INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

SARGEANT PETROLEUM LLC

Claimant

v.

DOMINICAN REPUBLIC

Respondent

COUNTER-MEMORIAL ON MERTIS AND MEMORIAL ON JURISDICTION

August 13, 2023

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1. In accordance with Annex A of Procedural Order No. 1 of December 22, 2022 and its respective Revision No. 1 of May 15, 2023, the Dominican Republic (the "**Respondent**" or the "**State"**) hereby submits its Counter-Memorial on Merits and Memorial on Jurisdiction, together with the factual exhibits and legal authorities numbered R-0001 to R-0046 and RL-0001 to RL-0106, respectively.

2. On August 18, 2023, within the deadline set forth in Annex A of Procedural Order No. 1 of December 22, 2022 and Revision No. 1 of May 15, 2023, the State shall submit the following witness statement and expert reports:

   i. Witness statement of the Minister of Public Works and Communications, Ing. Deligne Ascención and its exhibits.

   ii. Expert report of Dr. Guillermo Sabbioni of The Brattle Group, and its exhibits.

   iii. Expert report of Dr. Rafael R. Dickson Morales, and its exhibits.

1 INTRODUCTION

3. The issue before the Tribunal in this case is very simple. The Tribunal shall determine whether a company with no business activities in the United States, linked to companies that have confessed acts of corruption in the asphalt sector in several Latin American countries, is entitled to invoke a contract plagued with serious irregularities, which have allowed it to collect more than USD 360 million without having paid a single Dominican Peso in taxes, to submit a merely contractual claim for the collection of invoices before this Tribunal under the Free Trade Agreement between the United States, Central America and the Dominican Republic (the "**CAFTA-DR**" or the "**Treaty**").

4. Sargeant Petroleum LLC's (the "**Claimant**" or "**Sargeant**") claim is based on an opportunistic, abusive, and erroneous interpretation of the contract at issue in this arbitration that is not supported either by the text of the contract itself or by its performance by the parties. Moreover, such interpretation is contradicted by documents issued by Sargeant, by sections of its Memorial, and by the testimony of its witness. Due to a series of insurmountable jurisdictional, admissibility and substantive obstacles, Sargeant's claim must fail.

5. First, the Tribunal lacks jurisdiction *ratione personae* because Sargeant is not an enterprise of the United States under Article 10.28 of CAFTA-DR as it has failed to prove that it carries business activities in the United States. Sargeant does not even address this requirement in its Memorial. In fact, the evidence indicates that Sargeant has no activity outside of its operation in the Dominican Republic. Indeed, Sargeant has been in a "*tax forfeiture"* status in the United States for more than three years, until November 17, 2020 when, just a few months before the commencement of this arbitration, its tax registration was reinstituted.

6. In addition, in the hypothetical scenario that the Tribunal understood that Sargeant is an enterprise of the United States, the Dominican Republic denies the benefits of CAFTA-DR under Article 10.12(2), since Sargeant has no substantial business activities in the United States, and is controlled by Mr. Mustafa Abu Naba'a, a citizen of Jordan and the Dominican Republic.

7. Second, the Tribunal also lacks jurisdiction *ratione materiae for* several reasons. *First*, Sargeant has not established that it has a protected investment under the terms of the CAFTA-DR. Indeed, Sargeant's claim is merely a claim for the collection of invoices for the

sale of goods and services. The contract for the storage, handling and supply of asphalt material invoked by Sargeant is not a covered investment under the CAFTA-DR, because: (i) the CAFTA-DR itself expressly excludes claims for payment for the sale of goods or services from the definition of investment; and (ii) such contract does not meet the characteristics of an investment under Article 10.28 CAFTA-DR.

8. *Second*, in the hypothetical scenario that the Tribunal understood that Sargeant has a protected investment, the same is illegal. Indeed, as Dr. Rafael Dickson's expert report demonstrates, the contract in question violated several important rules under Dominican law, including lacking a competitive tender process, providing for a tax exemption in violation of the Constitution of the Dominican Republic, and lack a special power of attorney from the President of the Republic, as required by Dominican law and as set forth in the contract itself as a condition for its validity. Pursuant to all these breaches, the contract is null and void. For years, Sargeant has received hundreds of millions of dollars under a contract that does not deserve protection under Dominican law, without having paid a single Dominican Peso in taxes.

9. *Third*, Sargeant's claim is not an investment dispute, but a mere contractual claim for collection of invoices that must be resolved before the Dominican courts. It is a simple dispute for the collection of invoices and not an investment dispute under Article 10.16(1) of CAFTA-DR.

10. Sargeant is fully aware of such weakness in its case. Consequently, Sargeant invokes the Most Favored Nation clause of Article 10.4 CAFTA-DR in a vain attempt to import umbrella clauses from other investment treaties. However, Article 10.4 CAFTA-DR is not applicable to the present case, *inter alia* because the investment treaties invoked by Sargeant predate CAFTA-DR. Thus, the reservation made by the Dominican Republic, under CAFTA-DR Article 10.13 - which allows the State to grant differential treatment to investors from any country that has a pre-existing treaty with the Dominican Republic – is applicable here.

11. Acknowledging that its claim is merely contractual, in an attempt to force jurisdiction where there is none, Sargeant argues that the contract at issue in this arbitration would be an investment agreement as defined in Article 10.28 of CAFTA-DR. It is not.

12. *Fourth*, the Tribunal lacks jurisdiction over Sargeant's claim for breach of Article 10.3 of National Treatment because Article 10.13(5)(a) expressly excludes its application to public procurement, which is clearly the case here.

13. *Fifth*, Sargeant transferred to Intercaribe Mercantil SAS ("**Intercaribe**") part of the alleged credit claimed in this arbitration. Sargeant does not own those and therefore the Tribunal has no jurisdiction to hear Sargeant's claim for alleged lack of payment of credits assigned to a third party, and/or such claim is inadmissible.

14. The owner of Intercaribe was Mr. Donald Guerrero, who also served as Minister of Finance of the Dominican Republic. In that role, Mr. Guerrero approved payments to Sargeant, Intercaribe itself and Mr. Abu Naba'a for millions of dollars. Mr. Guerrero is now in prison, accused of crimes related to credit assignments and payments approved in the exercise of his public functions.

15. Third, the Tribunal also lacks jurisdiction *ratione temporis* with respect to a substantial part of Sargeant's claim, which is time-barred under the three-year deadline set forth in Article 10.13 CAFTA-DR. Specifically, Sargeant's claims for storage minimums and for the six invoices prior to March 23, 2019, have been filed beyond the three-year time limit.

16. Fourth, the Dominican Republic has not committed any breach under CAFTA-DR and international law.

17. *First*, there is no expropriation of Sargeant's alleged and denied investment. In fact, Sargeant has not even identified which property right would have been allegedly expropriated as required by Annex 10-C(2) of CAFTA-DR. Moreover, there is no expropriation possible of Sargeant's alleged claims to payment since, under Article 10.28 note 9, they are not considered investments. In any event, the alleged lack of payment of a debt does not constitute expropriation. In addition, Sargeant's alleged exclusion from the Dominican asphalt market did not occur and Sargeant has not put forward any claim for this alleged measure.

18. *Second*, the Dominican Republic has not accorded Sargeant treatment less favorable than to domestic investors. The alleged lack of payment did not constitute discrimination based on nationality. Instead, it is explained by a legitimate dispute by the Ministry of Public Works and Communications ("**MOPC**") of the validity of the contract invoked by Sargeant and the existence and merit of the amounts claimed. In the same vein, Sargeant does not even explain which are the acts or measures by the State that would have led to the exclusion of Sargeant from the Dominican AC-30 market in favor of local competition.

19. *Third*, the Dominican Republic has not breached customary international law under Article 10.5 of CAFTA-DR, as it has not acted arbitrarily or discriminatorily towards Sargeant.

20. *Fourth,* the Dominican Republic has not breached the Most Favored Nation clause of Article 10.4 CAFTA-DR since the contract invoked by Sargeant is null and void; the storage invoices claimed by Sargeant are not due by the MOPC since the minimum volumes claimed have already been consumed and paid for through the supply of asphalt; and, even if the contract were valid, and even if the Tribunal were to find that MOPC is indebted with Sargeant and has failed to comply with its contractual obligations, that does not constitute a violation of CAFTA-DR, even in the presence of an umbrella clause.

21. The Tribunal should dismiss the claim in its entirety and order Sargeant to bear the costs incurred by the State in defending a manifestly improper claim.

22. In the following sections, the State will first summarize the key factual background for the Tribunal to appreciate the context surrounding Sargeant's claim (**Section 2**). Next, the State will set forth its jurisdictional and admissibility objections, which should lead to the dismissal of Sargeant's claims in their entirety (**Section 3**). Then the State will present its response on the merits, which should also lead to the dismissal of Sargeant's claims in their entirety (**Section 4**). Finally, after making a reservation of rights (**Section 5**), the State will formulate its request for relief (**Section 6**).

2 FACTUAL BACKGROUND

2.1 SARGEANT PETROLEUM LLC: A SHELL COMPANY IN THE UNITED STATES, PART OF A GROUP WITH ADMITTED HISTORY OF CORRUPTION IN THE ASPHALT INDUSTRY

23. Sargeant is a company nominally incorporated in the State of Texas, United States, which was created expressly to participate in the tender for the 2003 Contract in the Dominican

Republic, as defined below, and incorporated therein to obtain protection of the U.S. government, as arises from Mr. Mustafa Abu Naba'a's witness statement.[1]

24. However, as demonstrated herein, the available evidence indicates that Sargeant has no real business activities in the United States.[2] For example, for several years, Sargeant has been in "*tax forfeiture*" status in its State of incorporation and its corporate governance activity is conducted entirely in the Dominican Republic.[3] As a result, Sargeant cannot be considered an enterprise of the United States under Article 10.28 of DR-CAFTA (**Section 3.1**). Additionally, this entitles the Dominican Republic to invoke the denial of benefits provision of DR-CAFTA (**Section 3.2**).

25. As Mr. Abu Naba'a explains, much of Sargeant and the MOPC's contractual relationship over the years has been conducted through two companies of the same name, Sargeant Marine Ltd., a company incorporated in the Bahamas ("**Sargeant Marine Bahamas**"), and Sargeant Marine Ltd, incorporated in the State of Florida, United States ("**Sargeant Marine Florida**"). Indeed, according to Mr. Abu Naba'a, Mr. Harry Sargeant III and Mr. Abu Naba'a operated in the Dominican Republic initially through Sargeant Marine Florida.[4] According to Mr. Abu Naba'a, Sargeant Marine Florida would have provided "knowledge contributions" to the Dominican asphalt industry.[5]

26. On September 21, 2020, the company Sargeant Marine Inc., also incorporated and domiciled in the State of Florida, entered into a plea agreement with the United States Department of Justice, Fraud Division and the United States Attorney's Office for the Eastern District of New York (the "**Plea Agreement**").

27. By means of the Plea Agreement, Sargeant Marine Inc. pleaded guilty for acts of corruption in violation of the Foreign Corrupt Practices Act, including the payment of bribes to public officials to obtain asphalt contracts with state-owned companies in various Latin American jurisdictions.[6] As a result of this confession, Sargeant Marine Inc. agreed to pay criminal fines for USD 16.6 million. The Department of Justice press release states:

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[1] Witness Statement of Mustafa Abu' Naba, ¶ 14.

[2] Witness Statement of Mustafa Abu' Naba, ¶¶ 8-10, 19, 21, 23, 24, 26, 29.

[3] **R-0001**, Declaration of Tax Forfeiture of Sargeant Petroleum LLC; **R-0003**, Minutes of Sargeant's Extraordinary Shareholders' and Board of Directors' Meetings 2013-2021.

[4] Witness Statement of Mustafa Abu' Naba, ¶¶ 8-10.

[5] Witness Statement of Mustafa Abu' Naba, ¶ 22.

[6] **R-0004**, Plea Agreement dated 21 September 2020; **R-0005**, Press release from Department of Justice dated 22 September 2020.

> *According to its admissions, between 2010 and 2018, the company paid millions of dollars in bribes to foreign officials in Brazil, Venezuela, and Ecuador to obtain contracts to purchase or sell asphalt to the countries' state-owned and state-controlled oil companies, in violation of the FCPA.*
>
> *"With today's guilty plea, Sargeant Marine has admitted to engaging in a long-running pattern of paying bribes to corrupt officials in three South American countries to obtain lucrative business," said Acting Assistant Attorney General Brian C. Rabbitt of the Justice Department's Criminal Division.*[7] (emphasis added)

28. Thus, a company linked to the Claimant confessed to serious acts of corruption for the purpose of obtaining public contracts in the asphalt industry, the very same industry Sargeant's contracts with the Dominican State through the MOPC relate to.

29. In the Plea Agreement, Mr. Daniel Sargeant, also pleaded individually guilty. That name listed as Sargeant's first Secretary in its bylaws, at the time of its incorporation.[8]

30. Contrary to the assertion in Claimant's Memorial, Sargeant's conduct in the Dominican Republic has been far from representing an "*exemplary service record*," as explained below.

2.2 SARGEANT'S ACTIVITY IN THE COUNTRY, THE CONTRACTUAL RELATIONSHIP WITH THE MOPC AND ITS VARIOUS IRREGULARITIES

2.2.1 The 2003 Contract

31. As explained by Claimant, Sargeant and the then called Secretaría del Estado de Obras Públicas y Comunicaciones ("**SEOPC**"), initially entered into a Contract for the Transportation, Storage and Handling of Asphalt Materials (the "**2003 Contract**").[9]

32. The 2003 Contract was the result of a tender process organized by the MOPC. The terms of the call for bids provided for the provision of transport, storage and handling services for asphalt materials from PDVSA and Mexico.[10] In other words, the supply or sale of asphalt was not the purpose of this bid. After submitting a bid, the "Sargeant Consortium" was awarded the contract. Sargeant and the MOPC signed the 2003 Contract on February 26, 2003. The 2003 Contract was signed on behalf of Sargeant by Mr. Mustafa Abu Naba'a.

33. The purpose of the 2003 Contract, as set forth in Article 3, was to provide transportation, storage and handling services for asphalt coming from Venezuela and Mexico to the Dominican Republic. Pursuant to Article 9.3, the asphalt to be transported and stored would be purchased by the MOPC from suppliers other than Sargeant.[11]

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[7] **R-0005**, Press release from Department of Justice dated 22 September 2020.

[8] **R-0006**, Articles of Organization of Sargeant, Article 3.5.

[9] **MAN-0006-ENG/SPA**, 2003 Contract.

[10] **R-0045**, Terms and Conditions of Call for Bids for the Contracting of Transportation, Storage and Handling of Asphalt Materials.

[11] **MAN-0006-ENG/SPA**, 2003 Contract, article 9.3.

34. Under the 2003 Contract, Sargeant would transport 28,350,000 gallons of asphalt cement per year. With respect to storage, the contract set forth a minimum monthly payment for 1,260,000 gallons, to be deducted from the contract.[12]

35. Although the price offered by the "Sargeant Consortium" and awarded by the MOPC was USD 0.14 per gallon for transportation and USD 0.14 for storage, a higher price was agreed upon in the 2003 Contract: USD 0.3618 for transportation (more than double) and USD 0.18 for storage. [13]

2.2.2 Performance of the 2003 Contract and its various addendums

36. Throughout the performance of the 2003 Contract, the parties signed 13 addendums, also called "additional contracts". These addendums modified some aspects of the 2003 Contract several of them increasing the obligations of the MOPC.

37. Importantly, while the purpose of the 2003 Contract was the transport, storage and handling of AC-30, Sargeant began supplying AC-30 directly to the MOPC. Asphalt 6upply is a substantially more expensive service than transportation, storage and handling.

38. In fact, Addendum III of January 22, 2008 included the option for direct purchases and exchange of asphalt products.[14] As a consequence, by Addendum IV from November 1, 2009, the MOPC agreed to purchase AC-30 from Sargeant for a total of USD 45,000,000. This Addendum did not provide a number of gallons to be purchased or the purchase price – as per the contract, the purchase would be at the "*current market price*" -, but only a global amount in U.S. Dollars.[15]

39. This fundamental change in the contracting conditions of the 2003 Contract was conducted absent a proper call for bids. As described in the previous section, the supply of asphalt had not been the subject of the tender process for the 2003 Contract.

40. As of Addendum IV, Sargeant started supplying millions of gallons of asphalt directly to the MOPC.

41. Pursuant to Article 15, the 2003 Contract agreed duration was eight years as from the date of signature.[16] That is, it expired on February 26, 2011. Once this term elapsed, however, Sargeant continued operating under an expired contract. Seven of its thirteen addendums were executed after its expiration. In fact, the General Directorate of Public Contracting, by Resolution 23-2013 of May 29, 2013, declared that the term of the contract had been fulfilled and that the Addendums that were executed after the contract's expiration violated the law. [17]

42. On August 14, 2012, more than one year and five months after its expiration date, Sargeant and the MOPC entered into Addendum XXIII. Article 3 of Addendum XIII provided that the

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[12] **MAN-0006-ENG/SPA**, 2003 Contract, article 11.2.

[13] **MAN-0006-ENG/SPA**, 2003 Contract, Article 11.1.; **R-0046**, Analysis of Sargeant's bid by SEOPC.

[14] **MAN-0007-ENG**, Addendum No. III of January 22, 2008.

[15] **MAN-0007-ENG**, Addendum No. IV, dated November 1, 2009, article 1.

[16] **MAN-0006-ENG/SPA**, 2003 Contract, Article 15.

[17] **R-0007**, Resolution N° 23-2013 of the General Directorate of Public Procurement.

amount of product originally contracted for under the 2003 Contract was of 229,200,000 gallons.

43. That document states that, according to Sargeant, a total of 149.6 million gallons had been consumed, with 79.6 million gallons remaining to be shipped "*to comply with the entire supply agreed in the Original Contract of 229,200,000 gallons*". (emphasis added)

44. It is worth noting the confusion between the scope and purpose of both the 2003 Contract and its tender process (transportation, storage, handling), and how Addendum XIII describes the services under the 2003 Contract (supply), which is a service substantially more expensive than the former.

45. This confusion is highly relevant. Attempting to take advantage of this confusion, Sargeant has claimed amounts from the MOPC – included in its claim in this arbitration - that are not due, as explained below.

2.2.3 The 2013 Contract

46. On May 10, 2013, Sargeant and the MOPC signed Contract No. 13-2013 (the "**2013 Contract**").

47. As explained below, the 2013 Contract violates important rules of Dominican law, including the lack of a competitive tender, the inclusion of a tax exemption in violation of the Constitution of the Dominican Republic, and the lack of a special power of attorney from the President set forth by 2013 Contract itself as a condition of its validity. Due to all these breaches, the 2013 Contract is null and void.[18]

48. In addition, the gallons of AC-30 under the 2013 Contract were consumed years ago, resulting in the expiration of the contract. However, even after that date, Sargeant continued to sell AC-30 to the MOPC.

49. Therefore, as explained in detail below, Sargeant has operated in the Dominican Republic pursuant a null and void and expired contract, without paying taxes while collecting millions of dollars from the public treasury.

50. Additionally, one of Sargeant's main arguments in this arbitration is that, under the 2013 Contract, the storage and handling of asphalt was "*entirely separate*" from the optional supply provision. According to Sargeant, any volume directly supplied by Sargeant would not count towards the monthly minimum storage volume, and Sargeant was entitled to invoice the monthly storage minimum and, separately and additionally, charge the MOPC the supply price.[19]

51. As explained below, this is simply false and not supported by either the text of the 2013 Contract or the performance of the contract. Pursuant to this opportunistic interpretation that Mr. Abu Naba'a (unsuccessfully) attempted to impose on the MOPC, Sargeant seeks to collect in this arbitration USD 29.6 million for storage invoices that are not due. This portrays a fully abusive conduct from Sargeant, who has already collected from the MOPC millions of dollars in violation of Dominican law.

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[18] Expert Report of Rafael Dickson Morales, ¶¶ 39, 48-49.

[19] Claimant's Memorial, ¶ 46.

52. As a consequence, the MOPC has a legitimate contractual dispute with Sargeant concerning the validity, existence and amount of the credits invoked by Sargeant in this arbitration. This excludes any breach by the Dominican State to CAFTA-DR and international law.

(i) Main terms and conditions of the 2013 Contract

53. Despite the fact that, as explained, the 2003 Contract term had expired, the background section of the 2013 Contract provides that the 2003 Contract continued to be in force.

54. Article 2 sets forth the purpose of the 2013 Contract. Article 2(a) provides that Sargeant agreed to provide asphalt storage and handling services at a price of USD 0.75 per gallon. Article 2(a1) provides that the agreement is based on a "*monthly consumption*" of 1,260,000 gallons, which equals 15,120,000 gallons per year. It provides that if the "*material dispatched"* is below those annual gallons, the MOPC would pay the difference between the "*material dispatched"* and that annual amount, at the price provided for storage.

55. Article 2(B), on the other hand, sets forth an option for direct supply, whereby the MOPC could purchase asphalt directly from Sargeant at a maximum price of USD 3.75 per gallon. That supply option, just like the supply under the 2003 Contract, was not subject to a competitive tender process, in violation of Dominican law.[20]

56. As part of Article 2(B) which governs the supply option, Article 2(B2) refers to Addendum XIII to the 2003 Contract, from August 14, 2012, already mentioned in section 2.2.2 above. This Article 2(B2) provides that Addendum XIII established that the 2003 Contract provided for "*supply"* of 229 million gallons "*to be acquired by the MOPC"*.

