3 at 03:38:06

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1 liked by the people that were purchasers of the properties.

2 That goes a long ways towards making a successful project.

3 Q. All right. Let's go somewhere else then,

4 Mr. Farrell.

5 In your damages calculations related to the
6 Phase 2 lots, which you discuss in your First Report in
7 Schedule 1, you assumed that--and you can either just wait
8 for the question and react to it or look at your schedule,
9 if you wish.

10 You assumed that the 70 lots would be sold--the 70
11 lots of Phase 1 would be sold within a six-year time span
12 from 2012 to 2017; is that correct?

13 A. Bear with me one minute.

14 Q. Sure.

15 A. Okay. Go ahead. Now, can you go back and reask
16 your question about the dates and stuff?

17 Q. Sure. Yeah.

18 You said in your damages--in your damage
19 calculations related to the Phase 2 lots, you assumed that
20 the 70 lots would be sold within a six-year time span from
21 2012 to 2017.

22 A. Yes.

23 Q. And similarly, in your damages calculation
24 relating to the Phase 2 house build and sales in Schedule 2
25 of the First Report, you assumed that the 70 houses for the

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1 Phase 2 lots would be sold within seven years, from 2012 to
2 2018; correct?

3 A. Yes.

4 Q. And then in your Second Report at Page 7 in the
5 next-to-the-last paragraph--and sorry I'm jumping around,
6 but that's all the jumping we're going to do--you said the
7 calculations--"The calculations presented in the BRG report
8 are conservative and primarily based on the historical
9 results of Phase 1."

10 Correct? Do you see that?

11 A. You said the bottom of Page 7?

12 Q. No. I said at Page 7, next-to-last paragraph.

13 A. Next-to-the-last paragraph.

14 Q. Second Report, page 7.

15 A. Yeah.

16 Q. This is the same quote we talked about earlier,
17 right, that the calculations are conservative based on the
18 historical results?

19 A. Okay.

20 Q. And--you also observe--I'm sorry. There was one
21 more.

22 In Footnote 31 at Page 15, here you note that the
23 Ballantines finished selling the remaining phase
24 lots--Phase 1 lots in January of 2017; is that right?

25 A. I'm sorry. Where is the footnote here?

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1 Q. Footnote 31 on Page 15.

2 A. Okay. Give me a minute.

3 Q. Sure. Sure. Take your time.

4 A. Okay. Now, go back and ask your question. I'm
5 sorry.

6 Q. Right. So it says, "Subsequent to January 2017,
7 the Ballantines have sold the remaining Phase 1 lots."

8 So if it took--if it took the Ballantines ten
9 years, from 2006 to 2017--so over ten years to sell all of
10 the--let me ask you the question. I mean, it did take the
11 Ballantines over ten years to sell all of the Phase 1 lots.
12 Is that an accurate characterization?

13 Right, they started selling these things in 2006,
14 or do you not recall?

15 A. Yeah. That's what I'm searching for. I don't
16 remember exactly when they started. But if we want to
17 represent that, that's fine.

18 Q. All right. Yeah. I'll represent that to you so
19 we can move on.

20 So as we discussed a minute ago, your Phase 2
21 sales were to be completed in your projection in only six
22 years; right?

23 A. Right.

24 Q. So your assumption regarding the timing isn't
25 really all that conservative; right? If you're projecting

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1 that the Phase 2 lots up at the top of the mountain are
2 going to take only six years, but it actually took them ten
3 years to sell the Phase 1 lots, then that's not really a
4 conservative assumption.

5 Would you agree with that?

6 A. No, I would not.

7 Q. Why would you not agree with that?

8 A. Well, first of all, you're trying to compare
9 apples with oranges here.

10 Phase 1, you have--it's a brand-new development.
11 It had start-up. Lots were slow going, let's say, in the
12 early years. And then later years you have the impact of
13 the knowledge that the Dominican Republic is not providing
14 permits and not doing the things--at least alleged, let's
15 say, that there's problems with it. So sales for Phase 1
16 slows down.

17 So they are also at the lower portion of the
18 mountain. As I indicated, as you go up the mountain,
19 there's a premium, both from a sales perspective, and
20 there's a--people want those types of lots.

21 So while you from a time point of view are right,
22 I don't believe that the assumption is right. And I
23 believe that my six-year period for Phase 2 lots is a
24 reasonable approach and conservative.

25 Q. Right, but you also said that you were basing your

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1 projections for the Phase 2 sales on the historical
2 performance. And I just showed you what the historical
3 performance was.

4 So what you're saying--what I hear you saying is
5 something different. What I hear you saying is that, you
6 know, you're--you were assuming certain things will happen
7 in the future that aren't really related to the historical
8 performance as such; right?

9 A. There are certain things that are based on the
10 historical, as we--as I gave in my presentation. Some of
11 the costs, some of the sales information, those types of
12 things are used from Phase 1. We evaluated the Phase 1
13 sales. We determined that it took time. But there's
14 a--reasons why it took time.

15 And so the reasonableness of my Phase 2 sales then
16 makes sense to me, and that's why we ended up using the six
17 years.

18 Q. All right. Let me ask you a couple questions
19 about the Aroma restaurant.

20 You asserted that⁸ the Claimants incurred expansion
21 costs for the Aroma restaurant from 2009 through 2016;
22 correct?

23 A. Yes.

⁸ English Audio Day 3 at 03:45:53

1 Q. That's at BRG 1, Schedule 9, for the record, but
2 you remember that.

3 A. Excuse me.

4 Q. And your source for that assertion is a restaurant
5 expansion report that you referred to; correct?

6 A. Yes.

7 Q. In the BRG 1, Schedule 9?

8 But you didn't--again, you did not append that
9 restaurant expansion report to your Expert Report; is that
10 correct?

11 A. As I have testified, it was in what I considered
12 to be the work papers that I have.

13 Q. Right.

14 Did you test the veracity or the accuracy of that
15 report in any way?

16 A. We took the information that was provided through
17 document production that was provided to us by
18 Mr. Ballantine, and through a test process, we evaluated
19 the costs as to the reasonableness of the expenditure
20 statement.

21 Q. Right. Well, again, because none of that
22 was--well, how much of that is actually in the record here?
23 Do you know?

24 A. I'm sorry?

25 Q. How much of that information that you say you

1 reviewed is--since you didn't attach it, but you said it
2 was, you know, in the arbitration--is in the record--I
3 think you said something like that. But do you know how
4 much of that information that you relied upon is actually
5 in the record?

6 A. No. I wasn't part of the record. I didn't
7 participate in the document production.

8 Q. Right.

9 So if it was not in the record, then neither
10 Mr. Hart, nor I, nor Ms. Taveras, nor the Tribunal could
11 really evaluate the accuracy of what you're saying about
12 that report; right?

13 A. I think there's enough in the record to be able to
14 validate the expenditure statement as to the costs that
15 were incurred in expanding the restaurant.

16 If you want to do a⁹ 100 percent, the only way to
17 do that is to sit down and go through everything and
18 evaluate.

19 But I think that as you go through the various
20 documents, you will find that they are sufficient enough to
21 validate the expenditure statement for the restaurant.

22 Q. Right.

23 Now, with respect to the expansion of the

⁹ English Audio Day 3 at 03:47:49

1 restaurant, are you aware that the Ballantines did not
2 request a permit for Phase 2 until 2011?

3 A. I'm going to say I'm weak on the date, but I'm
4 aware that they didn't request it.

5 Q. All right. So I'm going to represent to you that
6 that was the year that they submitted the permit
7 application.

8 A. I'm sorry. I will agree. 2011 is fine, the more
9 I think about it.

10 Q. You remember that now?

11 A. Yeah. I'm sorry.

12 Q. And so--

13 MR. ALLISON: I think it mischaracterizes the
14 record. The permit application for Phase 2 I believe is in
15 November 2010. And I'll--I'm weak on the dates as well, so
16 I'll--but it is in the record.

17 MR. Di ROSA: So I--okay. Fair enough.

18 PRESIDENT RAMÍREZ HERNÁNDEZ: I'm even weaker,
19 but--

20 BY MR. Di ROSA:

21 Q. What happened was they submitted in November 2010
22 and it was stamped "Received" in January 2011. So it
23 doesn't matter for purposes of my question. Let's assume
24 that it's November 2010.

25 A. Okay.

1 Q. The question relates to, you know, the costs that
2 you recorded in your--in your reports for the Aroma
3 restaurant expansion started in 2009; right? You said
4 that, 2009 to 2016. You remembered that.

5 So if--if your costs for the Aroma expansion go
6 all the way back to 2009, but they didn't actually submit
7 the permit application until November 2010, which is later
8 in time, and you're saying all the damages flowed from the
9 denial of the permit, which is even later in time, then
10 aren't you claiming for certain costs that aren't
11 attributable to the conduct that you yourself are saying
12 forms the basis of your damages calculations?

13 A. No, I disagree with you. I think that the
14 calculation is based on the idea that the expansion was due
15 to the expectation that Phase 2 would have been approved,
16 that the Mountain Lodge would have been opened, the lower
17 complex would have been opened, and that there would have
18 been a tremendous increase, let's call it, in the activity
19 at the restaurant, which would have provided additional
20 revenue, additional earnings to the Ballantines.

21 When that didn't happen, then the investment isn't
22 what it's--what--the investment didn't return what it
23 expected to return.

24 Q. Right, but so--and this goes back to the
25 expectation issue that we talked about earlier. You said

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1 they started expanding the Aroma restaurant in the
2 expectation that the permit would be granted before it had
3 been granted; right?

4 Right? That's what you just said.

5 A. Yes.

6 Q. And you also said that they started incurring
7 costs for that expansion in 2009; right? That's what you
8 also said?

9 A. Yes.

10 Q. All right. So far so good.

11 And that those costs that were incurred between
12 2009 and when the permit was ultimately denied are
13 reflected in your damages calculations; correct?

14 A. That's right.

15 Q. So isn't that improper for you to calculate
16 damages that are--that are based on something that happened
17 before the measure that caused the harm--that allegedly
18 caused the harm?

19 A. Well, I'm not sure that I can talk to what might
20 have been in Michael Ballantine's head. But the idea was
21 that the expansion of the restaurant was made because the
22 plan was to expand Phase 2--sorry--to do Phase 2, expand
23 the hotel, the motel--the apartment complexes, those types
24 of things, and to get there. And once you got there, that
25 would create the revenue to pay for the thing--for the

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1 investment that was being made.

2 And so whether it was incurred prior or after,
3 that wasn't what I was looking for. What I was looking for
4 is, what is the amount of dollars that were spent expanding
5 the restaurant in anticipation of the expansion that the
6 project was going to have.

7 Q. In anticipation. You ¹⁰based on the expectation
8 that they had; right?

9 A. Well, yeah. Of course. I mean, if you
10 didn't--that's the whole underpins here in the damages. If
11 you don't get the revenue--sorry. If you don't get the
12 permit, then the damages flow out of there.

13 Q. Right.

14 A. If you get the permit, then you've got additional
15 sales. You've got all the different things that I
16 calculated.

17 Q. Right. So that's the part that I find myself
18 struggling with, Mr. Farrell, is that you just said, "I'm
19 not sure I can talk to what might have been in Michael
20 Ballantine's head."

21 And this goes back to my question earlier, which
22 is, an expectation is necessarily something that is inside
23 somebody's head; right? It's not an objective thing. I

¹⁰ English Audio Day 3 at 03:53:20

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1 expect something to happen, but it may or may not be true.
2 It may or may not happen. Is that right?

3 A. Well, again, in my conversations with Michael
4 Ballantine, I was told that when they started the project,
5 Phase 1, they anticipated to go to Phase 2, they expected
6 to build a restaurant, they expected to do all these
7 different things, and that didn't happen because of
8 what--the Dominican Republic's failure to provide the
9 permits.

10 And so I looked at what was the cost of making the
11 expansion, and basically what happened with that expansion
12 and whether or not they were going to get their investment
13 back.

14 Q. Right, but I read to you at the very beginning of
15 this cross-examination the statement you made that your
16 calculations are based on the harm that was caused by the
17 permit denial.

18 Do you remember that?

19 A. Yes.

20 Q. How could the permit denial have caused damages
21 that happened before the permit denial?

22 It's a chronological impossibility.

23 A. That may be, but at least we were--at least they
24 were expanding the restaurant. These--the restaurant
25 doesn't happen overnight. I mean, it was a complete redo

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1 of the top portion of the restaurant. And so you have to
2 start someplace.

3 Now, I guess you could have waited until the
4 permit was issued and start the construction then. But he
5 wanted to be up and running and ready to go once the
6 permits were going.

7 Q. Yeah, but at that point he's taking a chance;
8 right? I mean, the reasonable thing would, in fact, be to
9 wait until the construction--until the permit is issued
10 before he launches off on new expenses.

11 But let's move--

12 A. But I disagree with you, because I think that
13 Mr. Ballantine had it based on his--at least what he told
14 me--based on his interaction with the Dominican Republic
15 and his background with them, he had a belief that he was
16 going to get the permit in an orderly fashion.

17 And that didn't happen. And so he orderly moved
18 forward with the idea that he was going to get a permit.

19 Q. Right. He had a belief that he was going to get
20 the permit. So you base your damages on his belief.

21 But let's move on. Let me ask you this. I mean,
22 he--the issue is that he then continued to expand the Aroma
23 restaurant even after he had denied the permit; right?

24 A. Yeah. I mean, you have--you have a building. It
25 has no roof. You have to do something. You have to move

1 forward. It has--you can't just say, "Okay. I didn't get
2 the permit, so let's stop construction, and we're not going
3 to do any more."

4 This was a viable business that was moving
5 forward, and so he completed the construction.

6 Q. But if you--you know--if you don't have the
7 permit, then, you know, you're on your own. It's not the
8 Dominican Republic's problem, right, if he's spending stuff
9 on the restaurant at that point?

10 A. Not if you believe that you are going to get the
11 permit and the permit wasn't made available to you and you
12 made decisions based on your belief that that was going to
13 go forward.

14 Q. All right. Now, are you aware of the multiple
15 reconsideration requests that were presented and then
16 denied?

17 A. I'm--

18 Q. Generally?

19 A. Generally, yeah. Let's do it that way.

20 Q. And let me accept, you know--just for the sake of
21 argument--your premise that, you know, he had a legitimate
22 belief before the permit was denied, and even, you know,
23 when it was denied initially, that it was going to be able
24 to, you know, prosper eventually; right?

25 But after he's been denied four times, maybe at

1 that point one reasonably starts to consider the
2 possibility that it's not going to happen and--you know,
3 and that happened in 2012, I think it was; right?

4 A. '12.

5 Q. 2014. Okay. Sorry.

6 The last reconsideration denial was 2014, but you
7 kept--you added costs for the Aroma restaurant expansion
8 through 2016; is that right?

9 A. Yes.

10 Q. I mean, that's what you said earlier.

11 So at that point, when you're calculating damages
12 for 2015 and 2016, you're still doing it on the basis of
13 the Ballantines' belief that it was going to be granted
14 eventually; is that right?

15 A. Well, now we know that they didn't grant it.

16 Q. Well, right.

17 A. So now we know we have a damage.

18 Q. But at the time--right. But, you know, you're
19 claiming for damages that were incurred long after it
20 should have been obvious that, you know, the permit was not
21 going to be issued, and yet you're still claiming damages
22 all the way to 2016.

23 A. Well, I reiterate what I said. I mean, we have a
24 building that needs to be completed, and so Mr. Ballantine
25 completed the construction. And some of those costs roll

1 through in 2016 or whenever they roll through.

2 I looked at the total construction of the
3 expansion.

4 Q. Right.

5 A. And calculated the numbers that I came up with.

6 Q. Yeah. So, I guess, you know--my point is, they
7 continued to incur these expenses for the expansion of the
8 Aroma restaurant as long as, you know, five years after
9 they initially had a pretty clear idea that maybe it was
10 not going to happen, and you based your damages on that
11 assumption; right?

12 A. Again, we know now that the permit isn't going to
13 happen.

14 Q. Right.

15 A. We have damages now. And, basically, it's the
16 costs associated with the expansion.

17 Q. Yeah. But, you know, I guess--my question is
18 about mitigation of damages, right? You know, if the
19 Claimant gets a permit denied, but somehow in his head he
20 continues to think that, you know, it's going to get
21 granted, then he's--by pouring more money into something
22 that might not be reverted, he's actually contributing to
23 his own financial harm.

24 Is that not also just plain logic?

25 A. That might be the case in--if we have widgets that

1 we're trying to build here or something. But we've got a
2 restaurant that's got an open roof that's under
3 construction and basically needs to be completed so that we
4 can move forward.

5 So I don't think that you can just basically say,
6 okay, I didn't get the permit, so I've got to stop, and I'm
7 just going to let this piece of property deteriorate in the
8 weather and things like that.

9 So, if anything, the mitigation is the idea that
10 he finished the project and brought it up to a running
11 restaurant that really produces pretty good food.

12 Q. All right. Let's move on from the restaurant to
13 the road.

14 In both of your reports--well, let's just focus on
15 the first one. In your First Report, at Schedule 12, you
16 claim \$1.8 million dollars¹¹ in replacement costs for the
17 alleged road expropriation; correct?

18 A. Yes.

19 Q. And that road is still there; right?

20 A. Yes.

21 Q. As far as you know.

22 And the owners of the Phase 1 lots still have
23 access to those roads, right, the internal roads and the

¹¹ English Audio Day 3 at 04:01:55

1 main road? We're talking about the road, the¹² main road, I
2 guess. So they still have access to that road as far as
3 you know?

4 A. As far as I know. I don't know.

5 Q. All right. Fair enough.

6 And Claimants invested in the development--in the
7 construction of the road during Phase 1; correct?

8 A. I'm sorry. I was thinking about something. Could
9 you ask your question again?

10 Q. Sure. Let me repeat the question.

11 Claimants invested in the development of--you
12 know, the construction of the road during Phase 1; correct?

13 A. Yes.

14 Q. Do you know if the Ballantines made any specific
15 investment in the road in preparation for the sale of the
16 lots, you know, as opposed to just the initial construction
17 that they did? So additional work that was done once they
18 had already completed the road initially.

19 A. I'm sorry. I don't understand. I mean, a road is
20 a road. They built the road.

21 Q. Right.

22 A. That's about all I know.

23 Q. Okay. Fair enough.

¹² English Audio Day 3 at 04:02:15

1 A. I've seen the road. I've traveled down it. But I
2 can't tell you other than that. I'm a little confused by
3 your question.

4 Q. Well, I guess my question is the following: They
5 built the road, and the road was part of the development.
6 And then they--and they sold the lots. So is the value of
7 the lots not somehow reflected to some extent in the sale
8 price?

9 A. I was--

10 Q. And the sale price would have been lesser if there
11 was no road leading to them; right?

12 A. I was instructed that the road within the
13 development still belonged to Mr. Ballantine, and that when
14 the Dominican Republic, I guess, took over the road, he
15 lost the value associated with that road.

16 And this attempts to calculate what that¹³ value is
17 by looking at the expenditures that were made to develop
18 the road and the potential of what Phase 2 would have
19 brought to that road as a tool to value a road.

20 We also looked at this homeowners' cost to see how
21 that plays into this and felt that this was a better way of
22 valuing the road that was lost.

23 Q. I think I misspoke earlier, because I said the

¹³ English Audio Day 3 at 04:04:20

1 value of the lots was reflected in the sales price, and I
2 meant the road. I think you understood that that's what I
3 was talking about.

4 So, you know, these homes--these houses were on
5 the lots were--the lots were sold after--after the road was
6 built, and so I'm trying to understand--well, let me
7 reverse the question.

8 Is it your position that the sales price of the
9 lots did not have--did not reflect in any way the value of
10 the road?

11 A. That's right.

12 Q. That's your position?

13 A. That's my understanding.

14 Q. Right, because of what they represented to you.

15 But would you agree that if these lots were just
16 sort of randomly placed on the mountain with no roads and
17 you had to parachute in or whatever, that the sales price
18 would have been lower? I mean, is that a fair assumption?

19 A. As compared to what?

20 Q. As compared to, you know, a housing development
21 with a road.

22 No road, lesser value; right?

23 A. Probably, yes.

24 Q. All right. Let's talk a little bit about
25 something else.

1 You know, you said at some point you did review
2 the Jamaca financial statements; correct?
3 A. Yes.
4 Q. Do you recall if those financial statements were
5 audited?
6 A. No, I do not.
7 Q. You don't recall?
8 A. No.
9 Q. Okay. And do you recall if they had any footnotes
10 or other written disclosures?
11 A. No. That part, I do¹⁴.
12 Q. You do know that they did not?
13 A. No, I didn't find anything.
14 Q. Correct.
15 Do you know what basis of accounting was used to
16 prepare those financial statements?
17 A. No. Because, again, I didn't use them. I didn't
18 study them that closely. I felt that the information
19 wasn't the information that I needed to do the calculations
20 that I did.
21 Q. Right. Let me ask you--hold on just a second. I
22 want to see how much--give me just a moment.
23 PRESIDENT RAMÍREZ HERNÁNDEZ: Let's have a

¹⁴ English Audio Day 3 at 04:06:55

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1 five-minute break, please.
2 (Brief recess.)
3 PRESIDENT RAMÍREZ HERNÁNDEZ: Are you ready to
4 proceed?
5 MR. Di ROSA: Yes, Mr. Chairman.
6 Just for planning purposes, when is the Tribunal
7 angling to have lunch? At what time?
8 PRESIDENT RAMÍREZ HERNÁNDEZ: I was going to ask
9 you how long it will take.
10 MR. Di ROSA: I can adapt, depending on--I think I
11 have maybe 25 or 30 minutes still.
12 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay.
13 MR. Di ROSA: Maybe less.
14 PRESIDENT RAMÍREZ HERNÁNDEZ: Maybe we can go a
15 little after 1:00, just to finish, go through this, and see
16 whether you have a lot of cross.
17 MR. ALLISON: I don't expect significant redirect
18 at all.
19 PRESIDENT RAMÍREZ HERNÁNDEZ: And we will take a
20 lunch break. I think we will take the one hour and 15
21 minutes that we were allocated for the benefit of all the
22 people that are helping us in here. So, let's go through
23 that and then we'll come back with your witness.
24 MR. ALLISON: Thank you.
25 MR. Di ROSA: All right. I'll try to abridge it

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1 as much as I can, then, Mr. Chairman.
2 BY MR. Di ROSA:
3 Q. All right, Mr. Farrell. Are you ready to
4 continue?
5 A. I think so, yes. And thank you for the break.
6 Q. When Mr. Ballantine hired you for this
7 arbitration, did he give you at that time the contracts for
8 the Phase 1 lot sales?
9 A. No.
10 Q. At what point did he give them to you?
11 A. He--I got portions of some of them prior to the
12 issuance of my report, and the remaining amounts I got
13 after the issuance--sorry, of my First Report.
14 And after the issuance of my--sorry. Cancel what
15 I just said. Let's start over again.
16 Q. Okay.
17 A. Prior to the issuance of my First Report, I was
18 provided with various contracts. After that was issued,
19 then I was given the remaining amount.
20 Q. Okay.
21 A. But prior to the issuance of my Rebuttal Report.
22 Q. Right.
23 Do you recall how much time elapsed between the
24 time you were hired and the time you got the first batch of
25 contracts, approximately?

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1 A. No, because I don't remember when I actually got
2 hired, to be honest with you.
3 Q. But in any event, he--the Ballantines did not give
4 you the contract sales right away when you were hired?
5 A. No.
6 Q. And you didn't consider it relevant to ask for
7 those contracts, and you said that you also hadn't seen the
8 financial statements; is that right?
9 A. No. We requested the contracts, and they were in
10 the process of gathering them for us, and eventually--
11 Q. So it just took a while. All right.
12 Were you aware that there were--there was a
13 separate set of contracts for the same lot sales--at the
14 time that you were hired or shortly thereafter, were you
15 aware that there were separate contracts for the same lot
16 sales, so one set that the Ballantines are now claiming
17 reflect the true sale price, which for convenience we'll
18 call "the parallel contracts," and a second set which was
19 provided to the Dominican tax authorities and on the basis
20 of which Jamaca's income was reported to the tax
21 authorities, and which for convenience we'll call "the tax
22 contracts."
23 So I guess the question is, were you aware that
24 there were these two contracts, the parallel contracts and
25 the sale--the tax contracts?

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1 A. Yes.

2 Q. And they related to the same lot? I mean, you
3 know, when you had these parallel contracts, the same lot,
4 different price?

5 A. Again, yes.

6 Q. Now, Mr. Ballantine has--the Ballantines have
7 argued in this arbitration that the tax contracts did not
8 reflect the true sales prices.