57. Article 2(B2) provides that 74,536,312.52 remains to be purchased from the MOPC: "*Subject to verification by the MOPC within 20 days from the signing of this contract, 74,536,312.52 US gallons of product remains to be acquired from the SUPPLIER*."[21] At the same time, Article 6 provides that 74,536,312.52 gallons are contracted for storage.[22] The confusion between the scope of the original services (storage, handling, transportation) and the supply is seen here again.

58. Article 11 of the 2013 Contract sets forth the duration of the Contract in the following terms:

> *The parties agree that this contract will remain in force until the 74,536,312.52 million gallons of AC-30 Asphalt Cement contracted and described in Article b2 of this contract are consumed*.[23]

59. Finally, Article 18.2 of the 2013 Contract includes a forum selection clause in favor of the Dominican Administrative Jurisdiction.[24]

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[20] Expert Report of Rafael Dickson Morales, ¶¶ 41-53.

[21] **LC-0003-ENG/SPA**, 2013 Contract, article 2(B2).

[22] **LC-0003-ENG/SPA**, 2013 Contract, article 6.

[23] **LC-0003-ENG/SPA**, 2013 Contract, article 11.

[24] **LC-0003-ENG/SPA**, 2013 Contract, Article 18.2: "*APPLICABLE LAW, RESOLUTION OF DISPUTES AND EFFECTIVENESS OF THE CONTRACT: For everything not provided for in this Contract, the rules of administrative law shall preferentially apply and, in addition, Common Law shall apply. Any dispute, controversy or claim resulting from or relating to this Contract, its breach, interpretation, resolution, or annulment shall be subject to Administrative Jurisdiction. The effectiveness of this contract will be subject to the issuance of the special power of attorney to be granted by the President of the Republic.*"

60. The same clause also provides that "*The effectiveness of this contract shall be subject to the issuance of the special power of attorney to be granted by the President of the Republic*". Such special power of attorney was never granted.

(ii) The supply agreement between Sargeant and Intercaribe Mercantil SAS

61. On July 15, 2013, only two months after the signing of the 2013 Contract, Sargeant entered into an Asphalt Cement Purchase Agreement with Intercaribe Mercantil SAS ("**Intercaribe**") for exactly the same amount of gallons contracted with the MOPC and for the same monthly minimum of 1.26 million gallons.[25]

62. This agreement expressly mentions the 2013 Contract in its background section. The 20123 Contract is thereby described as a contract for the supply, storage and handling of 74,536,312.52 gallons of asphalt cement, to be supplied by Sargeant to the MOPC:

> *WHEREAS: On May 10, 2013, SARGEANT PETROLEUM LLC and the Ministry of Public Works and C*ommunications *entered into a contract whereby they agreed on the supply, storage and handling of asphalt products, for an amount of 74,536,312.52 gallons of asphalt cement, to be supplied by the company to that Ministry during the term of this contract.*[26] *(emphasis added)*

63. Article First sets forth the purchase by Sargeant from Intercaribe of 74,536,312.52 gallons. It also provides that such service includes the supply, transportation, storage and handling of asphalt. Article Fourth provides that the gallons are purchased by Sargeant *to be supplied* to the MOPC. Article Second provides for a minimum monthly supply of 1,260,000 gallons - *i.e.* the monthly storage and handling minimum amount provided for in the 2013 Contract.

> *FIRST: INTERCARIBE MERCANTIL, SAS, agrees to sell to SARGEANT PETROLEUM LLC, the amount of 74,536,312.52 gallons of AC-30 asphalt cement. This operation includes the supply, transportation, storage and handling of the product.*
>
> *SECOND: The supply in question shall be delivered in instalments by THE SELLER to THE PURCHASER by mutual agreement between the parties, at the Haina Pier, in the Dominican Republic. The parties agree that each delivery will be for the minimum amount of one million two hundred and sixty thousand (1,260,000) gallons of AC-30 per month. A supply of seven million five hundred sixty thousand (7,560,000) gallons of AC-30 every six months is guaranteed, which will be renewable at maturity, until the total contracted supply is consumed;*
>
> *(...)*
>
> *FOURTH: This product is purchased in order to be supplied to the Ministry of Public Works and Communications.*[27]

64. That is, Sargeant describes the 2013 Contract as one pursuant to which it was to supply, transport, store and handle 74.5 million gallons. Therefore, Sargeant *already knew that it was going to supply* the gallons that were supposedly optional under the 2013 Contract.

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[25] **R-0008**, Asphalt Cement Purchase Agrement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013

[26] **R-0008**, Asphalt Cement Purchase Agrement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013

[27] **R-0008**, Asphalt Cement Purchase Agrement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013

Moreover, it agreed to a minimum supply amount equal to the minimum storage and handling under the 2013 Contract.

65. Therefore, this document alone demonstrates that the supply was not independent of storage and handling as Sargeant now claims.

66. Article Fourth of this agreement also provides that Sargeant may pay Intercaribe for the asphalt by means of assignments of Sargeant's credits against the MOPC.[28] In this sense, several credit assignment agreements were in fact subscribed throughout the 2013 Contract. By means of those agreements, the MOPC would pay Intercaribe a percentage of the invoices issued under the 2013 Contract.[29]

67. The Asphalt Purchase Agreement was signed on behalf of Intercaribe, by Mr. Donald Guerrero Ortiz. Mr. Guerrero owned Intercaribe between 2013 and 2019.[30]

68. In 2016, Mr. Guerrero was appointed Minister of Finance of the Dominican Republic. He held this position until August 16, 2020, when the current administration took office. In exercise of his charge, Mr. Guerrero approved most of the payments made from the Banco de Reservas to different MOPC contractors. By way of example, on July 31, 2020, only two weeks before the current administration took office, Mr. Guerrero approved several payments for MOPC obligations. These payments were made by the Banco de Reservas on August 14, 2020, the last business day before the new administration took office.[31] These payments included: RD$ 943,360,000 (approximately USD 16.1 million) to Sargeant; RD$ 1,782,896,145.90 (approximately USD 30.5 million) to Intercaribe; RD$ 220,950,764.36 (approximately USD 3.7 million) and RD$ 136,417,193.07 (approximately USD 2.3 million) to Mr. Mustafa Abu' Naba; RD$ 2,475,836,939.89 (approximately USD 42.3 million) to Grupo Kyrat SRL (a company affiliated to Sargeant, to which Sargeant also assigned credits[32]).[33]

69. Mr. Guerrero is currently imprisoned (pre-trial detention), accused of corruption charges allegedly committed in office arising from an investigation called Operation Calamar at the behest of the Specialized Prosecutor's Office for the Prosecution of Administrative Corruption. His imprisonment was recently ratified by an Appellate Court in June 2023.[34] Mr. Gonzalo Castillo, Minister of Public Works and Communications between 2012 and 2019 is also included in that investigation, currently under house arrest.

2.2.4 The performance of the 2013 Contract

[28] **R-0008**, Asphalt Cement Purchase Agrement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013

[29] **R-0009**, Credit Assignment Agreement between Sargeant and Intercaribe dated 11 June 2019; **R-0010** Credit Assignment Agreement between Sargeant and Intercaribe dated 15 April 2019; **R-0011**, Credit Assignment Agreement between Sargeant and Intercaribe dated 26 June 2019; **R-0012**, Credit Assignment Agreement between Sargeant and Intercaribe dated 8 April 2019.

[30] **R-0013**, Corporate Information about Intercaribe Mercantil SAS, downloaded from Open Corporates website.

[31] **R-0015**, Letters from Banco de Reservas to Donald Guerrero Ortiz.

[32] **R-0016**, Sargeant's Extraordinary General Shareholders' Meeting Minute dated 9 May 2018; **R-0017** Sargeant's Extraordinary General Shareholders' Meeting Minute dated 15 August 2018; **R-0018** Sargeant's Extraordinary General Shareholders' Meeting Minute dated 5 December 2016.

[33] Dollar amounts calculated at the approximate August 2020 exchange rate of 58.4, according to **MAN-0015**.

[34] **R-0019**, "Court holds Donald Guerrero and Jose Ramon Peralta in prison", Press release from Diario Libre, dated 2 June 2023; **R-0020,** "Preventive prison for Donald Guerrero and Jose Ramon Peralta is ratified" Press release from Listin Diario, dated 2 June 2023; **R-0021**, "Miriam German leads investigation against Donald Guerrero and Simon Lizardo for alleged corruption, embezzlement and scam", Press release of AdMedios, dated 9 February 2021.

70. Sargeant supplied millions of gallons of asphalt to the MOPC pursuant to the 2013 Contract optional supply provision, which was subject to a competitive tender process.

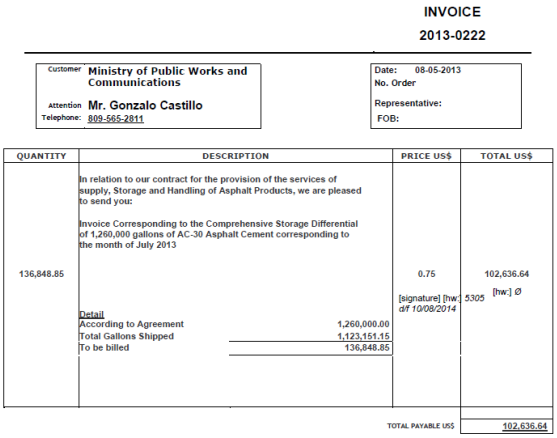
71. Indeed, between the signing of Contract 2013 in May 2013 and August 2020, Sargeant supplied the MOPC with approximately 115 million gallons of AC-30 and PG-76 asphalt;[35] *i.e.*, far beyond the total volume of the contract. Pursuant to Article 11 of the 2013 Contract - which provides that the Contract would expire once 74,536,312.52 gallons were consumed - the 2013 Contract ended in May 2018. However, Sargeant continued to sell asphalt to the MOPC on the basis of an expired contract which, in addition, was not subject of a competitive tender and thus, was not duly awarded as required by Dominican law.

72. According Sargeant's damages expert, the asphalt supplied by Sargeant between August 2012 and August 2020 represents more than 55% of the total volume purchased by the MOPC during that timeframe.[36] Pursuant to the detail of invoices provided by its quantum expert, Sargeant collected under the 2013 Contract approximately USD 360 million from the MOPC for supply only.

73. The storage and handling services under the 2013 Contract were not effectively provided separately from the supply of asphalt. There was no storage and handling of asphalt supplied by third parties, but rather direct supply by Sargeant. However, the MOPC did pay Sargeant - month to month - for the monthly minimum storage and handling volumes set forth in Article 2(a1).

74. As explained by Dr. Guillermo Sabbioni, Respondent's quantum expert, Sargeant did – month to month - invoice the MOPC for storage. Sargeant called these invoices "Storage Differential".[37]

75. The "Storage Differential" was the difference between the gallons supplied by Sargeant in a given month, and the monthly minimum of 1,260,000 gallons of storage and handling. Below is an example of an invoice:[38]



INVOICE
2013-0222

Customer: Ministry of Public Works and Communications
Attention: Mr. Gonzalo Castillo
Telephone: 809-565-2811

Date: 08-05-2013
No. Order
Representative:
FOB:

QUANTITY	DESCRIPTION		PRICE US$	TOTAL US$
	In relation to our contract for the provision of the services of supply, Storage and Handling of Asphalt Products, we are pleased to send you:			
	Invoice Corresponding to the Comprehensive Storage Differential of 1,260,000 gallons of AC-30 Asphalt Cement corresponding to the month of July 2013			
136,848.85			0.75	102,636.64
			[signature] [hw:] 5305 dif 10/08/2014	[hw:] Ø
	Detail			
	According to Agreement	1,260,000.00		
	Total Gallons Shipped	1,123,151.15		
	To be billed	136,848.85		
			TOTAL PAYABLE US$	102,636.64

[35] This amount is 129,913,319.74 gallons of AC-30 asphalt and 3,188,000 gallons of PG-30 asphalt between August 2012 and May 2013. See **RI-0011**, Asphalt material supplied and removed per MOPC instructions.

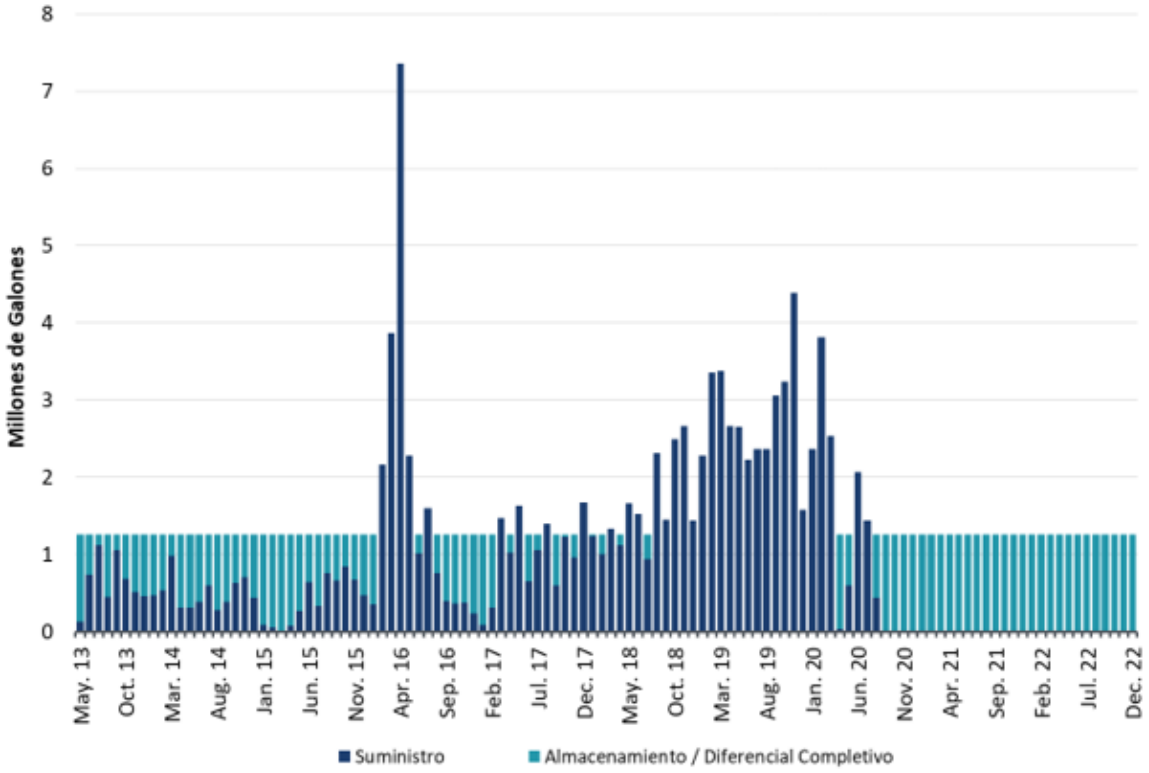
[36] **RI-0011**, Asphalt material supplied and removed by instructions of the MOPC; Expert Report of Richard Indge, Appendix D.I.

[37] The original in Spanish reads "*Diferencial Completivo*"

[38] **RI-0023**, Invoices.

76. Whenever Sargeant supplied less than the monthly minimum of 1,260,000 gallons in a given month, Sargeant would invoice the balance between what was actually supplied and the monthly minimum of 1,260,000 gallons, at the storage and handling agreed price. If on the other hand, Sargeant supplied more than the monthly minimum of 1,260,000 gallons, Sargeant would not invoice the MOPC for storage. In other words, Sargeant itself deducted the gallons that were supplied in the calculation of the monthly minimum storage volume.

77. The following chart prepared by Dr. Sabbioni illustrates how the Contract was performed. The blue bars represent the volume purchased in each month, while the light blue bars represent the volume invoiced for storage or "Storage Differential":



78. After several years of performing the 2013 Contract as described, Sargeant tried to impose an opportunistic and retrospective interpretation of the agreement, under which the gallons supplied delivered did not count towards the volume to be deducted from the contract. That is, Sargeant began to claim that all the storage volumes which Sargeant had failed to invoice each month remained to be stored and were due by the MOPC.

79. Pursuant to this erroneous and opportunistic interpretation, as of September 2020, Sargeant began to submit monthly invoices for storage minimum corresponding to the gallons that, allegedly, had not been used.[39] Those invoices amount to USD 29.62 million claimed by Sargeant in this arbitration.

80. Sargeant now contends that, apparently, it did not charge the MOPC for the full 1,260,000 gallons storage monthly minimum "*as a courtesy*", when the MOPC purchased a

[39] See **RI-0023**, Invoice Detail.

"*considerable amount*" of AC-30.[40] This is disingenuous and absurd. The image above by itself shows that both Sargeant and the MOPC systematically considered the volumes supplied as part of the monthly minimum to be consumed.

81. Sargeant is using this alleged courtesy in an improper attempt to extend an expired contract, in order to continue selling asphalt without going through a competitive bidding.

82. There are multiple reasons that prove that both Sargeant and the MOPC considered that the volume of asphalt supplied did count towards the storage minimum. The text of the 2013 Contract, documents issued by Sargeant, and the performance of the 2013 Contract all disprove Sargeant's theory. Section 4.4.2 below explains in detail all the reasons that disprove Sargeant's interpretation and thus, that the amounts claimed for storage are not due by the MOPC.

2.2.5 The 2017 Contract

83. On December 21, 2017, the MOPC and Sargeant entered into Contract 606-2017 (the "**2017 Contract**").[41] Tellingly, neither Sargeant nor Mr. Abu Naba'a in his witness statement mention this contract.

84. Under the 2017 Contract, the MOPC and Sargeant agreed on the supply of AC-30 or PG-76 asphalt cement for USD 6,266,937.

85. The 2017 Contract categorically shows that the gallons supplied by Sargeant were counted by the parties towards the guaranteed monthly minimum volume under the 2013 Contract. This document clearly shows Claimant's argument is untenable. Article Three of the 2017 Contract provides:

> *For all other aspects, the supply to be provided under this agreement will be governed and regulated by the provisions set forth in the Original Contract No. 13-2013 signed on July ten (10), two thousand thirteen (2013), between **THE SUPPLIER** and **MOPC,** a copy of which is attached to this agreement. The SUPPLIER hereby declares, acknowledges and accepts the number of gallons dispatched under this agreement shall be deducted from the minimum guaranteed volume set forth in the supply contract referenced in this article*.[42] (emphasis added)

86. This document puts an end to Sargeant's untenable claim for USD 29.7 million for storage invoices. The mere fact that more than half of the amount claimed by Sargeant's is based on an interpretation that is clearly erroneous and abusive precludes even an insinuation of arbitrary conduct by the MOPC and thus excludes any breach to international law. The MOPC acted like any reasonable party to a contract that disputes the existence and amount of a claim for payment.

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[40] Claimant's Memorial, ¶ 42.

[41] **R-0022**, Contract 606-2017 dated 21 December 2017

[42] **R-0022**, Contract 606-2017 dated 21 December 2017, Article THIRD.

2.3 THE MOPC ANALYSED THE 2013 CONTRACT, FOUND SEVERAL VIOLATIONS OF DOMINICAN LAW AND GROUNDLESS CLAIMS BY SARGEANT, AND EXERCISED ITS RIGHTS AS ANY CONTRACTUAL COUNTERPARTY WOULD.

87. According to Sargeant, MOPC allegedly failed to pay invoices allegedly due as part of a "*concerted effort to starve Sargeant of capital and squeeze it out of the Dominican asphalt* market"[43] .

88. This is totally false. In addition to the fact that there is not even a shred of evidence (or even an attempt to prove) this statement, the facts do not support Sargeant's statement.

89. According to Claimant, this alleged concerted effort would have started with the inauguration of President Luis Abinader's administration on August 16, 2020. However, Sargeant's own Memorial contradicts this assertion. Sargeant states that the alleged breaches of CAFTA-DR began in 2019, prior to the new Government's inauguration.[44]

90. In the same vein, Sargeant acknowledges that in February 2019 at the earliest, Sargeant became aware that the MOPC understood that the 2013 Contract's volume had been exhausted.[45]

91. Thus, Sargeant's thesis is contradictory in and of itself.

92. At issue in this case is a pure contractual dispute, by which the MOPC, as any contractual party, legitimately disputes the validity of the 2013 Contract and the existence, merit and amount of the claims to payment put forth by Sargeant. As described below, pursuant to this dispute, the MOPC initiated legal proceedings before the administrative courts of the Dominican Republic.

93. Even if the MOPC's position was not correct - which it is -, legitimately disputing the merits of a claim and exercising its rights as the MOPC did here is not an internationally wrongful act.

2.3.1 Report of the General Comptroller, press reports on irregularities in the asphalt industry and analysis of the 2013 Contract

94. On September 21, 2020, the MOPC received a report from the Office of the General Comptroller of the Republic (the "**Comptroller**") which contained observations to "*libramientos"* issued under several contracts of the MOPC.

95. The Comptroller is the government agency responsible for supervising and authorizing payments made by government agencies to the private sector.[46]

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[43] Sargeant's Memorial, ¶ 129: "*The Parties' dispute concerns the injury to Sargeant's covered investment in the 2013 Contract arising from breaches by the Dominican Republic of its obligations under Articles 10.3, 10.4, 10.5 and 10.7 of the CAFTA-DR, as well as breaches of the 2013 Contract itself, which is an investment agreement. These breaches are the result of expropriatory, arbitrary and unlawful actions by the government of the Dominican Republic and by its agency MOPC, which commenced in 2019 and continue to the present day*." (emphasis added)

[44] Sargeant's Memorial, ¶ 129.