9 So were you provided the tax contracts as well, or
10 just the parallel contracts?

11 A. Just the parallel contracts.

12 Q. At some point were you provided the tax contracts?

13 A. Yes.

14 Q. And do you remember when that was?

15 A. When we got Mr. Hart's--what is it--Second Report.

16 Q. I see. So you were not made aware of by the
17 Ballantines of the existence of this parallel set of
18 contracts?

19 A. No. As I said, I was aware of them.

20 Q. Right.

21 A. But I didn't--again, didn't believe that they were
22 meaningful for what I was trying to calculate.

23 Q. Did you take any steps to determine if--so did you
24 take any steps to determine which of the two contracts
25 actually reflected the real sales price, or did you simply

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1 accept the Ballantines' representation that the parallel
2 contracts were the ones that reflected the real price of
3 the contracts?

4 A. Well, I was told that the sale--I guess you're
5 calling them the parallel contracts. So if I go back to
6 the real versus parallel, I'm sorry.

7 Q. Right.

8 A. But the parallel contracts were indicative of the
9 sale that took place, and that the taxes--tax set of
10 contracts were to--mainly for tax purposes. So if there
11 were tax purposes--and, obviously, they're much smaller
12 than the parallel--then I believe I was working with the
13 right contracts.

14 Q. I see. But did you--I guess my question was: Did
15 you take any steps to confirm or corroborate that the
16 parallel contracts or what you call "the real contracts"
17 were, in fact, the contracts that reflect the sales--the
18 real sales prices?

19 For example, you know, when you--if you say that
20 one of the sales contract provided for a price of 100, you
21 couldn't--you could have asked for their banking
22 statements, for example, to follow the money, so to speak.
23 You know, if you have 100 from the contract, then you see
24 the deposit of 100 in some bank account.

25 Did you do that?

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1 A. No.

2 Q. You didn't try to reconcile them in that way?

3 A. No.

4 Q. So you had no real way of knowing which of the
5 contracts was the real one; right?

6 At the point where you discovered that there are
7 two seemingly genuine contracts, both of them signed by
8 Mr. Ballantine, but they don't have the same price, you
9 don't have any way of confirming other than through what
10 the Ballantines told you; right?

11 A. Right.

12 Q. All right. Let's go to C-162, if you don't mind,
13 Mr. Farrell. This is--this was an exhibit that contained
14 all of the contracts that the Ballantines say are the ones
15 that reflect the actual price of the lot sales, and there's
16 a spreadsheet summary on the last two pages that appears
17 now on the screen. And that's--those are the last two
18 pages that you'll find in your binder under C-162.

19 Can you tell from looking at it what date this
20 summary was made?

21 A. No.

22 Q. For the average sales prices that you quoted in
23 your First Report at Page 10, did you use the sales price
24 column that appears in this summary? Do you remember?

25 A. You know, that was two and a half years ago. I'd

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1 have to take what I have and compare it to see.

2 Q. So you don't remember?

3 A. Some of them look familiar. Let's do it that way.

4 Q. All right. How about the "date of sale" column in
5 the summary? Do you think those might have been the dates
6 that you used in your reports as the sale dates for the
7 Phase 1 lots?

8 A. Again, I'd have to look at my information and see.

9 Q. All right. Does this spreadsheet have any
10 indication of when the cash was actually received? Because
11 these are--these are figures that reflect the contract
12 price. But it's one thing, what the contract says the
13 price was, and another thing when they actually pay--the
14 buyer pays the amount of the contract; correct?

15 A. Yes.

16 Q. But this spreadsheet doesn't have any indication
17 of when that cash was actually received; right?

18 A. No.

19 Q. So, if you relied on the sale prices that appear
20 here for your projections, they may or may not be accurate,
21 depending on how much of that price was actually paid
22 eventually, and how many of those contracts, you know,
23 actually resulted in a--in a transaction, a closing
24 transaction, pursuant to which the money was actually
25 handed over to the Ballantines?

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1 A. The information is what it says. I--

2 Q. Okay. Fair enough.

3 Let's turn to R-207. This is a document that was

4 produced by the Claimants in response to the Dominican

5 Republic's Document Production Request Number 85 regarding

6 information or data on the Ballantines' ability to finance

7 the project, and it consists of a list of the Claimants'

8 receivables.

9 Do you recognize this document at all?

10 A. No.

11 Q. So you don't recall seeing it ever?

12 A. No.

13 Q. Okay. In that case, I'm not going to ask you any

14 questions about it.

15 All right. We'll just skip the questions since

16 you haven't seen the document. I don't think it makes

17 sense to ask you questions about it, Mr. Farrell. Let me

18 ask you, I guess, in a different way.

19 Did you do any testing of any sort or, you know,

20 undertake any efforts to determine if the sales prices of

21 the lots were actually collected?

22 A. No.

23 Q. All right. Let me just ask you, then, did you

24 reconcile the sales revenues of the contract with the

25 Dominican income tax returns filed by Jamaca?

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1 A. No.

2 Q. Did you reconcile the sales revenues of the

3 contracts with the U.S. income tax returns filed by the

4 Ballantines?

5 A. No.

6 Q. Just one final question, then, Mr. Farrell.

7 At page 8 of your Second Report, you criticize

8 Mr. Hart, the Dominican Republic's damages expert, for not

9 performing studies of his own and for not presenting a

10 damages model of his own.

11 Is it your understanding that it is¹⁵ Mr. Hart's

12 responsibility to prove the Claimants' damages?

13 A. No. But he could have sided with me for various

14 assumptions and inputs and things that he believes I didn't

15 take in consideration. So I would have expected him to

16 tell me some type of analysis or some calculation that

17 would have indicated what the results of his criticisms

18 would have been.

19 Q. But his job is simply to point out flaws in your

20 Report and get you to--you know, to correct those flaws in

21 the second round of reports. He doesn't have any

22 affirmative obligation to come up with a new theory or new

23 calculations. But--

¹⁵ English Audio Day 3 at 04:28:55

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1 A. Well, I would say the same thing. That's what

2 this Report does. I looked at his Report. Felt that he

3 had flaws in his Report. And those are the flaws that I

4 saw in his Report.

5 Q. And it's fair to point out flaws in the Report.

6 But what you were criticizing him for was not presenting a

7 damages model of his own or performing studies of his own.

8 And I guess that's the part that I'm saying, you know,

9 maybe he didn't have the obligation to do that.

10 It's your understanding that he did?

11 A. No. I believe that if he--if he's criticizing me

12 for not doing a study and the results would have been

13 different, then where's the study that he thinks would have

14 come up with any different conclusion than I came up with?

15 MR. Di ROSA: All right. That's all I have,

16 Mr. Chairman.

17 Thank you, Mr. Farrell, very much.

18 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you,

19 Mr. Di Rosa.

20 Mr. Allison.

21 MR. ALLISON: No redirect.

22 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Perfect. So

23 we go for lunch. Let's reconvene at 2:15.

24 (Witness steps down.)

25 (Whereupon, at 12:54 p.m., the Hearing was

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1 adjourned until 2:15 p.m. the same day.)

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AFTERNOON SESSION

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Before we begin, let me come back to yesterday's request by Respondent on the third-party funder.

The Tribunal has reviewed the contract provided by the Claimant. Thanks.

The Tribunal so far has not identified any conflict of interest of any of the Tribunal members with regard to the Parties involved.

Moreover, the Tribunal has decided to direct the Claimant to provide by today, at the end of the day, the name of the third-party funder as well as the date that the contract was signed.

So that's--that's the order for now. With that, good afternoon, Mr. Zacarías. How are you doing?

Would you please read the page you have in front of you that says "Witness Statement" or "Witness Declaration."

THE WITNESS: "I solemnly declare upon my honor and conscience that I will say the truth, the whole truth and nothing but the truth."

PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you very much.

MS. SILBERMAN: Mr. President, before we get started, I just wanted to raise one quick point of order, which is that it's possible that over the course of the

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next couple of examinations, we may see some documents that have been designated "attorney eyes only," and because of that, we wanted to offer to the Tribunal, if you thought it would be useful, to briefly, very briefly recall what that designation means, how that designation was made and what the rule is if any of those documents come up.

So, the Dominican Republic, just like the United States and other countries, has a Freedom of Information law that establishes that government documents can and should be disclosed to the public upon request.

But the Dominican law, which was promulgated in 2004, just like its counterpart in the United States, it recognizes that certain information should not be released to the public, like sensitive national security information, information about ongoing deliberative processes, and personal and proprietary information that is submitted to the government on a confidential basis.

And because it's inherently difficult and impractical to make designations in advance of a request, what tends to happen in practice is that once a request is made, documents are reviewed to determine whether they can be disclosed or whether one of the exceptions applies and they must be withheld.

So, this is what the Dominican Republic did once the Ballantines made a request in respect of the,

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quote-unquote, other projects, and then a resolution was passed pursuant to this preexisting law from 2004.

This was one of the examples in the Ballantines' opening presentation. I think it was Slide 63 and 64 where it was called--let's see, a "misuse of sovereign powers" designed to "create a defense in the arbitration, cover up its conduct or gain an advantage in the arbitration."

Those documents are the very documents that I'm talking about, the attorney eyes only documents that you're going to see right now. So, what the Dominican Republic did was say, "These documents can't be released to the public, but we will provide them to the Ballantines' counsel on an attorney eyes only basis." Those documents--some of them have been submitted to the Tribunal.

And the rule is that if we get to those documents today, we need to turn off the live feed, and anyone who isn't under the umbrella of attorney eyes only needs to leave the room.

PRESIDENT RAMÍREZ HERNÁNDEZ: Yes, Claimant.

MR. ALLISON: Of course, the Claimant intends to abide by the procedural order and the rules that were agreed to prior to the hearing. And I will attempt, for purposes of logistics and convenience, to see if I can't put any attorneys' eyes only documents in one lump so that

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we don't have to have people coming in and out.

There may be some dispute about some of these documents, whether they have been designated attorneys' eyes only or not, but we'll deal with that as we go forward.

PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you very much. So, Respondent.

MS. TAVERAS: Mr. President, members of the Tribunal, our first witness is engineer Zacarías Navarro. Mr. Zacarías Navarro presented two Witness Statements for this arbitration, the first one dated May 25, 2017, and the second one dated March 19th, 2018¹⁶.

ZACARÍAS NAVARRO, RESPONDENT'S WITNESS, CALLED
DIRECT EXAMINATION

BY MS. TAVERAS:

Q. Good afternoon, Mr. Navarro.

A. Good afternoon.

Q. Mr. Navarro, would you please confirm whether the Witness Statements you have in front of you are the ones that you introduced, submitted as witness in this arbitral proceeding?

A. Yes, that's correct.

Q. Would you like to introduce any correction to your

¹⁶ English Audio Day 3 at 04:30:00

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1 Witness Statements?

2 A. The Second Statement at Paragraph 60, third line,
3 second line should read, "August 1, 2013," but it reads
4 "2011."

5 PRESIDENT RAMÍREZ HERNÁNDEZ: Would you please
6 repeat.

7 THE WITNESS: At Paragraph 60, paragraph at
8 Page 25, second line where it reads, "August 1, 2011." It
9 should read "2013." August 1st, 2013.

10 BY MS. TAVERAS:

11 Q. Beyond that correction, do you fully confirm the
12 content of your Statements?

13 A. Yes, I do.

14 Q. Mr. Navarro, would you please now tell us about
15 your professional background?

16 A. I am an electrical engineer. I have a master's
17 degree in environmental engineering and a Ph.D. in--also
18 the environment and environmental risk from Brazil¹⁷.

19 I am a professor at the University of Santo
20 Domingo¹⁸ on environmental impact and ecology, and also at
21 the Catholic University on the impacts of--the assessment
22 of environmental impacts and environmental management.

23

¹⁷ Original in Spanish adds: "un diplomado en riesgos ambientales".
¹⁸ Original in Spanish adds: "la Universidad Autónoma de Santo Domingo".

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1 Q. Within the Ministry, what was your--what is your
2 background?

3 A. I was a technician, and then I was in charge of
4 cleaner production within the Ministry, and in 2013, I
5 became the Director of Environmental Assessments.

6 Q. And how about currently?

7 A. I am the Director of Environmental Regulations.

8 Q. Mr. Navarro, did you participate in the assessment
9 of the project to expand Jamaca de Dios?

10 A. I did as of 2013.

11 Q. What did you do?

12 A. ¹⁹ I was the coordinator of the process.

13 Q. Would you please tell us about that project?

14 A. The project requested the construction of
15 10 cabins, 19 lots on the mountain in Jarabacoa.

16 Q. And what were the reasons why there was a
17 determination that that project was not viable?

18 A. The environmental conditions where the project was
19 going to be developed showed high levels of environmental
20 weaknesses, and it was an area of high altitude with the
21 forest and--with the rainforest, and once we analyzed the
22 project, we realized that it required deep intervention or
23 significant intervention.

¹⁹ Original in Spanish adds: "Como director de Evaluaciones,".

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1 Q. The Ballantines have suggested that if all of the
2 project had slopes that were greater than 60 percent
3 including the area for the expansion of Jamaca de Dios, all
4 of the projects should have been rejected or all of them
5 should have been approved.

6 They are saying that Jamaca de Dios' permit was
7 rejected while the others obtained their permit, and that
8 implies that the project were not assessed with the same
9 rigor, and this was detrimental to Jamaca.

10 What is your opinion?

11 A. The projects were assessed following the same
12 method and technique. The rigor applied was similar to all
13 of the projects.

14 The environmental conditions change depending on
15 the place. Even though there are slopes on the mountain,
16 as expected, the interventions in those areas for the--in
17 each of the projects were different.

18 Q. Would you please elaborate on the Precautionary
19 Principle under the Environmental Law.

20 A. The Precautionary Principle implies that human
21 beings should not be regarded as knowing all of the
22 environmental dynamics and complexity.

23 ²⁰And the idea is to avoid--measures to prevent

²⁰ Original in Spanish adds: "Lo que busca es que aunque no se tenga certeza científica".

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1 accidents or environmental impact, assuming that we know
2 everything that we can based on science in connection with
3 the specific environmental phenomenon or social event.

4 The intent is that even though there is no
5 scientific certainty that something may be harmful,
6 measures are introduced to avoid these damages.

7 Q. Mr. Navarro, do you consider that the protection
8 levels in connection with the environment are static
9 throughout time, or do they evolve?

10 A. They evolve. The measures evolve with
11 intervention of human beings, and human beings get to know
12 certain aspects in more depth; therefore, the level of
13 protection introduced increases.

14 In general, we are going to have an increase in
15 the actions that we conduct in a specific period of time.
16 The actions continue, but the period of time is final.
17 Therefore, there is a loss in the environment since it
18 cannot absorb all of those activities.

19 MS. TAVERAS: Thank you very much, Mr. Navarro. I
20 have no further questions.

21 Next, the attorney for Mr.--the Ballantines will
22 be asking you questions.

23 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you.

24 MR. ALLISON: Thank you.

25 CROSS-EXAMINATION

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1 BY MR. ALLISON:

2 Q. Good afternoon, Mr. Navarro. How are you?

3 A. Very well, thank you.

4 Q. Just to make sure this process goes smoothly, I

5 will try to speak slowly so the translator can translate my

6 questions for you, and I will listen to your answer, and

7 we'll try not to speak over each other so that the Tribunal

8 and the interpreters and the court reporters can get a

9 record of what we discuss. Is that fair?

10 You need to audibly respond.

11 A. Yes.

12 Q. And if, at any point during our discussion this

13 afternoon, you want to take a break or use the washroom,

14 just say the word and we'll stop.

15 A. Thank you.

16 Q. One additional note. There is a transcript being

17 taken, and so if you intend to respond affirmatively or

18 negatively, please do so with a "yes" or a "no" rather than

19 a nod of the head or a shake of the head so it can be

20 recorded by the court reporters. Is that fair?

21 A. Agreed.

22 Q. You deposited two Witness Statements in this

23 proceeding; correct?

24 A. Correct.

25 Q. And in the first one, you attached a curriculum

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1 vitae and described some of your job duties and titles over

2 the last several years with the MMA, and I just want to

3 make sure I understand what your roles were and what your

4 duties encompassed.

5 So, I want to start with 2004 when you were in the

6 Environmental Investigation Department of the MMA; is that

7 correct?

8 A. Correct.

9 Q. And what did you do in that role?

10 A. As part of investigation, we carry out all the

11 studies to determine--to get to know the regulations and

12 also to get to know environmental factors that are of

13 interest to the Ministry. This is coordination--rather, a

14 coordination among various areas.

15 Q. In connection with that role, did you visit any of

16 the mountain developments that were in process in La Vega

17 Province?

18 A. I do not recall doing that in 2004. It was not

19 part of the job I was doing.

20 Q. And that's true from 2004 until you took your next

21 position in 2010; correct?

22 A. That is correct.

23 Q. And in 2010 you became the coordinator for the

24 Cleaner Production National Program. Can you tell us what

25 that entailed?

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1 A. It was the National Program for a Cleaner

2 Production. The National Program for a Cleaner Production

3 seeks to change consumption habits and--of the country. It

4 seeks to establish policies to reduce consumption of water

5 and energy.

6 Q. You held that position until January of 2013²¹,

7 when you went back to the Department of Environmental

8 Assessment and became Director of Environmental Assessment;

9 is that correct?

10 A. That is correct.

11 Q. And you were in that position from January 2013

12 until February 2017; correct?

13 A. Yes, 2017. Correct.

14 Q. And I want to understand, you were the Director

15 for Environmental Assessment for the entirety of the

16 Dominican Republic or for a specific province or--can you

17 explain what your directorship entailed?

18 A. This is the whole country. It was a national

19 position.

20 Q. And that includes La Vega Province; correct?

21 A. That is correct.

22 Q. And was there a provincial Director of

23 Environmental Assessment for La Vega at that time?

²¹ Original in Spanish: "febrero de 2014".

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1 A. No. The position of Environmental Assessment

2 Director is only one. It's a Ministry, and it's a national

3 position.

4 Q. Okay. And in that role, you had some specific

5 interactions with some of the projects that bring us here

6 today; correct?

7 A. Correct.

8 Q. Your Witness Statement specifically refers to

9 Jamaica de Dios Phase 2 and Jarabacoa Mountain Garden.

10 Are those the only two projects mentioned in the

11 pleadings with which you've had any direct involvement?

12 A. Also Aloma Mountain. Those two plus Aloma

13 Mountain.

14 Q. Okay. And so you didn't have any direct

15 involvement in the application and permitting of Mirador

16 del Pino; is that correct?

17 A. Correct.

18 Q. And did you have any direct involvement with the

19 evaluation and permitting of Phase 2 of Quintas del Bosque?

20 A. Yes. Correct. That was--yes, I participated in

21 Quintas del Bosque as well.

22 So, that was part of the permitting²². I wasn't

23 there when it was given the final authority, the final

²² Original in Spanish: "O sea, entré en mi proceso.".

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1 permit.

2 Q. Okay. And so we're clear, Quintas del Bosque has

3 had two phases as well. You're aware of that; right?

4 A. There was no Phase 1 and Phase 2. There was

5 Project 1 and Project 2. The features of these

6 two projects make each project independent in the eyes of

7 the Ministry. They're not phases, as it were.

8 Q. Okay. That's fair enough.

9 Quintas del Bosque has applied for two separate

10 permits for two different development periods in its

11 project. Is that fair?

12 A. Two different projects, yes.

13 Q. And Quintas del Bosque sought its permit for its

14 second project which, if it's all right with you, I'll

15 refer to as Project 2, in February of 2014; correct?

16 A. I do not recall the exact date, but it was within

17 my mandate.

18 Q. And at that time, you were the Director of

19 Environmental Assessment and so you were aware of that

20 application?

21 A. Yes.

22 Q. And what about La Montaña?

23 A. La Montaña was part of the projects I looked at

24 when I was in my position, but I did not end that

25 permitting process.

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1 Q. And when you say "end that permitting process," do

2 you mean you weren't there when the permit was approved

3 earlier this year?

4 A. Correct.

5 Q. But you were there in June of 2016 when the permit

6 was initially denied; correct?

7 A. Correct.

8 Q. Let's talk a little bit about Sierra Fría. Are

9 you familiar with this project?

10 A. I do not recall.

11 Q. Sierra Fría had a permit denial in November of

12 2016. At that time, you were still the Director of

13 Environmental Assessment; is that correct?

14 A. That is correct. Yes.

15 Q. You're not aware of the reconsideration requests

16 and the terms of reference that have now been issued after

17 that initial denial; is that right?

18 A. Correct.

19 Q. And we'll talk a little bit more about some of

20 these projects later and look at some documents, but I have

21 one more question about projects.

22 Did you have any involvement in the permitting of

23 Alta Vista?

24 A. I do not recall Alta Vista.

25 Q. And maybe I'm not using the complete--Alta Vista

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1 Bayacanes owned by Franklin Liriano. Does that ring a bell

2 with you?

3 A. If you tell me what area--geographic area it is,

4 perhaps. But I do not remember exactly. I don't remember

5 when it came in. If it came in when I was at the post,

6 yes. But I don't remember because many projects come in.

7 Q. Okay. You don't remember that specific project.

8 It's in Constanza in the La Vega Province.

9 MR. ALLISON: Is it in Constanza?

10 (Comments off microphone.)

11 BY MR. ALLISON:

12 Q. Sorry. La Vega. In the La Vega Province.

13 A. I do not remember Alta Vista.

14 Q. And you don't recall that they're now seeking to

15 expand their project in a new project?

16 A. Well, I'm not there now at the--I'm not there at

17 the assessment directorate, so I don't have that

18 information.

19 Q. Okay. Thank you.

20 In February of 2017, you became the Director of

21 Environmental Regulations and Investigations. And do you

22 still hold that title today?

23 A. Yes.

24 Q. And what do you do in that position?

25 A. The Directorate of Regulations coordinates the

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1 regulations of the Ministry, and it conducts investigations

2 in connection with environmental matters that are of

3 interest to it.

4 Q. Does that include investigations of potential

5 violations of environmental regulations by project

6 developers?

7 A. It does not. There's another area that deals with

8 that kind of work.

9 Q. And in your role as the Director of Environmental

10 Regulations and Investigations, have you been involved in

11 the issuance of any new regulations involving project

12 development issues?

13 A. I did.

14 Q. Have you been involved in the issuance of the new

15 regulation concerning altitude restrictions with respect to

16 development?

17 A. Yes.

18 Q. What was your role in the creation of that

19 regulation?

20 A. The Regulations Department coordinates things with

21 the other Vice Ministries and also with the technicians

22 that are ready to conduct those regulations.

23 Q. And that regulation bars development above

24 1300 meters above sea level; is that correct?

25 A. These are what we call interventions. This is a

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1 regulation that encompasses everything. The Ministry had
2 problems with matters of water in Constanza, so it had to
3 pass regulations to limit water-related activities.

4 This was mainly directed to our cultural works and
5 also all kinds of interventions, including notifications.

6 Q. Okay. So, does that regulation not bar
7 development above 1300 meters?

8 A. It does.

9 Q. It does. But it doesn't address development below
10 1300 meters above sea level; correct?

11 A. That's correct.

12 Q. And I think you've answered this because you've
13 indicated you haven't been involved in the investigation of
14 any of the projects that are at issue here.

15 But just so the record is clear, did you have any
16 involvement or knowledge of any of the inspections or the
17 fines that were issued at Rancho Guaraguao?

18 A. No.

19 Q. Los Auquelles?

20 A. No.

21 Q. Or Monte Bonito?

22 A. No.

23 Q. And I think we touched on this as well, but just
24 to confirm, your Report has some discussion about some
25 additional projects that I think is clear you provide

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1 testimony on based on your review of files.

2 But were you--did you have any involvement in the
3 original permitting of the first phase of Jamaca de Dios?

4 A. I did not.

5 Q. And did you have any involvement in the original
6 permitting of the first project at Quintas del Bosque?

7 A. I did not.

8 Q. And Paso Alto?

9 A. I did not.

10 Q. I want to talk a little bit about the second phase
11 of Jamaca de Dios. And I think your Witness Statement
12 states that your first direct involvement with Phase 2 was
13 in connection with your September 2013 visit to the
14 project. Is that correct?

15 MS. TAVERAS: Excuse me. Could you clarify for
16 the witness what you mean by Phase 2 because he has already
17 testified that for him, it's two separate projects.

18 MR. ALLISON: Well, I think he said that with
19 respect to Quintas del Bosque, but I didn't understand he
20 had a confusion about Phase 1 and Phase 2 for Jamaca de
21 Dios, but let me ask him that.

22 BY MR. ALLISON:

23 Q. If I use the phrase "Phase 1," speaking about
24 Jamaca de Dios, you understand that's the phase lower down
25 the mountain that was permitted by the MMA in 2007;

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1 correct?

2 A. These are not phases. These are projects. A
3 project was approved in Jamaca de Dios and then they asked
4 for approval of a second project. These are different
5 projects in our view.

6 Q. I understand that. I was simply asking, if I used
7 that terminology, whether or not you would understand what
8 I'm talking about.

9 And would you understand what I'm talking about if
10 I used that terminology?

11 MS. TAVERAS: Excuse me. Maybe it would help if
12 you define what you mean by "phases," what's included in
13 each phase.

14 MR. ALLISON: I just did that. I said Phase 1 is
15 the permitted development of the lower mountain of Jamaca
16 de Dios that was issued a permit in September of 2007.