[45] Sargeant's Brief, ¶ 48.

[46] Witness Statement of Minister Ascención; **R-0023**, Decree 15-17 Control of Expenses and Payment to Suppliers, Article 16.

96. Sargeant was among the suppliers mentioned in the Comptroller's report No. IN-CFR-2020-002727. The Comptroller's Office informed that irregularities were identified in the "*libramiento"* No. 7855 issued in favor of Sargeant for an amount of RD$ 973,645,035.15 (approximately USD 16.6 million at the then applicable exchange rate). Due to these observations, the "*libramiento*" was rejected by the Comptroller.[47]

97. Among other irregularities related to lack of supporting documents and overdrafts in certain payments, the Comptroller noted that the 2013 Contract was fully paid, since its balance had been exhausted.[48] In addition, the Comptroller recommended the MOPC to conduct a special audit of the 2013 Contract with Sargeant.

98. The MOPC's position regarding the exhaustion of the 2013 Contract volume - which is consistent with the Comptroller's report - and thus the dispute with Sargeant, was not new and dated back to the prior Administration. In this sense, Sargeant acknowledges that as early as February 2019 Sargeant was aware of the MOPC's understanding in that regard.[49]

99. In fact, a quick reading of the 2013 Contract and a simple arithmetic operation is sufficient to conclude that the issue of whether the 2013 Contract was still in force in 2020 was, at most, doubtful.

100. Indeed, given that the 2013 Contract provides for a minimum monthly volume of 1,260,000 gallons, an annual volume of 15,120,000 gallons[50], and subjects its duration to the "consumption" of a total volume of 74,536,312.52,[51] it is clear that the 2013 Contract would conclude in approximately five years (i.e., 74,536,312.52 / 15,120,000 = **4.9**). In other words, as of its signing in May 2013, the 2013 Contract would conclude in May 2018.

101. A more detailed analysis, by reviewing the volumes dispatched by Sargeant under the 2013 Contract, further indicates that the 74,536,312.52 gallons had already been consumed. Indeed, based on the information provided by Claimant's damages expert, Sargeant dispatched approximately 115 million gallons between the date of signing of the 2013 contract and August 2020. Therefore, the contract volume was fully exhausted.

102. In this context, the media started to report irregularities in the asphalt industry, particularly involving the relationship between the MOPC and its contractors, including Sargeant.[52] Among others, the press reports involved Mr. Donald Guerrero, former Minister of Finance. Mr. Guerrero also owned Intercaribe, the company Sargeant had engaged to purchase the asphalt that Sargeant would in turn supply to the MOPC. Sargeant had also assigned Intercaribe millions of dollars in credits against the MOPC. Mr. Guerrero is currently imprisoned for corruption charges in his role of Minister of Finance, as a result of an investigation known as "*Operación Calamar*".

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47 **R-0024**, Observations of the General Comptroller Office on *Libramiento* N° 7855.

48 **R-0024**, Observations of the General Comptroller Office on *Libramiento* N° 7855.

49 Sargeant's Brief, ¶ 48.

50 **LC-0003-ENG/SPA**, 2013 Contract, Article 2(a), Article 2(B2).

51 **LC-0003-ENG/SPA**, 2013 Contract, article 11.

52 **R-0025**, "MPOC lasted 11 years buying AC-30 asphalt without tender", Press release from Acento, 25 November 2020; **R-0026**, "Attorney General's Office reveals Guerrero is investigated for payments of 21 billion, including asphalt", press release from elJacaguero dated 9 February 2021; **R-0027**, "Hot asphalt supply companies would have been linked to Gonzalo Castillo", press release from HOY, 10 September 2020

103. As a consequence, the MOPC started to analyze Sargeant's payment claims and the performance of the 2013 Contract more in detail, before addressing any invoices issued and claimed by Sargeant. Considering all the above, the course of action of the MOPC was fully legitimate and reasonable.

2.3.2 Violations to Dominican law in the execution and performance of Contract 2013. The lawsuit before the administrative courts

104. On top of the already legitimate doubts about whether the 2013 Contract was still in force and the merit of the amounts claimed by Sargeant, the MOPC analyzed the legality of the 2013 Contract and found several serious breaches to Dominican law.

105. Among others, the following are some of the main violations to Dominican law which are described in Dr. Rafael Dickson Morales' Expert Report.

106. First, the 2013 Contract breached the principle of administrative due process, in particular Law 340-06 on Procurement of Goods, Services, Works and Concessions (the "**Procurement Law**").

107. Specifically, the 2013 Contract was contrary to administrative due process since it did not follow a competitive call for bids. This violated the administrative law principles of legality, equality, free competition, transparency, publicity, participation, and reasonableness.[53]

108. Under Dominican law, the legal consequence of such breaches is that the 2013 Contract is null and void ("*nulidad absoluta*"). [54]

109. Second, the 2013 Contract was executed without a special power of attorney from the President authorizing the MOPC to enter into the contract.

110. As explained by Dr. Dickson, Article 18 subjects the validity of the 2013 Contract to the issuance of such special power of attorney. Therefore, the 2013 is also null and void due to the failure to obtain this authorization.[55]

111. Third, the 2013 Contract included in its Article 9 an unconstitutional tax exemption. Article 9 of the 2013 Contract provided that "*Current or future Customs or any other local taxes, or any levies or taxes on the operation, will be borne by the MOPC*".[56]

112. As Dr. Dickson explains, this exemption violates Articles 128 and 244 of the Constitution, and other laws and decrees of the Dominican Republic. In particular, Sargeant's tax exemption is unconstitutional because the Constitution of the Dominican Republic requires any tax exemption be approved by law or by Congress.[57]

113. Thanks to this unconstitutional exemption, Sargeant failed to pay millions of dollars in taxes in the Dominican Republic. This, despite having collected several hundred million dollars from the Dominican State.

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[53] Expert Report of Rafael Dickson Morales, ¶ 48.

[54] Expert Report of Rafael Dickson Morales, ¶ 49.

[55] Expert Report of Rafael Dickson Morales, ¶ 39.

[56] **LC-0003-ENG/SPA,** 2013 Contract, article 9.

[57] Expert Report of Rafael Dickson Morales, ¶¶ 65-75.

114. By virtue of these and other legal violations, the MOPC decided to file a lawsuit before the Dominican administrative courts against Sargeant and Mr. Abu Naba'a. In this lawsuit, the MOPC requests a declaration that the 2003 Contract, all its addendums, and the 2013 Contract 2013 is null and void, as well as the reimbursement of all the amounts unduly collected by Sargeant thereof. A copy of the statement of claim is attached hereto.[58]

115. This is, upon a different understanding than Sargeant's and a legitimate dispute over the validity of the 2013 Contract – on top of the disagreement regarding whether the 2013 Cotnract was still in force given the exhaustion of its volume and whether the invoices claimed by Sargant were in fact due – the MOPC decided to enforce its rights before the competent courts. The MOPC did what any contractual party could do.

116. The State did not issue a regulation, did not pass a law, did not in any way exercise its sovereign powers or invoked its *ius imperium*. The State did not adopt a single measure actionable under CAFTA-DR. The MOPC acted as a mere contractual party.

117. Moreover, the MOPC's conduct was justifiable and reasonable, in view of the existence of legitimate and accurate grounds to question Sargeant's monetary claims under the 2013 Contract.

2.3.3 Current status of the judicial proceedings against Sargeant and Mr. Abu Naba'a

118. The case is currently before the Supreme Court of Justice, pursuant to an appeal filed by the MOPC against Ruling No. 0030-1642-2023-SSEN-00278 issued by the Fourth Chamber of the Superior Administrative Court on April 5, 2023.[59]

119. By means of said judgment, the Superior Administrative Court granted Sargeant's jurisdictional objection, and declared itself incompetent to hear the MOPC's claim.

120. The main ground invoked by the Superior Administrative Court in support of this decision was the pendency of the present arbitration, based on Sargeant's partial and misleading account of the facts. Indeed, in the operative part of the judgment, the court invited the parties "*to submit to the International Centre for the Settlement of Investment Disputes (ICSID), for the hearing and adjudication of the claims of the appellant* [the MOPC]".[60]

121. The ruling is absurd and erroneous both under Dominican law as explained by Dr. Dickson[61] and under CAFTA-DR and international law. The claim brought by the MOPC against Sargeant is not (and cannot be) an investment dispute under the terms of CAFTA-DR.

122. Surprisingly, the main basis for this ruling is that the State would have tacitly consented to the jurisdiction of this Tribunal by having appointed an arbitrator in the present arbitration proceedings.[62]

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[58] **R-0028**, Administrative Litigation Complaint dated 25 July 2022.

[59] **R-0029**, Decision No. 0030-1642-2023-SSEN-00278 issued by the Fourth Chamber of the Administrative Superior Court dated 5 April 2023.

[60] **R-0029**, Decision No. 0030-1642-2023-SSEN-00278 issued by the Fourth Chamber of the Administrative Superior Court dated 5 April 2023, p. 15.

[61] Expert Report of Rafael Dickson Morales, ¶¶ 76-93.

[62] **R-0029**, Decision No. 0030-1642-2023-SSEN-00278 issued by the Fourth Chamber of the Administrative Superior Court dated 5 April 2023, ¶¶ 19-20.

123. This reasoning is wholly untenable. This experienced Tribunal does not require further elaboration in this regard. Accordingly, the MOPC has filed an appeal that must result in the reversal of that judgment.

3 OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

124. Sargeant's claim must be dismissed for lack of jurisdiction and admissibility.

125. The Dominican Republic hereby raises the following eight objections to the jurisdiction of the Tribunal and/or admissibility of the claim.

126. First, the Tribunal lacks jurisdiction *ratione personae* because Sargeant is not an enterprise of the United States under Article 10.28 of CAFTA-DR, as it has failed to prove that it conducts business activities in the United States (**section 3.1**). Second, even if the Tribunal understood Sargeant is an enterprise of the United States, the Dominican Republic denies the benefits of CAFTA-DR under its Article 10.12(2) (**section 3.2**).

127. Third, the Tribunal also lacks jurisdiction *ratione materiae* to hear Sargeant's claim because Sargeant has no protected investment under CAFTA-DR (**section 3.3**). Fourth, in the event the Tribunal understood that Sargeant has a protected investment, its investment is illegal (**section 3.4**). Fifth, Sargeant's claim does not constitute an investment dispute, but a mere contractual claim for the collection of invoices, and the 2013 Contract is not an investment contract (**section 3.5**). Sixth, the Tribunal lacks jurisdiction to hear Sargeant's claim for breach of the National Treatment standard under Article 10.3 because Article 10.13(5)(a) excludes its application to public procurement, as is the case here (**section 3.6**). Seventh, the Tribunal lacks jurisdiction to hear Sargeant's claim regarding the invoices that Sargeant transferred to a third party, as they are not part of its alleged investment (**section 3.7**).

128. Eighth, the Tribunal also lacks jurisdiction *ratione temporis* since a substantial part of Sargeant's is time-barred under Article 10.13 CAFTA-DR (**section 3.8**).

3.1 FIRST *RATIONE PERSONAE* OBJECTION: SARGEANT IS NOT AN ENTERPRISE OF THE UNITED STATES UNDER ARTICLE 10.28 OF CAFTA-DR AS IT HAS FAILED TO DEMONSTRATE THAT IT CONDUCTS BUSINESS ACTIVITIES IN THE UNITED STATES.

3.1.1 Under CAFTA-DR, in addition to being incorporated or organized in the home State, an enterprise must conduct business activities in that territory

129. Chapter 10 of CAFTA-DR applies to measures adopted by a State with respect to "investors of another Party" and their covered investments.[63] Article 10.28 of CAFTA-DR defines “investor of a Party” in the following terms:

[63] **RL-0001**, CAFTA-DR, Article 10.1(1).

> *investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality .*[64] (emphasis added)

130. The term enterprise of a Party, applicable in this case to Sargeant as a legal entity, is in turn defined as follows:

> *enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there*[65] (emphasis added)

131. Therefore, CAFTA-DR outlines two cumulative requirements for a legal entity to be considered an enterprise of a Party:

(i) the entity shall be an enterprise incorporated or organized under the laws of a Party or a branch located in the territory of a Party; and

(ii) the entity must conduct business activities in that territory.

3.1.2 Sargeant has not established any business activities in the United States.

132. In section IV.C of its Memorial, Sargeant argues that CAFTA-DR is applicable and the Tribunal has jurisdiction because "*Sargeant was at all relevant times, and continues to be, an enterprise of the State of Texas within the United States*".[66]

133. However, Sargeant has not established the second requirement for qualifying as an enterprise of the United States under CAFTA-DR Article 10.28.

134. While Sargeant states that it is a company initially incorporated in the State of Florida and later converted into a Texas company,[67] it has not established having business activities in the United States. There is no reference to this requirement in Claimant's Memorial.

3.1.3 The evidence indicates that Sargeant has no business activities in the United States.

135. The fact that Claimant has not provided any evidence to establish that it conducts business activities in the home State is in itself indicative that Sargeant does not satisfy this requirement.

136. In addition, there are several elements that confirm that Sargeant does not conduct business activities in the United States.

137. Mr. Mustafa Abu Naba'a, founding shareholder and administrator of Sargeant, indicates in his witness statement that Sargeant was created solely for the purpose of participating in the tender for the 2003 Contract in the Dominican Republic. The company was incorporated in the U.S. in order to be able to "*invoke the assistance of the American government if*

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[64] **RL-0001**, CAFTA-DR, Article 10.28.

[65] **RL-0001**, CAFTA-DR, Article 10.28.

[66] Sargeant's Brief, ¶ 134-136.

[67] Sargeant's Brief, ¶ 12.

necessary".[68] According to Mr. Abu Naba'a, the only activity that is actually carried out in the United States would be that Mr. Harry Sargeant III and his family members "*have always supervised Sargeant's logistical operations remotely from their offices in Florida and* Texas".[69]

138. Therefore, Sargeant has no activity of its own outside of its operation in the Dominican Republic. It was created to operate in the Dominican Republic; and it was incorporated in the United States to procure assistance from the U.S. government. However, under CAFTA-DR, incorporation in a the home State is not sufficient to qualify as an enterprise of that State.

139. As explained below, several other elements confirm that Sargeant has no business activities in the United States.

140. First, Sargeant has been in "*tax forfeiture"* status in the United States during many of the years it has operated in the Dominican Republic.

141. Indeed, on June 27, 2017, the Texas Secretary of State issued a forfeiture resolution with respect to Sargeant, whereby "*pursuant to Section 171.309 of the Texas Tax Code, the Secretary of State hereby forfeits the charter, certificate or registration of the taxable entity as of the date noted above (...)"*.[70]

142. Sargeant remained in this situation for more than three years, until November 17, 2020 when, just a few months before the commencement of this arbitration, when its tax registration was reinstituted.[71] Most recently, Sargeant's charter was again forteited between March 10, 2023 and April 21, 2023.

143. Given that Sargeant does not even regularly comply with its minimum tax obligations in the United States, which resulted in the forfeiture of its registration as a taxable entity, it is evident that it has no business activities in the United States.

144. Second, Sargeant's corporate documents also demonstrate that both its business operations and corporate activity are conducted in the Dominican Republic.

145. For example, despite being a company incorporated in the United States, Sargeant has from 2013 to date consistently held its Shareholders' Meetings and Board of Directors' Meetings in the city of Santo Domingo, in the Dominican Republic.

146. Attached as exhibits hereto are 14 minutes of Shareholders' Meetings from 2013 to 2022, and six minutes of Board of Directors' Meetings, all of which have been held in the city of Santo Domingo.[72] In those meetings, the shareholders and the board adopted several very relevant management decisions. By way of example, the execution of several contracts for the assignment of Sargeant's credits against the MOPC in favor of third parties, for millions of dollars.

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[68] Witness Statement of Mustafa Abu' Naba, ¶ 14.

[69] Witness Statement of Mustafa Abu' Naba, ¶ 16.

[70] **R-0001**, Declaration of Tax Forfeiture of Sargeant Petroleum LLC, 27 January 2017.

[71] **R-0002**, Corporate Information of Sargeant Petroleum, LLC downloaded from Open Corporates website.

[72] **R-0003**, Minutes of Sargeant's Extraordinary Shareholders' and Board of Directors' Meetings 2013-2021.

147. Also, several of these minutes make express reference to compliance of these corporate acts with Dominican corporate law, expressly invoking the Commercial Code of the Dominican Republic. This shows that even for purely corporate purposes, Sargeant operates in the Dominican Republic and not in the United States.

148. Third, Sargeant has failed to prove that it has any offices, employees, corporate activities, or any type of business activity in the United States. A simple online search does not show any actual presence or activity from Sargeant in the United States.

149. Fourth, as described in section 2.2.3(ii), even the supply of asphalt to the Dominican Republic from abroad under the 2013 Contract was provided by Intercaribe and not directly by Sargeant, by virtue of the Asphalt Purchase Agreement, as acknowledged by Sargeant's damages expert. [73]

150. This confirms that Sargeant has no infrastructure or activities outside the Dominican Republic, as it had to engage a third party for the supply of asphalt to be provided to the MOPC.

151. Furthermore, the scope of the services provided by Intercaribe under the Asphalt Purchase Agreement included the transportation, storage and handling of asphalt, which indicates that Sargeant also planned to outsource that part of the services:

> *FIRST: INTERCARIBE MERCANTIL, SAS, agrees to sell to SARGEANT PETROLEUM LLC, the amount of 74,536,312.52 gallons of asphalt cement AC-30. This operation includes the supply, transportation, storage, and handling of the product.*[74] (emphasis added)

152. In conclusion, Sargeant is in the United States a mere shell company without any real activity. As it lacks business activities in its country of incorporation, Sargeant is not an enterprise of the United States within the meaning of Art. 10.28 of CAFTA-DR.

153. Therefore, Sargeant is not entitled to invoke the substantive protections and arbitration provision of CAFTA-DR, and this tribunal lacks jurisdiction *ratione personae* to hear Sargeant's claim.

3.2 SECOND *RATIONE PERSONAE* OBJECTION: DENIAL OF BENEFITS. IN THE EVENT THE TRIBUNAL UNDERSTANDS SARGEANT IS AN ENTERPRISE OF THE UNITED STATES UNDER ART. 10.28 OF CAFTA-DR, THE DOMINICAN REPUBLIC DENIES CAFTA-DR BENEFITS TO SARGEANT AS PROVIDED IN ARTICLE 10.12(2).

154. In the event the Tribunal understood that Sargeant is an enterprise of the United States, the Dominican Republic denies the benefits of Chapter 10 of CAFTA-DR to Sargeant, pursuant to Article 10.12(2). Sargeant's claim is therefore not admissible.

155. Article 10.12(2) of CAFTA-DR sets forth the right of a State Party to deny the benefits of the investment chapter of the Treaty to investors of another Party, in certain circumstances, in the following terms:

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[73] Richard Indge Expert Report, ¶ 4.1.3.

[74] **R-0008**, Asphalt Cement Purchase Agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013.

> *Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.*[75]

156. According to CAFTA-DR Article 10.12.2, in order for the Dominican Republic to deny CAFTA-DR benefits to Sargeant, the following two requirements shall be satisfied:

(i) That Sargeant does not conduct substantial business activities in United States territory of the territory of any other State party to CAFTA-DR, other than the Dominican Republic.

(ii) That Sargeant is owned or controlled by national(s) of a country that is not a Party to the Treaty, or national(s) of the denying Party;

157. This was the understanding of the tribunal in *Pac Rim v. El Salvador,* when analyzing DR CAFTA Article 10.12(2) for the first time.[76]

158. As we will see below, the available evidence in this case indicates that both of the above requirements are met. Therefore, the Dominican Republic has the right to deny the benefits of Chapter 10 of CAFTA-DR to Sargeant, in the event the Tribunal understood that Sargeant is indeed an enterprise of the U.S. (*quod non*).

159. In addition, the Dominican Republic has notified the Government of the United States as a potentially interested country in the present denial of benefits, as provided in Article 10.12(2) and Article 18.3 of the Treaty.[77]

3.2.1 Sargeant has no substantial business activities in the United States.

160. First, as explained in sections 3.1 and 3.2 above, Sargeant has not established that it conducts any business activities – let alone "*substantial business activities"* - in the United States. In fact, the evidence available indicates otherwise.

161. Investment tribunals have understood that the term substantial means that the activity must be material enough to establish a genuine connection with the territory. Moreover, the "*business*" nature of the activity means that the activity must be something beyond what is necessary to simply maintain its existence or registration in that country. It cannot be a shell company.[78]

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[75] **RL-0001**, CAFTA-DR, Article 10.12(2).

[76] **RL-0002**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.61: "*The Tribunal determines that the meaning and application of CAFTA Article 10.12.2, interpreted in accordance with its object and purpose under international law, require the Respondent to establish two conditions in the present case: (i) that the Claimant has no substantial business activities in the territory of the USA (beyond mere form) and (ii) either (a) that the Claimant is owned by persons of a non-CAFTA Party (here Canada) or (b) that the Claimant is controlled by persons of a non-CAFTA Party (here also Canada, or at least persons not of the USA or the Respondent as CAFTA Parties)."*

[77] **R-0030**, Notification of Denial of Benefits dated 13 August 2023.

[78] **RL-0002**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.75.

162. In this regard, the tribunal in *Aris Mining v Colombia*, in the context of Article 814.2 of the Colombia-Canada Free Trade Agreement, which provides a very similar denial of benefits to Article 10.12.2 of CAFTA-DR[79] held:

> *137. The next word in the treaty text, "substantial," nonetheless provides an important materiality threshold. A business activity may not be mere cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home State. That genuine connection is necessary to ensure that the company is one that the home State has an interest to protect, and which the host State would consider it* appropriate *for the home State to protect. The connection between the company and its home State cannot be merely a sham, with no business reality whatsoever, other than an objective of maintaining its own corporate existence. That requirement is reinforced by the last words in the treaty text, "business activities"; the activities of the company in its State of registration must be of a "business" nature. If the company has no activities in its home jurisdiction other than those required to maintain its bare registration, then it is impossible to conclude that it is conducting any "business" there, in any real sense of that word.*
>
> *138. ... Either way, the activities in the home State must be examined on their own merits - separate from the activities undertaken in other jurisdictions, including by the company's subsidiaries or affiliates - to determine if they are of sufficient reality and materiality as to satisfy the requirement that there be some "substantial business activities" in the country of registration.[80] (emphasis added)*

163. The position of the *Aris Mining v. Colombia* tribunal has been followed by other tribunals in the context of denial of benefits. [81]

164. Furthermore, the tribunal in *Pac Rim v. El Salvador* noted that under Article 10.12(2) of CAFTA-DR, the tribunal must assess the activities of the claimant itself, and not those of other affiliated or related companies. [82]

165. The tribunal in *Aris Mining v. Colombia* considered the following examples as substantial business activities, holding that those activities must be themselves material:

(i) *Core corporate functions in Toronto: corporate finance, fundraising, accounting, shareholder relations, legal, administration and IT support;*

(ii) *Office space: spending over US$100,000 on rent, utilities and related expenses in 2018;*

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[79] **RL-0003**, Colombia-Canada Free Trade Agreement signed on 21 November 2008: "*A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if investors of a non-Party or of the Party denying benefits own or control the enterprise and the enterprise has no substantial economic activities in the territory of the Party under whose laws it is incorporated or organized*".

[80] **RL-0004**, *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, ¶¶ 137-138.

[81] See e.g., **RL-0005**, *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021, ¶ 279.

[82] **RL-0002**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.66.

(iii) *Eight full-time employees in Toronto: In 2018, GCG spent over CAD$1.2 million in Canada on compensation and benefits.*

(iv) *Several bank accounts in Canada: Six bank accounts through which GCG actively conducts its business; in or about May 2018, those six accounts contained more than US$25 million;*

(v) *Annual purchases of goods and services in Canada: GCG has spent hundreds of thousands of dollars related to accounting and advisory services, legal services, and shareholder and investor related activities, as well as miscellaneous services such as IT, liability policies and a listing fee for the Toronto Stock Exchange; and*

(vi) *Financing activities: GCG has raised more than US$500 million over the last 10 years, in transactions on the Canadian debt and equity markets, in order to support its operations.*[83]

166. In a similar vein, the tribunal in *Pac Rim v. El Salvador* found that the claimant lacked substantial business activities in the country of incorporation, given the claimant lacked employees, did not lease an office there, did not have assets other than the shares of the company through which it operated in El Salvador, and lacked a bank account in the country of incorporation.[84]

167. Pursuant to the elements and criteria considered by the relevant case law, Sargeant does not have substantial business activities in the United States.

168. In this case, as acknowledged by Mr. Mustafa Abu Naba, Sargeant was created exclusively for the purpose of participating tender for the 2003 Contract in the Dominican Republic, and the U.S. as place of incorporation was chosen for the purpose of involving " *the assistance of the American government if needed*".[85] Consequently, Sargeant is not an entity that carries an activity of its own besides its operation in the Dominican Republic, nor does it have a real and substantive connection to the United States.

169. In this sense, none of the activities listed by the tribunal in *Aris v. Colombia* arise from the available information about Sargeant. In fact:

i. It is nowhere indicated that Sargeant has any activity besides its activity in the Dominican Republic. In the territory of the United States, Mr. Abu Naba'a only refers to the "overseeing" of Sargeant's logistics operation, not by Sargeant itself, but by Mr. Sargeant and his family.[86]

ii. The import of asphalt to the Dominican Republic was not even carried out by Sargeant itself, but by Intercaribe;

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[83] **RL-0004**, *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, ¶ 139.

[84] **RL-0002**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012.

[85] Witness Statement of Mustafa Abu' Naba, ¶ 14.

[86] Witness Statement of Mustafa Abu' Naba, ¶ 13.

iii. There is no record that Sargeant by itself owns or leases offices in the United States. In fact, Mr. Abu Naba'a refers to the offices of Mr. Harry Sargeant and his family in Texas and Florida, not the company's.

iv. There is no evidence that Sargeant has any assets, employees, routine expenses of any company with business activity, financing activities or bank accounts in the United States.

v. Even Sargeant's corporate activity, such as shareholders and board meetings, have been repeatedly held in the Dominican Republic, as explained in section 3.1 above.

vi. In fact, as explained in section 3.1 above, Sargeant has been in "*tax forfeiture"* status in the United States for several of the years it operated in the Dominican Republic, for failure to regularly comply with its minimum tax obligations in the United States, which resulted in the forfeiture of its charter as a taxable entity there.

170. Therefore, Sargeant has no substantial business activities in the United States.

3.2.2 Sargeant is controlled by Mr. Mustafa Abu Naba'a, a Jordanian and Dominican national

171. Second, Sargeant is controlled by Mr. Mustafa Abu Naba'a. As arises from his witness statement and other documents, Mr. Abu Naba'a is a national of Jordan and the Dominican Republic.[87] Therefore, Sargeant is controlled by a national of both the denying Party and of a non-party to CAFTA-DR. Thus, the second requirement for the denial of benefits is also satisfied.

172. Tribunals have understood that the second requirement for the denial of benefits is satisfied by establishing only one of either ownership or control. In this regard, the *Pac Rim v. El Salvador* Tribunal stated that the State must show: "*(ii) either (a) that the Claimant is owned by persons of a non-CAFTA Party (here Canada) or (b) that the Claimant is controlled by persons of a non-CAFTA Party (here also Canada, or at least persons not of the USA or the Respondent as CAFTA Parties).*" [88]

173. According to investment tribunals, control is not limited to legal control or control of the shareholding. As explained below, several tribunals have understood that *de facto* control

[87] See **MAN-009 ENG**, p. 9: "*and the other party, Mr. MUSTAFA ABU NABA'A, of Jordanian origin and a Dominican citizen, of legal age, married, businessman, holder of identity and election card No. 001-1208505-5"*; **R-0031**, Sargeant Petroleum, LLC Extraordinary General Shareholders' Meeting Minute dated 13 March 2013: "*MUSTAFA ABU NABA'A, Jordanian*"; **R-0032**, Sargeant Petroleum, LLC Extraordinary General Shareholders' Meeting Minute dated July 10, 2013: "*MUSTAFA ABU NABA'A, Dominican*"; **R-0033**, Resolutions adopted with the unanimous written consent of the Board of Directors of Sargeant Petroleum Limited of 3 June 2014: "*MUSTAFA ABU NABA'A, naturalized Dominican*"; **R-0034**, Sargeant Petroleum, LLC Extraordinary General Shareholders' Meeting Minute dated 6 October 2016: "*MUSTAFA ABU NABA'A, Jordanian*".

[88] **RL-0002**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.61; see also **RL-0006**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 170: *Under Article 17(1)'s first limb, the question is whether the Claimant is a legal entity owned or controlled "by citizens or nationals of a third state". A "third state" being a non-Contracting State under the ECT, it would not include France (as a Contracting State); and if a national of France "owned" and "controlled" the Claimant at all material times, it would follow that Article 17(1)'s first limb would not be satisfied in the present case. In the Tribunal's view, the word "or" signifies that ownership and control are alternatives: in other words, only one need be met for the first limb to be satisfied, as the Claimant rightly conceded at the September Hearing [D2.37]*".

is the relevant factor to assess. In other words, control may be exercised even by holders of less than 50% of the shareholding of a company.

174. Tribunals have understood that *de facto* control of a company is exercised by whomever has the ability to exert "substantial influence" over the management and operation of the company. This is the case of Mr. Abu Naba'a with respect to Sargeant.

175. For example, the tribunal n *Big Sky Energy Corporation v. Republic Of Kazakhstan* assessed control from the perspective of the administration of the investment vehicle and who was in charge of its management.[89]

176. In this regard, the tribunal in *Plama v. Bulgaria* considered that the term control under Article 17(1) of the Energy Charter Treaty included *de facto* control, meaning the capacity to exercise substantial influence over the legal entity's management:

> *Also, in the Tribunal's view, ownership includes indirect and beneficial ownership; and control includes control in fact, including an* ***ability to exercise substantial influence*** *over the legal entity's management, operation and the selection of members of its board of directors or any other managing body. This interpretation appeared to be common ground between the parties: see the Respondent's Memorial at paragraphs 49 ff (page 17) and the Claimant's submissions at the September Hearing [D2.38]. What was not remotely common ground were the relevant facts*[90] *.* (emphasis added)

177. The tribunals in *Thunderbird v. Mexico* and *B-Mex v. Mexico* analyzed in detail the meaning of "control". While both analyzed this term under NAFTA Article 1117, their conclusions are squarely applicable to term control under denial of benefits provisions, as both tribunals also referred to NAFTA Article 1113 on denial of benefits in support of their interpretation.

178. The tribunal in *Thunderbird v. Mexico* stated:

> *105 (...) the present discussion turns on whether Thunderbird exercised control over the Minority EDM Entities. The question arises whether "control" must be established in the legal sense, or whether de facto control can suffice for the purposes of Chapter Eleven of the NAFTA. (…)*

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[89] **RL-0005**, *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021, ¶ 256-257*: "Importantly, the Respondent has failed to establish that Mr. Lawler is a nominee director who takes instructions from another entity or individual, as alleged. In examining the footnote that accompanies this general argument in the Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, it can be seen that the Respondent fails to provide any evidence that definitively supports this position, but rather primarily relies on its contention that the Claimant has failed to provide evidence establishing that Mr. Lawler is not merely such a nominee director. This of course relates to his role generally, and is distinct from the Respondent's position concerning control over this arbitration which is addressed below. While the Tribunal does acknowledge the Claimant's failure to provide thoroughly compelling evidence concerning Mr. Lawler's role in the company, the Claimant has managed to provide enough support to withstand an argument which is primarily based on the allegation that the Claimant has failed to meet its initial burden. Prior to their resignation in March 2013, the Board of Directors, empowered with controlling the business activities of the Claimant, appointed Mr. Lawler as the Sole Director, President, Secretary and Treasurer. As the Claimant correctly highlights, Mr. Lawler has had a long-standing relationship with the Claimant, having been appointed its US General Counsel in 2006. The Tribunal is not willing to characterize Mr. Lawler as a mere "nominee director". In his role, the Tribunal sees no evidence suggesting that anyone other than Mr. Lawler manages the Claimant's activities at the Board level, which is the role of the Sole Director. Absent any compelling evidence that Mr. Lawler takes instructions from someone else in his capacity as the Sole Director, the Tribunal is satisfied that Mr. Lawler's execution of this role is sufficient to withstand scrutiny*."

[90] **RL-0006**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 170.

106. The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "de facto" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA.

107. Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of de facto control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in Mexico.

108. It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[91] (emphasis added)

179. In *B-Mex v. Mexico*, the tribunal stated that:

"205. (...) "control" can mean both the legal capacity to control and de facto control. Article 1117 thus applies whenever the investor: (...) c. does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise de facto control (also an enterprise that the investor "controls").

(...)

239 The framework within which the Tribunal has assessed the evidence of de facto control is the one set out by the Thunderbird tribunal, which the Tribunal considered persuasive. The Thunderbird tribunal found that the "ability to exercise significant influence on the decision-making" and being the "driving force" in the company would be significant evidence of de facto control.298 Beyond influence on decisionmaking, the Thunderbird tribunal also took into account other factors such as (i) being exposed to the economic consequences of decisions in the company299 and (ii) having expertise and involvement in the capitalisation and operation of the business.300 To the Tribunal's mind, these are examples of relevant factors, although by no means the only ones.[92] (emphasis added)

[91] **RL-0007**, *Thunderbird Gaming Corporation v. United Mexican States,* UNCITRAL, Arbitral Award, 26 January 2006 ¶¶ 105-108.

[92] **RL-0008**, *B-Mex, LLC and others v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 240.

180. In this case, Mr. Abu Naba'a had the ability to exercise, and in fact exercised, significant influence over the management and operation of Sargeant. This is confirmed by several elements.

181. From a formal point of view, Mr. Abu Naba'a owns 50% of Sargeant's shareholding. He is also the Vice-President of the company.[93] In addition, he is Sargeant's representative with broad powers and the ability to act individually on behalf of the company in several types of acts.

182. Mr. Abu Naba'a is who in practice manages Sargeant. He has always and for all purposes been the face of the company before the Dominican Government, as well as the one that introduced Sargeant's business to the country.[94]

183. In his witness statement, Mr. Abu Naba'a expressly states: "*I have always managed Sargeant's on-the-ground activities from the Dominican Republic*". On the other hand, he states that Mr. Harry Sargeant III limited himself to "*[overseeing] Sargeant's logistics operations remotely from their offices in Florida and* Texas"[95] .

184. Sargeant's corporate documents confirm that Mr. Mustafa Abu Naba's has extensive powers to control and manage the company. Therefore, he has had the ability to exercise clear influence over Sargeant's decision-making process on a continuous and uninterrupted basis since its incorporation.

185. For example, the General Extraordinary Shareholders' Meeting from March 13, 2013, passed a resolution "*to grant a power of attorney to Mr. MUSTAFA ABU NABA'A, partner of the company, to be the manager or representative of the company in the Dominican Republic*"[96] .

186. Also, the Board of Directors Meeting of Sargeant from April 25, 2014, resolved that "*Mr. Mustafa Abu Naba (...) is hereby authorized and empowered to direct and execute (...) and sign all necessary acts, to negotiate the payment terms to carry out the purposes and intent of all the resolutions hereby adopted*."[97]

187. Additionally, his witness statement also proves that he was responsible for meeting with the relevant persons and senior officials of the Government of the Dominican Republic alongside several administrations;[98] the one who negotiated the contracts with the MOPC[99] and the one who decided and put forward different proposals on behalf of Sargeant.[100]

188. In addition, Mr. Mustafa Abu Naba'a himself signed all of Sargeant's contracts with the MOPC and other entities since its incorporation in 2003: the 2003 Contract,[101] the 2013

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[93] **R-0035**, Certificate of the Commercial Registry of the Chamber of Commerce and Production of Santo Domingo.

[94] Witness Statement of Mustafa Abu' Naba, ¶¶ 6-7.

[95] Witness Statement of Mustafa Abu' Naba, ¶ 16.

[96] **R-0031** Sargeant Petroleum, LLC Extraordinary General Shareholders' Meeting Minute dated 13 March 2013.

[97] **R-0036**, Resolution of the Board of Directors of Sargeant dated 26 May 2014; see also **R-0037,** Resolution of the Board of Directors of Sargeant dated 11 February 2015.

[98] Witness Statement of Mustafa Abu' Naba, ¶¶ 41, 53, 54, 55, 61, 70, 83, 88.

[99] Witness Statement of Mustafa Abu' Naba, ¶ 47.

[100] Witness Statement of Mustafa Abu' Naba, ¶ 77.

[101] **MAN-0006**, 2003 Contract.

Contract and its addendums,[102] the so-called Dock Lease Contract,[103] and the 2017 Contract.[104]

189. Mr. Abu Naba'a's degree of influence on the operation and economic fate of the company was such that huge amounts of money for Sargeant's services to the MOPC (more than USD 65 million) were paid directly to Mr. Abu Naba'a.

190. Indeed, on November 1, 2016, Sargeant assigned in favor of Mr. Abu Naba'a a USD 23,000,000 credit against MOPC.[105]

191. On May 9, 2018, Sargeant's General Extraordinary Meeting approved the assignment in favor of Mr. Abu Naba'a of four separate credits against the MOPC for a total of USD 45,744,020.02.[106]

192. Following the standard and elements proposed by investment tribunals, the overwhelming evidence available shows that Mr. Abu Naba'a controls Sargeant.

193. In such sense, Mr. Abu Naba'a has always been in a position to exert and has in fact exerted significant influence over Sargeant's decision-making process; he had the power to decide and execute the key business decisions for Sargeant; he had sufficient power to control Sargeant's management, direction and operational decisions, and has in fact done so; and has had clear economic benefit as evidenced by Sargeant's assignment of millions of dollars in his favor. [107]

194. Therefore, given that Mr. Abu Naba'a is a national of both the Party denying benefits (the Dominican Republic) and a non-CAFTA-DR party (Jordan), the second requirement under Article 10.12(2) of CAFTA-DR is satisfied.

195. By virtue of the foregoing, the Dominican Republic denies the benefits of the Treaty to Sargeant as provided in its Article 10.12(2).

3.3 FIRST *RATIONE MATERIAE* OBJECTION: SARGEANT DOES NOT OWN A COVERED INVESTMENT UNDER CAFTA-DR.

196. The Tribunal also lacks jurisdiction as Sargeant does not own a covered investment under CAFTA-DR Articles 10.1 and 10.28. Therefore, Sargeant is not entitled to invoke the substantive protections or arbitration offer of the Treaty.

197. CAFTA-DR Article 10.1(1) sets forth its scope of application as follows:

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[102] **LC-0003**, 2013 Contract; **MAN-0007**, Addenda to 2003 Contract.

[103] **MAN-004**, Dock Lease Agreement.

[104] **LC-0003**, 2013 Contract; **MAN-0007**, Addenda to 2003 Contract.

[105] **R-0038**, Credit Assignment Agreement between Sargeant and Mustafa Abu' Naba dated 1 November 2016.

[106] **R-0039**, Sargeant's Second Extraordinary Shareholders' Meeting Minute dated 9 May 2018; see also **R-0040**, Sargeant's Extraordinary Shareholders' Meeting Minute dated 5 July 2018; **R-0041**, Minutes of the Extraordinary Meeting of Sargeant dated 26 October 2017.

[107] **R-0038**, Credit Assignment Agreement between Sargeant and Mustafa Abu' Naba dated 1 November 2016; **R-0039**, Sargeant's Second Extraordinary Shareholders' Meeting Minute dated 9 May 2018; see also **R-0040**, Sargeant's Extraordinary Shareholders' Meeting Minute dated 5 July 2018; **R-0041**, Minutes of the Extraordinary Meeting of Sargeant dated 26 October 2017.

This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) covered investments;....

198. In addition to proving that it is an investor of a Party, an alleged investor invoking the protections of DR-CAFTA must establish the existence of (i) measures by the State Party, (ii) related to a covered investment.

199. Article 2.1 General Definitions provides that

> *covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.* (emphasis added)

200. Article 10.28 defines investment as follows:

> *investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*
>
> *(a) an enterprise;*
>
> *(b) shares, stock, and other forms of equity participation in an enterprise;*
>
> *(c) bonds, debentures, other debt instruments, and loans;*
>
> *(d) futures, options, and other derivatives;*
>
> *(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
>
> *(f) intellectual property rights;*
>
> *(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and*
>
> *(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;*

201. While this is an ICSID Additional Facility arbitration and the *double-barreled test* under Article 25 of the ICSID Convention is not directly applicable, the very definition of investment under CAFTA-DR requires the claimant to establish that its so-called investment has the characteristics of an investment. This has been recently ratified by CAFTA-DR tribunals.[108]

202. The rule cited above requires Sargeant to demonstrate:

i. That it owns or controls an asset;

ii. That such asset has the characteristics of an investment.

[108] **RL-0009**, *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶¶ 329-330.

203. Sargeant invokes as its covered investments in the Dominican Republic, on the one hand, the 2013 Contract itself, allegedly unpaid purchase orders and inventory allegedly purchased by Sargeant under the 2013 Contract. On the other hand, Sargeant invokes several other items. However, Sargeant asserts no claim whatsoever with regards to the those items, nor does Sargeant explain how they were impacted by the alleged measures raised by Claimant as Treaty breaches.[109]

204. In the jurisdictional section of Claimant's Memorial, Sargeant makes no effort whatosever to how any of those elements satisfy the definition of investment set forth in the Treaty.[110]

205. Sargeant also fails to prove the existence and ownership of several of the items identified as its investment. In addition, Sargeant fails to indicate both how those items satisfy the characteristics of an investment and how they fit into any of the forms of investment listed in Article 10.28.

206. As explained below, none of the elements invoked by Sargeant qualify as a covered investment under CAFTA-DR.

3.3.1 The 2013 Contract is not an investment

207. Sargeant's claim is essentially an action for collection of invoices for the sale of goods and services. The only "measures" for which Sargeant asserts a claim and invokes as breaches to the Treaty are the alleged non-payment of invoices supposedly due under a mere ordinary commercial contract.

208. Sargeant's claim, therefore, does not arise from measures relating to a covered investment, as required by CAFTA-DR Article 10.1(1) as a condition of its application.