17 BY MR. ALLISON:

18 Q. Let's start there. Are you aware that
19 Jamaca de Dios received a permit to subdivide and develop
20 90 lots on Loma Peña?

21 A. Yes.

22 Q. And are you aware, as you testify in your Witness
23 Statement, that Jamaca de Dios applied for an additional
24 permit to develop land further up the mountain in
25 Loma Peña?

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1 A. Yes.

2 Q. And to assist you with clarity, I'll attempt to
3 use the word "project," respecting your view on that. But
4 if I slip and use the word "phase," will you still
5 understand what I mean?

6 You have to answer yes or no.

7 A. The problem is that if you say "phase," we're
8 assuming that in the first project there was a division of
9 the transaction into different phases. It is technical
10 terminology that the Ministry uses.

11 Q. All right. I won't ask you to make any admissions
12 about your legal arguments. I'm just trying to give us a
13 terminology to discuss the issues here.

14 And I've indicated that I'm willing to try to use
15 the term "project," but that if I slip, you'll still
16 understand what I'm talking about. Is that fair? Or is it
17 not fair?

18 A. Agreed.

19 Q. Thank you.

20 A. Although I will always say "project." It's a
21 custom thing. I'm accustomed to that.

22 Q. I understand, and I won't ask you to use my
23 terminology.

24 So let's talk about Project 2 at Jamaca de Dios.
25 Your first involvement in that project was--your first

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1 direct involvement was when you visited the site in
 2 September 2013; correct?
 3 A. When the first--well, the third²³. For the
 4 duration of the project, I was the Director of Assessments.
 5 Q. Did you ever go to Jamaca de Dios before
 6 September 2013?
 7 A. Yes.
 8 Q. When did you first visit Jamaca de Dios?
 9 A. I do not recall the date exactly. But it was
 10 2013, after I was there as a director. I just passed by.
 11 It was not a technical visit.
 12 Q. Okay. Your first technical visit was in September
 13 of 2013?
 14 A. Yes.
 15 Q. And then by then, you had been the Director of
 16 Environmental Assessment since January of 2013.
 17 Were you aware that there was a pending
 18 reconsideration request at Project 2 for Jamaca de Dios?
 19 MS. TAVERAS: Excuse me, Mr. Allison. Just for
 20 the record, so that we have a clean record, since we refer
 21 to Project 2 as something different--just so that we have a
 22 clean record, what I'm going to say is, for the record,
 23 when he says Project 2, he's referring to our Project 3, so

²³ Original in Spanish adds: "reconsideración".

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1 we have a clean record, Mr. Allison.
 2 MR. ALLISON: Is that an objection or--no.
 3 BY MR. ALLISON:
 4 Q. Well, let's use your terminology for a clean
 5 record. You have the original JDD project and the
 6 expansion JDD project. Those are your phrases.
 7 So if I refer to the expansion request, you'll
 8 understand I'm talking about the intention to expand
 9 Jamaca de Dios; correct?
 10 A. Correct.
 11 Q. All right. Now, I think this--we spent a fair
 12 amount of time on this yesterday with Mr. Ballantine on the
 13 chronology of the rejections and reconsiderations. But I
 14 want to make sure I understand your knowledge of that
 15 proceeding.
 16 When you first became aware, in your technical
 17 capacity, of the JDD expansion request, what was your
 18 understanding of where that was in the evaluation project
 19 of the Ministry of the Environment?
 20 A. I think there are two questions. You posed two
 21 questions. Could you separate those questions? I think
 22 you talked about my understanding. So I'm not sure what
 23 you mean by what my understanding was, so I don't know what
 24 you're trying to ask there.
 25 Q. Okay. You became the Director of Environmental

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1 Assessment in January 2013. When is the first time you
 2 remember hearing, in your technical capacity, about the JDD
 3 expansion request?
 4 A. When the reconsideration came in in 2013.
 5 Q. And what reconsideration was that, if you recall?
 6 A. They were asking for the decision of the Ministry
 7 to be revisited. This was a decision that stated that the
 8 project was not viable.
 9 Q. And do you recall when that reconsideration
 10 request came in?
 11 A. I do not recall the date exactly.
 12 Q. If I represent to you that it was in July of 2013,
 13 does that roughly comport with your recollection?
 14 A. I would have to look at the letter. I do not
 15 recall the date.
 16 Q. Okay. Why don't we take a look at the letter. If
 17 you could pull up Exhibit C-97. It's in your binder.
 18 There's a binder next to you, Mr. Navarro, of documents.
 19 And it has an index at the front that identifies where
 20 certain exhibits are.
 21 So if you go to Tab 7, you will see Exhibit 97.
 22 And I would ask to go to the English version for me, but
 23 you can look at the Spanish version at the front.
 24 And I'm--
 25 MR. ALLISON: If we go a few pages down, Larissa,

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1 we'll see here--no. You can go back.
 2 BY MR. ALLISON:
 3 Q. This is a letter dated June 4th, 2013, to Bautista
 4 Rojas Gómez of the MMA. It's from Michael Ballantine,
 5 discussing the expansion request for Jamaca de Dios. So I
 6 believe I misspoke when I said July.
 7 Is this the letter you were referring to when you
 8 said the reconsideration request came in?
 9 A. Yes.
 10 Q. And did you read this letter when it came in?
 11 A. I did.
 12 Q. So it went to Mr. Rojas Gómez, who was the
 13 minister; right?
 14 A. Yes.
 15 Q. He was your boss at the time?
 16 A. Yes.
 17 Q. And he provided it to you and asked you to
 18 investigate?
 19 A. As part of the system process, well, yes, you gain
 20 knowledge of the reconsideration process.
 21 Q. And you said you read the letter.
 22 Did you see in the letter where Mr. Ballantine
 23 indicated that he had no intention to develop his project
 24 where the slopes exceeded 60 percent?
 25 A. I did.

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1 Q. And did you see the part of the letter where
2 Mr. Ballantine wrote, "We are very willing to work with the
3 technicians of the Ministry of Environment to execute
4 what's necessary to make this project a landmark in the
5 ecotourist offer of the Dominican Republic"?

6 It's the last line before the signature.

7 A. Yeah, I did see this at the time.

8 Q. Did you understand that Mr. Ballantine was willing
9 to work with the MMA to try to find a way to continue with
10 the expansion project?

11 A. Yes.

12 Q. Let's look--before you went to the project in
13 September '14, you sent some technicians who inspected the
14 project in August.

15 Do you recall that?

16 A. Yes.

17 Q. Now, we've looked at a lot of the inspection
18 reports and rejection letters, and I'm not going to go back
19 through all of those. But I wanted to take a look at this
20 specific exhibit. This is Exhibit R-114, which is in your
21 binder in Spanish at Tab 25 and in English at Tab 24.

22 Were you in charge of sending the technicians out
23 to make this visit?

24 A. Yes.

25 MR. ALLISON: And I'd like to go to Page 4 of the

1 Report. Not of Mr. Navarro's report. Page 4 of
2 Exhibit R-14, please. R-114.

3 BY MR. ALLISON:

4 Q. There are some findings that begin at the bottom
5 of the page and move to the next page.

6 MR. ALLISON: Can you blow the findings up down
7 there?

8 BY MR. ALLISON:

9 Q. You see it says, "Findings. A tour was made of
10 the site where the various slopes in the area could be
11 seen. They go from steep to very steep. GPS points were
12 taken in the area where it is intended"--

13 MR. ALLISON: And then if we could go to the next
14 page, please, and blow up the top.

15 BY MR. ALLISON:

16 Q. --"to develop the project, and they were viewed
17 using Google Earth."

18 Do you see that?

19 A. Where are you reading?

20 Q. I'm reading from the "Findings" section of Exhibit
21 114, which I believe is on Page 4 of the document.²⁴

22 A. I did see it.

²⁴ Original in Spanish: "R-14, R-14, que se encuentra en la página 4 de 17 de este documento, detrás del separador 25."

1 Q. And so the inspection group went out to
2 Jamaca de Dios and went to certain points where the
3 Ballantines intended to develop the project, and they took
4 GPS points and then viewed them using Google Earth; is that
5 correct?

6 A. Correct.

7 Q. And did they use any other technical machinery or
8 satellite to view the project and determine slopes?

9 A. To determine the slopes, RITs were used, which are
10 geographical information systems.

11 Q. Right, and they're attached here at the end of the
12 project and I want to look at them now.

13 MR. ALLISON: So if we can continue to scroll
14 through the document, Larissa.

15 BY MR. ALLISON:

16 Q. There are a series of pictures. And here's the
17 first one on Page 12. This is an overhead GPS image and it
18 says at the top, "Slopes analyzed with Google Earth," and
19 there's an approximate slope there.

20 Do you see that?

21 A. Yes.

22 Q. Is that approximate slope 52.6 percent?

23 A. Yes.

24 Q. And if we go to the next page, same thing.

1 There's an approximate slope of 48 percent.

2 Do you see that?

3 A. I do.

4 Q. And on the next page there's a slope of
5 45.3 percent.

6 Do you see that?

7 A. Yes.

8 Q. And then the next page, there's a slope of
9 29.8 percent?

10 A. I do see it.

11 Q. And the next page, the final slope reading is
12 40 percent.

13 Do you see that?

14 A. I do.

15 Q. And these are the GPS points that were taken in
16 the area where it was intended to be developed, according
17 to the findings of your inspection team, and all of them
18 were less than 60 percent; correct?

19 A. Not in that case. These are not GPS takes. These
20 are Google Earth takes.

21 Q. Right. But the slopes you measured were viewed
22 using Google Earth. That's what your inspector said.

23 Were you there?

24 A. Both were taken. They were taken with GPS and
25 also the exercise was conducted with Google Earth.

1 These are some approximate indicators of what we
2 can find in the area. And then we measure the area. We
3 determine the slopes in the various areas. That's
4 where--this is a visual impression by selecting the various
5 path points and interest points.

6 Q. Okay. So are there additional slope measurements
7 that aren't part of the inspection report for that visit?

8 A. Yes, what we already presented with other maps.

9 Q. Okay. I'm not talking about what you've now
10 presented, and we will talk about the slope maps that
11 you've appended to your report.

12 But I'm talking about when your inspection team
13 went out in August of 2013 and wrote that GPS points were
14 taken where it is intended to develop the project and they
15 were viewed through Google Earth, they attached five slope
16 readings using Google Earth and all five of them were less
17 than 60 percent; is that correct?

18 A. In those measurements. That's what I'm trying to
19 say. The area of the project had higher slopes. This is
20 just a sample from those points.

21 Q. I understand that, but even your inspectors wrote
22 that they took the measurements in the area where it was
23 intended to be developed. Those are the words of your
24 inspectors, are they not?

25 A. That includes all of the area of the project.

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1 Q. Well, I'm just communicating what's in your own
2 report, and I don't mean yours. I mean Respondent's
3 reports. And it says they were taken in the area that it
4 was intended to be developed.

5 There are five Google map slope readings attached
6 to the report that was contemporaneously made, and all of
7 them are less than 60 percent. Can we agree on that?

8 A. Similarly, at Page 4 we said that a clinometer was
9 used and that we found slopes of up to 35 percent²⁵. So
10 those are various elements, various instruments that were
11 used to measure the slope.

12 The slope is just one. It is just one indicator
13 of what was used for decision-making. But there were other
14 indicators that are also included in the report. Also, the
15 fragility, the weakness of the project meant that a 30 or
16 40 percent slope was quite critical in case of any
17 landslide, erosion, or accident.

18 Q. I understand your position, Mr. Navarro, and we're
19 going to explore that this afternoon, I think, at some
20 length. But I want to know whether there are any other
21 slope readings attached to this report when the inspection
22 was done in August of 2013 that indicate slope readings in
23 excess of 60 percent.

²⁵ Original in Spanish: "75 por ciento".

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1 A. Yes. On Page 4, we established the measurement on
2 the field.

3 Q. I'm not sure I understand what that means. Does
4 that mean you're referring to the visit in January 2012?

5 A. The Ministry saw the history of the project.

6 Q. Okay.

7 A. So we worked with all of the information that we
8 had in the file of the project.

9 Q. Understood. And there were previous
10 communications that the Ministry had given the Ballantines
11 that their project would exceed the 60 percent slope law.

12 You've seen those; correct?

13 A. Yes.

14 Q. And the Ballantines wrote several reconsideration
15 letters, saying, "I think you've calculated the area of the
16 project where I intend to develop incorrectly," and asked
17 for an additional inspection; correct? You recall that?

18 A. Yes.

19 Q. And this inspection in August 2013 was the result
20 of one of those requests. And that team came out and
21 measured using Google Earth. Am I right?

22 A. Yes. And also GPS.

23 Q. Okay. Where are the GPS slope readings in this
24 report?

25 A. They are estimated. They were estimated in 2011,

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1 2012, and they were also estimated in 2013.

2 Q. I understand the prior reports you're referring
3 to. I'm speaking about this report.

4 A. That report also includes the history of the other
5 ones. The conditions of the terrain did not change. They
6 did not change, and the same measurements found at the
7 beginning were maintained.

8 Q. Okay.

9 A. And that refers to the slope--looking at the slope
10 as an indicator that the rainfall will be a risk given the
11 speed it would take on the ground. The soil will not
12 withstand strong intervention. Any earth movement will
13 increase the loose of the soil structure.

14 Therefore, the slope is one indicator that those
15 risks will increase. They will be worsened with any sort
16 of intervention.

17 Q. I understand that the--we looked at the denial
18 letters yesterday, and the denial letters said that the
19 project was unfeasible because the slopes were in excess of
20 60 percent and because the area was environmentally fragile
21 and of natural risk.

22 I'm assuming that's what you're referring to in
23 your testimony there?

24 A. Yes.

25 Q. And now here that environmental fragility, you

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1 mention the soil and the rainfall, and I think earlier you
2 mentioned altitude; right?

3 A. Yes.

4 Q. And you mentioned being in the rainforest; right?

5 A. Yes.

6 Q. And are you aware that your former colleague,
7 Mr. Martínez, has testified that the rain--that the
8 cloud forest starts at 800 meters above sea level and that
9 any project above 800 meters above sea level is in the
10 cloud forest.

11 Have you seen his testimony in that regard?

12 A. I have not seen it.

13 Q. Do you disagree with Mr. Martínez about where the
14 cloud forest starts?

15 A. That is an indicator that is handled by a
16 different division within the Ministry. If the forest as
17 an indicator starts at that altitude, that is correct.

18 Q. So you don't disagree with Mr. Martínez and his
19 testimony that the cloud forest begins at 800 meters above
20 sea level; correct?

21 A. What I'm telling you is that that information is
22 not something that I handle, and I leave it up with the
23 team--with the Ministry that is able to define that.

24 Q. So you'll defer to Mr. Martinez on that issue?

25 A. I would defer to the information that the

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1 technical team may present, as well as the scientific
2 evidence from the country.

3 Q. Well, I just want to make clear what your position
4 is. Do you think the cloud forest starts at a different
5 area than 800 meters above sea level?

6 A. I do not have the information.

7 PRESIDENT RAMÍREZ HERNÁNDEZ: I believed it's been
8 asked and answered.

9 MR. ALLISON: I understand.

10 BY MR. ALLISON:

11 Q. So we've talked some--well, let's finish up with
12 Exhibit R-114.

13 The final page of the exhibit directly above
14 the--I'm sorry. Page--these are the pictures. Page 5 of
15 the exhibit, just above the signature line, has the
16 conclusions and recommendations.

17 And it reads, "Having regard to the fact that the
18 project is located within the Baiguaté protected area in
19 National Park category, with sloping land, and to the
20 aforesaid background facts and the type of project to be
21 developed, it is recommended that the case be sent back to
22 the Technical Evaluation Committee for its information and
23 final decision."

24 Did I read that correctly?

25 A. Correct.

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1 Q. And you were part of that Technical Evaluation
2 Committee; correct?

3 A. I coordinated the committee.

4 Q. And this appears to be the first reference in
5 Respondent's internal inspection reports to the project
6 being in the Baiguaté protected area.

7 Have you seen any documentation in your review of
8 the phase--the JDD expansion request that indicates an
9 earlier reference to the Baiguaté Park?

10 A. No.

11 Q. How did you learn that the expansion area of JDD
12 was in the Baiguaté Park?

13 A. Using the geographical information system that the
14 Ministry has to conduct evaluation.

15 Q. Were you the one who discovered that the project
16 was in the park?

17 A. It was the technical team in charge of the
18 analysis.

19 Q. And do you know when they discovered that the
20 project was in the park?

21 A. It was part of the analysis. The identified
22 areas, protected areas, is not necessarily used in the
23 reports, but all of the areas are identified.

24 Q. Okay. So is the answer you don't know when the
25 inspection teams for the expansion request learned that

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1 Jamaca de Dios was in a national park?

2 A. I don't know if it was before 2013 when they saw
3 that. We saw it in 2013. I don't if it was before and
4 that's when we established it.

5 Q. And just so I'm clear, someone came to you and
6 said, "This expansion request is in the Baiguaté Park";
7 correct?

8 A. Yes. That's what the technicians established.

9 PRESIDENT RAMÍREZ HERNÁNDEZ: Would you please
10 repeat your answer.

11 THE WITNESS: Yes, that was established by the
12 technicians.

13 BY MR. ALLISON:

14 Q. Okay. So someone did come to you and say, "This
15 expansion request is in the park"?

16 A. Yes. It was established in the report.

17 Q. Right, in the August 2013 report at R-114;
18 correct?

19 A. I don't know if they saw it at some other time,
20 but that's when it was established. It was recorded as
21 being in the protected area.

22 Q. And that's when you learned about it when you read
23 this report?

24 A. Yes.

25 Q. And then you went to Jamaca de Dios the next

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1 month; correct?

2 A. The next morning? I don't remember.

3 Q. No. I'm sorry. The next month. Maybe that was a
4 translation issue. I'm not sure.

5 Let me ask you this way. So, in December of 2013,
6 you visited Jamaca de Dios in your official capacity?

7 A. Yes.

8 Q. Before you went to the park, did you review the
9 files, including this inspection report we just looked at?

10 A. I did not understand the question.

11 Q. Before you went to visit the project, you had
12 reviewed the report that we looked at which is marked as
13 R-114; correct?

14 A. Yes.

15

16 Q. And I think we talked about this. But did it
17 cause you any concern when you looked at the report and you
18 looked at the attachments and saw that the five slope
19 measurements that were attached to the report were all less
20 than 60 percent?

21 A. No.

22 Q. Were you surprised by that?

23 A. I don't understand the question.

24 Q. Were you surprised when you read the report and
25 looked at the slope measurements that were appended to it

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1 and saw that the slope measurements were all less than
2 60 percent?

3 A. No. In the Environmental Impact Assessment, we do
4 not focus on just one indicator.

5 Q. Did you review the prior inspections and the prior
6 rejections of Jamaca before you visited the project?

7 A. Yes.

8 Q. Were you surprised that none of the prior
9 inspection reports or any of the prior rejection letters
10 had mentioned the existence of the Baiguate park?

11 A. It didn't surprise me. It just caught my
12 attention.

13 Q. Did you ask anyone "why haven't we been saying
14 this has been in the park the whole time?"

15 A. I wasn't able to verify that.

16 Q. I want to look at your Report and some of the
17 specific additional concerns you have about the Phase 2
18 expansion--excuse me, the JDD expansion project.

19 If we can go to Paragraph 24 of your First Report.

20 MR. ALLISON: And, Larissa, if you would blow up
21 23 and 24, that would help.

22 BY MR. ALLISON:

23 Q. At the top of--or, excuse me, at the bottom of
24 Paragraph 23, you write, "In general, mountain projects
25 require a great amount of work to make all areas

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1 accessible."

2 Do you agree with the statement you wrote there?

3 A. Would you repeat your question. Where?

4 Q. My question is: You don't--you don't now disagree
5 with what you wrote there?

6 A. Yes.

7 Q. You agree with what you wrote there?

8 A. Yes.

9 Q. Okay. And that's all mountain projects. It takes
10 a lot of work to build a mountain project; right?

11 A. Yes.

12 Q. And then you refer to that work in your next
13 paragraph and say, "Such earth movements create a
14 geological instability and alter the geomorphology and
15 drainage, especially if the type of soil is not
16 consolidated and rainfall is high."

17 Do you see that?

18 A. Yes. That would be 24?

19 Q. Yes.

20 A. Yes.

21 Q. And those earth movements are a great amount of
22 work to make mountain projects accessible; right?

23 A. Yes.

24 Q. And you write, "These are features of the JDD
25 Expansion Project, which would be located on a land between

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1 900 masl and 1200 masl, on the north face of the Central
2 Mountain Range with rainfall exceeding 1600 mm per year."

3 Do you see that?

4 A. Yes.

5 Q. I just want to confirm, is it your testimony that
6 there's more rainfall at the Jamaca de Dios Expansion
7 Project than there is at the other projects within a few
8 miles in La Vega?

9 A. Based on the information we have, the answer is
10 yes.

11 Q. And what is that information that you have?

12 A. That is the meteorological information from the
13 country.

14 Q. Okay. Did you attach that meteorological
15 information to your Report here?

16 A. That is--we do refer to the rainfall in a map.
17 It's part of a map.

18 Q. How much more rain do you contend the Expansion
19 Project receives than, let's say, La Montaña?

20 A. I do not have the information.

21 Q. How much more rain do you say falls on the JDD
22 Expansion Project than Paso Alto?

23 A. That is on the map.

24 Q. Those maps are--can you tell me where those maps
25 are so I can look at them?

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1 A. We analyzed these and we analyzed the rainfall.
 2 Page 19.
 3 Q. Is that of your Second Report or your First Report
 4 or--
 5 A. Second.
 6 Q. We'll take a look at that and I'll likely ask you
 7 some questions about that. But I want to make sure that I
 8 understand.
 9 Is the reason why the Jamaca de Dios Expansion
 10 Project was untenable was because of your contention that
 11 it rains more on that mountain than it does on the mountain
 12 less than two miles away?
 13 A. The rain on that mountain is caused by the
 14 topography. That mountain is the front of the displacement
 15 of the northern winds. The first one to receive the
 16 rainfall would be that side of the mountain. That's the
 17 reason it has a different vegetation and different
 18 conditions--environmental conditions.²⁶
 19 Q. Okay.
 20 A. It rains less in the other areas because of
 21 topographical conditions that are renowned all over the
 22 world. The northern front in the Dominican Republic is

²⁶ Original in Spanish adds: "Después de esa montaña llueve menos, por cuestiones topográficas conocidas a nivel mundial meteorológicamente. El frente norte en República Dominicana va a ser más húmedo que el frente sur."

1 more humid than the southern point of the Dominican
 2 Republic.
 3 Q. Okay. So just so I'm clear, I want to confirm
 4 that it's your testimony that it rains more in Jamaca de
 5 Dios than it rains in projects within a few miles,
 6 including La Montaña and Jarabacoa Mountain Garden, which
 7 is also on the north face of the Central Mountain Range and
 8 Quintas del Bosque?
 9 A. At a lower altitude. At the--in the--at the
 10 highest point of the mountain, it just rains more because
 11 of the cloud cover. The fact that it's just at a higher
 12 altitude, there is higher cloud density of the--in that
 13 area, in addition to the rainfall--in addition to the
 14 rainfall water, there is a higher cloud concentration at
 15 the higher altitudes than lower altitudes.
 16 Q. Okay. So the higher up you go, the more it rains?
 17 A. It depends on the location, but the answer would
 18 be yes. If it is in an area where the rainfall condensates
 19 at the--at the beginning of the alisios winds, that will be
 20 the situation.²⁷
 21 Q. Just so the record is clear for the Tribunal, can
 22 we make sure we're looking at whatever map you indicate is

²⁷ Original in Spanish adds: "Donde se condensa la lluvia, a la entrada de los vientos alisios, sí. Si ya los vientos alisios se han descargado, va a llover menos."

1 the source for your projections of rainfall. I think you
 2 said Page 19 of your Second Report?
 3 A. Yes.
 4 Q. Is this the map we're looking at?
 5 A. Yes.
 6 Q. And that map doesn't have any figures on it about
 7 rain, does it?
 8 A. The blue line, not the one that describes the
 9 river, the one that is a deeper blue, shows rainfall in the
 10 area.
 11 Q. You say rainfall in the area ranges from
 12 1,600 meters per year to 1,800 meters per year; right?
 13 A. Correct.
 14 Q. Okay. I want to look at the next paragraph of
 15 your Witness Statement which is back in the first one on
 16 Page 11.
 17 And you say, "The modifications that would have
 18 been required to build the access road increased the risk
 19 of disasters, the most violent risk being a landslide," and
 20 you describe what a landslide is.
 21 And then on the next page you say, "Changes to the
 22 natural drainage system that the project would cause in
 23 such pronounced gradients."
 24 Just so I'm clear, when you say "in such
 25 pronounced gradients," are you talking about the slope of

1 the property?
 2 A. Where are you?
 3 Q. I'm in the second sentence of Paragraph 25, when
 4 you're talking about changes to the natural drainage
 5 system. And you use the term "in such pronounced
 6 gradients." And I just want to make sure I understand
 7 that's referring to the slope of the project?
 8 A. Yes. It refers to the slope.
 9 Q. And with greater slopes, you have more runoff,
 10 erosion, and the risk of the things you mention here:
 11 landslide, water pollution, and less catchment; correct?
 12 A. Yes. Landslides and water pollution, yes.
 13 Q. And is that a feature only of Jamaca de Dios's
 14 expansion request, or is that a feature at any mountain
 15 with pronounced gradients?
 16 A. It would apply to all mountains. Although it
 17 applies to all mountains, the level of intervention is
 18 going to be greater because you have less soil cohesion and
 19 more potential water energy that is going to bring with it
 20 soil.
 21 Q. Thank you, Mr. Navarro.
 22 And just so we're clear about soil cohesion, did
 23 you ever commission when you were the Director of
 24 Environmental Assessment any soil stability tests or
 25 measurements or diggings or anything in that regard?

1 A. I did not. That is observed in the field visits.
 2 Q. It's observed by the technicians and their report
 3 communicates what they did to make those observations;
 4 correct?
 5 A. Correct.
 6 Q. Okay. I'd like to look at the slope map for JDD
 7 Phase 2.
 8 MR. ALLISON: And I'd ask Larissa to put up
 9 Claimants' Demonstrative Exhibit Number 1.
 10 BY MR. ALLISON:
 11 Q. That is in your binder at Tab 50. Claimants'
 12 Demonstrative 1. This is a slope map of Jamaca de Dios
 13 Phase 2. Have you seen this document before?
 14 A. I have, yes.
 15 Q. This is from the Eric Kay Report and he's--this
 16 document highlights in black those areas of Jamaca de Dios
 17 with slopes in excess of 60 percent. You understand that;
 18 correct?
 19 A. I do.
 20 Q. And if we connect--
 21 PRESIDENT RAMÍREZ HERNÁNDEZ: Mr. Allison, can you
 22 speak closer to the mic, please.
 23 BY MR. ALLISON:
 24 Q. And if we look at the next demonstrative, we
 25 connect the two phases--two projects at Jamaca de Dios and

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1 cast the slopes of those projects over the boundaries of
 2 the border; right?
 3 Do you agree? You can understand that?
 4 A. Yes.
 5 Q. And this comes from Mr. Kay's map, and it's his
 6 projection from two separate satellite sources, that less
 7 than 15 percent of 14-plus of Phase 2 has slopes less than
 8 60 percent.
 9 So the record is clear--and I'm not trying
 10 to--you've measured those slopes yourself and your analysis
 11 is that 19 percent are in excess of 60 percent; correct?
 12 A. That is correct, yes.
 13 Q. So there's a slight discrepancy between your two
 14 calculations but, so I'm clear, the decision to reject the
 15 Jamaca de Dios expansion request wasn't predicated on the
 16 difference between 15 percent or 19 percent of the land
 17 being above 60 percent?
 18 A. That is so, yes.
 19 Q. Okay. And if we take this slope map and project
 20 it over a GPS or Google Earth image of Jamaca de Dios, at
 21 Claimants' 17--I'm sorry, Claimants' Demonstrative 17--we
 22 see the Expansion Project and the slopes above 60 percent.
 23 Do you see that?
 24 A. I do see that.
 25 Q. And so I'm clear, it appears that your technicians

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1 in the August 13 visit must have been taking readings
 2 somewhere where the slopes do not exceed 60 percent; right?
 3 A. The analysis conducted by the Ministry is not only
 4 limited to the study of the slopes. It is not only limited
 5 to the fact that there are slopes of 60 percent in that
 6 case.
 7 We look for the fragility of this space. We will
 8 look at the map with a 50-percent or 40-percent slope. We
 9 see that the impact is much greater than in the lower
 10 portion. In the lower portion, we see plains, and you can
 11 go to the plain land without affecting the 60 percent much.
 12 And you profit from this more than if you go up to
 13 1,200 meters in an area--well, here it's presented as
 14 60 percent. But this space is, in appearance, small. But
 15 if you add the 50 or 40-plus, the environmental impact is
 16 going to be quite substantial when it comes to
 17 interventions in the proposed project.
 18 This area is sufficiently fragile to have constant
 19 landslides. And you see this at the bottom here, the
 20 bottom portion here of constructions.
 21 Now, you're going to see landslides that are going
 22 to be much more constant up--in the upper portion than in
 23 the lower portion.
 24 Q. Just so I'm clear, because we've looked a lot at
 25 the law, is it impermissible to develop on land in excess

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1 of 60 percent?
 2 A. It is not permitted.
 3 Q. Is it permissible to develop on land of less than
 4 60 percent?
 5 A. Yes, provided that the environmental conditions
 6 allow the development to take place.
 7 Q. And those environmental conditions are set forth
 8 in Dominican regulation where? The fragility you speak of,
 9 where can an individual go to Dominican law to see an
 10 objective determination of what he is allowed to do and
 11 what he's not allowed to do, like you can with the
 12 specificity you just testified to concerning the slope law?
 13 A. There are different regulations, and there are
 14 different instruments that can be used for fragility
 15 purposes. For example, the delimitation of protected
 16 areas. That is one of the instruments.
 17 The use of the land is also regulated. The type
 18 of land that may be used depending on the type of activity
 19 conducted. The slope levels, native forests, and also the
 20 environmental impact study.
 21 That is an instrument that allows us to look for
 22 those fragilities to compare them against the use that the
 23 project intends to have, and then it is decided whether the
 24 use can be conducted. And, of course, we have to see
 25 whether the environmental damage is more than the benefits

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1 that the project is going to yield.

2 When it comes to the environmental impact study,
3 there are methodologies that include these technical
4 indications.

5 PRESIDENT RAMÍREZ HERNÁNDEZ: Sir, I wanted to
6 understand something, Mr. Navarro. And I make reference to
7 the Inspection Report that Claimant was making reference to
8 which is R-114. And this is at Tab 25. And I wanted to
9 understand the decision-making process.

10 I understand that this is a report that was
11 provided to you, that you are the coordinator of the
12 Technical Evaluation Committee.

13 The report starts with an introduction and it
14 talks about methodology, and then it talks about background
15 facts. Mention is made here of the visit conducted on
16 February 17, 2011, and they talk about conclusions by the
17 committee. And then it also talks about environmental
18 fragility, slope, type of land, geomorphological aspects,
19 natural runoff, et cetera.

20 It then talks about another communication, and it
21 talks about something that you also made reference to. It
22 says that on January 11, 2012, a visit was conducted and a
23 clinometer was used. And you mentioned this.

24 Now, after these background facts, you have the
25 findings. The background facts talk about the

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1 environmental fragility, about the slopes that are in
2 excess of this number, and then we talk about the use of
3 GPS and the type of soil predominating in the area viewed
4 and GPS points were taken, and, also, they talk about the
5 slope. And apparently none of these slopes are in excess
6 of 60 percent.

7 Then there is a conclusion. And that's what my
8 question is about. The Expert's Report says the file does
9 not contain a topographical sheet with the extraction area.
10 And then it says, "Having regard to the fact that the
11 project is located within," et cetera, et cetera, "it is
12 recommended that the case be sent back to the Technical
13 Evaluation Committee."

14 What is the decision-making basis of this report?
15 Apparently, these conclusions appear to be inconsistent
16 amongst themselves. What does the Technical Evaluation
17 Committee do to make a decision? Because the committee is
18 the decision-making body that is going to make a decision.
19 But what is the basis that the committee has to make a
20 decision? It talks about background facts. But then in
21 their findings, they say that there are no slopes in excess
22 of 60 percent.

23 THE WITNESS: The committee, Mr. President, is a
24 group made by a number of members and it has
25 representatives from each of the five vice ministries,

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1 legal, et cetera. A representative from each vice ministry
2 goes to the site when possible. But at all times, three
3 vice ministries need to be represented.

4 The information that the representatives of the
5 vice ministry obtain during the--and the report is given to
6 it by the people who took the report. And, also,
7 information related to the project is provided. With the
8 information of the project and the knowledge gained of the
9 area by the Ministry--well, each person looks for the
10 information in its own cabinet.

11 The Technical Committee discusses the intervention
12 described in the project, and it compares it against
13 information describing the environmental portion, and then
14 a decision is made.

15 There are no contradictions in the project. When
16 an analysis is conducted of the historical background,
17 well, there was no contradiction here. The technician
18 recorded it as such. If there are contradictions between
19 what the technician found at this point and what was found
20 before, then that is stated. In this case, the reports are
21 supplementary. There is also information submitted, but
22 the--both reports complement each other.

23 PRESIDENT RAMÍREZ HERNÁNDEZ: That was my point,
24 Mr. Navarro. Exactly. You said that the background facts
25 were very important. But when we assess the background

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1 facts to what really happened and there was a difference,
2 why isn't there a recommendation where it says "Conclusions
3 and Recommendations"? For example, saying "because of the
4 slope and the type of soil and the environmental fragility,
5 and because the clinometer said whatever"--I'm trying to
6 understand, this report does not contain a conclusion and
7 recommendation. The only findings here are findings that
8 indicate that the law was being abided by.

9 THE WITNESS: The report in some cases does not
10 present a conclusion. That is common in cases.

11 But the report needs to present all the detailed
12 information, although the technician may not make a
13 decision. He has to provide all the information necessary
14 for the decision-maker to assess the indicators that will
15 allow the decision-maker to make an appropriate decision,
16 and then the decision is made. It is not necessarily the
17 case that the technician is going to say "I agree" or "I
18 don't agree."

19 This is a team. And sometimes no agreement is
20 reached as to what is included or not included in the
21 report.

22 But you always have a detailed set of information
23 of environmental facts, and the decision-maker is going to
24 use that in order to make a decision. The decision-maker
25 is going to assess that information.

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1 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you very much,
2 Mr. Navarro. Thank you.

3 BY MR. ALLISON:

4 Q. I just want to make sure I'm clear as to your
5 position and the MMA's position now on whether or not the
6 slopes at Jamaca de Dios's Expansion Project was a barrier
7 to its approval?

8 A. The fragility, the type of soil, the slope, the
9 load conditions in the area, the fact that it was a
10 national park.

11 Q. Mr. Navarro, I understand those conditions but--
12 PRESIDENT RAMÍREZ HERNÁNDEZ: Would you let him
13 give his response, please.

14 MR. ALLISON: I'm sorry.

15 PRESIDENT RAMÍREZ HERNÁNDEZ: Do you have anything
16 else to add, Mr. Navarro?

17 THE WITNESS: I do not.

18 BY MR. ALLISON:

19 Q. I understand your position with respect to
20 fragility and soil and that it was in the national park.
21 But I just want to confirm. I think you said earlier if
22 you--there is no Dominican law that prohibits development
23 on slopes of less than 60 percent; correct?

24 A. I did not say that. In the Environmental Ministry
25 Law, it established that human settlements should not be

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1 located in places where there is environmental risk for
2 them. The Environmental Risk Law, 147-02, establishes that
3 as well. There is legislation to establish projects in
4 locations where the environmental conditions do not
5 represent problems for human settlements or for
6 environmental quality.

7 Q. Let me--I see. I was a little broad. Article 122
8 of Law 64-00 does not prohibit development on areas of less
9 than 60-percent slope; correct?

10 A. In the sense that prohibiting it--well, it's in
11 excess of 60 percent. That does not mean that when there
12 are conditions that create the same environmental issues of
13 over 50²⁸ percent, well, those conditions do not have to be
14 taken into account.

15 Q. Okay. Mr. Navarro, at any time when you were
16 evaluating the project in August and September of 2013, did
17 you or any of your MMA employees ever write to the
18 Ballantines and ask them, "What is your plan with respect
19 to soil stability at your Phase 2 expansion project?"

20 A. No. In 2013--well, it was established that this
21 was in a protected area and that the environmental
22 conditions were substantially fragile. So the Ministry was
23 not going to propose any kind of use. And the promoter is

²⁸ Original in Spanish : "60".

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1 the one who needs to conduct corrections that it sees or
2 deems fit.

3 Q. Okay. So just so the record is clear, in your
4 review of the files, you didn't see any communications from
5 the MMA to the Ballantines at any point in which they said,
6 "How do you plan to deal with soil stability at your
7 expansion project"?

8 A. The letter provides an option to them of
9 relocating the project.

10 Q. That's not what I'm asking. I understand that
11 letter says you can submit some different property. I'm
12 asking with respect to the property that they had
13 submitted, did the MMA ever write to them and say, "What is
14 your plan with respect to soil stability?"

15 A. During my tenure, I have no knowledge of a letter
16 of that nature.

17 Q. And you haven't seen any letters in the file that
18 you reviewed for purposes of giving this testimony;
19 correct?

20 A. I have not.

21 Q. And did you ever see a letter that said, "How do
22 you plan to address water runoff at your expansion
23 project?"

24 A. I did not.

25 Q. Did you ever see a letter that said, "How do you

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1 plan to deal with areas of slope greater than 60 percent?"

2 A. I did not.

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

6 A. I did not. Can I say something?

7 Q. There's no question pending. There's no question
8 pending. You'll be able to say what you'd like.

9 PRESIDENT RAMÍREZ HERNÁNDEZ: If you want to say
10 something.

11 THE WITNESS: Okay. I just wanted to clarify
12 something.

13 Within the Environmental Assessment Project, and
14 the question posed by counsel, well, that has to do with
15 the Environmental Management Program. What do I do with a
16 development when those impacts take place.

17 BY MR. ALLISON:

18 Q. Did you ever issue terms of reference, you or the
19 MMA, to the Ballantines to provide a basis for a dialogue
20 as to how to adapt the expansion project to address any
21 environmental concerns?

22 A. No ToR was issued.

23 MR. ALLISON: This is potentially a time for a
24 break. I'm going to move on to some documents and some
25 other projects.

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1 PRESIDENT RAMÍREZ HERNÁNDEZ: So let's come back
2 at 4:15, please.
3 (Brief recess.)
4 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Mr. Allison.
5 BY MR. ALLISON:
6 Q. Mr. Navarro, I'd like to turn you to Appendix
7 Exhibit A-28.
8 THE INTERPRETER: Would you please repeat?
9
10 BY MR. ALLISON:
11 Q. A-28 which is in your binder at Tab 39 in Spanish.
12 And this is the environmental permit for Alta Vista, which
13 we discussed a little earlier. You indicated you weren't
14 involved with the issuance of this permit?
15 MS. TAVERAS: Mr. Allison, excuse me. I think he
16 said he did not recall.
17 MR. ALLISON: Okay. That's fine.
18 BY MR. ALLISON:
19 Q. I'd like to turn to Page--well, let's identify
20 this. This is dated August 12, 2012, and it's the
21 environmental permit for the Alta Vista Bayacanes plot
22 division project requested by Mr. Franklin Liriano Ortega.
23 And under the characteristics, you see it's a
24 project, 54 plots used for single-family dwellings, an area
25 for access roads and infrastructure including streets,

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1 sidewalks, electrification, water, an administrative
2 office, and a restaurant. Do you see all that in the
3 beginning of the description of the project?
4 A. I see it.
5 Q. Okay. Thank you. I'd like to turn to page--
6 A. I was not the director in August.
7 BY MR. ALLISON:
8 Q. I understand. I understand. But anyways--
9 PRESIDENT RAMÍREZ HERNÁNDEZ: Could you hold on,
10 Mr. Allison.
11 THE INTERPRETER: We just need to hear his last
12 answer in Spanish.
13 THE WITNESS: I said that I was not the Director
14 of Evaluation in August 2012.
15 BY MR. ALLISON:
16 Q. If we turn to Page 5, there are a series of
17 conditions and paragraphs with respect to the permit. And
18 if we look at the bottom one, 15--to the bottom, it says,
19 "The developer shall carry out the project without altering
20 ecological integrity and while protecting the scenic beauty
21 of the area, decreasing the possibility of negatively
22 affecting the area."
23 Did I read that correctly?
24 A. Yes.
25 Q. And then it reads, "Given the conditions and

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1 topographical characteristics of the terrain (which has
2 inclines ranging between 25-degrees and 35 degrees),
3 particularly the phenomena of soil erosion at the project
4 site, plot division work on the land, the design and future
5 construction of the project will be done while bearing in
6 mind the potential risks of mass landslides and subsidence.
7 Therefore, future houses must have lightweight structures
8 according to the load-bearing capacity of the soil."
9 Did I read that correctly?
10 A. Yes.
11 Q. And so the soil erosion noted at this project and
12 the potential risk of mass landslides at this project did
13 not prevent the MMA from issuing a permit; correct?
14 A. I am not aware of the context for that permit.
15 Q. Okay. But you can read this document just as I
16 can; right?
17 A. But I can understand it differently. What it says
18 there is that they are going to consider the fragility for
19 the construction so that they are not affected.
20 Q. Okay. So the potential risk of mass landslides
21 and soil erosion is not--is only related to the development
22 of the project and not the continuation of it after it's
23 been developed? Is that how you read that?
24 A. No. I would rather explain how I understand it.
25 The limiting factor is that the constructions need to bear

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1 in mind that those are the characteristics, that is to say
2 the sloping and the risk.
3 And that should be considered as part of the
4 project and in the future. It doesn't mean that they are
5 going to build there. This is the limitation.
6 Q. Right. And it says, "Future houses must have
7 lightweight structures according to the load-bearing
8 capacity of the soil." Right? Is that what it says at the
9 end?
10 A. Yes.
11 Q. Did the MMA issue a permit to Jamaca de Dios with
12 a condition that its future houses must have lightweight
13 structures according to the load-bearing capacity of the
14 soil?
15 A. Are we talking about Jamaca de Dios?
16 Q. Yes.
17 A. In this--in this permit?
18 Q. No, Mr. Navarro.
19 My question is: Was a permit issued to Jamaca de
20 Dios' expansion project that had a condition that said,
21 "We're aware that there are risks of mass landslides and
22 soil erosion; therefore, the houses you need to build must
23 be lightweight structures according to the capacity of the
24 soil." Did it do that at Jamaca?
25 A. No. The permit was not granted.

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1 Q. I'd like to look at the Sierra Fría project. And
 2 I'd like to look first at Appendix A-36 which you have in
 3 Spanish at--you may not have it. Maybe we can put it upon
 4 the screen. This is in Spanish and I'm going to read into
 5 the record--I want you to be able to read it, but I will
 6 read into the record what it says in English. This is a
 7 letter to the developers of Sierra Fría, November 18, 2016.
 8 And it says, "The technical assessment committee has met
 9 and that your project must be rejected for the following
 10 reasons: The project is located in an environmentally
 11 fragile area. The project is located on a slope of more
 12 than 60 percent with soils with productive capacity
 13 suitable for forests, perennials and pastureland. The
 14 proposed area is in the source of various natural streams,
 15 all tributaries of the Yujo River. Such a project would
 16 directly pollute the aquifer, change the natural drainage
 17 pattern in the area, and the conditions of the watershed at
 18 the local and micro basin level. The construction of the
 19 project would cause soil erosion and acidity."

20 Did I read that correctly?

21 A. Yes.

22 Q. And so the project was denied but the promoter of
 23 the project, Roberto Rijo--Mr. Penrose, appealed. And in
 24 Appendix A-32, the MMA wrote to them, which you can find in
 25 your binder in Spanish at 41. It describes the project and

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1 we have seen evidence of this earlier, it's a Condo Hotel
 2 of 20 units, a Condo Hills of 14 units, a Chalet Laurel of
 3 21 units, and a Condo Pueblo Yujo of 52 units located at
 4 the site in Jarabacoa in the La Vega province.

5 There had been a rejection, and this letter is six
 6 months later. And the Technical Evaluation Committee is
 7 considering it, and they postpone their meeting requesting
 8 a redesign of the master plan, restructuring each and every
 9 project component in an editable and geo referenced
 10 document respecting all water sources.

11 Do you see that?

12 A. Yes.

13 Q. Did the MMA ever write to Jamaca de Dios and say,
 14 "Would you please submit a redesign of your plan for its
 15 project?"

16 A. No.

17 Q. So the MMA said, "This is in an area of extreme
 18 environmental"--excuse me, I don't want to overstate it.
 19 The MMA said in Exhibit A-36, "The project is located in an
 20 environmentally fragile area." And we've heard the phrase
 21 "environmentally fragile area" a lot in this arbitration,
 22 have we not?

23 A. We need to look at the context of that project. I
 24 do not recall.

25 Q. But you do see in the letter that the MMA said it

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1 was in an environmentally fragile area. You do see that,
 2 don't you?

3 A. Yes.

4 Q. And so the Technical Evaluation Committee meets.
 5 And we have a letter that they wrote to the project
 6 promoters in--on July 4th, less than two months later. And
 7 that's Exhibit A-34 in your binder in Spanish at 43. It
 8 says, "Dear Sir, as we write to report the results of the
 9 Technical Evaluation Committee that was completed as to the
 10 Sierra Fría project." And the second paragraph, if you
 11 blow it up says, "The document attached hereto contains the
 12 terms of reference for conducting the environmental survey,
 13 and they serve as a guide for the environmental impact
 14 assessment of the project."

15 Do you see that?

16 A. Yes.

17 Q. And so the MMA, just about a year ago, after
 18 rejecting this project for being in an environmentally
 19 fragile area, reconsidered and decided to issue terms of
 20 reference to Sierra Fría; is that correct?

21 A. That is correct. I'm not aware of the context of
 22 that approval.

23 Q. But you know Sierra Fría is a mountain project in
 24 La Vega Province in the Municipality of Jarabacoa; correct?

25 A. Yes.

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1 Q. And you know that Alta Vista is a mountain project
 2 in the Municipality of La Vega in La Vega Province; right?

3 A. Yes.

4 Q. Did the MMA, after denying Jamaca de Dios permit
 5 for being in an environmentally fragile area, later
 6 reconsider given their requests and issue terms of
 7 reference for an environmental impact study to begin a
 8 process for consideration of that reconsideration?

9 A. I am not aware of the context when that permit was
 10 issued and the terms of reference. It is necessary to know
 11 the history of the project.

12 Q. That wasn't my question. My question was: Did
 13 the MMA after denying Jamaca de Dios later issue terms of
 14 reference?

15 A. You're talking about Jamaca de Dios?

16 Q. Yes.

17 A. No. No terms of reference were issued.

18 Q. And I just want to--I understand you weren't the
 19 person who wrote the rejection letter, and I'd like to go
 20 back to that on A-36. If we see who signed that letter.
 21 Is it a Ms. Zoila González? Do you know Ms. González?

22 A. Yes.

23 Q. She appears on much of the--

24 A. I don't have the document that you are reading.

25 Q. It's up on the screen.

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1 A. But in the binder. Where is it in Spanish?
 2 Q. Well, I think unfortunately--
 3 A. Which one is it?
 4 Q. There's one--what--it's not in the binder
 5 unfortunately. This is Exhibit A-36 and it missed our
 6 filter. But this is a blow up--
 7 A. What does the letter say?
 8 MR. ALLISON: Can you show the whole letter to the
 9 witness and start on Page 1?
 10 BY MR. ALLISON:
 11 Q. This is what we were looking at just a few moments
 12 ago. Do you remember this? This is the rejection letter
 13 from Sierra Fría, and it's signed by Ms. Zoila González.
 14 Do you know Ms. González?
 15 A. Yes.
 16 Q. And as you reviewed documents for this--for your
 17 testimony and your Witness Statement here, did you notice
 18 Ms. González appeared in many of them?
 19 A. Yes.
 20 Q. Did you ask Ms. González whether or not she wanted
 21 to be a witness in this proceeding?
 22 A. I shouldn't--I don't know why I should do that.
 23 It was not my duty.
 24 Q. Okay. Is she still an employee of the MMA?
 25 A. Yes.