209. The 2013 Contract is not a covered investment under CAFTA-DR, because: (i) the Treaty expressly excludes claims for payment for the sale of goods or services from the definition of investment; and (ii) the 2013 Contract does not meet the characteristics of an investment under Article 10.28 CAFTA-DR.

210. First, the definition of investment under Article 10.28 of CAFTA-DR provides, in footnote 12, the following exclusion:

> *For purposes of this Agreement, claims for payment that are immediately due and result from the sale of goods or services are not investments.*

211. This exclusion is clear. Its wording is even more categorical in CAFTA-DR than the wording under similar treaties.[111]

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[109] Claimant's Memorial, ¶ 139.

[110] Claimant's Memorial, ¶ 139.

[111] See for example **RL-0010**, United States-Peru Free Trade Agreement (PTPA) signed on 12 April 2006, Chapter 10, footnote 16: "*Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.*." (emphasis added); **RL-0011**, Trade Promotion Agreement between the United States and Colombia, chapter 10, footnote 12: " Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.."

212. Sargeant's claim is a mere claim for payment resulting from the sale of goods (supply of asphalt) and services (storage of asphalt). This is not an investment dispute. The intention of CAFTA-DR contracting parties is crystal clear in excluding claims like the one Sargeant has brought here.

213. Second, the 2013 Contract is an ordinary commercial contract and therefore does not qualify as an investment.

214. While Article 10.28, subparagraph (e), includes some types of contracts as examples of investments, namely "*turnkey, construction, management, production, concession, revenue sharing and other similar contracts*", the 2013 Contract is not comparable to any of these types of contracts. Moreover, the 2013 Contract is exactly the type of contract that investment tribunal exclude from the concept of investment.

215. The definition of investment under CAFTA-DR requires that the assets owned by the investor meet the characteristics of an investment. The list of characteristics included in Article 10.28 CAFTA-DR (commitment of capital or other resources, the expectation of obtaining gain or profit, assumption of risk) is not exhaustive.[112] Therefore, it is relevant for these purposes to take into account the criteria provided by investment tribunals to define investment.

216. Investment tribunals understand that mere commercial contracts, in particular contracts for the sale of goods, are not considered investments.[113]

217. In the same vein, the United States has explained that "*Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e)*", when commenting on an investment treaty with an identical provision to subsection (e) of the definition of investment in Article 10.28 CAFTA-DR.[114]

218. The 2013 Contract is an ordinary commercial contract for the sale of goods (supply) and services (storage). Moreover, those services were never directly provided by Sargeant. Indeed, Sargeant's only activity under the 2013 Contract was to sell asphalt to the MOPC (which was actually provided through Intercaribe, a third party) and to charge for storage minimum amounts (invoices for storage differential).

219. Therefore, the 2013 Contract and Sargeant's claims for payment thereunder are not protected investments under CAFTA-DR.

3.3.2 The remaining items relied upon by Sargeant are not covered investments, the majority lack supporting evidence, and none are subject of a claim by Sargeant.

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[112] See e.g., **RL-0012**, *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia,* Submission of the United States of America, ICSID Case No. ARB/19/34, 4 April 2022. ¶ 30.

[113] **RL-0013**, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 ¶ 58: "*The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an* investment."; **RL-0014**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 ¶¶ 55-57; **RL-0015**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, ¶ 185-187; **RL-0016**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, ¶ 113.

[114] **RL-0017**, *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, Submission of the United States, ICSID Case No. ARB/16/34, 28 August 2017, ¶ 16.

220. In addition to the 2013 Contract itself, Sargeant states that its investment in the Dominican Republic is comprised of the lease of a dock, supposed expenditures to repair certain sugar tanks in Terminals 1, 2 and 3 of the Port of Haina, supposed expenditures to lease storage tanks at Terminal 3, supposed expenditures for permits and plans to build a fourth terminal and expand its operation in the Dominican Republic, and supposed expenditures for the construction of a pipeline.

221. According to Sargeant, it would have incurred all of these expenses for the purposes of complying with its obligations under the 2003 Contract and the 2013 Contract, and to continue providing services to the Dominican Republic after these contracts were terminated.

222. First, according to Sargeant, all these elements would be accessories to the 2013 Contract. The 2013 is not a covered investment as demonstrated above. Thus, all these elements are not covered investments either.

223. Second, none of the disbursements invoked by Sargeant (with only one exception) are supported by evidence and are based solely on cost estimations made by Mr. Abu Naba'a in this witness statemen. Sargeant has not demonstrated either that it was Sargeant itself and not other entities mentioned in Claimant's Memorial (*i.e.,* Sargeant Marine Florida or Sargeant Marine Bahamas) the one that incurred in those alleged disbursements. The only exception is the dock lease, for which Sargeant produced a copy of the lease agreements.[115] Those documents provide for an annual disbursement of USD 18,000 until 2019 and of USD 37,000 as of December 2019. These are minuscule amounts compared to Sargeant's claim and the hundreds of millions of dollars it has already received from the Dominican State from 2002 to date.[116]

224. All of this is further questioned by the fact that two months after signing the 2013 Contract, Sargeant hired Intercaribe to perform the very activities set forth in the 2013 Contract.[117]

225. Third, Sargeant did not put forward any claim related to these so-called investments. Claimant's quantum expert mentions this expressly:

> *Sargeant continues to own and operate the infrastructure assets and has not claimed that the Measures have resulted in a diminution in value of the physical investments themselves. As such, there are no losses claimed in respect of these assets and I have not sought to estimate such losses.*[118]

226. As a condition for its application, Article 10.1(1) CAFTA-DR requires the existence of State measures relating to covered investments. Claimant's only claims in this arbitration are payment claims for the sale of goods and services, which are expressly excluded by CAFTA-DR. Consequently, there is no covered investment that justifies the jurisdiction of the Tribunal.

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[115]Witness Statement of Mustafa Abu' Naba ¶¶ 27-33.

[116]Witness Statement of Mustafa Abu' Naba ¶¶ 27-33.

[117] **R-0008**, Asphalt Cement Purchase Agrement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013, article FIRST: " INTERCARIBE MERCANTIL, SAS, agrees to sell to the company SARGEANT PETROLEUM LLC, the amount of 74,536,312.52 gallons of AC-30 asphalt cement. This operation includes the supply, transport, storage, and handling of the product."

[118] Richard Indge Expert Report, ¶ 3.5.2.

3.4 SECOND *RATIONE MATERIAE* OBJECTION: IN THE HYPOTHETICAL EVENT THAT SARGEANT HAD A COVERED INVESTMENT, IT IS ILLEGAL

227. Sargeant is not entitled to invoke the protections of CAFTA-DR, and lacks standing to bring its claims, because its alleged investment is illegal, as it was acquired in violation of the law.

3.4.1 Investments made in violation of the law are not eligible for protection under CAFTA-DR and international law

228. An investment obtained by unlawful means is contrary to the obligation of good faith and fair dealing under international law and public policy, and is thus excluded from the protection afforded by CAFTA-DR.[119]

229. As stated by the tribunal in *Hamester v. Ghana*:

> *An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.*[120]

230. This position was also shared by the tribunal in *Yukos v Russia,* which acknowledged that:

> *there is support in the decisions of tribunals in investment treaty arbitrations for the notion that... an investment that is made in breach of the laws of the host State may either: (a) not qualify as an investment, thus depriving the tribunal of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty.*[121]

231. As Prof. Zachary Douglas points out:

> *if a plea of illegality to the effect that the investor has violated a ground of international public policy is successful, then it should result in the rejection of the claims as inadmissible*.[122]

232. The legality requirement applies regardless of the specific language of the applicable treaty and even when the same does not expressly include such a requirement.

233. The tribunal in *Alvarez Marin v. Panama*, applying NAFTA which text is very similar to CAFTA-DR, understood that investment treaties only protect investments that do not violate the host State's legal regime, even when the applicable treaty does not expressly provide so:

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[119] **RL-0018**, *Phoenix Action Ltd.v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 100: "*The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State. The protection of foreign investments made in accordance with the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and bona fide investments*".

[120] **RL-0019**, *Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 123-124.

[121] **RL-0020**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶ 1349.

[122] **RL-0021**, Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration ICSID Review*, Vol. 29, No. 1 (2014), p. 180.

> *in the Tribunal's opinion the legality requirement arises implicitly from the investment treaties and is based on a general principle of law that restricts international legal protection to investments made without violating the legality of the host country*.[123]

234. The tribunal in *Inceysa v. El Salvador* noted in turn that:

> *the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud.*". [124]

235. The tribunal in *Plama*, a case decided under the ECT, stated that the "*substantive protections of the ECT cannot apply to investments made contrary to law*"[125]. While acknowledging that the ECT "*does not contain a provision requiring the conformity of the Investment with a particular law*", the tribunal stated that "[t]*his does not mean... that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic and international law.*"[126] According to the tribunal:

> *granting the ECT's protections to Claimant's investment would be contrary to the principle nemo auditur propriam turpitudinem allegans invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal*.[127]

236. Several arbitral tribunals have stated that the principle that an investment will not be protected if it has been established in violation of domestic or international principles of good faith or the law of the host state is a general principle that exists regardless of the specific language of an investment treaty. [128]

237. For example, the tribunal in *Fraport v Philippines* stated that:

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[123] **RL-0022**, *Álvarez y Marín Corporación S.A. and Others v. Republic of Panama,* ICSID Case No. ARB/15/14, Award, October 12, 2018, ¶ 140.

[124] **RL-0023**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 242.

[125] **RL-0024**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 139

[126] **RL-0024**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 138

[127] **RL-0024**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 143; See also, **RL-0020**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶ 1349.

[128] **RL-0018**, *Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 101: "it is the Tribunal's view that this condition - the conformity of the establishment of the investment with the national laws - is implicit even when not expressly stated in the relevant BIT*"; **RL-0025**, *David Minnotte and Robert Lewis v. Republic of Poland, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, ¶ 131: "The Tribunal's view that this condition - the conformity of the establishment of the investment with the national laws - is implicit even when not expressly stated in the relevant BIT. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, ¶ 131: **"***The BIT in this case does not define an 'investment' in terms that explicitly require the investment to be made in accordance with the host State's law. Nonetheless, it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law.*"; See also, **RL-0019**, *Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 2010, ¶¶ 123-124; **RL-0020**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶ 1349.

even absent the sort of explicit legality requirement that exists here, it would still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.[129]

238. The *Mamidoil Jetoil* tribunal also followed the widely accepted view that investments are only protected by international law when they are made in accordance with the law of the host state. According to the tribunal, states agree to arbitration and accept waiving part of their immunity from jurisdiction to encourage and protect investments under international Treaties; in doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws.[130]

239. In short, even if the applicable treaty does not expressly require that an investment must be obtained in accordance with the law of the host State, such a requirement may be imposed by the tribunal as a matter of interpretation of the jurisdictional requirements set forth in the treaty or as a ground for admissibility of a claim.

3.4.2 Sargeant's so-called investment is contrary to Dominican law and does not merit protection

240. As explained in section 2.3.2, the execution of the 2013 Contract breached core rules and principles of Dominican law. Sargeant has for years made millions in profits under a null and void contract that is not entitled to protection under Dominican law and, therefore, does not deserve protection under CAFTA-DR.

241. Among other irregularities, the 2013 Contract was obtained in violation of the Procurement Law, absent a competitive procurement procedure, which violated the legality, equality, free competition, transparency, publicity, participation, and reasonableness principles.[131] Under Dominican law, the 2013 Contract is null and void ("*nulidad absoluta*") as a consequence of that breach.[132]

242. Second, the 2013 Contract was executed without a special power of attorney from the President of the Republic authorizing the MOPC to execute the contract. As Dr. Dickson explains, the consequence of such breach is also the nullity of the 2013 Contract.

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[129] **RL-0026**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 332.

[130] **RL-0027**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case. No. ARB/11/24, Award, 30 March 2015, ¶¶ 294, 359: "*the Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions.*"; **RL-0028**, *SAUR International v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶ 308: "*The Tribunal understands that the purpose of the investment arbitration system lies in protecting only legal and bona fide investments. Whether the France-Argentina APRI mentions or fails to mention the requirement that the investor acted in accordance with domestic law is not a relevant factor. The requirement of not having incurred in a serious violation of the legal system is a tacit condition, inherent in every APRI, since it cannot be understood in any case that a State is offering the benefit of protection through investment arbitration, when the investor, in order to achieve such protection, has incurred in an unlawful act*";

[131] Expert Report of Rafael Dickson Morales, ¶ 48.

[132] Expert Report of Rafael Dickson Morales, ¶ 49.

243. Third, the 2013 Contract included an unconstitutional tax exemption provision. This exemption, as Dr. Dickson explains, violates Articles 128 and 244 of the Constitution, and other laws and decrees of the Dominican Republic.[133]

244. Thanks to this unconstitutional tax exemption, Sargeant has collected hundreds of millions of dollars from the Dominican treasury without paying the corresponding taxes.

245. According to the Tribunal in *Kim v. Uzbekistan*, in order to determine whether an investment is not worthy of protection under an investment treaty because it has been made in violation of local law, the following elements should be taken into account: the importance of the rules that have been breached, the seriousness of such breach, and whether a combination of the conduct of the investor and the law involved compromises a fundamental interest of the State that justifies placing the investment outside the protection of an investment treaty.[134]

246. In this case, all of these elements justify a finding from the Tribunal that ever if Sargeant's so-called investment can qualify as such, it is illegal. All of the illegalities identified above are serious and substantial, and have harsh consequences under local law, as Dr. Dickson explains.[135] The violation of these rules has costed the Dominican State hundreds of millions of dollars and has prevented the State from raising hundreds of millions more in taxes.

247. Accordingly, in view of the various illegalities of Sargeant's operation in the country, the MOPC filed a lawsuit before the administrative courts seeking the declation of annulment of the 2003 and 2013 Contracts, and the reimbursement of the amounts unduly received by Sargeant.

248. These specific illegalities alone determine the illegality of the investment. However, it is also revealing to consider them in conjunction with other contextual elements of Sargeant's operation in the country, namely:

i. the fact that the performance of the 2013 Contract continued beyond the exhaustion of its total volume in gallons. Similarly, the performance of the 2003 Contract continued after its term had expired;

ii. the fact that under the Asphalt Purchase Agreement between Sargeant and Intercaribe, Sargeant purchased the exact same volume of AC-30 under the 2013 Contract to supply it the MOPC, when according to Sargeant such supply was entirely optional and might not occur at all;[136]

iii. the link between Sargeant and Intercaribe in itself, considering that this company belonged to Mr. Donald Guerrero, who later approved huge payments to Sargeant, Intercaribe and Mr. Abu Naba'a as Minister of Finance, and is now in prison for

[133] Rafael Dickson Expert Report, ¶¶ 66-67.

[134] **RL-0029**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶¶ 404-408.

[135] Rafael Dickson's Expert Report

[136] **R-0008**, Asphalt Cement purchase agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013.

accusations related to credit assignments and payments approved in exercise of his public duties;[137]

iv. the fact that Mr. Abu Naba'a had access to internal MOPC memoranda, as explained in Minister Ascención's witness statement;[138] .

v. Mr. Abu Naba'a's close relationship with top officials from the Dominican Government for several years;[139] and

vi. the history of corruption of companies related to Sargeant in the asphalt market in contracts with Latin American public entities.[140]

249. Pursuant to all these facts, the Dominican Republic reserves the right to invoke other illegalities arising either from the evidence to be produced in this arbitration and/or from other eventual investigations.

250. In conclusion, Sargeant's so-called investment, if any, is contrary to Dominican law and is not subject to protection under CAFTA-DR and international law.

3.5 THIRD *RATIONE MATERIAE OBJECTION*: THIS IS NOT AN INVESTMENT DISPUTE UNDER ARTICLE 10.16(1) CAFTA-DR BUT A PURELY CONTRACTUAL DISPUTE OVER THE COLLECTION OF INVOICES

251. Sargeant's claim is not covered by CAFTA-DR arbitration clause as it is a purely contractual claim. Sargeant's claim is a mere lawsuit for the collection of invoices.

252. Knowingly, Sargeant attempts to force the Tribunal's jurisdiction by arguing that the MFN clause would allow Sargeant to import umbrella clauses from other investment treaties, or that the 2013 Contract is an investment agreement. Both arguments are meritless, as explained below.

253. The Dominican Republic did not consent submitting purely contractual disputes to arbitration under CAFTA-DR. Pursuant to Article 10.16(1) CAFTA-DR, an investor may submit to arbitration a claim that the State has breached:

> *(A) an obligation under Section A,*
>
> *(B) an investment authorization, or*
>
> *(C) an investment agreement*.

254. With this wording, the signatory States excluded merely contractual disputes – other than those based on a breach of an investment agreement – from the jurisdiction of the Tribunal.

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[137] **R-0013**, Corporate Information about Intercaribe Mercantil SAS, downloaded from Open Corporates website; **R-0014**, Corporate documents of Intercaribe Mercantil SAS; **R-0015**, Letters from Banco de Reservas to Donald Guerrero Ortiz; **R-0019**, "Court holds Donald Guerrero and Jose Ramon Peralta in prison", Press release from Diario Libre, dated 2 June 2023; **R-0020**, "Preventive prison for Donald Guerrero and Jose Ramon Peralta is ratified" Press release from Listin Diario, dated 2 June 2023; **R-0021**, "Miriam German leads investigation against Donald Guerrero and Simon Lizardo for alleged corruption, embezzlement and scam", Press release of AdMedios, dated 9 February 2021.

[138] Testimonial Statement of Minister Ascención.

[139] Testimonial Statement of Minister Ascension; **R-0042**, "Mustafa Abu visited his son in prison, then Leonel at the Funglode", Acento press release, December 26, 2012; **R-0043**""Prince Karim", the controversial American businessman who was injured in an air accident in Soledad," Infobae Press Release, 18 February 2023

[140] See Section 2.1.

255. According to Sargeant, the Tribunal would have jurisdiction to hear this dispute under subsections (A) and (C) of Article 10.16(1) CAFTA-DR.[141]

256. However, Sargeant's argument is meritless. The Tribunal lacks jurisdiction because Sargeant's claim represents a purely contractual dispute that must be resolved before Dominican courts (**Section 3.5.1**); Article 10.4 of CAFTA-DR cannot be used by Sargeant to import umbrella clauses from other investment treaties (**Section 3.5.2**); even if Article 10.4 were applicable for those purposes, the 2013 Contract contains a forum selection clause that must be enforced (**Section 3.5.3**); and the 2013 Contract is not an investment agreement (**Section 3.5.4**).

3.5.1 This is a purely contractual dispute that must be resolved before the Dominican courts.

257. The alleged violations of Section A of CAFTA-DR by the Dominican Republic are nothing more than mere contractual breaches which are excluded from the Tribunal's jurisdiction and should be referred to Dominican Administrative courts. This is a simple invoice collection dispute and not an investment dispute under Article 10.16(1).

258. Indeed, the alleged breaches of the Dominican Republic invoked by Sargeant are:

i. Refusing to pay Sargeant amounts due under the 2013 Agreement;

ii. Refusing to receive and pay for AC-30 ordered from Sargeant; and

iii. Excluding Sargeant from the Dominican AC-30 market in favor of local competition.[142]

259. The contractual nature of the first two is self-evident; they relate to a supposed debt under the 2013 Contract and the supposed breach of payment obligations. The third claim is merely an attempt by Sargeant to disguise its contractual claim. Sargeant has not formulated any claim whatsoever in relation to this third alleged breach. In addition, its fundamental factual basis is the same as in the other two claims: it is based on the alleged non-payment of a supposed contractual debt. Therefore, Sargeant's claims are outside the Dominican Republic's consent to arbitrate under and thus, outside the Tribunal's jurisdiction.

260. Investment tribunals have consistently held that arbitral tribunals under investment treaties do not have jurisdiction to hear purely contractual claims.

261. For example, according to the tribunal in *Abaclat*:

> *316. It is in principle admitted that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. This is because a BIT is not meant to correct or replace contractual remedies, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims.*
>
> *Within the context of claims arising from a contractual relationship, the tribunal's jurisdiction in relation to BIT claims is in principle only given where, in addition to*

[141] Claimant's Memorial, ¶¶ 123, 125.

[142] Claimant's Memorial, ¶¶ 131, 171, 181.

> *the alleged breach of contract, the Host State further breaches obligations it undertook under a relevant treaty. Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ - be it a court or an arbitral tribunal - can and must hear the claim in its entirety and decide thereon based on the contract only*.[143]

262. Similarly, the tribunal in *BP v. Argentina* clearly stated that " *it has only jurisdiction over treaty claim, and cannot entertain purely contractual claims which do not amount to a violation of the BIT*.".[144]

263. In this case, Article 18.2 of the 2013 Contract clearly states that *"[a]ny dispute, controversy or claim resulting from or relating to this Contract, its breach, interpretation, resolution or annulment shall be subject to Administrative Jurisdiction [of the Dominican Republic]*."[145] Therefore, the Dominican courts are the competent forum to hear Sargeant's claims, not a tribunal under CAFTA-DR.