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1 Q. Did you review any of the Sierra Fría documents in
 2 connection with your testimony here today?
 3 A. No, I don't recall Sierra Fría.
 4 Q. Did you review any of them in connection with the
 5 creation of your first or Second Witness Statement?
 6 A. You're talking about Sierra Fría again?
 7 Q. Yes.
 8 A. No. I do not recall looking at Sierra Fría.
 9 Q. Let's talk quickly about Quintas del Bosque
 10 project 2. The Tribunal has seen evidence of Quintas del
 11 Bosque project 1, and it was approved in February 2009.
 12 And then Mr. José Roberto Hernández submitted a request for
 13 another permit to expand his project; right?
 14 A. To build a second project.
 15 Q. Directly next to the first project; right?
 16 A. Correct.
 17 Q. And you've seen the site plan for both project 1
 18 and project 2, have you not?
 19 A. Yes.
 20 Q. And you mentioned that you were involved in part
 21 in the consideration of the permit that was granted for his
 22 expansion project 2; correct?
 23 A. Correct.
 24 Q. And the Tribunal has in the record documentation
 25 of significant back-and-forth between Quintas del Bosque 2

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1 and the MMA, and I will point them to the exhibit that
 2 aggregates that communication. But I'd like to
 3 specifically point to a recent--a more recent communication
 4 dated July 31st of last year.
 5 Can you please pull up Exhibit C-116, which is in
 6 your binder. Well, it may not be in your binder. Pull up
 7 C-116. If you can pull it up in Spanish for Mr. Navarro.
 8 Now, you had left the MMA at the time of this--or
 9 you had left the Department of Environmental Assessment at
 10 the time of this letter, hadn't you?
 11 A. I was no longer the director.
 12 Q. And so this letter is signed again by Ms. Zoila
 13 González, Deputy Minister of Environmental Management;
 14 correct?
 15 A. Yes, she was the Vice Minister. She was the Vice
 16 Minister of Environmental Management.
 17 Q. And she writes to Mr. José Roberto Hernández about
 18 the Technical Evaluation Committee meeting concerning his
 19 Quintas del Bosque 2, as he calls it, request. Do you see
 20 that?
 21 A. I do.
 22 Q. And he says--he writes--excuse me. Zoila González
 23 writes, "It was decided that several of the lots described
 24 in your project proposal were located in an area which had
 25 slopes higher than 60 percent and others were located

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1 inside the buffer zone of the Baiguata National Park, which
 2 is why the following is requested: A redesign of your
 3 project plan in AutoCAD."
 4 And then in 2, "The relocation of Lots 2, 7, 8,
 5 28, 29, 30, and 31."
 6 And it says, "Once the response is received to
 7 this request, the project will continue. The process of
 8 evaluation with the corresponding stage."
 9 Do you see that?
 10 A. I do.
 11 Q. And you're aware that Quintas del Bosque 2 was
 12 issued a permit less than a month after this letter, are
 13 you not?
 14 A. I wasn't sure about the timeline, no.
 15 Q. But you know they have a permit; correct?
 16 A. Correct.
 17 Q. And you know Mr. Hernández is going to be a
 18 witness for the Respondent in this arbitration; correct?
 19 A. I do know that.
 20 Q. And did the MMA ever write to Jamaca de Dios and
 21 say, "We need a redesign of your project plan for your
 22 expansion project"?
 23 A. It was asked to provide a new location for the
 24 project.
 25 Q. Okay. So they asked them to move the project, but

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1 they didn't say, "You need to redesign the project within
2 the area you're submitting"; correct?

3 A. Correct.

4 Q. And are they asking Mr. Hernández to move Quintas
5 del Bosque to here or to redesign it within the area he had
6 already submitted?

7 A. As the letter says, the park that is within the
8 national park is withdrawn. Those with slope more than
9 60 percent. And the only thing that was left was the areas
10 that had an environmental fragility that could be managed.

11 Q. And does it talk about the management of the
12 environmental fragility in this letter?

13 A. Well, environmental fragility can be deducted--can
14 be deduced, rather, because he was taken out of the parts
15 of the area that were national park and the 60-percent
16 slope.

17 Q. And so environment--

18 A. And, also, there are lots that have been
19 eliminated because they are close to an environmentally
20 fragile area.

21 Q. Okay. Well, you're deducing environmental
22 fragility because he's in a buffer zone and because he has
23 60-percent slope; is that right?

24 A. That is correct.

25 Q. Look at Claimants' Demonstrative 13, please. This

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1 is your slope map for Quintas del Bosque 1, as you call it,
2 or I should say, perhaps, we call it. This is the first
3 project of Quintas del Bosque. Do you recognize your slope
4 calculations?

5 A. I do.

6 Q. And you submitted--so to be fair, you submitted a
7 similar map that had different colors for slope gradations
8 below 60 percent, below 40 percent, below 20 percent, like
9 that, right, and it was different colored; is that right?

10 A. Yes.

11 Q. And we've taken that and just highlighted the
12 areas that are above 60 percent?

13 A. Yes.

14 Q. Okay. And if we look next at Demonstrative
15 Exhibit 14, we see this is your slope map for Quintas del
16 Bosque 2. Do you recognize that?

17 Oh, I'm sorry. That's not yours. That's from
18 Respondent's Exhibit 342. It's one of your exhibits. Have
19 you seen the Respondent's Exhibit 342?

20 A. I have seen it.

21 Q. And this is the area of the Expansion Project that
22 has slopes in excess of have 60 percent; correct?

23 A. I did not compare this in my report. That's
24 yours. That was not examined in the report that we
25 submitted.

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1 Q. It's not your calculation, but it's a calculation
2 done by Respondent and submitted as their Exhibit 342;
3 correct? You've seen Exhibit 342 which is a similar map to
4 this?

5 A. Yes, I have.

6 Q. Right. And I've taken it and just--

7 A. But I do not recall it being exactly like this.

8 PRESIDENT RAMÍREZ HERNÁNDEZ: The exhibit, if you
9 can give it to the witness.

10 MR. ALLISON: This one?

11 PRESIDENT RAMÍREZ HERNÁNDEZ: The one that you
12 referred to. Oh, that one.

13 BY MR. ALLISON:

14 Q. This is Exhibit 342 and if we scroll through it,
15 these are calculations of projects with slope maps done by
16 the Respondent, including Quintas del Bosque 2, if we keep
17 going. There's Paso alto. There's Quintas del Bosque 1.
18 The red is areas above 60 percent. And the next one, I
19 think, is Quintas del Bosque 2. Do you see that there?

20 A. I do see that.

21 Q. And the red area are slopes in excess of
22 60 percent. And do you know what the MMA did with respect
23 to that area to manage the fragility of that land?

24 A. I did not finish the file for this project. I
25 didn't see the conclusion of the file to this project.

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1 Q. Were you involved at all in any of the
2 evaluations? Were you involved in any Technical Evaluation
3 Committee meeting with respect to Quintas del Bosque 2?

4 A. I do not recall whether I was involved or not, but
5 I did participate in the assessment and determination of
6 the areas that could not be used.

7 Q. So you were involved in a process by which the MMA
8 identified certain areas in the project which couldn't be
9 used, and you communicated those areas to Mr. Hernández and
10 ultimately he received a permit; correct?

11 A. I did not communicate that to him. I was no
12 longer at the Ministry at that point in time.

13 Q. I'm not saying you personally, Mr. Navarro. But
14 the MMA had a process by which it identified certain areas
15 in Quintas del Bosque 2 which couldn't be used, and the MMA
16 communicated those areas to Mr. Hernández. He removed them
17 from his project and received a permit; correct?

18 A. No. If all the requirements of the Ministry are
19 fulfilled, the permit is issued.

20 Q. And a permit was issued here; correct?

21 A. A permit was issued.

22 Q. I'd like to look at La Montaña, please. You
23 indicated earlier that you were familiar with this project;
24 correct?

25 A. It came in when I was the Director of

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1 Environmental Assessments.

2 Q. Okay. Do you recall when it came in?

3 A. I do not recall. I would have to look at the

4 letter or the request form.

5 Q. And when a request comes in for a developmental

6 project, do all requests ultimately hit your desk as the

7 director?

8 A. True.

9 Q. And is it you who decides which group of

10 technicians is going to go out and do certain inspections

11 or which group of technicians is going to make certain

12 evaluations? Is that part of what you do as the director?

13 A. I coordinate the trip. I can only identify the

14 technician. The other--the technicians for my area. The

15 other technicians are determined by other ministries or

16 vice ministries, rather. Vice ministers.

17 Q. Okay. So you're in charge of coordinating those

18 who are under your charge or under your report, but not

19 other subdepartments?

20 A. Correct.

21 Q. I'd like to look at a document. You'll find it in

22 your binder at Tab 37, in Spanish, and it's Respondent's

23 Rejoinder Appendix Exhibit A-27.

24 The English version is at Tab 36. Now, this is a

25 long document which appears to be an aggregation of several

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1 documents, and I wanted to ask you a question about that.

2 On the first page, there's some handwriting up at the top.

3 It says "La Montaña," and it has a number 13165 and 325-T.

4 Do you know what that handwriting or what those numbers

5 refer to?

6 A. These numbers are code.

7 Q. And are they a code for identifying a project

8 within the MMA for file-keeping purposes and the like?

9 A. Exactly. It's for the database.

10 Q. And so do you collect hard copy documents by

11 reference code as well?

12 A. Yes.

13 Q. So if you wanted to go and look at the file for a

14 project, you could go somewhere physically within the MMA

15 and pull all the documents out; is that right?

16 A. Correct.

17 Q. And those documents should include anything that's

18 been submitted to or from the MMA in connection with the

19 project evaluation; right?

20 A. Correct.

21 Q. And so if I ask you to go and look at the Paso

22 Alto file, is there a place you could go in the MMA and see

23 that hard copy file?

24 A. Correct. That's what's expected.

25 I must say something. In 2010, the Ministry moved

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1 and there was a problem with some documents. It moved

2 buildings.

3 Q. So you lost some files?

4 A. Yes.

5 Q. Did you lose the Paso Alto file?

6 A. I don't know.

7 Q. And if you hadn't lost the file, you would expect

8 that you could go to that file and find the environmental

9 impact study that the developer had submitted for that

10 project; correct?

11 A. True. Sorry. The environmental impact studies

12 are not filed in that file. Only the file is archived.

13 Because the environmental impact studies are very

14 voluminous. They are what we call a "dead file." Because

15 otherwise our buildings would be filled with documents.

16 Q. So do you throw away the environmental impact

17 studies submitted by project developers?

18 PRESIDENT RAMÍREZ HERNÁNDEZ: When you talk about

19 environmental impact studies, are you talking--you are

20 referring to the environmental impact studies; right? That

21 is what counsel is asking. I don't know if you're

22 referring to the same thing. Just a clarification.

23 THE WITNESS: There are two kinds of environmental

24 impact studies. The environmental impact statements and

25 environmental impact studies. And those are for the larger

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1 projects, and they have to do with permits. These are very

2 voluminous studies and they are not archived. They're not

3 filed in the file.

4 BY MR. ALLISON:

5 Q. Are they archived anywhere or are they disposed

6 of?

7 A. Well, at some point in time, you need to dispose

8 of them.

9 Q. In connection with the document exchange process

10 in this arbitration, were you involved in collecting

11 documents related to certain projects?

12 A. Yes.

13 Q. And you were instructed by counsel, I assume, to

14 look for all the documents with respect to certain

15 projects?

16 A. I looked for those that I was asked to look for.

17 Q. And anything you found you provided to counsel?

18 A. Whatever the Ministry had in its hands was

19 provided. And the ones that I used to make decisions,

20 those were also submitted.

21 The information that we had.

22 Q. And so if documents aren't in a file with respect

23 to a certain project, it's because either it was too

24 voluminous or it was lost in the 2010 move?

25 A. Perhaps. I don't know on a case-by-case basis

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1 specifically.

2 Q. Let's get back to Document A-27.

3 This first page is a rejection of the La Montaña

4 project. And we see Ms. Gutierrez as the Vice Minister of

5 Environmental Management. It's dated February 17, 2017.

6 Were you still--I know you left in February 2017.

7 But do you recall whether you were still in your role when

8 this project was rejected?

9 A. This was--had come in and it was being assessed

10 but I was not a member of the committee that assessed this

11 project in the end.

12 Q. Okay. But my question is, on February 17, 2017,

13 were you still in your role as Director of Environmental

14 Assessment? If you know.

15 A. I do not recall. I think I left my post in

16 February. I don't remember the exact date.

17 Q. So it's rejected in February of 2017. And if we

18 skip a few pages to the fourth page, we have the English

19 translation of what appears to be down below, the

20 preliminary analysis report of La Montaña, and it

21 identifies certain inspectors.

22 Do you know the gentlemen listed in the line down

23 there?

24 MS. TAVERAS: What page?

25 MR. ALLISON: Page 4.

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1 THE WITNESS: Where are you reading?

2 MR. ALLISON: I'm reading from Page 4 of

3 Appendix 27, which is your Tab Number 36.

4 I'm sorry. 37.

5 PRESIDENT RAMÍREZ HERNÁNDEZ: (In Spanish.)

6 THE WITNESS: These are conditions from the

7 Ministry, yes.

8

9 BY MR. ALLISON:

10 Q. If we go to the top, it says, "According to the

11 proposal, the master plan of the interested Parties of

12 La Montaña project contains a new tourist project for the

13 construction of ecotourism cottages on a total of 60

14 plots."

15 Do you see that?

16 A. Where exactly in Spanish are you looking at?

17 I do see that.

18 Q. And in the paragraph below, it says, "The

19 La Montaña project is on an occupied property with

20 extensive copses of pine trees," and it identifies a series

21 of species of trees.

22 Do you see that?

23 A. I do.

24 MR. ALLISON: And then if we highlight the

25 next--blow up the next paragraph.

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1

2 BY MR. ALLISON:

3 Q. It says, "The property is located on the eastern

4 part of the Central Mountain Range. The soil has developed

5 on metamorphic, igneous rock, with high elevations exposed

6 to mass erosion due to the high local precipitation of

7 1600 millimeters on the range."

8 Do you see that?

9 A. I do see that.

10 Q. And that's what we were discussing earlier, that

11 the eastern part of the Central Mountain Range has a lot of

12 precipitation; right?

13 A. True.

14 Q. And then it says in your bold or in the MMA's

15 bold, "This is a water-producing zone with both surface and

16 ground flows that play an important role in the series of

17 rivers: Jimenoa, Baiguata, Auyama, El Rancho, Los Dajao,

18 among others."

19 And I apologize for my pronunciation of those.

20 A. I do see that.

21 Q. "Soil topography is rugged, with very pronounced

22 variations in slope, between 36 and 60 percent."

23 See that?

24 A. Yes, I do.

25 Q. "And during the inspection tour, they observed a

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1 series of streams having a clear and constant flow of high

2 and good quality."

3 Do you see that?

4 A. I do see that.

5 Q. Now, if we pull back out, there's a paragraph

6 describing the forest that the project is in. The next

7 paragraph identifies the soils of La Montaña as Class VII.

8 Do you see that?

9 A. I do see that.

10 Q. You understand what Class VII is, right, for soil,

11 mountain soil?

12 A. I do.

13 Q. And all mountains have Class VII soil; right?

14 A. Not all of them, no.

15 Q. Do the mountains in and around Jarabacoa in the La

16 Vega Province have Class VII soils?

17 A. Most of them do.

18 Q. Then it reads, "Due to the topographical

19 conditions and elevations, these soils are limited for

20 other economic activities and structural developments

21 altering the environmental ecosystems when proper handling

22 is used, which according to Chapter II, Article 122, of law

23 64-00."

24 You see that?

25 A. Yes, I do see that.

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1 Q. So, it identifies Article 122 as the law that
2 limits development and issues relating to soil; right?

3 A. Related to slopes, not soils. And I do see that,
4 yes.

5 Q. I was just reading what's in the document. And it
6 says the soils are limited according to Article 122 of Law
7 64-00.

8 And I don't think it's a translation issue, but it
9 limits--it identifies soil issues in connection with
10 law 122, which is a slope law; right?

11 A. True.

12 Q. The next paragraph says, "If the project were to
13 be carried out, it would include construction of an access
14 road running 7 to 8 kilometers from Pinar Quemado to the
15 plant project site, as well as the construction of main
16 roads, internal roads. Therefore, cutting and removing
17 soil material does not guarantee final disposal according
18 to circumstances in operationality that would affect the
19 drains, depressions, natural and nascent undulations of
20 streams that, when there is runoff and infiltration, may be
21 altered and contaminated."

22 Do you see that?

23 A. I do.

24 Q. And you were describing runoff earlier as one of
25 the indicators of environmental fragility, were you not?

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1 A. True.

2 Q. If we turn to the next page, we have a paragraph
3 in the middle being with "Considering." And it says,
4 "Considering that work will be carried out during the
5 construction and operation phase, we are of the opinion
6 that should the project be implemented, it would
7 considerably and negatively affect the dynamic of the
8 ecosystems that interact for the conservation of the
9 forest, especially the area's flora and fauna."

10 Do you see that?

11 A. I do see that.

12 Q. And we can continue through this document.

13 MR. ALLISON: If we flip through some pages.
14 Larissa, I will tell you where to stop.

15 Do you know how to flip pages? Yeah, there you
16 go.

17 BY MR. ALLISON:

18 Q. There are some pictures of a proposed project and
19 then this appears to be a technical follow-up report. And
20 this is all one document, because that's how it was
21 produced as an exhibit by the Respondents.

22 MR. ALLISON: If we go to the next page, you see
23 an outline of the map. And we continue a few pages
24 through. We come to a page that describes impacts. There
25 it is. And if we blow that up, we see some of the impacts

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1 that the MMA identified this project would cause.

2

3 BY MR. ALLISON:

4 Q. The third says, "Loss of vegetative cover due to
5 the removal of earth during the construction phase; loss of
6 forested area due to felling trees; changes in the natural
7 conditions; loss of biodiversity and loss of species'
8 habitat due to project construction work; possible
9 disappearance of the El Rancho Stream and an unidentified
10 stream due to land clearance work."

11 Did I read that correctly?

12 A. You did.

13 Q. And so this project was denied.

14 And just one final note on that, if we go to the
15 second-to-last page of this exhibit.

16 MR. ALLISON: Can you try to type it in, perhaps?
17 Okay. There it is.

18 BY MR. ALLISON:

19 Q. And this is a log of activity with respect to this
20 project. And if we look at the second line, it's the
21 February 1st, 2017, description of the minutes of the
22 technical assessment committee where it was rejected.

23 And it says, "Rejected. 23 streams flow from the
24 zone, which are the primary source of the Jarabacoa
25 Aqueduct, in addition to the existing stands of pine

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1 trees."

2 Do you see that?

3 A. I do see that.

4 Q. So the project was denied, but the project owners,
5 utilizing the procedure permitted under the MMA guidelines,
6 appealed the denial.

7 Do you recall that?

8 A. I do not recall the reconsideration.

9 Q. Are you aware of--

10 A. I--I don't recall when it--I don't remember if I
11 was there as director.

12 Q. Okay. But do you recall that there was a request
13 for reconsideration?

14 A. I don't recall the request for reconsideration. I
15 imagine there was, but I do not recall it.

16 Q. Okay. Well, let's look at it. It's Exhibit A-35,
17 which is in your binder at Tab 45.

18 MS. TAVERAS: Mr. Allison, I'm sorry. Mr. Navarro
19 has already stated that he was not the director at the time
20 that came in and that he does not recall this project, so
21 he doesn't--

22 MR. ALLISON: No.

23 MS. TAVERAS: --he doesn't address this project in
24 his Reports, so I don't see why this line of questioning to
25 this witness is relevant right now. He can't help you.

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1 MR. ALLISON: Well, he did actually indicate that
2 he did remember the project, that it came in when he was
3 the director. And he is the witness that has testified for
4 the Respondent as to the putative differences between
5 Jamaca de Dios' expansion--

6 MS. TAVERAS: He doesn't refer to La Montaña.
7 Pardon.

8 MR. ALLISON: --and other projects in the area.
9 The fact that he doesn't refer to La Montaña
10 doesn't mean I can't question him about it.

11 PRESIDENT RAMÍREZ HERNÁNDEZ: Continue.

12 BY MR. ALLISON:

13 Q. So Exhibit A-35 is the reconsideration letter, and
14 it's dated May 22nd, 2017. And I'd like to turn to Page 2
15 and look at Point 11, just as one example.

16 "The project developer rights. I have modified
17 the project master plan that was included in the first
18 submission, taking into account the Ministry of Environment
19 map related to the buffer zone and the slopes of each lot,
20 relocating the construction areas pursuant to the
21 guidelines and suggestions of the Ministry of the
22 Environment; and, therefore, we have submitted the attached
23 corrected Master Plan."

24 Do you see that?

25 A. Yes.

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1 Q. Did the MMA ever give guidelines or suggestions to
2 Jamaca de Dios with respect to its construction areas?

3 A. In the letter, they were requested to relocate.

4 Q. I see. Is this a request to relocate the
5 La Montaña project or to alter the project to take into
6 account concerns that the MMA communicated with the
7 developer about?

8 A. It is a reconsideration letter. I don't know what
9 he has stated. This is the Ministry that rejected the
10 project.

11 Q. Okay. It did reject it. But are you aware that
12 after the reconsideration and after it took into account
13 the guidelines and suggestions of the Ministry of the
14 Environment, a permit was issued to La Montaña?

15 Are you aware of that?

16 A. Yes. I do.

17 Q. You are aware of that.

18 And if we look at Paragraph 7, we see the owner
19 envisions the La Montaña ecotourism project, is offering a
20 unique vacation option in Jarabacoa.

21 Do you see that?

22 A. Where?

23 Q. Paragraph 7 on the second page of the
24 reconsideration request.

25 A. Yes.

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1 Q. When it was submitted by La Montaña, you were
2 still the director. Did you understand that La Montaña was
3 submitting an ecotourism project to develop lots and
4 construct homes?

5 A. The project that was rejected, I am not sure--I
6 don't know what proposal was presented.

7 Q. And for the record, the license for La Montaña is
8 dated November 15, 2017, and is in the record at R-276.

9 We're getting there. I'd like to talk about
10 Mirador del Pino, which I believe is one of the projects
11 you speak to in your Report, is it not?

12 A. Yes, it is true, but I wasn't aware of it during
13 the evaluation process. Where is Mirador del Pino?

14 Q. Where is it in your Report, or where is the
15 project?

16 A. The documents that you will be using.

17 Q. I will show you. I will show you. I just--I
18 haven't gotten there yet. I haven't gotten there yet.

19 You did make clear in your Report that you were
20 not involved in the assessment of Mirador del Pino, but you
21 do state in your Report--

22 PRESIDENT RAMÍREZ HERNÁNDEZ: What report?

23 BY MR. ALLISON:

24 Q. Report Number 1 at Paragraph 51, you state--do you
25 see it there? You state--you're talking about what the

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1 Claimants have asserted, and you say, "The Claimants refer
2 to the following projects, Paso Alto, the first Quintas del
3 Bosque project, Jarabacoa Mountain Garden, Mirador
4 del Pino, and Aloma Mountain.

5 Do you see that?

6 A. Yes.

7 Q. And down at 53 you then say, "My knowledge of the
8 approval or denial of an environmental permit for the other
9 aforementioned projects, except for the JDD Expansion
10 Project that I've already referred to, results from the
11 review of Ministry files."

12 Do you see that?

13 A. Yes, I do.

14 Q. And so you did review the files for Mirador
15 del Pino; correct?

16 A. Yes.

17 Q. And you wrote about it in your Report at Paragraph
18 65(d), which is on Page 29 of your Report.

19 And that says, "Only 7 percent of the land
20 includes slopes higher than 60 percent," which I don't
21 think is disputed. And then it talks about the
22 environmental assessment process, "Identified 7 lots that
23 affected the basin of the Mirador del Pino stream, some
24 with slopes close to 60 percent." You say, "This created a
25 risk of landslide and river pollution. Therefore, they

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1 were excluded by the developer before project approval."

2 You say, "Despite being at the--at a relatively
3 low altitude, this project has significant slopes.
4 66 percent of the terrain is between 20 percent and
5 50 percent."

6 PRESIDENT RAMÍREZ HERNÁNDEZ: Did you find,
7 Mr. Zacarías, where you are?

8 THE WITNESS: The translation said--it says
9 "relatively low" here in the document rather than
10 "relatively high."

11 MR. ALLISON: I'm sorry. I didn't mean to--I
12 misspoke. Despite being at a relatively low altitude.
13 Yes.

14 BY MR. ALLISON:

15 Q. And you mention the percentage of the terrain
16 between 20 and 50 percent, and I think we've clarified that
17 Article 122 does not prohibit development on slopes less
18 than 60 percent; correct?

19 A. But if there are risk conditions, the Ministry has
20 the power to avoid any environmental damage.

21 Q. And that power arises from the--is that what you
22 were talking about before, the Precautionary Principle?

23 A. That's part of the Precautionary Principle and
24 also the knowledge that the mountainous terrain could
25 suffer landslides. And there is some scientific certainty

1 right there.

2 Q. Right. And you're--you even say in this project,
3 "Despite that it's at relatively low altitude, there's a
4 risk of landslide," right? There are a risk of landslides
5 in mountains. Would you agree with me on that?

6 A. Yes, I am.

7 Q. Okay. So, let's look first at C-127, which is in
8 your binder in Spanish at Tab 20.

9 This is a letter from Mr. Vanderhorst--excuse me.
10 This is a letter from the MMA from an engineer, Ernesto
11 Reyna Alcántara.

12 Do you know Mr. Alcántara?

13 A. Yes, I do.

14 Q. He writes to the developer in March 28th, 2011,
15 which is between when JDD had issued its--or had submitted
16 its permit application and the first denial; correct?

17 A. Yes, correct.

18 Q. And the MMA writes to him. It says, "In
19 connection with your letter dated February 4, 2011, by
20 means of which you informed that the project in question is
21 comprised of 84 lots instead of the 60 stated in the Terms
22 of Reference"--do you see that?

23 A. Is that Paragraph 2?

24 Q. No. It's Paragraph 1 where he's describing the
25 letter where they ask to increase the lots from 84 to 60.

1 Do you see that?

2 A. Please help me find it.

3 Q. Sure. In the very first--

4 A. Is this the letter here, this one right there?

5 Q. It's in your binder. You can look at it in
6 Spanish at Tab 20. That letter, yes.

7 A. I have it. But where are you reading from?

8 Q. The very first line. "Courteously, we are writing
9 to you in connection with your letter dated February 4,
10 2011"--do you see that?

11 A. Yes.

12 Q. --"by means of which you informed that the project
13 in question is comprised of 84 lots instead of the 60
14 stated in the Terms of Reference."

15 Do you see that?

16 A. Yes.

17 Q. So, he had written to the MMA and said, "My
18 project is no longer 60 lots; it's 84 lots." Correct?

19 A. Correct.

20 Q. And the beginning of the second paragraph it says,
21 "In this matter, we are writing to tell you that the
22 Ministry of Environment accepts the quantity of 84 lots
23 specified in your above-mentioned communication."

24 Do you see that?

25 A. Yes.

1 Q. So, after the submission of the application and
2 after the Terms of Reference are issued, the MMA learned
3 that the developer wanted 84 lots instead of 60 lots, and
4 the MMA accepted that increased request; correct?

5 A. Correct.

6 Q. And if we move, then, to Document R-167, which is
7 in your tab--your binder in Spanish at Tab 29, this is a
8 letter from the MMA to Mr. Vanderhorst dated January 12,
9 2012.

10 Do you see that?

11 A. Yes, I do.

12 Q. And they write to him that they reviewed his
13 Environmental Impact Statement, which came after his Terms
14 of Reference; correct?

15 A. Correct.

16 Q. And said, "We need some things. We need you to
17 exclude Lots 64, 65, 76, a series of lots from the
18 project."

19 Do you see that?

20 A. I see that.

21 Q. And then they say, "In addition, in adherence to
22 Article 122 of Law 64-00, any lots whose slope is equal to
23 or more than 60 percent shall be excluded."

24 Do you see that?

25 A. I see that.

1 Q. And on the next page, there's just an image of the
2 site plan with the lots that they were asking to be
3 removed.

4 Do you see that?

5 A. I see that.

6 Q. Now, did the MMA ever write to Jamaca de Dios and
7 say, "In adherence to Article 122, any area where you're
8 going to build on that's greater than 60 percent needs to
9 be excluded"?

10 A. No, they did not.

11 Q. They wrote and said, "Your entire project
12 submission is denied"; correct?

13 A. Correct.

14 Q. And some inspectors come to visit Mirador
15 del Pino, and I just have one--

16 MR. ALLISON: You know what? It's marked as an
17 attorneys' eyes only document. I'm not going to ask him a
18 question to confirm it. For simplicity's sake and for
19 speed's sake, I'm going to have to do that in a few
20 minutes.

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 Let's look at this document, which doesn't appear

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1 to have--excuse me one minute.

2 Thank you for your patience, Mr. Navarro and
3 Members of the Tribunal.

4 BY MR. ALLISON:

5 Q. I'd like to point you to Exhibit C-44, which is in
6 your binder in Spanish at Tab 6, Mr. Navarro. This is an
7 inspection report from Mirador del Pino, which is what we
8 were just looking at, is it not?

9 We've seen several similar types of inspection
10 reports. If you turn to the next page, there's a
11 background, it describes the chronology of events. The
12 next page is a picture of the project and the components of
13 the project.

14 And then there's analysis by the environmental
15 technicians, and then there's some conclusions at the end.

16 And they say--it says here, "The process of
17 revisions to the project Mirador del Pino has been
18 completed. The technical revision team considers that the
19 process of revision has been completed following
20 established procedures."

21 I wanted to ask you about the technical revision
22 team. What is that? Is that a department within the MMA?

23 A. Where is that segment, that passage?

24 PRESIDENT RAMÍREZ HERNÁNDEZ: That is in the
25 conclusion paragraph, and it refers to the technical team

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1 in charge of the revision.

2 THE WITNESS: So, this technical team is in charge
3 of studying the study on the environmental impact when
4 submitted to the Ministry or the environmental impact
5 assessment. This is a multidisciplinary team also.

6 BY MR. ALLISON:

7 Q. Okay. And I just wanted to query whether or not
8 there were specific inspectors who were involved with
9 project revisions at the department. Is there such a
10 dedicated group of inspectors who deal with revised
11 projects?

12 A. There is a team that reviews the projects, and
13 based on the type of project, the project is assigned to
14 the--to a qualified technician to analyze.

15 MS. TAVERAS: Excuse me, Mr. President. Can we
16 ask Mr. Allison to confirm--I think he thinks it's
17 "evaluate."

18 PRESIDENT RAMÍREZ HERNÁNDEZ: I think what you
19 were referring to is the one that you mentioned in the
20 conclusions. The problem is the translation says "equipo
21 técnico revisión" as opposed to "equipo técnico revisar."

22 MS. TAVERAS: I understand that review has to do
23 with those projects that have been modified and that
24 revisions are introduced. Is that what you're referring
25 to, or are you referring to an evaluation?

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1 MR. ALLISON: Is that a question for me?

2 PRESIDENT RAMÍREZ HERNÁNDEZ: No, just a
3 clarification. And let me tell you how I understood your
4 question, which was to which team you are referring when
5 you're talking about this technical team. Is that correct?

6 MR. ALLISON: Yeah, my question--

7 MS. SILBERMAN: Mr. Allison, it--

8 MR. ALLISON: My question is whether there are
9 dedicated MMA employees who deal with project revisions who
10 are assigned to review revised project plans or whether
11 they're all part of the same evaluation team.

12 MS. SILBERMAN: I think the confusion is that the
13 word "para revisar" in Spanish means to review, so it may
14 just be a confusion with the translation. So,
15 that's--they're just trying to figure that out.

16 MR. ALLISON: Okay. Let's move on.

17 BY MR. ALLISON:

18 Q. It says--whether they've reviewed it--"The project
19 is viable from an environmental perspective according to
20 the measures in the plan of environmental management and
21 modification."

22 Do you see that?

23 A. Where are you?

24 Q. In the same paragraph there.

25 A. In the conclusion paragraph?

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1 Q. In the conclusion, yeah.

2 A. So conclusion, first paragraph?

3 Q. Yeah, where it's underlined. It says, "The

4 project is viable from an economic perspective."

5 Do you see that?

6 A. I do.

7 Q. It then says, "In order to approve the project, it

8 is suggested to include the following dispositions of

9 environmental authorization."

10 Do you see that?

11 A. Yes.

12 Q. And it has exclusion of certain lots. Then it

13 says, "Definition of the type of structure of the homes and

14 materials. Change the location of a treatment plant."

15 And the final bullet says, "The project should

16 comply with Article 122 of Law 64-00," and then continues

17 to cite the law.

18 Do you see that?

19 A. I see that.

20 Q. If you flip to the next page, the underlined

21 conclusion of that bullet point reads, "Every plot which

22 has these topographical conditions will be eliminated and

23 disqualified from the project."

24 Do you see that?

25 A. I see that.

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1 Q. And then there's a discussion of "ensuring that no

2 activity is within 30 meters of any water sources."

3 Do you see that?

4 A. I do.

5 Q. And then it concludes and says, "This project is

6 in a vulnerable area due to the amount of water which is

7 sourced there from streams and brooks which are used as a

8 source for the Yaque del Sur River. Therefore, the

9 municipal authority of Jarabacoa must keep a watchful eye

10 to ensure strict adherence to the rulings by those who buy

11 the lots and make sure the project complies with

12 construction requirements using the correct materials for

13 housing."

14 Do you see that?

15 A. I do.

16 Q. And so Mirador del Pino was in a vulnerable area,

17 to use the MMA's words, and it was permitted to remove any

18 plots that had slopes greater than 60 percent, and it was

19 approved; correct?

20 A. That is correct, yes.

21 Q. Did the MMA write to Jamaca de Dios and say, "You

22 need to define the type of structure of homes and materials

23 you're going to use in your expansion request"?

24 A. It did not, it did not write to it.

25 Q. Did it write and say, "You need to remove from

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1 your request any part of your project that has slopes in

2 excess of 60 percent"?

3 A. It did not write that.

4 Q. Mirador was allowed to develop its project despite

5 the fact that it was located in an environmentally

6 vulnerable area; correct?

7 A. No. The environmentally vulnerable areas were

8 withdrawn, and the part of the project that it could be

9 managed with a certain impact was provided, and some lots

10 were eliminated. And that is why it could not build in

11 areas where the slope was over 60 percent.

12 Q. Okay. Was it where the slopes were over

13 60 percent that made it environmentally vulnerable?

14 A. Yes. And the ones close to the stream.

15 Q. And so since Jamaca de Dios was fully rejected, is

16 it your position that all 283,000 square meters of the

17 expansion request for Jamaca de Dios were environmentally

18 fragile?

19 A. That is correct. Because of the location of the

20 project and the altitude where it's in and the rainfall and

21 the conditions of the soil and the vegetation--well, all

22 this made it so that if the land was to be used, the impact

23 was going to be quite great.

24 The MMA, when analyzing this, sought to have the

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1 development--the developer invest²⁹ in an area that

2 evidenced environmental conditions that the MMA could not

3 approve because environmental damage was going to be caused

4 with any use of the land.

5 In the other projects, that was not the case. At

6 least the projects that are worked on.

7 Now, you asked about La Montaña. I can't really

8 tell you about that. I was at the point where the project

9 was to be rejected. I don't know what else was submitted

10 after that.

11 Q. Do you know that La Montaña has been approved to

12 develop up to 1300 meters above sea level?

13 A. I did not know that.

14 Q. And do you know that that's higher than the top of

15 Jamaca de Dios?

16 A. I do. 1300; right? I don't know about the top of

17 JDD.

18 Q. It's in the record, but it's not 1300 meters above

19 sea level.

20 Moving on to the final project, but there are some

21 attorneys' eyes only documents in connection with this.

22 Not all of them, but I think it makes sense to cut

²⁹ Original in Spanish: "lo que buscó ahí es evitar hacerle una inversión al promotor".

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1 everything off now and move through those.

2 PRESIDENT RAMÍREZ HERNÁNDEZ: Let's take

3 three minutes, two-minute break.

4 THE WITNESS: Can I use the restroom?

5 PRESIDENT RAMÍREZ HERNÁNDEZ: Yes, of course.

6 Let's take a five-minute break.

7 (Brief recess.)

8 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Very well.

9 BY MR. ALLISON:

10 Q. Hello again, Mr. Navarro.

11 I'd like to talk to you about another project that

12 you were directly involved with when you were Director of

13 Environmental Assessment, and that is Jarabacoa Mountain

14 Garden. Are you familiar with that project?

15 A. I do remember.

16 Q. And do you recall that Jarabacoa Mountain Garden

17 is just a few kilometers from Jamaca de Dios?

18 A. Yes.

19 Q. It's on the other side of the Baiguata River;

20 right?

21 A. Yes.

22 Q. Indeed, it sits directly above the Baiguata River;

23 correct?

24 A. Yes.

25 Q. And Jarabacoa Mountain Garden was approved to

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1 develop 115 lots; correct?

2 A. Yes.

3 Q. And you've seen the site plan, I'm sure. But

4 let's take a look at that. Let's look at demonstrative

5 number 6, which we'll just put up on the screen. Let's go

6 back one to demonstrative 5. This is the Jarabacoa

7 Mountain Garden site plan. Do you recall seeing this

8 document as part of your work as the director of

9 environmental assessment?

10 A. I do remember, yes.

11 Q. And we see the Baiguata River on the left of the

12 site plan. There's essentially a brief border and then

13 lots begin to be built directly above the river. Do you

14 see that?

15 A. Yes.

16 Q. And then Jarabacoa Mountain Garden climbs to an

17 altitude of approximately 1060 meters where it abuts to

18 Paso Alto; correct?

19 A. Correct.

20 Q. And so if we look at demonstrative 12, this is a

21 map of the Jarabacoa Mountain Garden project and Paso Alto;

22 correct?

23 A. Correct.

24 Q. And the black areas in this demonstrative are

25 areas where the slopes of those two projects exceed

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1 60 percent; correct?

2 A. Correct.

3 Q. And Paso Alto goes all the way up to the top of

4 the mountain and then back down the other side some. Is

5 that correct?

6 A. That is correct.

7 Q. And the top of that mountain which I believe is

8 Loma Barrero is 1200 meters; correct?

9 A. 1180.

10 Q. I think there are other places where it's

11 documented as 12 and 1190, but 20 meters; right? Give or

12 take? We don't need to argue about 20 meters; right?

13 And that is only 60 meters below the top of Jamaca

14 de Dios Phase 2; correct?

15 A. Of the highest portion of it.

16 Q. That's right. The expansion project of Jamaca de

17 Dios climbed to the top of Loma Peña where the Ballantines

18 owned land, you're familiar with that, and the top of their

19 project--the highest part of their project is 1260 meters

20 above sea level; correct?

21 A. Correct.

22 Q. Which is 60 or 70 meters above Paso Alto; correct?

23 A. Correct.

24 Q. And we have the slope percentages, but we can

25 agree because I think these come from your--I think they do

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1 come from your Appendix B that 43 percent of Paso Alto is

2 on land with slopes in excess of 60 percent; right?

3 A. No. Paso Alto is not like that. It's 17 percent.

4 Q. I'm sorry. Paso Alto is 17 percent. Jarabacoa

5 Mountain Garden is 43 percent; right?

6 A. Yes. JMG. Yes.

7 Q. And so under Article 122, 43 percent of Jarabacoa

8 Mountain Garden couldn't be developed without violating the

9 slope law; correct?

10 A. Correct.

11 Q. And then if we go to Demonstrative 6 we put your

12 slope map on top of the Jarabacoa Mountain approved site

13 plan and we see a lot of development above 40--above

14 60 percent; correct?

15 A. A lot of subdivisions are over 60 percent. If you

16 look at the roadways, the trace of the roadways do ascend

17 would entail a great number of switchbacks. And without

18 the subdivision, those switchbacks would not be necessary

19 because of the location of the project³⁰, you would see that

20 the houses are located in the land where the slope is low.

21 The yards of the subdivisions would have to be left unused,

22 this because of restrictions of the Ministry and because of

³⁰ Original in Spanish: "Si se fija en las carreteras, el trazo de la carretera para ascender por obligación conllevaría un sinnúmero de curvas en zigzag que ahí dijimos."

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1 the physical restrictions of the area. In order to ascend,
2 they wouldn't have to construct switchbacks in the roads as
3 JDD would have to do. And this impacts on the area.

4 So if you do it like that and the roadway doesn't
5 have a lot of inclination the benefit is not as much. Of
6 course there is an inclination. It is a mountain area that
7 is undeniable. But they're going to have to do works of
8 art in order to take the water out, but this is true for
9 the roadway and this is shown by the trajectory of the
10 roadway.

11 So this will be different from JDD's roadway,
12 totally vertical.³¹ This has to do with the reality of the
13 land location and the mountain.

14 This is not an invention of the Ministry, and it
15 is not an invention coming from them either.

16 Q. Okay. We'll get to all that. But I'd like to
17 conclude the thought I had which is that the MMA approved a
18 site plan for 115 lots in an area 43 percent of which
19 exceeded 60 percent. Is that true?

20 A. They are required to use only 5 percent. The
21 areas that are shown here within that lot.

22 Q. So--I'm confused. So it's okay that this site

³¹ Original in Spanish: "Sin embargo, es evidente en la conformación de la carretera y eso se evidencia en el recorrido que se hace, que no requiere a ascender como lo requeriría de manera totalmente vertical Jamaca de Dios."

1 plan calls for houses, entire lots--let's look at the ones
2 right next to the river there down in the lower corner.
3 Those slopes cross over all ten of those lots. But if they
4 can find 5 percent of the lot where the slope doesn't
5 exceed 60 percent, it's okay to develop?

6 A. They can build the house; yes.

7 Q. Okay. So if the Ballantines could find 5 percent
8 of the lot that didn't exceed 60 percent, could they have
9 built a house on that?

10 A. Under those environmental conditions, no. That
11 land has a certain feature that allowed it for a road to be
12 built much before asking for the authorization of the road.
13 And they were able to use strong rock in that case. If
14 this were unconsolidated soil, that road would have been
15 the subject of landslides.

16 Q. Okay. And we'll see some pictures later where
17 there are landslides at the road at JMG. But I just want
18 to confirm--actually, when you went to visit JMG--you've
19 testified about how the road was already built apparently
20 in violation of MMA permits. But that report says only
21 25 percent of the JMG road had been built. Are you aware
22 of that?

23 A. I did.

24 Q. Okay. So they still had to build 75 percent of
25 the road.

1 I'm sorry. Were you done or--oh, excuse me.
2 Translation in my ear.

3 So I just want to make sure I understand. The
4 fact that 43 percent of this land is above the
5 developmental area permitted by Article 122 was not a
6 barrier to its construction because you say the developer
7 could find 5 percent areas within these site plans on which
8 to construct their lodge, then everything's okay?

9 A. There is a limitation for construction. If you
10 look, the traces of the roadway are the ones that are going
11 to allow you to have access to the houses. They were
12 looking at limiting the use of the 60 percent by having
13 that kind of roadway trace.

14 Q. Okay. And so is the MMA only looking to see
15 whether or not a road is going to cross 60 percent when it
16 evaluates the project?

17 A. No. What happens is that the roadway is the
18 facility that covers the greatest extent of land.

19 Q. Well, let's look at the roadways here as long as
20 we're on that topic. And let's go to Demonstrative 7 which
21 highlights in green the roadways that were planned and
22 approved at Jarabacoa Mountain Garden. And is it your
23 contention that these roads don't cross areas of 60 percent
24 slope.

25 A. Yes, they do cross areas of 60 percent. But the

1 most significant roadway would be the two--the lower
2 portion. The two that are parallel to the river were
3 subject to limitations. The one on the top was already
4 constructed. In connection with the other one, because of
5 the trace that it has, and they're able to go up into the
6 mountain without a lot of earth movement.

7 They don't have to build an ascent that is as
8 steep as the one that you have to have in JDD. So they can
9 go up that 60 percent without altering the space. They are
10 maintaining the vegetation as required because in this
11 project, the vegetation was not quite altered, although
12 this was an agricultural area. So in that project some of
13 the plots can be managed. Other plots of land are limited
14 by the permit itself.

15 The plots of the lower portion were limited, and
16 they had to relocate the project. That area is not subject
17 to development. The only area that's subject to
18 development is the one that does not have a steep slope.

19 This master plan has to be updated. That
20 portion--the lower portion was not approved.

21 Q. This is the map--we'll look at that because I
22 think the test--the evidentiary record will show that's
23 incorrect. I'm sorry?

24 THE INTERPRETER: Could you please repeat, the
25 microphone was off, could you please repeat?

1
2 BY MR. ALLISON
3 Q. We'll look at that and we'll look at the site plan
4 that was requested and the site plan that was approved and
5 I just want--you say a lot in what you said there, and I
6 want to see if I can go through it a little bit.
7 You talked about a big road--
8 MR. Di ROSA: Mr. Allison, I'm really sorry to
9 interrupt.
10 Mr. Chairman, we're advised by our clients that
11 Mr. Graviel Peña is a consultant on environmental matters
12 in the Dominican Republic and that maybe it would not be
13 appropriate for him to be listening to this particular
14 testimony on these particular documents. So we were
15 wondering if they mind if he is removed from the hearing
16 room.
17 MR. ALLISON: Well, we're talking about a document
18 that hasn't been marked. This comes from your Witness
19 Statement and from our 330 which is a document that you
20 submitted to the thing. These are not attorneys eyes-only
21 documents, this is a public hearing, you know.
22 PRESIDENT RAMÍREZ HERNÁNDEZ: But you yourself
23 said that this portion--and we've made the arrangement not
24 to be broadcast, so I think it's better that he can leave
25 this part.

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1 Thank you very much, sir.
2 MR. Di ROSA: Sorry for the interruption.
3 (Mr. Peña exited the hearing room.)
4 BY MR. ALLISON:
5 Q. I want to go back to the answer that you just
6 gave, in which you said that roads do cross areas of
7 60 percent but the most significant roadway would be the
8 lower portion. The two that are parallel to the river were
9 subject to limitations; is that right?
10 A. Correct.
11 Q. Correct. So the roads that crossed 60 percent
12 here had already been constructed? Is that your testimony?
13 A. The first one.
14 Q. So as long as the main road is constructed, you
15 can have access roads that cross 60 percent, and that
16 doesn't run afoul of MMA regulations?
17 A. No. What I'm saying is to build that access road
18 did not imply cutting the terrain to have access to it. It
19 is easy to see because there is no curb to make it easier
20 for the vehicle to go up. Those terrains had, already had
21 crops. So some of those roads were cut by the farmers
22 themselves.
23 Q. And were those the roads that Jarabacoa Mountain
24 Garden were going to use for their development?
25 A. Yes.

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1 Q. The roads cut by the farmers?
2 A. Mostly. They are the ones to have access to the
3 upper portion of the mountain.
4 Q. Let's look at Demonstrative 8 because it's a
5 little bit easier. These are the approved roads that
6 Jarabacoa Mountain Garden and they include the contour
7 lines that Respondent put into the record at R-330.
8 And I believe in your testimony one of your
9 arguments was that the roads here were fine because they
10 didn't have to transversely cross contour lines.
11 Do you recall that?
12 A. I do recall that.
13 Q. And I want to point out a couple specific ones.
14 But unless I'm mistaken, it appears that many of these
15 access roads cross contour lines throughout this project;
16 is that right?
17 A. As a matter of fact, they are parallel to the
18 contour line. At least most of them are. Only a few
19 points do they need to break that contour line.
20 Q. So if some of the roads break contour lines it's
21 okay as long as it's only a few of all of the roads. And
22 yet you approved these roads and the breaking of these
23 contour lines. And your testimony is that you rejected
24 Jamaca de Dios because and as of yet undefined pathway what
25 would apparently cross too many contour lines; is that

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1 right?
2 A. The only path to get to the upper portion of the
3 mountain is by breaking the contour line because they are
4 going to go from the lowest to the highest point through
5 that contour line. It is easy to see here they are not
6 going to ascend to the higher section by going through
7 contour lines or breaking them. They are going to go above
8 or parallel to them.
9 That allows you not to make any--introduce any
10 disturbance to the road and also introducing a
11 house--housing that is of low impact to the environment.
12 The runoff at that point will come down relatively at the
13 same pace as the runoff under natural conditions,
14 relatively. It will--they will be a little bit faster
15 because there is a water treatment. But that will not
16 disrupt natural drainage going down. It will remain with
17 the same drainage there is parallel to the topography.
18 Q. All of these roads are connected, are they not?
19 There's no stand-alone road in that picture?
20 A. There are some stand-alone roads that would need
21 to be accessed from above. The roads above have not been
22 defined. Access is from the higher portion.
23 Q. Well, if I come in to Jarabacoa Mountain from the
24 lower road, which you say was built, but the documents say
25 was only 25 percent built, I can get to any point within

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1 this approved project because at some point the roads all
2 connect; right?

3 A. I did not understand your question.

4 Q. Well, my question is: There's no road in this
5 approved site plan that isn't connected to some other road
6 that would allow you if you were on any road to travel to
7 any point of the project. Am I right?

8 A. That is correct. Yes, based on this site plan.

9 Q. And we know that the lower road is at
10 approximately--my eyes are quite bad--but at approximately
11 700--700, 750 meters, and the project climbs all the way up
12 to over 1060; right?

13 A. Yes. Talking about contour lines, yes, 1060.

14 Q. So there's a 300-meter elevation gain within the
15 approved site plan. And is it your testimony that the road
16 design that was laid out here wouldn't require cutting
17 across contour lines?

18 A. That's what we can see here. The roads are
19 parallel to the contour lines. And this is a condition of
20 the terrain that was randomly favorable. But you do not
21 need to establish a perpendicular path to the contour line.
22 One or two roads should have a perpendicular line going
23 through five contour lines, if I can see correctly. So the
24 vertical path break in contour lines are relatively few.

25 Q. Okay. Well, let's go to Claimants' Demonstrative

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1 8.1 and that's the same picture, but it highlights a few of
2 the roads to test what it is that you've said. If we look
3 at Road 6 it appears to cross several contour lines in a
4 very short period. And Road 3, the same. And if we look
5 at Road 4 it comes along a contour line for half of its
6 distance, and then it breaks five contour lines
7 immediately. Do you see that?

8 A. I see that.

9 Q. So some of the roads--as long as you have a couple
10 roads that follow contour lines, you can get your project
11 approved. Is that what you're saying?

12 A. Yes. If the intervention is low and also Road 6,
13 Road 2 were not presented as part of that project. That
14 the entrance--the entry point there is from above. Road
15 number 6 was not built.³²

16 Q. So it would have to be built, you approved it to
17 be built, and yet it crosses almost a thousand feet in a
18 small area. In fact, if we go to Claimants' Demonstrative
19 Exhibit 8.2.

20 A. Where do you see a thousand feet?

21 Q. I may be--I can't count the number of contour
22 lines that Road 6 crosses. But let's put--let's put

³² Original in Spanish: "Eso solamente se le permite entrando por arriba. O sea el camino 6 en sí no va construido..".