264. The tribunal in *Abaclat* proposed a criterion for determining whether a State's conduct relation to a contract amounts to an international wrong. Under this criterion, the breach must derive from the exercise of sovereign powers:

> *318. A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract. This is not the case where the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State. This applies where the circumstances and/or the behavior of the Host State appear to derive from its exercise of sovereign State power. Whilst the exercise of such power may have an impact on the contract and its equilibrium, its origin and nature are totally foreign to the contract*. [146]

265. Similarly, the tribunal in *Convial Callao v Peru* noted that the State must have acted beyond its role as a mere contractual party, exercising sovereign powers:

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[143] **RL-0030**, *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 316; **RL-0031**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 103: "*In order for a breach of contract to serve as the basis for jurisdiction of a tribunal in an investment arbitration, such breach must at the same time, and for reasons inherent in the investment protection treaty itself, amount to a violation of that treaty, one that could not be resolved by using the ordinary procedure. Among the matters falling within the scope of the jurisdiction ratione materiae of an arbitral tribunal in an investment case are acts by the host State in the exercise of its public powers ("actes de puissance publique") that deprive the foreign investor of its rights in violation of the guarantees offered by the Agreement*."

[144] **RL-0103**, *BP America Production Company and others v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 91. See also **RL-0013**, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 78, where the tribunal confirmed that it had no jurisdiction, as a bank guarantee is clearly a commercial element of the contract and the claimant's arguments that the non-release of the guarantee constitutes a breach of the Treaty were difficult to accept.

[145] **LC-0003-ENG/SPA**, 2013 Contract, Article 18.2.

[146] **RL-0030**, *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 318.

> *In cases involving contractual relations with the State, the protection provided by an international standard should only be accorded if it is established that the State acted beyond its role as a mere contractual party, with the objective of disregarding not only obligations of a contractual nature, but also obligations of an international nature through the exercise of its sovereign powers. Therefore, in order to establish the international responsibility of the State it is necessary to establish the existence of a "sovereign element" that has frustrated the legitimate expectations of the investor*.[147]

266. In the same vein the tribunal in *Impregilo v Pakistan* stated:

> *In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.*[148]

267. Applying the standard proposed in *Impregilo v Pakistan*, the tribunal in *Bureau Veritas* concluded that for a claim for breach of the treaty to succeed, the claimant would have to show that the conduct of a State constitutes an act of "puissance publique"; i.e., an "*activity beyond that of an ordinary contracting party*".[149]

268. In the present case, the MOPC did not exercise *ius imperium* powers in the execution of the 2003 and 2013 Contracts. The conduct of the MOPC questioned by Sargeant would constitute, at most, a contractual breach. Sargeant does not even allege much less prove the existence of legislative or regulatory measures that would have frustrated Sargeant's so-called investment.

269. Sargeant does not even allege that the MOPC acted in exercise of its *jus imperium* powers. Instead, Claimant simply attempts to import an umbrella clause through CAFTA-DR's NFM clause.

270. Referring to the Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Claimant's only argument is that the breach of a contract between a State instrumentality and a foreign investor is attributable to the State and, in certain circumstances, such breach amounts to an internationally wrongful act. Sargeant

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[147] **RL-0032**, *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013; see also **RL-0033,** *UAB E energija v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017, ¶ 838: "*Moreover, the breach by a State of a representation made in a contract may not suffice to give rise to a breach of the standard of fair and equitable treatment since a distinction must be made between pure contract claims and treaty claims. The Tribunal considers that, as a general rule, a breach of contract is unlikely on its own to amount to a breach of the standard of fair and equitable treatment, and the State would have to have acted in its sovereign capacity*".

[148] **RL-0034**, *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 260.

[149] **CL-0034-ENG,** *Bureau Veritas v. Paraguay*, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 125.

further states that it is irrelevant for the purposes of attribution whether the conduct of the State organ can be characterized as commercial or *acta iure gestionis*.[150]

271. However, as noted by the tribunals cited above, a mere breach of contract by a State entity – regardless of whether it may eventually be attributed to the State – is not *per se* sufficient to give rise to international responsibility. This is clear from a full reading of the section of the Commentary to the Draft Articles partially cited by Sargeant:

> *It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as acta iure gestionis. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act*. [151]

272. There is no doubt that Sargeant's claim relates to purely commercial acts, without any exercise or even invocation of sovereign power whatsoever.

273. In relation to the first two breaches raised by Sargeant (failure to pay invoices under the 2013 Contract and failure to receive and pay for purchase orders), this is clear from its mere reading. With respect to the third alleged breach (exclusion of Sargeant from the Dominican AC-30 market in favor of local competition), the fundamental basis of the claim is the same as for the first two breaches, *i.e.,* the breach of the 2013 Contract. Moreover, Sargeant has not put forward a claim for this alleged third breach of the Treaty.

274. According to the tribunal in *Cristalex v Venezuela*:

> *To determine whether, as a matter of jurisdiction, the Claimant is bringing contract or treaty claims, the Tribunal must consider, to use the words of the Vivendi I annulment committee, the "fundamental basis of the [Claimant's] claim". The Tribunal's starting point will be the Claimant's prayers for relief and the formulation of its claims, as it is for a claimant to file its claim and thus define the nature of the claim that it submits before a tribunal. However, it would of course not be sufficient for a claimant to simply label contract breaches as treaty breaches to avoid the jurisdictional hurdles present in a BIT. The Tribunal's jurisdictional inquiry is a matter of objective determination, and the Tribunal would in case of pure "labeling" be at liberty and have the duty to re-characterize the alleged breaches*. [152]

275. Sargeant does not clearly individualized how did the Dominican Republic exclude Sargeant from the Dominican AC-30 market in favor of local competition. Moreover, its argument turns circular in Section VII of its Memorial (national treatment); the section where one would expect to find arguments regarding exclusion in favor of domestic investors. In that section, however, Sargeant merely repeats that the national treatment claim is based on the MOPC:

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[150] Claimant's Memorial, ¶ 159.

[151] **CL-0008-ENG**, ¶ 41.

[152] **RL-0034**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 475.

i. Refusing to pay Sargeant amounts allegedly owed under the 2013 Agreement;

ii. Refusing to take delivery and pay for the volumes of AC-30 allegedly ordered from Sargeant; and

iii. Excluding Sargeant from the Dominican AC-30 market in favor of local competition.[153]

276. Tellingly, when stating that the Treaty breaches continue to this day, Sargeant merely refers to the fact that the alleged debt for invoices under the 2013 Contract remains unpaid. [154]

277. In fact, Sargeant does not put forward an independent claim for damages for the so-called exclusion from the Dominican market. In this regard, its quantum expert states:

> *Sargeant claims that the actions of the MOPC have excluded Sargeant from the Dominican Republic AC-30 market, and that this had the effect of causing "injury" to the value of the Claimant's investment in the Dominican Republic. I have not been instructed to perform an assessment of the Claimant's loss resulting from this alleged breach, at this time*.[155]

278. According to the tribunal in *Cristalex*, the starting point of the analysis to determine the nature of a dispute is the formulation of Claimant's claims. Based on this, despite Sargent's attempt to disguise the alleged breaches of contract as breaches of the Treaty, it is clear that the fundamental basis of Claimant's claim is in all cases the alleged breach of the 2013 Contract.

279. If Sargeant considered that the invoices are due by the Dominican State, it should have resorted to the proper legal proceedings to seek collection. Claimant has not alleged that the exercise of the legal remedies available under the 2013 Contract has been impaired in any manner whatsoever.

280. Accordingly, the Tribunal must dismiss the present claim in favor of the Dominican courts, which have jurisdiction under Article 18.2 of the 2013 Contract.

3.5.2 The MFN clause in CAFTA-DR Article 10.4 is not applicable and, in any case, does not allow Sargeant to import an umbrella clause

281. Sargeant invokes Article 10.4 CAFTA-DR, with respect to both the applicable law[156] and the Dominican Republic's breaches of its obligations under the Treaty.[157] According to Sargeant, "*numerous international tribunals*" have held that MFN clauses "*in similar terms to Article 10.4*" allow an investor to resort to umbrella clauses contained in treaties concluded by the respondent State with other States.[158] Specifically, Sargeant requests the application of Article 3(4) of the 2006 Dominican Republic-Netherlands Bilateral Investment Treaty, and/or Article 12(2) of the Dominican Republic-Finland Bilateral Investment Treaty.[159] According to

[153] Claimant's Memorial, ¶ 181.

[154] Claimant's Memorial, ¶ 98-99.

[155] Richard Indge Expert Report, ¶ 3.5.3.

[156] Claimant's Memorial, ¶ 116.

[157] Claimant's Memorial, ¶¶ 119, 193-212.

[158] Claimant's Memorial, ¶ 195.

[159] Claimant's Memorial, ¶¶ 199, 205.

Sargeant, in application of the MFN clause, the alleged breach of the 2013 Contract is automatically a breach to CAFTA-DR.[160]

282. Sargeant's argument is untenable for multiple, independent reasons.

283. First, Article 10.4 CAFTA-DR is not applicable to the present case because the investment treaties invoked by Sargeant predate CAFTA-DR and thus, the reservation formulated by the Dominican Republic under Article 10.13 CAFTA-DR applies (**Section 3.5.2(i)(a)**) and because Article 10.13 excludes the application of the MFN clause to procurement (**Section 3.5.2(i)(b)**). Second, even if the MFN clause was applicable in abstract, the requirements of Article 10.4 CAFTA-DR are not met (**Section 3.5.2(ii)**). Finally, MFN clauses do not allow importing umbrella clauses from other investment treaties (**Section 3.5.2(iii)**).

(i) The application of the MFN clause is excluded by Article 10.13 CAFTA-DR

284. For an MFN clause in a treaty to permit the import of a more favorable standard of protection from a treaty with a third State, the Claimant must first establish that the MFN provision of the base treaty is applicable .[161] Then, based on that provision, it may - or may not - import a more favorable standard of protection from another treaty.[162] In this case, Sargeant should have first established that the MFN provision, *i.e.* CAFTA-DR Article 10.4, is applicable. This includes demonstrating that this case does not fall under the exceptions set forth in Article 10.13 CAFTA-DR. It has failed to do so.

285. Article 10.13, entitled "Non-Conforming Measures", provides for a number of exceptions to the application of the MFN and National Treatment clauses. Article 10.13 operates as an exception to the jurisdiction of the Tribunal,[163] so that even if the requirements of Article 10.4 were met - *quod non* – the claim would be outside of the jurisdiction of the Tribunal.

286. Article 10.13 is not mentioned even once in Claimant's Memorial. It is Claimant who has the burden of establishing the Tribunal's jurisdiction. As explained below, Article 10.13 is fatal to Claimant's case.

287. In line with the position of the tribunal in *Resolute Forest v Canada,* before addressing Article 10.4 the Tribunal should first analyze the application of Article 10.13 because, if the Tribunal determines that the subject matter of the dispute is covered by the exceptions in Article 10.13, the obligations set out in Article 10.4 do not apply and Sargeant's argument should be dismissed *in limine*.[164]

288. In this case, the following two exclusions of Article 10.13 are applicable.

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[160] Claimant's Memorial, ¶¶ 211-212.

[161] **RL-0035**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 145: "*Or, in fewer words, one must be under the treaty to claim through the treaty*." See also, **CL-0026-ENG,** *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 401.

[162] **CL-0026-ENG**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 401.

[163] See **RL-0036**, *Astrida Benita Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America, 1 May 2020, ¶ 17, explaining that the Tribunal "*has no jurisdiction to consider*" claims that fall within the scope of reservations made by States parties.

[164] **RL-0037**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022, ¶ 371.; see also **RL-0038**, *Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶ 6.50.

(a) The Dominican Republic made a reservation applicable to all sectors under Article 10.13.2.

289. Pursuant to Article 10.13.2, the MFN clause "*do not apply to any measure that the Dominican Republic] adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex*".

290. As indicated in its Schedule to Annex II, the Dominican Republic made a reservation applicable to "All Sectors" with respect to its MFN obligations (Article 10.4), as follows:

> *The Dominican Republic reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.*[165]

291. In other words, the Dominican Republic has reserved the right to grant differential treatment to investors from any country that has a pre-existing treaty with the Dominican Republic. This meaning has been confirmed by the United States – Sargeant's country of incorporation – and by other countries.

292. For example, the United States, referring to an identical reservation in the U.S.-Colombia Trade Promotion Agreement, indicated that a tribunal does not have jurisdiction to consider any more favorable treatment granted pursuant to prior treaties.[166] The Asia-Pacific Economic Cooperation (APEC) forum has offered the same interpretation, confirming that in such cases the MFN commitment applies prospectively but not retrospectively.[167]

293. The reservation applies in this case, since all treaties with third countries invoked by Sargeant under the MFN clause predate the entry into force of CAFTA-DR for the Dominican Republic, that is, March 1, 2007.[168]

294. Sargeant resorts to the MFN clause in an attempt to import the umbrella clause contained in Article 3(4) of the Bilateral Investment Treaty between the Dominican Republic and the Kingdom of the Netherlands.[169] However, said treaty was signed on March 3, 2006, prior the date of entry into force of CAFTA-DR (i.e., March 1, 2007), thus falling under the reservation of Article 10.13.2.

295. The same is true for all treaties alternatively relied on by Sargeant in its Memorial. The Dominican Republic-Finland,[170] and Dominican Republic-Taiwan[171] treaties were signed in

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[165] **RL-0001**, CAFTA-DR, ANNEX II, List of Dominican Republic, II-DR-3.

[166] **RL-0036**, *Astrida Benita Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America, 1 May 2020, ¶ 17: "*a tribunal has no jurisdiction to consider any more favorable treatment extended pursuant to* [prior] *agreements*."

[167] **RL-0039,** APEC, A Guide for Telecommunications Elements of Regional Trade Agreements and Free Trade Agreements, 5 August 2010, p. 8: "*In some RTAs / FTAs, Parties may, in their Schedules, include limitations on MFN reserving the right to treat service suppliers and investors of a non-Party more favourably under a previously concluded RTA / FTA. This means that the MFN commitment will apply prospectively but not retrospectively.*", available at https://www.apec.org/-/media/Files/Groups/TEL/2010_GuideTelecomsElementsRTAsFTAs.doc.

[168] Sargeant's Brief, ¶ 127.

[169] Claimant's Memorial, ¶ 199; **CL-0029-ENG**, signed on March 3, 2006.

[170] Claimant's Memorial, ¶ 205; **CL-0038-ENG**, signed November 27, 2001.

[171] Claimant's Memorial, ¶ 207-208; **CL-0039-ENG**, signed on November 5, 2001.

2001; while the Dominican Republic-Chile[172] treaty was signed in 2000, *i.e.* before the entry into force of CAFTA-DR in the Dominican Republic.

296. Accordingly, the MFN clause of Article 10.4 CAFTA-DR cannot be used to import any of the benefits set forth in the treaties relied on by Sargeant as all these treaties fall under the reservation of Article 10.13.2, and therefore outside the jurisdiction of the Tribunal.

(b) The MFN clause is not applicable to procurement matters under Article 10.13.5(a) CAFTA-DR.

297. Even if the Tribunal were to understand that the reservation of Article 10.13.2 does not exclude the application of MFN clause in Article 10.4, its application is also excluded by CAFTA-DR Article 10.13.5(a). This rule expressly provides that Articles 10.3 on National Treatment and 10.4 on MFN do not apply to "procurement". In other words, in order for Sargeant to establish that Article 10.4 applies, it should have demonstrated that the 2013 Contract does not constitute procurement, which it has not and cannot do.

298. The tribunal in *Mesa v Canada* analyzed a similar provision under NAFTA.[173] In that case, the investor argued that the Ontario authorities, through the state-owned Ontario Power Authority (OPA), had imposed arbitrary requirements to prevent its participation in a feed-in tariff program (FIT) and had favored other companies in similar circumstances. The tribunal concluded that the FIT program was indeed public procurement and dismissed the claims under the Articles of National Treatment and Most Favored Nation, as the Ontario government's measures related to procurement could not be challenged under those standards of protection.[174]

299. According to the tribunal in *Mesa*, "*Article 1108(7)(a) is a "carve-out" rule. Its function is to exclude all procurement activities from the scope of some of the obligations of Chapter* 11."[175]

300. In this case, Sargeant's so-called investment and its claim undoubtedly relate to procurement. Therefore, it is excluded from the scope of Article 10.4 of MFN, and thus from the Tribunal's jurisdiction.

301. Procurement is defined in Chapter Two of the Treaty as follows:

> *the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or with a view to use in the production or supply of goods or services for commercial sale or resale*[176]

302. The 2013 Contract clearly constitutes procurement pursuant to this definition.

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[172] Claimant's Memorial, ¶ 207, 209; **CL-0040-ENG**, November 28, 2000.

[173] **RL-0040**, NAFTA, Chapter 11, Article 1108: "*Reservations and Exceptions ... 7. Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise...*"

[174] **CL-0026-ENG,** *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 465.

[175] **CL-0026-ENG,** *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 427.

[176] **RL-0001**, CAFTA-DR, Chapter 2, Article 2.1.

303. First, the subject-matter provision of the 2013 Contract expressly refers to the procurement by the State of services and goods: the storage and handling services and the optional supply of AC-30 by Sargeant to the MOPC.

> ***Article 2.- PURPOSE OF THE CONTRACT***
>
> *The Ministry of Public Works and Communications hereby contracts the services described below from the company Sargeant Petroleum, Ltd., which declares to accept under the terms and conditions agreed in this contract:*
>
> *a) Product Storage and Handling Service*
>
> *...*
>
> ***B) THE SUPPLY**. At the option of the MOPC, THE SUPPLIER may sell or supply the product...*[177]

304. Second, such goods or services were acquired by the MOPC for governmental purposes and not for commercial resale. This is confirmed by the first recital of the 2013 Contract, according to which the product would be used for the execution of public works planed by the Dominican Government, as well as roadworks within its territory.

> ***WHEREAS (1):** For **THE MINISTRY OF PUBLIC WORKS AND COMMUNICATIONS**, hereinafter referred to as **[MOPC]**, the asphalt cement called AC-30, hereinafter **[MOPC]**, the asphalt cement called AC-30 **[hereinafter the Product]**, material that is used for the execution of the works plan drawn up by the Dominican Government, as well as for the performance of the maintenance and repair work of the Highways, Roads, Avenues, Streets and Neighborhood Roads throughout the Territory of the Dominican Republic, is of utmost interest.*[178]

305. It is therefore clear that the 2013 Contract entered into by Sargeant with the Dominican Republic falls squarely within the definition of procurement under CAFTA-DR. Therefore, Sargeant's MFN claim (as well as its National Treatment claim, as explained below) falls within the exclusion of Article 10.13.5(a) and is thus outside the jurisdiction of this Tribunal. Accordingly, the MFN clause cannot be invoked by Sargeant to import the umbrella clauses of other treaties.

(ii) Even if the MFN clause was applicable in abstract, the requirements of Article 10.4 CAFTA-DR are not met

306. In any event, even if the Tribunal were to conclude that in the present case Article 10.13 does not preclude the application of MFN Article 10.4, Sargeant's argument is also unavailing because the requirements of the MFN clause are not met.

307. Article 10.4 CAFTA-DR provides that:

> *Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in*

[177] **LC-0003-ENG/SPA**, 2013 Contract, article 2.

[178] **LC-0003-ENG/SPA**, 2013 Contract, preamble.

its territory.[179] (emphasis added)

308. In application of the requirements of Article 10.4, Sargeant should have:

i. Identified a comparable investor, i.e., the existence of a specific investor from one of the countries that are parties to the treaties whose umbrella clauses Sargeant intends to import;

ii. Demonstrated that such investor is in similar circumstances; and

iii. Demonstrated the existence of "treatment" less favorable to Sargeant than to the comparable investor.

309. The *UPS v Canada* tribunal, applying an identical NAFTA provision, understood that *"[f]ailure by the investor to establish one of those three elements will be fatal to its case*", given that this is a legal burden that falls entirely on the claimant and never shifts to the State.[180] In the same vein, the United States indicated in its submission in the *Mercer* case that nothing in the provisions of National Treatment and Most Favored Nation suggests a shifting of the burden of proof. The burden of establishing the violation of those Articles and every element of its cause of action lies entirely with the claimant.[181] The United States confirmed in *Kappes v Guatemala* that this is equally applicable in the context of Articles 10.3 and 10.4 of CAFTA-DR.[182]

310. In its Memorial, Claimant did not establish the satisfaction of any of the requirements set forth in Article 10.4. Sargeant did not even attempt to individualize and explain the satisfaction of the three requirements of Article 10.4. Its only argument regarding the MFN standard is limited to the following paragraph and a reference to the *EDF v Argentina* case:[183]

> *Article 10.4 of CAFTA-DR is what is commonly referred to as a "most-favored nation" (MFN) clause. Numerous international tribunals have held that MFN clauses in terms similar to Article 10.4 allow an investor to rely on more favorable provisions contained in other treaties entered into by the host state that relate to the performance of obligations to a foreign investor or a covered investment*.[184]

311. First, Sargeant did not identify which is the specific "treatment" complained about. The so-called "treatment" appears to be the mere fact that CAFTA-DR does not include an umbrella clause, which does not amount to individualized treatment allowing the application of the MFN clause.

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[179] **RL-0001**, CAFTA-DR, Article 10.4.

[180] **RL-0041**, United Parcel Service of America, Inc *(UPS) v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, ¶¶ 83, 84: "*Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102.*"

[181] Position previously adopted by the United States in **RL-0042**, *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, 8 May 2015, ¶ 13.

[182] **RL-0043**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, *Submission of the United States of America*, 19 February 2021, ¶ 31.

[183] Claimant's Memorial, ¶¶ 196-197.

[184] Claimant's Memorial, ¶ 195.