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1 Claimants' Demonstrative 8.1 next to Claimants'
2 Demonstrative 8.2. So these are the roads that--can we put
3 them side by side? And you see what you say about the
4 green road at the bottom which I think is the main road
5 that had been built 25 percent. But we see other roads
6 that cross significant altitude heights over very short
7 periods. And your--your Witness Statement describes how to
8 calculate the percentage grade by simply taking it as a
9 factor of the increase in height over the length, and we
10 can determine what percentage grade the road would have to
11 be; right? Did you do any--

12 A. Yes.

13 Q. I'm sorry. Did you do any analysis like this in
14 connection with your approval of JMG?

15 A. Sorry. Did you mean Jamaca?

16 Q. I'm sorry. Jamaca. No, no, no. I meant, did you
17 do an analysis of the roads that were part of the site plan
18 that you approved to determine what degree of incline those
19 roads would have to be in order to be built as they were
20 proposed and approved by the MMA? Did you do that analysis
21 when you approved JMG?

22 A. The roads analyzed with the map of the area of the
23 slope in areas.

24 Q. And is that--does that analysis appear anywhere in
25 the documents relating to your review and consideration of

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1 JMG? We're going to look at the documents. We can wait to
2 do that. But as you sit here today, do you recall an
3 analysis that either you approved as part of your
4 involvement in the Technical Evaluation Committee that
5 ultimately approved JMG or anybody approved saying, "We
6 need to do an analysis of how steep these roads were going
7 to have to be"?

8 A. Yes, it was analyzed. Yes, it was. That
9 information was analyzed.

10 Q. And where are the documents that show that
11 analysis?

12 A. They should be included in the--in the file. So
13 that's the reason why we limited the areas with the low
14 slope close to the river, including an area--a green area
15 that they establish in the map that you presented.

16 PRESIDENT RAMÍREZ HERNÁNDEZ: Mr. Allison, maybe
17 I'm following it wrong. But I don't know whether the
18 witness is being confused of whether you talk about JMG.
19 Maybe he's--he thinks you're referring to Jarabacoa as
20 opposed to--

21 MR. ALLISON: I'll use the full words.

22 PRESIDENT RAMÍREZ HERNÁNDEZ: Yes, please.

23 BY MR. ALLISON:

24 Q. When you were collecting documents to provide to
25 your counsel in connection with the Jarabacoa Mountain

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1 Garden project, do you recall seeing any of the analyses
2 that you just described to the Tribunal?

3 A. Yes, it was one of the analyses that was presented
4 here.

5 Q. And what analysis is that?

6 A. The one for Jarabacoa Mountain Garden. And the
7 area that was affected by Jarabacoa Mountain Garden.

8 Q. Well, you just spent a lot of time explaining
9 about the roads that were approved and how it's okay if
10 some cross contour lines, but not all of them. And I asked
11 you if you had done an analysis of that specific road issue
12 in connection with your approval of Jarabacoa Mountain
13 Garden, and I think you said yes. And so now I'm asking:
14 Where in Respondent's files related to Jarabacoa Mountain
15 would I find that?

16 A. I don't know where the file is. But my report
17 includes the Jarabacoa Mountain Garden analysis. And the
18 map was drafted.

19 Q. Which map?

20 A. And that map also established the points that were
21 not going to be disturbed or used. The pages are numbered,
22 but this is the map. This is the map.

23 Q. That map. Okay. That's the slope map that we
24 looked at earlier; right, that identifies the areas with
25 60-degree slopes and 40-degree slopes and the like;

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1 correct?

2 A. That is correct.

3 Q. And in fact if you look at that map for Jarabacoa
4 Mountain Garden, would you agree with me that 76 percent of
5 Jarabacoa Mountain Garden has slopes over 40 percent in
6 addition to the 43 percent of Jarabacoa Mountain Garden
7 that has slopes over 60 percent?

8 A. I don't recall that piece of information, the one
9 reporting 43 percent in connection with slopes higher than
10 60 percent. I don't recall that.

11 Q. You don't recall where you said in your testimony
12 that 43 percent of Jarabacoa Mountain Garden has slopes
13 greater than 60 percent?

14 A. Yes, that's what I'm telling you. I--no, I do
15 have that information. But if you tell me where to find
16 it, I can assert that figure. I don't recall by heart.³³

17 Q. Well, we don't--

18 A. So I--yes, I see the 43 percent. That one I
19 remember.

20 Q. You have in your First Report, Table 2, that
21 identifies Jarabacoa Mountain Garden. It's on Page 24.
22 And first, it describes the altitude gain. And it was

³³ Original in Spanish adds: "Pero no puedo afirmar el número sin -- no lo tengo de memoria. En la página 27 está establecido el 43 por ciento de Jarabacoa Mountain Garden".

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1 going to climb 440 meters above the Baiguarte River. Do you
2 see that?

3 A. Where?

4 Q. If you blow up Jarabacoa Mountain Garden. Can you
5 do that? You can see it in your report, if you'd like.

6 Okay. There's Jarabacoa Mountain Garden. You
7 site project name and then you have the altitude and the
8 difference between the bottom and the top is the altitude
9 climb, 440 meters; correct?

10 A. Correct.

11 Q. And the area with the slope above 60 percent, is
12 43 percent. Do you see that?

13 A. I see that.

14 Q. And then you say, "Concentration of slopes to the
15 northeast." And I'd like to go back to your slope map
16 which is Claimants' Demonstrative number 4. On the left is
17 Jamaca de Dios 2, and on the right is Jarabacoa Mountain
18 Garden. And you're saying the slopes at Jarabacoa Mountain
19 Garden are concentrated in the northeast?

20 MS. TAVERAS: Excuse me. Mr. Allison, can you
21 verify if the map of Jamaca de Dios is Zacarías' map or is
22 it Kay's map?

23 MR. ALLISON: It says right on there.

24 MS. TAVERAS: I can't see it.

25 MR. ALLISON: That's Kay's map, and that's his

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1 map.

2 MS. TAVERAS: Could you repeat that, please.

3 MR. ALLISON: Kay's map on the left for Jamaca de
4 Dios. And it's Jarabacoa Mountain Garden's map on the
5 right, from Navarro. Okay.

6 MS. TAVERAS: Okay.

7 BY MR. ALLISON:

8 Q. You testified earlier about the slight
9 difference--

10 A. But there is a difference that we need to
11 highlight. Jarabacoa Mountain Garden has a 12.5-meter
12 resolution with--Jamaca de Dios map has a 30-meter
13 resolution. That is a visual difference that may be
14 confusing.

15 Q. Is it your testimony that--

16 A. There is more slope in Jamaca. More than you can
17 actually see here.

18 Q. Let's look at your Report. You've identified the
19 slope at Jamaca in the very same table we were just looking
20 at on Page 24 of your report. You state, 19 percent of
21 Jamaca de Dios's expansion is more than 60 percent. And
22 you state Jarabacoa Mountain Garden, more than 60 percent,
23 is 43 percent of the project.

24 A. Yes.

25 Q. But is it your contention now that Jamaca is

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1 really steeper than Jarabacoa Mountain Garden?
 2 A. No, I did not say that. What I said is that
 3 visually the Jamaca de Dios project does not have the same
 4 resolution as the one of Mountain Garden. It may appear to
 5 have less slope--fewer slopes, but it has more than the
 6 ones you have here.
 7 You should compare both maps with the same
 8 resolution. Visually, you may get the impression that the
 9 sloping is not as significant. In Jamaca, the drawing is
 10 really like a curb, whereas here in Jarabacoa Mountain
 11 Garden you can see the pixels. You can see the grids
 12 clearly marked. Therefore, the resolution of both maps is
 13 different. You may have the visual impression that the
 14 slope is less of a slope in Jamaca.
 15 Q. Well, let's just put up the Jarabacoa Mountain
 16 Garden, at Claimants' Demonstrative 3.
 17 And I think the sum of the testimony you've given
 18 is that despite all of the area with slopes in excess of
 19 60 percent, you could find roads and have eight roads that
 20 connect together, and you wouldn't have to cross too many
 21 contour lines, and you wouldn't have to cross too many
 22 areas of 60-percent slope, but you could get a road, and
 23 then you could put 115 lots on there. Because as long as
 24 5 percent of the land is not over 60 percent, you can build
 25 a house there.

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1 Is that a fair summation of your testimony,
 2 Mr. Navarro?
 3 A. That is correct.
 4 Q. Let's look at some of the documents related to
 5 your analysis at the time, in 2012 and '13, of Jarabacoa
 6 Mountain Garden as opposed to your analysis in 2017 in
 7 connection with this arbitration.
 8 So let's start with C-118, which is not attorneys'
 9 eyes only, but may be sensitive. It's in Spanish. It's
 10 your binder at Tab 9.
 11 Do you have that document in front of you?
 12 A. No, I do not.
 13 Q. It's at Tab 9 of your binder, sir. This is a
 14 rejection letter to Mr. Duran dated October 16th, 2012, in
 15 which the MMA found that the project was not
 16 environmentally viable, if you see, in the last line, due
 17 to the following. And then on the next page there are a
 18 series of bullet points. It says, "The land is"--for the
 19 project is within the water-producing area of the Salto
 20 Baiguate National Park."
 21 Do you see that?
 22 A. Yes, I do.
 23 Q. And the next bullet says that "The project, due to
 24 its location, would affect the local hydrological system."
 25 Do you see that?

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1 A. I do.
 2 Q. And then the next bullet says, "The land for the
 3 project is of a forestry location suitable for forests,
 4 pastures, and mountain or perennial cultivation, as its
 5 topography is steep. So movement of the earth would be
 6 needed to carry out the project which could potentially
 7 lead to the erosion of the soil and hence sedimentation in
 8 the water basin."
 9 Do you see that?
 10 A. Yes, I do.
 11 Q. And that means that there could be landslides in
 12 which the soil would flow down into the water basin;
 13 correct?
 14 A. That is correct.
 15 Q. It also says that "Intervention on the land means
 16 the destruction of the habitat due to the elimination of
 17 the vegetation, the migration of the species and fauna
 18 associated with such vegetation, contamination of the water
 19 due to the dragging of sediment and the waterproofing of
 20 the surface area and in consequence, a reduction in the
 21 recharging of the aquifers and a change in the pattern of
 22 the runoff."
 23 Do you see that?
 24 A. I do.
 25 Q. So the MMA was concerned about runoff. They were

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1 concerned about landslides. They were concerned about
 2 water supply and the hydrological system, and they denied
 3 Jarabacoa Mountain Garden; correct?
 4 A. Correct.
 5 Q. And you weren't at the MMA at the time of
 6 this--you weren't a Director of Environmental Assessment at
 7 this time, were you?
 8 A. I was with the Ministry, but I was not the
 9 director.
 10 Q. But you're aware that Jarabacoa Mountain Garden
 11 promptly sought a reconsideration of this denial; correct?
 12 A. I don't know if it was rapidly, but they did
 13 request reconsideration when I was already the director.
 14 Q. Okay. And that letter is in the record at C-119,
 15 and I won't take the Tribunal to it. But after he filed
 16 his appeal, there were additional inspections of Jarabacoa
 17 Mountain Garden; correct?
 18 A. Correct. May I add something?
 19 PRESIDENT RAMÍREZ HERNÁNDEZ: Please proceed.
 20 THE WITNESS: In the first bullet, it implied that
 21 the project was in a protected area and as a result, the
 22 committee considered that it was not feasible. Later on,
 23 it was identified as an area that was not protected.
 24 BY MR. ALLISON:
 25 Q. Okay. So when the--this letter was all based on

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1 the fact that whoever wrote it was confused and thought it
2 was in the park. And when they realized it wasn't in the
3 park, then these other concerns didn't matter. Is that
4 your testimony?

5 A. The considerations are of importance. In all
6 projects, all environmental aspects are to be considered.
7 The point is whether the use can be made, running the risks
8 that that use may bring about.

9 Q. Okay. But this letter identifies those reasons,
10 which are four bullet points. And then it identifies that
11 the project is contradict--in contradiction with several
12 articles. And I don't see the fact that it's in a national
13 park is one of the reasons why the project was rejected.

14 A. That's what I'm trying to tell you. Because the
15 national park appears there. The technical committee
16 decided that it was in a protected area. This was not used
17 by CORAAVEGA. In the decision, they--there were certain
18 aspects that led this to be relooked at.

19 Q. Okay. But I took your testimony to mean that the
20 real reason why it was denied here was because they were
21 confused, and it was in a national park, not because of the
22 risks of landslide and water runoff and soil erosion.

23 And the reason I was confused about that is that
24 they identify these projects, none of which says it's in
25 the national park, but it says it's in the water-producing

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1 area of the national park. And we'll discuss that with
2 your colleague, Mr. Martínez. But then it says, "For such
3 reason, the execution of such cited projects is in
4 contradiction with a series of articles," none of which
5 mention the existence of the national park.

6 So how is it that you now, who weren't there and
7 didn't write this letter and weren't part of the team, can
8 somehow divine what really motivated the letter despite
9 nothing in the letter about that?

10 A. Because I studied the reconsideration of the
11 projects and I assessed the points, whether the Ministry
12 made some mistakes when identifying the information.

13 I did not divine anything. I looked at the file.
14 I looked at the background of the file and I gained
15 knowledge of the project. There was another visit made.

16 Q. Okay. So you looked at this letter and now that
17 you've looked at this letter, it's your opinion that the
18 reason this letter was issued and the project was denied
19 was because they were confused and thought it was in a
20 national park. Is that your testimony?

21 A. They had information to make a decision, and they
22 made their decision based on the information they had. But
23 the information was not fully correct.

24 Q. You know, I don't want to spend too much time on
25 this, but how did you come to learn that information? Did

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1 you talk to the author of this letter, Ms. González, in
2 preparation for your testimony today?

3 A. I did not.

4 Q. She wrote the letter. But now, even though you
5 haven't spoken to her, you've read this letter, and you've
6 divined that the real reason it was denied, because of
7 confusion by the inspectors that it was in the national
8 park; is that right?

9 A. No, that is not correct. I assessed the
10 information of the project by making a new visit of
11 reconsideration.

12 After that new visit of reconsideration, I saw
13 that some of the points that they took into account when
14 taking their reconsideration decision were not correct. A
15 corrected--a corrected document was brought and that's what
16 happened. There was--there's no intimidation there.³⁴ The
17 Vice Minister does not draft the letter. She has a team
18 that she works with, and the team presents the data to her.
19 And I talked to members of that team.

20 Q. Which members of the team did you talk to?

21 A. I talked to the assessment team, and the visit was
22 conducted and all the information was assessed in
23 connection with this project.

³⁴ Original in Spanish: "No hay adivinanza ahí";.

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1 When you look at the environmental, you look for
2 information in geographical systems, at the field,
3 institutions. CORAAVEGA was not used for that. Vegilla
4 (phonetic) was and--I'm sorry. The system to water--the
5 watering system was used there.³⁵

6 Q. Thank you, Mr. Navarro.

7 A. Yes. I'm talking about water for cultural
8 purposes.

9 THE INTERPRETER: I'm sorry. The interpreter
10 needed clarification of a word.

11 BY MR. ALLISON:

12 Q. Let's just go back to the first page of this
13 document. This is the proposed--it says here what his
14 proposal is. On October 16, 2012. And its--in the second
15 paragraph says, "It's a proposal to carry out a division
16 into lots of 115 lots."

17 Do you see that?

18 A. I do.

19 Q. So at the time he was rejected, he was planning to
20 build 115 lots; right?

21 A. Correct.

22 Q. [REDACTED]

³⁵ Original in Spanish: "Aparece ahí CORAAVEGA. No era una utilizada para CORAAVEGA sino para regadío y se buscó información con la institución que trabaja con el regadío";.

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 3 A. [REDACTED]
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 19 Now, so I'm clear, the MMA didn't write to
 20 Jamaca de Dios and say, "We're going to regulate you.
 21 We're going to make sure the work is completed and carried
 22 out in the way that it should be. And assuming that, and
 23 assuming execution of the suggestions we give to you, we
 24 consider your project viable."
 25 They didn't do that; right?

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1 A. That is established in the environmental
2 authorization.

3 Q. And they didn't give any suggestions like they put
4 here? Did the MMA give any suggestions to Jamaca de Dios
5 with respect to its expansion request?

6 A. The Ministry does not provide suggestions. The
7 Ministry provides limitations. The developers should
8 present its suggestions to the Ministry as to what it wants
9 to do.

10 Q. [REDACTED]
11 [REDACTED]
12 [REDACTED] It's a--I can't remember
13 what word you used, but these aren't suggestions. These
14 are things offered by Jarabacoa Mountain Garden; right?

15 A. These are limitations that are imposed. And they
16 are the ones that need to provide suggestions. The
17 Ministry does not provide these suggestions.

18 Q. Okay. Did the Ministry provide any limitations to
19 Jamaca de Dios' expansion request, or did it deny it and
20 say, "Go find another plot of land"?

21 A. It did provide information in the sense that the
22 lot where the project was to be located had environmental
23 conditions and that impeded the use proposed.

24 Q. Right.

25 A. And it asked to find another place.

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1 Q. Okay. And in your report at Paragraph 65(c) you
2 say, "The developer agreed to limit development to areas
3 with soft slopes, about 60 percent of the land, and to
4 maintain areas with stronger slopes as protection areas and
5 beautification of the environment."

6 Do you see that in your First Report at
7 Paragraph 65?

8 A. Where is that?

9 Q. Page 29 of your report, the last sentence of
10 Paragraph 65(c). You write, "In addition, the developers
11 of this project"--

12 PRESIDENT RAMÍREZ HERNÁNDEZ: It's on Page 33.

13 MR. ALLISON: In the Spanish version. I'm sorry.

14 PRESIDENT RAMÍREZ HERNÁNDEZ: Page 33,
15 Paragraph 65. And here it says "In addition."

16 BY MR. ALLISON:

17 Q. "In addition, the developers of this project
18 agreed to limit development to areas with soft slopes,
19 about 60 percent of the land, and to maintain areas with
20 stronger slopes as protection areas and beautification of
21 the environment."

22 Do you see that? Is that what you wrote here?

23 A. I do see that. That is information that I
24 submitted.

25 Q. And if we know that 43 percent of Jarabacoa

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1 Mountain Garden has slopes in excess of 60 percent, does
2 that mean that soft slopes, in order to be 60 percent of
3 the land, is anything less than 60 percent?

4 A. The point here is that they could use for the
5 construction of houses spaces with a slight slope and leave
6 the rest of the land that had a slope as a conservation
7 area.

8 Q. But Jamaca couldn't do that because there's no way
9 they could get a road up their hill; right?

10 A. It was a very fragile area, so they could not do
11 that.

12 Q. Let's just look at that letter quickly. It's
13 Exhibit R-153, and you can find it in your binder at
14 Tab 27. The English version is Tab 26. And I think this
15 is where you--this is what you cite to as support for the
16 developer's promise. And it's dated June 12, 2012.

17 Is this a submission from Mr. Duran? Is that a
18 submission from Mr. Duran, or is that an internal document
19 created by the MMA?

20 A. The developers sent this.

21 Q. And on Page 2, the developer says, "Despite its
22 mountainous characteristics, it has a high percentage,
23 60 degrees, of mild slopes, that is, slopes of less than
24 15 percent. The steeper slopes are intended to be left as
25 areas of protection and beautification of the

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1 surroundings."

2 Do you see that?

3 A. I do.

4 Q. And that's what you cited in your Report as
5 support for the developer's promise to stay on gentle
6 slopes; right?

7 A. Apart from the requirements set by the Ministry.

8 Q. And if we look at your appendix to your
9 First Report with the multicolored slope map of Jarabacoa
10 Mountain Garden, would it surprise you that less than
11 10 percent of Jarabacoa Mountain Garden has slopes of less
12 than 15 percent?

13 A. We assessed the information that was available to
14 us. The maps that you see are the maps that we assessed.

15 Q. Well, you assessed also the developer's promise
16 that 60 percent of his land had less than 15 percent
17 slopes; right?

18 A. We did not. We assessed our information, and we
19 made our decisions on the basis of our information. We
20 corroborated the information provided by the developer and
21 the technical team of developers.

22 Q. But did you corroborate this statement? You have
23 now, as part of this arbitration, we know that at least
24 76 percent of Jarabacoa Mountain Garden has slopes of over
25 40 percent.

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1 Here he's promising to you, "Hey. Sure, it's
 2 steep, but more than 60 percent of my land has slopes of
 3 less than 15 percent. I'll avoid those--or I'll only use
 4 those. And the steeper slopes are intended to be left as
 5 areas of protection and beautification of the surrounding."

6 You got that from the developer; right?

7 A. And that is what we verified, when we say that the
 8 use of land for housing will be 5 percent only, and the
 9 rest of the area has to be left unused.

10 Q. "Areas of protection and beautification of the
 11 surroundings." Did you think that meant they weren't going
 12 to be part of the development plan?

13 A. No.

14 Q. They were just going to be beautiful, and even
 15 though he was saying 60 percent of his property had slopes
 16 of less than 15 percent, you took that promise, and, in
 17 fact, cited it in your report as one of the reasons why
 18 Jarabacoa Mountain Garden is different than Jamaca.

19 And yet we know now two things. One, that
 20 statement is factually incorrect. And, two, the steeper
 21 slopes weren't left as areas of protection and
 22 beautification. Right?

23 A. That is your conclusion. I have not reached that
 24 conclusion.

25 Q. I'm cognizant of the time, but I need to point you

1 to a few other exhibits.

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 4 MR. Di ROSA: Mr. Chairman, can I just interrupt
 5 briefly to ask if Mr. Allison has an idea of how much
 6 longer he's going to go. Because we'll have some redirect,
 7 and so it might take a while still.
 8 MR. ALLISON: I'm trying to--I'm very close.
 9 MR. Di ROSA: Very, very close, as in two minutes
 10 or as in 20 minutes?
 11 MR. ALLISON: I can't tell you. When I get
 12 through this document, I'll take a minute to look at my
 13 notes, and then I think I can pass the witness.
 14 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay.
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 24 [REDACTED]
 25 [REDACTED]

1 Q. And when you visited, did you note that only
 2 25 percent of the road had been built?
 3 A. No. I did not see that.
 4 Q. And did you note the existence of erosion and
 5 landslides in the road already?
 6 A. Yes. They were observed.
 7 It was observed in a road that had not been
 8 finished. It had--the road had been cut, but the work had
 9 not been finished.
 10 Q. Okay. And so, as long as you finish cutting the
 11 road and completing the road, the risk of landslides isn't
 12 a problem?
 13 A. It is a problem, but you still need to build
 14 specific works to avoid that problem. Those works have not
 15 been conducted yet.
 16 Q. Okay. But the developer was saying that, "Don't
 17 worry, I'm going to build the road and there won't be
 18 landslides"; right?
 19 A. He was saying that he needed to build the road.
 20 He did not refer to the landslide. The environmental study
 21 that assesses the--that specifies the protections to be
 22 implemented.
 23 Q. Okay. But we started this with a lot of talk and
 24 concern about Phase 2 of Jamaca de Dios and the risk of
 25 landslide and runoff and soil stability, and you went out

1 in 2013 to visit Jarabacoa Mountain Garden and you observed
 2 landslides and soil erosion and that didn't cause you to be
 3 concerned about the environmental fragility of Jarabacoa
 4 Mountain Garden?
 5 A. Yes, it did concern me. We established measures
 6 to address that concern. This is what the Ministry later
 7 on assessed, that the items were being corrected, those
 8 items that could have led to environmental problems.
 9 Q. And did you establish measures to address the
 10 concern of environmental stability at Jarabacoa--at
 11 Jamaca de Dios?
 12 A. We established the measure not to award the permit
 13 because the stability was highly impacted.
 14 Q. I see. Even though when you went out to Jamaca de
 15 Dios, your inspection team took slopes and none exceeded
 16 60 percent in the area where they intended to develop. We
 17 started this examination confirming that.
 18 And you went to Jamaca de Dios, to Jarabacoa
 19 Mountain Garden, and 43 percent of that land has slopes in
 20 excess of 60 percent; right?
 21 A. Correct. And they also have use of the area that
 22 is not going to have an impact on that 60 percent. Out of
 23 the 60 percent that was going to be impacted, a relatively
 24 small area compared to the size of the project. That's why
 25 we established large lots in Jarabacoa Mountain Garden,

1 because the preservation area for each of the buyers
2 allowed us to protect that area.

3 Q. Okay. A few final questions.

4 43 percent you've just testified is a relatively
5 small area compared to the size of the project; is that
6 right?

7 A. The intervention in that 43 percent was going to
8 be smaller than what we apparently see as 43 percent.

9 Q. As long as you can find some areas in there
10 without steep slopes.

11 If I have a lot that's 95 percent slopes in excess
12 of 60 percent and 5 percent at 40 percent, I can develop
13 that lot. That's your testimony?

14 A. You can develop that lot in that lot areas that do
15 not have so much use or intervention of the slope, and the
16 other area would be left as preservation.

17 Q. And this preservation plan, about 95 percent and
18 5 percent, is that in any of the documents that have been
19 put in the record for this arbitration?