312. Second, Sargeant also failed to identify any investor or investments from a third State in "like circumstances". The treatment must be identified through a comparable investor, *i.e.*, another concrete and individualized investor in the Dominican Republic. Sargeant did not refer to any available comparable investor, as required by the MFN clause.

313. In this regard, it is not enough for Sargeant to eventually nominate any foreign company who may potentially benefit from a treaty that contains an umbrella clause – which, in any event, Sargeant has not done either. Such a company must be in "like circumstances" to Sargeant. For example, according to the United States, identifying appropriate comparators for the purposes of establishing "like circumstances" under Article 10.4 requires considering more than just the economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. That is, the proposed comparator must be similar in all relevant respects except for the nationality.[185]

314. Finally, Sargeant did not identify how it received "less favorable" treatment than that accorded to such investors or investments. Again, it can only be assumed that the less favorable treatment invoked by Sargeant would be the mere fact that CAFTA-DR does not include an umbrella clause when other international treaties signed by the Dominican Republic do include one.

315. These defects in Sargeant's argument are fatal to its claim because it is Claimant's burden to establish the requirements of Article 10.4, which it has failed to do.

316. Sargeant has made no attempt to discuss or analyze the elements of the MFN obligation under Article 10.4. It has simply invoked the existence of provisions of various treaties between the Dominican Republic and other countries that it considers most useful to its claim in the context of this arbitration but has failed to satisfy its burden of proving the requisites of the MFN standard.

317. Sargeant's only argument with respect to Article 10.4 is that "*numerous international tribunals*" have held that MFN clauses "*in similar terms to Article 10.4*" allow an investor to resort to umbrella clauses contained in treaties concluded by the State with third States. However, not even this point has been adequately established.

318. First, despite claiming that its argument is supported by numerous international tribunals, in essence Sargeant only refers to the decision of the *EDF v Argentina* tribunal and its subsequent ad-hoc annulment committee. However, in that case, the applicable MFN clause did not contain "*similar terms to Article 10.4*".

319. The Tribunal in *EDF* analyzed Article 4 of the France-Argentina ARPPI, according to which:

[185] **RL-0043**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, *Submission of the United States of America*, 19 February 2021, ¶ 33.

Each Contracting Party shall accord in its territory and maritime zone to investors of the other Party, in respect of their investments and activities in connection with such investments, treatment that is no less favorable than that accorded to its own investors or the treatment accorded to investors of the most-favored nation, if the latter is more advantageous...[186]

320. In that case, the ad hoc committee emphasized the "broad wording" of the clause to conclude that it would allow its application to any type of substantive obligation.[187]

321. However, unlike Article 10.4 CAFTA-DR, the MFN clause of the France-Argentina ARPPI does not include the requirement of "like circumstances" for its application. This is a fundamental difference. As explained, Article 10.4 CAFTA-DR requires the identification of an actual investment or investor which is in a "similar situation". The rule demands a demonstration that the comparable investment or investor has objectively been afforded a more favorable treatment, instead of simply pointing to hypothetical rights granted to hypothetical investors under treaties with other countries.

322. This has the position of tribunals in the specific context of umbrella clauses. For example, in *Muhammet Çap & Sehil v. Turkmenistan,* the tribunal analyzed an MFN clause similarly worded to Article 10.4 CAFTA-DR. Similar to Sargeant, the claimant in that case argued that the tribunal had jurisdiction to decide its contractual claims as a consequence of the application of the umbrella clause from another treaty through the MFN clause of the Turkmenistan-Turkey ARPPI. [188]

323. However, the tribunal correctly concluded that the term "similarly situated" in the treaty limits the application of the MFN standard to *de facto* discrimination cases. Namely, when two actual investors in a similar situation have been treated differently. According to the tribunal:

783. The Tribunal considers the key wording here is "similar situations" since this obligation can only apply if the investments are in "a similar situation". Accordingly, when determining if there was a breach of Article II(2) a comparison between the "situations" of the investments in question is needed. This involves comparing the factual circumstances surrounding the investments in question. It must be shown that actual investors, found in a similar situation, were treated differently. It is not sufficient that the two investors invested in the same State. This would simply render the term meaningless and without effect. Understanding the scope of application of "similar situation" only in relation to the territorial application of the treaty is contrary to the generally accepted treaty interpretation rules which provide that each term of the treaty should be given meaning and effect.

784. Accordingly, the Tribunal considers that the words "similar situations" indicate the State parties' intention to restrict the scope of the MFN clause to

[186] **RL-0044**, Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments, adopted 3 July 1991, Article 4.

[187] **CL-0028-ENG**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, ¶ 237.

[188] **RL-0045**, Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments, adopted 2 May 1992, Article II(2): "*Each Party shall accord to these investments, once established, treatment no less favorable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favorable*."

apply only to discriminatory treatment between investments of investors of investors of one of the State parties and investors of third States, insofar as such investments may be said to be in a factually similar situation. This required that the actual measures taken by the host State is directed towards investments of actual investors that are in a similar situation, and to prove that such measure had the effect of treating one less favourably than the other.[189] (emphasis added)

324. The tribunal in *İçkale İnşaat Limited Şirketi v. Turkmenistan* similarly *h*eld that:

It follows that, given the limitation of the scope of application of the MFN clause to "similar situations," it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to "treatment accorded in similar situations," without effectively denying any meaning to the terms "similar situations."[190]

325. By the inclusion of the term "*in like circumstances*" in Article 10.4 CAFTA-DR, the CAFTA-DR parties agreed to limit the scope of the MFN clause to discriminatory treatment *vis-à-vis* investments or investors of third States, to the extent they are proven to be similarly situated. Article 10.4 does not cover mere hypothetical differences with hypothetical investments and investors of third States, based on protections included in other investment treaties.

326. Accordingly, Sargeant's argument under Article 10.4 must be dismissed as Claimant has failed to establish the fulfillment of any of the requirements of Article 10.4.

(iii) <u>In any case, umbrella clauses from other investment treaties cannot be imported through MFN clauses</u>

327. Even if the Tribunal were to understand that the MFN clause is applicable and that the requirements have been satisfied - *quod non* – said provision cannot be invoked to import an umbrella clause. This would imply imposing on the Dominican Republic obligations that it never contemplated when agreeing to the Treaty. It would also imply creating jurisdiction where it was never contemplated by the State Parties to the Treaty. In this sense, the MFN clause cannot be used to create new rights.

328. In this line, International Law Commission Commentary to Article 9 (entitled "Scope of rights under a most-favored-nation clause") provides that unless the process by which an MFN clause attracts provisions from other treaties "*is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, <u>the result in a number of cases may be to impose upon the granting State obligations it never contemplated</u>*."[191] (emphasis added)

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[189] **RL-0046,** *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, ¶¶ 783-784.

[190] **RL-0047**, *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶ 329.

[191] **RL-0048**, International Law Commission, Draft Articles on Most Favored-Nation Clauses with Commentaries, in Yearbook of the International Law Commission, Vol. II, Part Two, 30th Session (1978), p. 30.

329. Historically, MFN clauses have their origin in economic and trade treaties between States. However, as pointed out by Dolzer and Shreuer, the quasi-mechanical application of the MFN principle under international trade law should not be replicated in investment law because:

> *Investment treaties contain the results of negotiations covering distinct substantive areas. When the MFN rule is applied in such a context in a mechanical manner, the effect may be to replace the negotiated substance of the treaty rather than to add an element of cooperation (...) A literal application of an MFN clause may indeed have the effect of transferring a regime into the treaty in an area that the parties specifically negotiated and that they regulated in the treaty in a manner distinct from the substance of the referenced treaty.*[192]

330. In the same vein, Prof. Zachary Douglas states:

> *The MFN clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty. It is not an exercise in the construction of a static legal text that has been modified by an invisible hand prior to or upon the commencement of arbitration proceedings. (...) it does not operate to rewrite the terms of a treaty in respect of which the claimant is not even a signatory*.[193]

331. When negotiating the text of the Treaty, the State Parties chose to exclude claims under purely commercial agreements from the scope of protection of CAFTA-DR, and from the jurisdiction of tribunals constituted under the Treaty. This is evidenced, first, by the absence of an umbrella clause in Section A of Chapter 10. Second, it is further supported by the inclusion of "investment agreements" within the jurisdiction in CAFTA-DR Article 10.16(1)(a).

332. In this sense, the tribunal in *Teinver v Argentina* rejected the claimant's attempt to invoke an umbrella clause from another investment treaty on the basis of the MFN clause of the Spain-Argentina investment treaty, noting that " *the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and <u>if they had intended to include such a clause in the Treaty, they would have done so</u>*"[194] (emphasis added). The tribunal also noted that the "*use*

[192] **RL-0049**, Rudolph Dolzer, Christoph Schreuer, Principles of International Investment Law (2nd ed., Oxford University Press 2008), p. 186-187.

[193] **RL-0050**, Zachary Douglas, The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails, 2.1 J. INT'L DISPUTE SETTLEMENT (2011), p. 105; see also **RL-0051**, Tony Cole, The Boundaries of Most Favored Nation Treatment in International Investment Law, 33 MICH. J. INT'L L. (2012), p. 560, explaining that incorporation by reference of provisions from an unlimited number of treaties "*would potentially be transformed into a replacement for the treaty itself, gathering any more favorable treatment offered to any third party while avoiding any restrictions*"

[194] **RL-0052**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶ 884.

of the MFN Clause to incorporate an umbrella clause into the Treaty would result in the incorporation of a new right or standard of treatment not provided for the Treaty".[195]

333. Therefore, allowing Sargeant to use the MFN clause to import an umbrella clause would be contrary to the intention of the CAFTA-DR State Parties, which opted to exclude such a provision from the protections afforded by the Treaty.

3.5.3 Even if the Tribunal were to consider that the MFN clause renders the umbrella clauses of other treaties applicable, the 2013 Contract provides for a specific forum selection clause in favor of the Dominican courts which must be respected

334. Article 18.2 of the 2013 Contract clearly states that *"[a]ny dispute, controversy or claim resulting from or relating to this Contract, its breach, interpretation, resolution or annulment shall be subject to Administrative Jurisdiction*."[196]

335. That is, even if the Tribunal were to understand that Sargeant may resort to the umbrella clause of an investment treaty with a third State through the MFN clause - *quod non* - the Tribunal would not have jurisdiction to hear disputes arising under the 2013 Contract.

336. Several international tribunals in the same circumstances have concluded that the investor must comply with the specific dispute resolution clause of a contract and cannot circumvent this obligation by resorting to an umbrella clause.

337. For example, in *SGS v. Philippines*, the tribunal analyzed the impact of the forum selection clause in the context of an umbrella clause. The tribunal concluded that a party should not be allowed "*to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum*" unless there are good reasons, such as force majeure, that prevent the claimant from complying with the contract. According to the tribunal, "*a party to a contract cannot claim on that contract without itself complying with it*".[197]

338. The same conclusion was reached in *Bureau Veritas v. Paraguay*. The tribunal understood that the forum selection clause in the contract, which provided that disputes would be

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[195] **RL-0052**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶ 884.; see also **RL-0053**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 ¶¶ 79, 81: "*In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause cannot create a right to go to arbitration where none otherwise exists under the BIT. The argument can be put more generally: the MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT.* (...) *In the view of the Tribunal, it cannot be assumed that Argentina and German intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties.*".

[196] **LC-0003-ENG/SPA**, 2013 Contract, Article 18.2.

[197] **CL-0031-ENG,** *SGS v. Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 154: "*The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.*"; **RL-0031**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 103: "*It is hard to see how an investment treaty would be breached by the mere fact of a breach of contract, as long as the control mechanisms put in place by that contract are functioning normally. Investment arbitration was not set up to provide a substitute for contracting partners who refrain from following the ordinary procedure by which they have agreed to be bound, nor as a means of appeal for those who have failed to obtain satisfaction (or full satisfaction) by using that procedure.*"

resolved by the courts of Asunción, raised an additional issue of admissibility. The question was whether an umbrella clause "*may be invoked in circumstances where the parties have clearly agreed on an exclusive jurisdiction for the resolution of contractual disputes that may fall within the terms of the umbrella clause*."[198]

339. According to the *Bureau Veritas* tribunal, the parties to a contract cannot simply choose to enforce certain parts of a contract under an umbrella clause and ignore others. The tribunal held that allowing the claimant "*to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy. If the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them, unless there are powerful reasons for not doing so*.".[199]

340. Similarly, in *Consutel v. Algeria*, when assessing the effects of the umbrella clause in that specific case, the tribunal concluded that such clause did not allow the claimant to avoid the arbitration clause of the contract by submitting a contractual dispute that the parties had agreed to submit to a different tribunal. [200]

341. Based on the above, even if the Tribunal were to understand that the MFN clause allows Sargeant to import umbrella clauses, the Tribunal lacks jurisdiction pursuant to the forum selection clause in favor of the Dominican courts as provided in clause 18.2 of the 2013 Contract.

3.5.4 The 2013 Contract is not an investment agreement under CAFTA-DR Article 10.28

342. In addition to the claims brought against the Dominican Republic based on breaches of the substantive protections afforded by the Treaty, Sargeant has also asserted a claim under CAFTA-DR Article 10.16(1)(a)(i)(C). This provision allows an investor to initiate arbitration proceedings when the host State has breached an "*investment agreement*".

343. By making this argument as well as the attempt import umbrella clauses through the MFN clause, Sargeant clearly acknowledges that its claim is purely a contractual one.

344. According to Sargeant, the 2013 Contract would be an investment agreement, as defined in Article 10.28 of CAFTA-DR.[201] However, this is not correct.

345. Article 10.28 CAFTA-DR defines investment agreement in the following terms:

> ***investment agreement*** *means a written agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the*

[198] **CL-0034-ENG,** *Bureau Veritas v. Paraguay*, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 142.

[199] **CL-0034-ENG,** *Bureau Veritas v. Paraguay*, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 148.

[200] **RL-0054**, *Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award, 3 February 2020, ¶ 375-376; **RL-0055**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶ 202: According to which the Umbrella Clause "*does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract. In the case at hand that implies that they remain subject to the contractual jurisdiction clause and have to be submitted exclusively to the Lebanese courts for settlement. Because of this jurisdiction clause in favor of Lebanese courts, the Tribunal has no jurisdiction over the contractual claims arising from the contract referring disputes to Lebanese courts*."

[201] Claimant's Memorial, ¶¶ 125, 148.

covered investment or investor rights:

(a) with respect to natural resources or other assets that a national authority controls; and

(b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.

346. First, the 2013 Contract is not an investment agreement because it does not grant rights "*with respect to natural resources or other assets that a national authority controls*".

347. According to Sargeant, this requirement would be satisfied by the MOPC's obligations under Article 17 of the 2013 Contract.[202] However, a mere reading of such article is sufficient to conclude that the argument is baseless.

348. In accordance with this clause:

THE MOPC will make every effort to:

17.1 Give to officials, agents and representatives of THE MOPC or the various State agencies all the instructions that may be necessary or relevant, for the prompt and effective execution of the services;

17.2 In the event of direct import, THE MOPC will assign the corresponding personnel to verify receipt, take inventory and control dispatch (the administrative part), as well as the physical security of the product's warehouse facilities. THE SUPPLIER shall be solely responsible for the transport, storage and handling of the product.

17.3 THE MOPC will make its best efforts and will sign all the appropriate protocols with the Ministry of Industry and Commerce, the Ministry of Finance, the Directorate of Internal and Customs Taxes, the Port Authority, etc., in order to obtain the necessary permits and authorizations for imports, free of all kinds of current or future local taxes.

17.4 The MOPC will assign a project director, who will be responsible for the relations with the other State agencies and everything related to the execution of this contract.

349. Contrary to Claimant's contention, none of the obligations under Article 17 of the 2013 Contract grant Sargeant any rights with respect to natural resources or other assets controlled by the State whatsoever. Article 17 simply provides contractual best-efforts obligations on the part of the MOPC for an efficient performance of the 2013 Contract.

350. This is enough to dismiss Sargeant's attempt to characterize the 2013 Contract as an investment agreement under Article 10.28 CAFTA-DR.

351. Nonetheless, the 2013 Contract also fails to meet the requirement of Article 10.28(b). First and foremost, the elements that Sargeant invokes as separate investments from the 2013

[202] Claimant's Memorial, ¶ 151: "*The 2013 Contract grants Sargeant rights with respect to assets that a national authority controls, including rights with respect to port officials and officials of state agencies (clause 17.1), personnel to provide physical security and other services (clause 17.2), other Ministries of the Dominican Republic (clause 17.3), a project manager assigned by the MOPC (clause 17.4), together with any asphalt cement owned or controlled by the MOPC in respect of which Sargeant has agreed to provide transport, handling and storage services.*"

Contract[203] do not represent a "*covered investment other than the written agreement itself*", as required by Article 10.28(b), for the reasons already expressed in section 3.3.2 *above*. Moreover, most of these elements are not even supported by evidence.

352. In any event, Sargeant has not proven that these alleged investments were made in reliance of the 2013 Contract, as required by Article 10.28(b):

- Lease of Dock No. 3 - Sargeant acknowledges that the initial lease was entered into on August 10, 2010, almost three years prior to the 2013 Lease.[204] Sargeant could have entered into a lease in reliance of a contract that would only be executed years later.

- Renovation of the terminals for the use of the sugar tanks - Sargeant has not presented any evidence of the date of the so-called investments in terminals 1, 2 and 3.[205] It is Sargeant's burden to prove the facts supporting its claim. Having failed to do so, this item must be disregarded by the Tribunal.

- Lease of storage tanks in Terminal 3 - Sargeant has not provided any evidence of the date of this so-called investment,[206] so this item should also be disregarded by the Tribunal.

- Permits and plans to build a fourth terminal - Sargeant has not presented any evidence of the date of this so-called investment,[207] so this item should also be disregarded by the Tribunal.

- Construction of a pipeline between its terminals - Sargeant acknowledges that said construction would have taken place "*in or about 2010*", i.e., several years prior to the 2013 Contract.[208] Thus, it cannot be argued that this so-called investment was made in reliance of the 2013 Contract. In any event, as with the previous items, Sargeant did not provide any evidence supporting this so-called investment. Accordingly, it must also be disregarded by the Tribunal.

353. As a consequence, the elements invoked by Sargeant as covered investments distinct to the 2013 Contract itself, which would have been made in reliance of the 2013 Contract, must all be disregarded by the Tribunal.

354. Accordingly, the 2013 Contract is not an "investment agreement" as defined by CAFTA-DR Article 10.28, and the Tribunal also lacks jurisdiction under Article 10.16(1)(a)(i)(C).

3.6 FOURTH *RATIONE MATERIAE* OBJECTION: THE TRIBUNAL LACKS JURISDICTION TO HEAR THE NATIONAL TREATMENT CLAIM UNDER CAFTA-DR ARTICLE 10.3 BECAUSE ARTICLE 10.13(5)(A) EXCLUDES ITS APPLICATION TO PUBLIC PROCUREMENT

[203] Claimant's Memorial, ¶ 152: "*consisting of all of those investments described at paragraphs 23-29 above which were made after the 2013 Contract came into force.*"

[204] Claimant's Memorial, ¶ 24.

[205] Claimant's Memorial, ¶ 25.

[206] Claimant's Memorial, ¶ 26.

[207] Claimant's Memorial, ¶ 27.

[208] Claimant's Memorial, ¶ 28.

355. Sargeant makes a separate claim for breach of the national treatment clause of Article 10.3, arguing that the Dominican Republic has accorded it a less favorable treatment than that given to Refidomsa, Bluport Asphalt, Inversiones Titanio and General Asphalt.[209] This claim is based on the same three alleged actions invoked for the other supposed breaches,[210] and has no associated claim for damages in Sargeant's Memorial.

356. In any event, the Tribunal also lacks jurisdiction to hear said claim, for additional and independent reasons to those provided above.

357. As explained in the prior section, according to Article 10.13(5)(a) CAFTA-DR the obligations of MFN under Article 10.4 and national treatment under Article 10.3 do not apply to public procurement.

358. Just as the Tribunal lacks jurisdiction to hear the MFN claim, by which Sargeant attempts to import umbrella clauses from other treaties, the Tribunal lacks jurisdiction to hear the national treatment claim under Article 10.3, for the same reasons.

359. As explained above, all reservations from Article 10.13 are jurisdictional in nature, since this provision operates as an exception to the protection set forth in Articles 10.3 and 10.4 of the Treaty. This means that the Tribunal lacks jurisdiction to hear any claim falling within the scope of Article 10.13.[211]

360. In this case, as already demonstrated, Sargeant's claim concerns public procurement. Sargeant's national treatment claim falls squarely within this reservation, as it claims that several allegedly comparable domestic companies, "*all competitors of Sargeant* [that] *provide the Dominican Republic with AC-30 and related services*", were treated more favorably than Sargeant in the performance of their respective contracts with the MOPC.[212]

361. Consequently, said claim is outside the jurisdiction of the Tribunal. This is without prejudice to the Dominican Republic's right to argue, should the Tribunal find it has jurisdiction to consider the claim, that Sargent has not satisfied the requirements of Article 10.3 on the merits (section 4.2 below).