20 A. Yes. The authorization establishes that they can
21 only use 5 percent of the terrain. And the map, the
22 location of each of the houses is a strategic point where
23 no intervention would take place.

24 Q. I see. So the permit says each lot, the home can
25 only be 5 percent of the size of the lot. It's a use

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1 restriction; right?

2 A. Correct.

3 Q. And your view is if you can find 5 percent of any
4 lot that has slopes less than 60 percent, you're set?

5 A. If the intervention in the whole project does not
6 impact 60 percent, yes. The answer is yes. There you need
7 to look at the project as a whole.

8 Q. That's right. Oh, sorry.

9 And here you had the project as a whole as 115
10 lots, houses on those lots, 5 kilometers of roads. We saw
11 what were approved. And that was not-too-bad use. But at
12 Jamaca de Dios, you had a request for 70 lots with a road
13 that had yet to be defined, and yet you had land that was
14 only 14 or 19 percent with slopes in excess of 60 percent,
15 and that was impact--use that was too impactful.

16 That's your testimony?

17 A. The environmental conditions of Jamaca de Dios
18 established that if the project continued as proposed, it
19 would have had an environmental impact throughout the
20 project in the lower portion as well as in the high
21 mountain because the road had to be--had to cut the area
22 perpendicularly to the high mountain and the environmental
23 conditions would not withstand that intervention.

24 Q. Okay.

25 A. As a matter of fact, in the first project we see

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1 conditions that confirm that.

2 MR. ALLISON: Thank you very much for your
3 testimony, Mr. Navarro.

4 THE WITNESS: Thank you.

5 PRESIDENT RAMÍREZ HERNÁNDEZ: Ms. Taveras.

6 REDIRECT EXAMINATION

7 BY MS. TAVERAS:

8 Q. Mr. Navarro, I am going to ask you some follow-up
9 questions. The first one is to clarify something that I
10 think was not clear at the beginning of your statement.

11 You are with the Ministry of Investigation, and
12 you were with the Ministry of Investigation; correct?³⁶

13 A. Yes.

14 Q. Is that related to oversight or scientific
15 research or investigation?

16 A. It has to do with scientific investigation or
17 research and also measures for environmental preservation.

18 Q. We heard about the intervention in Jamaca de Dios,
19 and you may have not explained in depth why you say that
20 the intervention would have been deeper there.

21 What are the conditions of the terrain that lead
22 you to say that?

³⁶ Original in Spanish: "Usted es parte ahora y formó parte antes del Departamento de Investigaciones. ¿Correcto?".

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1 A. The terrain in Jamaca de Dios is such the soil is
2 highly irrelevant, loose--not irrelevant--sorry--loose, is
3 not consolidated, and we can see that in the
4 construction--in the roads.³⁷

5 And because of the elevation, the slope has more
6 pressure from the top. Clearly there is more energy
7 towards the bottom. The soil has no capacity to withstand
8 a deep and significant intervention in this area.

9 When we combine this³⁸ with the meteorological
10 conditions, the rainfall, that is, part of what already
11 impacted on the conditions,³⁹ the soil in that area is more
12 fragmented by the chemical action of the water, and because
13 of the physical water action, we see the landslides in the
14 area.

15 The vegetation is typical of the rainforest, and
16 that means that the area always has moisture, humidity,
17 regardless of the fact that there is vertical raindrop or
18 not.

19 The trees gather humidity from the clouds, and the

³⁷ Original in Spanish: "El terreno de Jamaca de Dios como tal, el suelo, es muy inestable, muy suelto, y se -- se verifica en la -- en la erosión que hay en los caminos actualmente."
³⁸ Original in Spanish: "las condiciones geológicas".
³⁹ Original in Spanish: "que es parte de lo que en el tiempo modificó las condiciones geológicas,".

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1 clouds' humidity that⁴⁰ crash against the mountain, and
2 there is condensation. There is no farmer in the area
3 because the humidity is so significant that it would be
4 troublesome.

5 Therefore, those humidity conditions and the
6 rainfall imply that whenever it rains, if the soil has been
7 waterproofed, it will run over the water--over the soil.
8 And they--this may end up in the springs.⁴¹

9 And as we break that, the first part is--to suffer
10 the consequences will be those that are taking the water
11 from the springs.⁴²

12 If we open the road starting at 900 meters and up
13 to 1200 meters and also given the location--the random
14 location on the soil, the soil is in the upper section of
15 the mountain.⁴³ So if you attempt to go up along the
16 mountain, the most comfortable way is what the farmers do,
17 that is to say, the road that is already marked following

⁴⁰ English Audio Day 3 at 09:48:15

⁴¹ Original in Spanish: "Entonces, esas condiciones de humedad y la propia precipitación hacen que la lluvia cuando caiga, si encuentra un suelo impermeabilizado, va a correr por encima del suelo. En la actualidad se filtra y ellos pueden tener aguas en los manantiales."

⁴² Original in Spanish: "Inmediatamente comencemos a romper eso, los primeros que van a sufrir son los que están cogiendo el agua de los manantiales ahora, porque la recarga viene de ahí."

⁴³ Original in Spanish: "por condiciones aleatorias de ubicación del terreno, no es nada que ellos se lo buscaron, sino que el terreno le queda hacia arriba de la montaña."

1 the contour lines.

2 If they attempt to do this in a short--with a
3 shorter span, the water will run faster. But if you break
4 those contour lines, you will be altering the drainage in
5 the area.

6 That's the reason we are combining an area, a
7 sloping area in an area that has hydrological conditions
8 that would make the project--that would make for the
9 project--that would create a difficulty with the project to
10 handle water erosion.

11 Whenever we have human intervention, there will be
12 an impact on native vegetation, on the trees. So,
13 ultimately it would be the management of the water and the
14 wind power. We also have, in the area, highly windy
15 conditions.

16 So, the proposal showed that the environmental
17 impact would not be managed as identified,⁴⁴ and this is a
18 protected area. There was already a legal limitation.

19 And something that should be established clearly
20 is that as part of the evaluation process, we got to the
21 preliminary analysis. We did it only halfway.⁴⁵

⁴⁴ Original in Spanish: "Entonces, la propuesta del proyecto no -- evidenciaba que no podía manejar los impactos ambientales que -- que se estaban identificando."

⁴⁵ Original in Spanish: "Algo que debe quedar claro: en el proceso de evaluación nosotros llegamos hasta la mitad, digamos, que es la evaluación de análisis previo."

1 And the second portion that would include the
2 Terms of Reference, even though it could be transferred to
3 the Ministry and even though it was not included in the
4 study, we were going to identify that this was a protected
5 area.⁴⁶

6 So, the Terms of Reference for the study would
7 have been rejected⁴⁷ because this was part of a protected or
8 fragile area that had to be identified in the environmental
9 studies.

10 The environmental studies, even though they are an
11 instrument that the Ministry uses, they are an instrument
12 that the developer has to make intelligent decisions so
13 that there is not an impact on their project. And even
14 more so in this case.

15 If the landscape is damaged because of landslides
16 or because of the runoff water or the lack of water, it
17 beats any logic to try to promote this type of project.

18 Q. Another question. At C-93, I think, is the third
19 reconsideration letter. The Ballantines were promising not
20 to build on lots with more than 30 percent.

⁴⁶ Original in Spanish: "La otra parte era dar unos términos de referencia donde iba a haber el mandato de identificar si estaban en área protegida. Aunque se le pasara al Ministerio por la razón que fuere y no se presentara en el estudio, se iba a identificar que estaba en área protegida."

⁴⁷ Original in Spanish: "Entonces íbamos a haber dado una -- unos términos de referencia para hacer un estudio y lo íbamos a rechazar".

1 What was the main problem? Was it the access road
2 or the house in the project⁴⁸?

3 A. The project should be analyzed as a whole. If I
4 am going to introduce houses, I would need access roads. I
5 would need water and drainage. So, we analyze this all
6 together. For some of the components to weigh more than
7 the others in connection with one or several environmental
8 factors, this is an analysis that requires specific
9 attention in each case.

10 Q. Were they able to develop the project somewhere
11 else in their property?

12 A. In the area that they presented, we did not see
13 any possibility.

14 Q. Mr. Allison previously referred to the slope law.
15 Is there something like that?

16 A. No. The environmental law is the one that
17 includes the restrictions to the slopes.

18 Q. And what is the main purpose of the environmental
19 assessment or evaluation process and the environmental law?

20 A. The main purpose is to reduce environmental damage
21 as a result of human intervention and also to anticipate
22 any damage that may be caused by means of that activity.
23 The intent is to have interventions that are sustainable in

⁴⁸ Original in Spanish: "La edificación".

1 time.

2 Q. Now going to Article 122 of the environmental law.

3 The President of the Tribunal asked a question a couple of

4 minutes ago that I think was not fully answered.

5 At R-114--I know it is in your binder, but I don't

6 know where it is. It is Tab 25. That is the

7 second-to-last technical report on Jamaca de Dios,

8 Project 3.

9 The report states that--the word "GPS

10 measurements" and also "Google Earth measurements." Are

11 those the same measurements or are they different?

12 A. They are different. The GPS is a field piece of

13 equipment that allows me to take one point with a specific

14 altitude above and below that, and then another point with

15 its own altitude.

16 I compare the altitude, and then I define this

17 log.⁴⁹ This is what we mainly use for the path followed by

18 the roads and also to determine the slope from the lowest

19 to the highest point.

20 Q. The measurements through Google Earth do not state

21 a slope higher than 60 percent. Are they representative of

22 the terrain as a whole, or are they representative of

⁴⁹ Original in Spanish: "y arriba o abajo un punto con otra altura. Comparo la altura y el recorrido y ahí defino la pendiente."

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1 specific points of the terrain?

2 A. No. Those measurements are based on interest

3 points because we saw that there was a high-risk area. It

4 is easy to identify an area with a landslide. I am going

5 to identify the landslide. If I have a slope that is lower

6 than 60 percent, and that is one of the analyses, that is

7 to say at a specific point where there is a picture of that

8 point where we saw that there was a landslide.

9 So, if I have landslide in an area that has a

10 slope and vegetation--and this would be important

11 information--this is an active landslide.

12 If I have a landslide in an area where the slope

13 is lower than 30 percent⁵⁰, I can tell that the conditions

14 of the soil are extremely critical for any sort of

15 intervention that could have an impact or increase the risk

16 of landslide.

17 Q. I have a question about Article 122. Article 122,

18 I think that you previously said that establishes a ban.

19 You are not allowed to build whenever there is a slope that

20 exceeds 60 percent.

21 Does that imply that automatically you can build

22 whenever there is no slope that is above 60 percent?

⁵⁰ Original in Spanish: "en un área con una pendiente menor del 60 por ciento".

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1 A. The answer is no. The environment is analyzed

2 based on several variables. If I have a high level of

3 rainfall, clay soil, slope, and there the determining

4 factor would be gravity, the more slope you have, the more

5 influence gravity will have.

6 But if I have those conditions, I need to analyze

7 that all together to be able to determine if an area that

8 has less slope has the same risk as an area that has more

9 slope.

10 For example, the cut of a rock in Santo Domingo,

11 we had 90-degree--we make 90-degree cuts in limestone. But

12 in the case of a road, we need to analyze the works

13 depending on how long it will take.

14 So, here the slope, it's associated to other

15 elements to be able to determine whether we can use that

16 area or not.⁵¹ Article 122 is attempting to preserve the

17 soil as natural resource⁵².

18 Q. So, is it possible to isolate factors and also to

19 make decisions in connection with the environment also in

⁵¹ Original in Spanish: "un corte en una roca caliza, en Santo Domingo hacemos cortes de 90 grados en roca caliza. Ahí no hay muchos riesgos de deslizamiento. Si es una carretera, sí habría que hacerle trabajo, obra, por el tiempo que va a durar. O sea, la pendiente va relacionada con otra variable, que es lo que permite definir si se puede hacer una intervención o si no."

⁵² Original in Spanish adds: "uno de los que menos caso le hacemos en el país."

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1 observance of isolated factors, or are decisions made

2 taking into account all of the factors and how they relate?

3 A. The environmental impact assessment--and when we

4 go to the field, we have that evaluation already in mind.

5 But we made the mistake not to include all of the elements

6 into our analysis. That is to say, all of the elements

7 that we look into on the field.

8 So, it is not possible, given the environmental

9 conditions, to isolate one factor from the other. I would

10 not be able to look at the altitude, the slope and the

11 rainfall and study them separately. They all come together

12 to increase the fragility of the ecosystem.

13 Q. I also have some questions. I think I only have

14 three questions, three additional questions.

15 Can we please look on--look at R-342. And I don't

16 know where in your binder, but I think that you have it.

17 Q.⁵³ This is the map for Quintas del Bosque II, and

18 this was already discussed today, at 342, Page 11. We

19 would like to have a side by-side-comparison.

20 Now we're looking at C-113. C-113.

21 C-113, once we have it on the screen, is the

22 application for Quintas del Bosque II, and what we will see

23 is at Page 6 we have the map with the project design.

⁵³ English Audio Day 3 at10:00:35

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1 Rather, 11. Page 11. Page 13. I apologize.
 2 MS. TAVERAS: Kelby, can you rotate this
 3 180 degrees.
 4 BY MS. TAVERAS:
 5 Q. That is Quintas del Bosque II, and we were
 6 discussing this topic. I know that you did not grant⁵⁴ the
 7 final approval. But let me ask you the same question.⁵⁵
 8 You had mentioned, in connection with other
 9 projects, that the road was the most important. And taking
 10 into account the roads as proposed and also the slope map,
 11 do you consider that that project, regardless of having
 12 slopes, had potentials? Did it have any potential or not?
 13 A. Yes. It had the potential to be developed.
 14 You will clearly see the intervention of the
 15 roadways. These are straight. They shouldn't go⁵⁶ up
 16 really, except for one of them that's kind of curvy at the
 17 bottom.
 18 The promoters, the developers, including Jamaca,
 19 what they do is that they sell the plot of land with a
 20 slope that needs to be preserved. Because physically
 21 speaking, one cannot build on that.

⁵⁴ Original in Spanish: "que usted no participó de la aprobación final";
⁵⁵ Original in Spanish: "pero como se le puso la cuestión, se la pongo yo ahora".
⁵⁶ Original in Spanish: "no tendrían que subir mucho".

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1 So, the MMA agrees with those points provided that
 2 even though this may belong to the acquirer, well, the
 3 developer is responsible for maintaining the native trees
 4 there.
 5 Q. Thank you. In connection with Jarabacoa Mountain
 6 Garden, a lot was said about the fact that more than
 7 43 percent of the land had slopes of over 60 percent.
 8 That's in your report, and you also submitted a map.
 9 Why is it that in the case of Jarabacoa Mountain
 10 Garden it was possible to grant that permit although the
 11 slopes were steep?
 12 A. Well, it's something similar to what we've just
 13 seen. Now, they have the possibility of locating the
 14 roadway at the highest point of the mountain without
 15 breaking anything. You can see that there are no
 16 switchbacks, and they don't have to cut the contour lines.
 17 So, by placing the roadway in that way, they could
 18 build a house quite close to the roadway, and they could
 19 take advantage of the places where the lots were identified
 20 as lots adequate for housing, and then the steep slope
 21 land, well, that land would be conservation land.
 22 This is the limitation imposed on the acquirer of
 23 the plot of land. But they can take advantage of a space
 24 for building a house.
 25 Q. Well, apart from the luck that they may have in

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1 connection with the ⁵⁷plot of land they got, the kind of
 2 land is different from the plot of land that has to do with
 3 the expansion of Jamaca de Dios? ⁵⁸
 4 A. Well, yes, it's different because⁵⁹ they don't have
 5 to break up the land and they're not going to create those
 6 cuts in the mountain that would render the land unstable
 7 and landslide prone.
 8 Sometimes they have to, of course, cut the land
 9 because you have compulsory cuts like that. We don't have
 10 any terrains in Jarabacoa like that.⁶⁰
 11 Q. You're saying that the plots of land⁶¹ are
 12 different. What's the difference?
 13 A. In Mountain Garden, for example, you can see a
 14 rock that is quite solid. The mother rock--the bedrock,
 15 rather, has not been altered by the weather or the water.
 16 Q. What about the expansion area of JDD?
 17 A. Well, there we saw a clayey land with quite deep
 18 valleys, and when you deal with mountains, you have some

⁵⁷ Original in Spanish adds: "la conformación del terreno".
⁵⁸ Original in Spanish: "¿el tipo de terreno es diferente al tipo de terreno que hay en la fase de ampliación de Jamaca de Dios?".
⁵⁹ Original in Spanish: "En gran parte del terreno es diferente. Y en gran parte tiene la ventaja de que".
⁶⁰ Original in Spanish: "ya no queda en Jarabacoa muchos terrenos ya".
⁶¹ Original in Spanish: "Los terrenos".

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1 normal characteristics. The fertile soil is not very deep.
 2 Those soils are limited. Then you have rocks or limestone
 3 or clay.⁶²
 4 And in the case of Jamaca, you have a combination
 5 of clay and meteorized rock, rock that has been impacted by
 6 rainfall, so it's very loose.
 7 Q. Okay. For my understanding, what is the problem
 8 with clay? What's the problem with it?
 9 A. Well, clay is unstable. You cannot put any civil
 10 works on top of it. Clay absorbs water and it expands.
 11 And it also releases water when it dries out.
 12 So, this shows cracks, and this creates
 13 landslides. So, there is a combination there of limestone
 14 and clay. The soil in Jamaca is very unstable for civil
 15 works to be constructed on it.
 16 Q. My last question has to do with the exchanges that
 17 the developers had with the Ministry. In the case of
 18 Mirador del Pino, I think you discussed this with
 19 Claimants' lawyers.
 20 Well, Mirador del Pino had gone to the ToR phase.
 21 In connection with those Terms of Reference, amendments

⁶² Original in Spanish: "En la zona de expansión se veía un suelo arcilloso con unos volúmenes bien, bien profundos. En Montaña hay una característica normal en todo: los suelos fértiles son limitados, no son muy profundos, y estaríamos, desde luego, en una presencia de una roca o de caliza o de arcilla".

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1 were required. After the Environmental Impact Study was
2 submitted, changes were also suggested.

3 The question posed by Claimants' lawyer was: Why
4 wasn't JDD given that opportunity? Well, if JDD never went
5 to the ToR phase.⁶³ Could you please talk about that?

6 A. The Terms of Reference are the summary of the
7 doubt that the Ministry has in connection with a project.
8 So,⁶⁴ we look for all the information that we cannot get in
9 the field so that we can make a decision.

10 If the environmental conditions are expressed in a
11 manner such that the technicians in the field identify that
12 there are some environmental issues that we find there, and
13 those issues are not going to be solved by other programs,
14 then a decision is made by conducting a preliminary
15 analysis.⁶⁵

16 No options to amend the projects--the project were
17 available because the preliminary analysis showed that any
18 use of land there was inappropriate given the conditions.

19 So, we didn't get to the point where we had to
20 discuss with the environmental consultant, a third party

⁶³ Original in Spanish: "Jamaca de Dios nunca pasó a la fase de términos de referencia."

⁶⁴ Original in Spanish: "Ahí".

⁶⁵ Original in Spanish: "en un programa de manejo y adecuación ambiental, que sería la corrección de los impactos que se identifiquen, entonces se toma la decisión en análisis previo.".

1 that conducts the study for the promoter, the promoter and
2 the Ministry--well, we never got to the point where we held
3 discussions because the land there imposed limitations.⁶⁶

4 Q. I am going to have one last question.

5 Is it the presumption that a person or a project
6 is going to be provided or given an environmental permit or
7 the developer has to justify why, in a certain plot of
8 land, the promoter can develop a project?

9 Is there a presumption that you're going to get
10 the environmental permit or no, not necessarily?

11 A. Well, not necessarily. In point of fact,
12 developers think that when they get the ToR, the project
13 will be automatically approved.

14 The ToR is saying to the promoter--rather, the ToR
15 is saying to the promoter that the Ministry needs
16 information to make a decision, and then the Ministry will
17 make a decision whether the project will be approved or
18 not.

19 If the Ministry is certain that it is not going to
20 approve the project for all the reasons evidenced there,
21 it's not going to ask the promoter to waste money.

22 QUESTIONS FROM THE TRIBUNAL

⁶⁶ Original in Spanish: "Entonces no había forma de presentarle una opción más que no sea que cambie del lugar, porque el lugar te limita."

1 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. What you're
2 saying is that there was no possibility whatsoever here
3 with this proposal?

4 THE WITNESS: Yes, with that proposal, there was
5 no possibility for approval.

6 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. There was
7 determination that there were some sections that were not
8 over the limits of Article 122 in spite of the fact that
9 there were three reconsiderations presented by the
10 Ballantines.⁶⁷ What you're saying is that there was no
11 possibility for this to go forward. It was completely
12 inviable.

13 I know that the Ministry offered for the project
14 to be relocated to a different plot of land,⁶⁸ but there was
15 no possibility for this project to be viable?

16 THE WITNESS: Given the environmental conditions
17 of this site, this one only has to do with the slope,
18 right? Okay.⁶⁹

19 Although the Ministry, in the letter, says certain

⁶⁷ Original in Spanish: "Con esa propuesta, no había ninguna posibilidad, no obstante que había alguna determinación de que había algunas secciones que no estaban por encima de lo que decía el artículo 122, no obstante que había habido tres veces que los Ballantine habían pedido."

⁶⁸ Original in Spanish: "Yo sé que dos veces el Ministerio le ofrece que puede haber presentado otra propuesta en otra parte del terreno."

⁶⁹ Original in Spanish: "que no es -- no se limita solo a la pendiente,".

1 things. Well, the reports show information.⁷⁰ And one of
2 these points is used to provide this information to the
3 developer, perhaps with the wrong idea that the developer
4 has the information that we have to know that the soil
5 conditions, the rainfall conditions, the slope and the
6 identification of this land as an active land area, well,
7 all of these things would be sufficient for a promoter to
8 know about these things. To conduct a project here was a
9 risk that the Ministry did not want to run.⁷¹

10 Now, in connection with the Environmental Impact
11 Study if the ToR had existed. Well, we also had the park.
12 The park had to be there because this was a legal analysis
13 that had to be made by the consultants.

14 When the environmental study was conducted, the
15 park came in, and this, of course, is information that is
16 compulsory.⁷²

17 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you very much.

18 MS. TAVERAS: I have no further questions.

⁷⁰ Original in Spanish: "en los informes se notan que hay otra información que está tomando en consideración el proyecto y".

⁷¹ Original in Spanish: "la identificación del lugar de deslizamientos activos eran ya suficientes como para que él conociera que el hacer el proyecto ahí era un -- era un riesgo que el Ministerio no -- no debía correr."

⁷² Original in Spanish: "si por casualidad se nos va, entonces nos genera otro problema: Pero el análisis del Parque, aunque aparece tarde en el análisis del Ministerio, en el estudio ambiental es de la información que se pide de manera obligada."

1 ARBITRATOR CHEEK: I do have one question. My
2 apologies.
3 With regards to the park, is it forbidden to build
4 in a Category 2 park?
5 THE WITNESS: Certain uses of land are prohibited.
6 National parks are governed by a management set of rules.
7 Some things are permissible and some others are not.
8 But the permissible things need to be in agreement
9 with the purpose of the park, which is the preservation of
10 the natural conditions of the environment. So, land use in
11 protected areas--well, very little land use can be had
12 there in protected areas.
13 ARBITRATOR CHEEK: But there is some possible land
14 use; correct?
15 THE WITNESS: Yes, there is some possibility of
16 land use, but that's only for tourism purposes⁷³--
17 ecotourism, educational purposes. These are land uses only
18 for the Ministry. For example, the lodges for ecotourism,
19 people who do tracking, facilities for people who do
20 tracking, ecotourism, educational tourism, et cetera.⁷⁴
21 ARBITRATOR CHEEK: Thank you very much.

⁷³ English Audio Day 3 at 10:16:19.
⁷⁴ Original in Spanish: "Son intervenciones principalmente del Ministerio. Son las cabañas, las zonas de senderismo y eso. Es un turismo ecológico, educativo, más que...".

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1 (Witness steps down.)
2 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. If there is
3 anything else. I think it's time to--
4 MR. Di ROSA: Just a quick question, Mr. Chairman.
5 If we could get a time update, that would be helpful for
6 both Parties, I think, if that's possible.
7 PRESIDENT RAMÍREZ HERNÁNDEZ: Julian.
8 THE SECRETARY: So, the Claimant has used
9 five hours and 27 minutes, and the Respondent nine hours
10 and 31 minutes.
11 PRESIDENT RAMÍREZ HERNÁNDEZ: You don't need to
12 exhaust all of them, just to be clear.
13 Okay. Let's meet tomorrow, 9:00 o'clock.
14 Thank you very much.
15 (Whereupon, at 7:44 p.m., the Hearing was
16 adjourned until 9:00 a.m. the following day.)

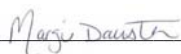
Realtime Stenographer
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CERTIFICATE OF REPORTER

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

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



MARGIE R. DAUSTER

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