3.7 FIFTH *RATIONE MATERIAE* OBJECTION: SARGEANT TRANSFERRED PART OF ITS ALLEGED INVESTMENT TO A THIRD PARTY, SO THE TRIBUNAL HAS NO JURISDICTION TO HEAR THE CLAIM FOR NON-PAYMENT OF THE ASSIGNED CREDITS AND/OR SUCH CLAIM IS INADMISSIBLE

362. In the unlikely event the Tribunal finds that Sargeant has an investment and that, notwithstanding its illegality, said investment is protected under the CAFTA-DR. Sargeant has transferred a share of its supposed investment to a third party, Intercaribe.

363. As Sargeant's own damages expert asserts, Sargeant entered into several credit assignment agreements with Intercaribe, pursuant to which a total of USD 9,812,407 of the

[209] Claimant's Memorial, ¶¶ 179-182.

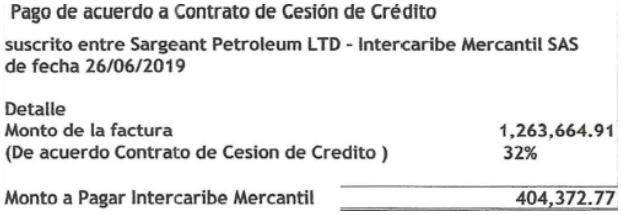
[210] Claimant's Memorial, ¶ 181.

[211] See in this regard, **RL-0037**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022, ¶ 371; **RL-0038**, *Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶ 6.50; **CL-0026-ENG,** *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016 ¶ 465.

[212] Claimant's Memorial, ¶ 181-182.

alleged credits against the MOPC claimed by Sargeant in this arbitration were transferred to Intercaribe.[213]

364. In this sense, the reference to each respective credit assignment agreement, and the amount to be paid to Intercaribe arises from each of the invoices,.[214] The invoices related to the assigned credits are identified with the letter "A" at the end of the invoice number. By way of example, see invoice No. 2020-0539-A:



Pago de acuerdo a Contrato de Cesión de Crédito
suscrito entre Sargeant Petroleum LTD - Intercaribe Mercantil SAS
de fecha 26/06/2019

Detalle	
Monto de la factura	1,263,664.91
(De acuerdo Contrato de Cesion de Credito)	32%
Monto a Pagar Intercaribe Mercantil	404,372.77

365. Such transfer raises a jurisdictional obstacle, because Sargeant does not own the investment related to those credits; an admissibility obstacle, since Sargeant, not being the owner of those credits, lacks legal standing to claim their payment; and a damages obstacle, because not being its owner, Sargeant has not suffered any harm due to the alleged non-payment of those credits. In this section, Respondent will address the jurisdiction and admissibility issues.

366. Article 10.28 of CAFTA-DR defines investment as "*every asset that an investor owns or controls*". That is, it requires that the investor owns the asset it claims as its investment.

367. Sargeant does not own these credits, as it has transferred them to Intercaribe, therefore they are not part of its so-called investment.

368. Several investment tribunals have held they lack jurisdiction to hear claims where the alleged investor has transferred the assets that are the subject of the investment. The tribunal in *Aven v. Costa Rica*, for example, under the CAFTA-DR and invoking its definition of investment, assumed jurisdiction over claims relating to assets (real estate) held by the claimant, while declining jurisdiction over claims relating to property that the claimant had transferred to a third party.[215]

369. As explained by the expert Dr. Rafael Dickson Morales, under Dominican law, the assignment of credits – upon notification to the assigned debtor – implies a transfer of the credit to the assignee. The assignee (Intercaribe) is the sole holder of the credit, and the assignor (Sargeant) has no legal standing to claim those credits from the assigned debtor (the MOPC).[216]

[213] Expert Report of Richard Indge, ¶ 4.1.4, Appendix E.3 of Unpaid Invoices.

[214] **RI-0023** Unpaid Invoices.

[215] **RL-0056**, David *Aven et al. v. the Republic of Costa Rica,* ICSID Case No. UNCT/15/3, Award, September 18, 2018, ¶ 306.

[216] Expert Report of Dickson Morales, ¶ 114.

370. In this case, the assignments were duly notified to the MOPC, transferring the ownership of these – allegedly owed – credits to Intercaribe, its new owner.[217] In fact, the invoices were directly issued as payable to Intercaribe.[218]

371. Therefore, the Tribunal lacks jurisdiction to hear the claim for the invoices assigned to Intercaribe because Sargeant does not own an investment concerning those invoices. The claim is also inadmissible since Sargeant lacks legal standing to claim over those alleged debts.

372. Moreover, it is hereby noted that Sargeant's damages expert states the credit assignments would have been revoked, by making reference to a revocation document dated 28 December 2020.[219] In the event that Sargeant, in response to this objection, argues that it in fact owns the credits initially assigned to Intercaribe as a consequence of that supposed revocation, then the Dominican Republic reserves its right to argue in detail that the investment law doctrine of abuse of rights, as delineated by investment tribunals, is applicable here.[220]

373. That abuse of right arises because such revocation – i.e., the reacquisition of the credits priorly transferred by Sargeant – would have been carried out for the sole purpose of creating jurisdiction under the CAFTA-DR, once this dispute was not only foreseeable, but already materialized. Therefore, such alleged revocation is unenforceable for jurisdictional purposes.

374. Finally, Sargeant's damages expert claims that even if the supposed revocation had not taken place - and Intercaribe is in fact the owner of those credits - Sargeant would still suffer a loss, as it would still be liable towards Intercaribe for the purchase cost of the AC-30.[221] This is incorrect. Under Dominican law, the credit assignor (Sargeant) is not liable before the credit assignee if the assigned debtor (MOPC) does not pay, unless the assignor has explicitly guaranteed the debtor's solvency, which did not happen in this case.[222] In fact, the Asphalt Purchase Agreement itself provides for the credit assignment as a payment method, which would extinguish Sargeant's payment obligation towards Intercaribe.[223]

375. For all of the foregoing reasons, the Tribunal lacks jurisdiction to hear the claim for the credits assigned to third parties, and the claim is inadmissible.

3.8 OBJECTION *RATIONE TEMPORIS*: PART OF SARGEANT'S CLAIM HAS BEEN FILED BEYOND THE THREE-YEAR TIME LIMIT PROVIDED IN ARTICLE 10. 18(1) OF CAFTA-DR

[217] Dickson Morales Expert Report, ¶¶ 116-117, 119-120; **R-0009**, Credit Assignment Agreement between Sargeant and Intercaribe dated 11 June 2019; **R-0010**, Credit Assignment Agreement between Sargeant and Intercaribe dated 15 April 2019; **R-0011**, Credit Assignment Agreement between Sargeant and Intercaribe dated 26 June 2019; **R-0012** Credit Assignment Agreement between Sargeant and Intercaribe dated 8 April 2019.

[218] **RI-0023** Unpaid Invoices.

[219] Expert Report of Richard Indge, ¶ 4.1.3; **RI-0010-SPA**, Assignment Revocation Agreement.

[220] See e.g., **RL-0057**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 554; **RL-0002**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.99.

[221] Richard Indge Expert Report, ¶ 4.1.4

[222] Expert Report of Dickson Morales, ¶ 115, 120

[223] **R-0008**, Asphalt Cement Purchase Agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013, Article FOURTH.

376. Article 10.18 of CAFTA-DR includes limitations and conditions to the Dominican Republic's consent to arbitration.

377. Article 10.18(1) excludes from the State's consent those claims where more than three years have passed since the alleged investor became aware or should have been aware of the supposed Treaty violation. The provision reads as follows:

> *No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.*[224]

378. As the tribunal in *Corona Materials v. Dominican Republic* understood, the date for computing the three-year period under CAFTA-DR Article 10.18(1) is the date of the filing of the request for arbitration.[225] Also according to the tribunal, "*the three-year period is a strict one, no suspension or "tolling" of the three-year period is contemplated by the Treaty*."[226]

379. In this case, Sargeant filed its request for arbitration on 23 March 2022, so the critical date is 23 March 2019. Any claim in respect of which Sargeant had or should have had knowledge prior to 23 March 2019, is outside the Tribunal's jurisdiction.

380. Sargeant states that the alleged Treaty breaches "*commenced in 2019*".[227] However, it does not specify at what point in 2019 it understands the Treaty breaches commenced and which breaches commenced on that date.

3.8.1 Sargeant's claim for storage minimums has been filed out of time

381. As explained in Sections 2.2 and 4.4.2, Sargeant's USD 29.62 million claim for storage invoices is inadmissible. The MOPC does not owe Sargeant any amount for storage minimums, and Sargeant's claim is based on an interpretation of the 2013 Contract that is wrong, opportunistic and contrary to Sargeant's own acts.

382. In any case, in the unlikely event that this Tribunal finds Sargeant's interpretation to be correct, the claim for storage services falls outside the Tribunal's jurisdiction since it was filed outside the three-year time limit.

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[224] **RL-0001**, DR-CAFTA, Article 10.18(1).

[225] **RL-0058**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 199: "*There is little room for discussion about what is the critical date; as agreed by both Parties, it is uncontroversial that the Claimant submitted its claims to arbitration when it initiated the present proceedings, i.e., by way of its Request for Arbitration which was dated June 10, 2014. The application of Article 10.18.1 leads to the conclusion that the critical date is three years earlier, i.e. June 10, 2011.*"

[226] **RL-0058**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 199.

[227] Claimant's Memorial, ¶ 129.

383. The Claimant itself indicates in its Memorial that, in February 2019, Sargeant learned that the MOPC understood that the storage and handling component of the 2013 Contract had been completed.[228]

384. Therefore, by February 2019 at the earliest, Sargeant already knew that the MOPC understood not to owe any amounts for storage under the 2013 Contract. According to Sargeant, failure to pay for those items is the measure that breached the Treaty.

385. Hence, this claim is outside the Tribunal's jurisdiction since Sargeant became aware of that alleged breach in February 2019, i.e., prior to the three-year limit before filing of the request for arbitration (23 March 2019).

386. Additionally, even if those storage minimums were due, they would be debts incurred between 2013 and 2018. Therefore, they would also fall outside the three-year deadline. Sargeant cannot evade this deadline under the excuse that they were not claimed at that time due to an alleged "courtesy", which in any case as explained in sections 2.2 and 4.4.2, did not really exist.

3.8.2 Sargeant's claim for the six invoices prior to 23 March 23, 2019, has been untimely filed

387. Sargeant's claim includes six invoices prior to 23 March 2019, totaling USD 1.49 and USD 0.12 million.[229] Three of those invoices date back to 2013, and the other three date back to 2015.

388. To the extent that the breach invoked by Sargeant is the non-payment of those invoices. That breach would have occurred –and Sargeant would have knowledge of this– several years before the 23 March 2019 deadline.

389. Therefore, Sargeant's claim over these six invoices is also outside the Tribunal's jurisdiction.

4 RESPONSE ON THE MERITS: THE DOMINICAN REPUBLIC HAS NOT COMMITTED ANY VIOLATION OF CAFTA-DR

390. The Dominican Republic has not committed any breach under the CAFTA-DR and international law.

391. As explained below, there is no expropriation of Sargeant's so-called investment (**Section 4.1**); the Dominican Republic has not breached the National Treatment clause (**Section 4.2**), nor customary international law (**Section 4.3**), nor the MFN clause (**Section 4.4**).

4.1 THE DOMINICAN REPUBLIC HAS NOT EXPROPRIATED SARGEANT'S SO-CALLED INVESTMENT

392. Article 10.7(1) CAFTA-DR, on expropriation, establishes that:

[228] Claimant's Memorial, ¶ 48: "*In February 2019, Sargeant learned that the MOPC believed that it had completed the 2013 Contract's storage and handling component, and thus that the 2013 Contract had ended*."

[229] Invoices 2013-0211, 2013-0212, 2013-0214, 2015-0306, 2015-0343, 2015-0344. See Expert Report of Richard Indge, **Appendix E.3.** and **RI-00213**.

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

(d) in accordance with due process of law and Article 10.5.

393. In its Memorial, Sargeant alleges that "[t]*he Dominican Republic's actions present a clear case of indirect expropriation by measures equivalent to expropriation. Through a series of actions, the Dominican Republic has stripped Sargeant of the reasonably expected economic benefits of the 2013 Contract.*"[230]

394. The Claimant characterizes the alleged indirect expropriation as unlawful and contrary to Article 10.7 CAFTA-DR. However, it has failed to substantiate such claims, since the actions invoked by the Claimant as the basis of its claim do not constitute an indirect expropriation of its supposed investment.

395. According to Sargeant, the actions that would have constituted the indirect expropriation of its so-called investment are the following: "*a. The MOPC's failure to pay Sargeant amounts owed under the 2013 Contract; b. The MOPC's failure to the delivery of and pay for volumes of AC-30 which it had ordered from Sargeant; and c. The deliberate exclusion of Sargeant from the Dominican AC-30 market in favour of local competition"*[231]

396. Sargeant alleges that, taken together, these actions would have resulted in a breach of Article 10.7 CAFTA-DR since, "*the Dominican Republic has targeted Sargeant and Sargeant's contractual rights, treating them unfavorably and in a discriminatory manner, over a prolonged period of time*".[232]

397. Contrary to Sargeant's assertion, neither the alleged actions amount to an expropriation – be it direct, indirect or creeping– nor has the Dominican Republic orchestrated any plan to deprive Sargeant of its alleged investment.

4.1.1 Legal standard on expropriation

398. Sargeant has not shown how the invoked actions breached the legal standard on expropriation under the CAFTA-DR or international law. Specifically, Claimant has not shown that the effect of the alleged actions attributed to the State, either individually or in the aggregate, have completely deprived it of the value of its so-called investment through the impairment of its property right, nor that those actions (either in the aggregate or individually) are not justifiable.

(i) Threshold requirement: existence of a right susceptible to expropriation

[230] Claimant's Memorial, ¶ 170.

[231] Claimant's Memorial, ¶ 171.

[232] Claimant's Memorial, ¶ 173.

399. Annex 10-C (Expropriation) (2) of the CAFTA-DR provides that "[a]*n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment*". (emphasis added)

400. For an expropriation to exist, by definition, it is necessary for the Claimant to have a valid right that the State has infringed.[233] That is the essential requirement: the existence of a valid right, which existence must be assessed in light of the domestic law of the host State.

401. In this sense, for example, the tribunal in *Encana* has stated that "*for there to have been an expropriation of an investment or return* […] *the rights affected must exist under the law which creates them".*[234] In short, it is impossible to expropriate individual rights that do not exist under the law of the host State.

402. As will be explained, (i) Sargeant has not identified which property right is supposed to have been expropriated under Annex 10-C (2) CAFTA-DR; (ii) the exclusion from the asphalt market is not only unproven, it did not exist and, the Claimant makes no claim over it; (iii) the alleged credits under the 2013 Contract cannot be expropriated, since under Article 10.28 CAFTA-DR, footnote 12, they are not investments; and (iv) the remaining so-called investments invoked by Sargeant have not been expropriated, as acknowledged by its damages expert:

> *Sargeant continues to own and operate the infrastructure assets and has not claimed that the Measures have resulted in a diminution in value of the physical investments themselves. As such, there are no losses claimed in respect of these assets and I have not sought to estimate such losses.*[235]

(ii) The degree of value deprivation is decisive

403. Annex 10-C (Expropriation) (4)(a) of CAFTA-DR establishes that:

[233] **RL-0059**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, ¶ 184; **RL-0060**, *Mr. Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ART/11/23, Award, 8 April 2013, ¶¶ 417-420; **RL-0061** *Emmis International Holdings, B.V., Emmis Radio Operating, B.V., Mem Magyar Electronic Media Kereskedlmi Es Szolgaltato Kft, v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶¶161-162; **RL-0062**, *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, ¶75; **RL-0063**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, ¶ 257.

[234] **RL-0059**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, ¶184.

[235] Richard Indge Expert Report, ¶ 3.5.2.

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action. (emphasis added)

404. Therefore, the second element to be analyzed to determine whether a given state action can be considered as expropriatory is the degree of affectation of the investment.[236] Tribunals agree that not any interference with an investment gives right to compensation, but that the interference must radically affect or effectively destroy the value of the investment.[237]

405. Sargeant relies on the *Metalclad Corporation v. Mexico* award[238] as support for its indirect expropriation thesis.[239] However, several tribunals have questioned the broad definition adopted by the tribunal in that case.[240] Most investment arbitration tribunals have adopted a much more demanding standard than *Metalclad* to determine whether an expropriation (be it direct or indirect) has occurred.

406. For example, the tribunal in *Electrabel v. Hungary* summarized the relevant case law and doctrine as follows:

[236] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009,* ¶¶ *356-357*; **RL-0064**, *El Paso Energy International Company v. the Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 245.

[237] **RL-0065**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ART/02/16, Award, 28 September 2007, ¶ 285.

[238] **CL-0010-ENG**, *Metalclad Corporation v. United Mexican States,* ICSID Case No. ARB (AF)/97/1, Award, August 30, 2000, ¶103.

[239] Claimant's Memorial, ¶ 167.

[240] **RL-0066**, *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, ¶177; **RL-0062**, *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, ¶ 176; **RL-0067**, *United Mexican States v. Metalclad Corporation*, British Columbia Supreme Court Decision, 2001 BCSC 664, 2 May 2001, ¶ 99.

> *the Tribunal considers that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment.*[241] (emphasis added)

407. The tribunal in *IMFA v. Indonesia*, noted that the formulation of the expropriation standard, as expressed by the tribunal in *Electrabel*, faithfully reflects the case law.[242] Likewise, the tribunal in *Isolux Netherlands v. Spain* clarified that "*the impact of the measures must be of such magnitude on the investor's rights or assets that its investment loses all or a very significant part of its value, which amounts to a deprivation of its porperty.*"[243]

408. For its part, the tribunal in *Tecmed v. Mexico* stated that a measure is only expropriatory "*if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "…any form of exploitation thereof…" has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed."*[244]

409. Thus, according to the case law, a mere reduction in the value of the investment does not constitute, *per se*, an indirect expropriation. Even so when there has been a significant reduction in value.[245] For example, in *Glamis Gold v. USA*, the tribunal found that, even though the state conduct resulted in a reduction of almost 60% of the investment, there was still no expropriation since the impact was not "*radical*" enough.[246]

410. In this case, not only did Sargeant fail to prove that the alleged expropriatory actions had an economic impact of such magnitude and severity as to strip its investment of value, but it has not even shown a decrease in value.

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[241] **RL-0068**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 6.62; **RL-0069**, *Indian Metals & Ferro Alloys Limited v. Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, ¶ 305; **RL-0070**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, ¶ 530; **RL-0071**, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, ¶ 530, ¶ 505; **RL-0072**, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019; ¶ 363; **RL-0073**, *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, 11 September 2018, ¶ 414; **RL-0074**, *LG&E Energy Corp, et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 192.

With respect to direct expropriations, see e.g., **CL-0013-ENG**, *Quiborax S.A. and Non Metallic Minerals, S.A. v. Plurinational State of Bolivia, ICSID Case No. ICSID Case No. D2005-0013. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, ICSID Case No. ARB/06/2. ARB/06/2, Award, 16 September 2015, ¶200: "*[A] State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine' [...] Tribunals dealing with direct expropriations have emphasized the need for a deprivation of property which must amount to a forcible taking or transfer to the State, and its permanent nature*."

[242] **RL-0069**, *Indian Metals & Ferro Alloys Limited v. Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, ¶ 305.

[243] **RL-0075**, *Isolux Netherlands v. Kingdom of Spain*, SCC Case No. V2013/153, Award, 12 July 2016, ¶ 839.

[244] **RL-0076**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 116.*

[245] **RL-0064**, *El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 233.2.b.*

[246] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009, ¶¶ 364, 366, 536.*

411. In fact, Sargeant itself acknowledges that the alleged actions taken by the Dominican Republic did not result in a decrease in the value of its supposed investments. This is acknowledged by Sargeant's own damages expert:

> *Sargeant … has not claimed that the Measures have resulted in a diminution in value of the physical investments themselves.*[247]

412. In the same vein, Sargeant's expert points out that the alleged non-payment of invoices has not prevented Sargeant from continuing to operate in the country, once again confirming that there is no substantial deprivation of the value of the investment, as required by the applicable standard.

> *Given the Claimant has continued to operate through the period affected by the Measures, this does not all appear to be cash which is required for the ongoing operations of the Business. On this basis, I assume that the withheld cash in respect of the Unpaid Invoices represents a surplus asset*.[248]

413. This conclusion of the Claimant's own expert refutes its assertion that the alleged contested measures "*starve*[ed] *Sargeant of capital and squeeze it out of the Dominican asphalt market*".[249]

414. Therefore, there was no expropriation, and this claim must be rejected.

(iii) Causal link between the claimed measures and the alleged injury

415. Sargeant also has the burden of proving the existence of a "*causal nexus between the measures complained of and the deprivation of its* business".[250] This requires more than the mere statements made by the Claimant, either in its Memorial or through the witness statement submitted.

416. In *Oostergetel*, the tribunal explained that the mere mention:

> *of the word 'expropriation'* [...] *or a literal quotation of another case cannot stand in lieu of an allegation of specific facts giving rise to a treaty breach. Labelling' - as an investment tribunal once wrote - 'is no substitute for analysis*".[251]

417. In the present case, Sargeant has merely labeled the alleged actions and omissions of the Dominican Republic as "expropriatory". As the case law demonstrates, that is not enough to establish a State's responsibility under international law.

[247] Richard Indge Expert Report, ¶ 3.5.2.

[248] Richard Indge Expert Report, ¶ 3.5.5.

[249] Claimant's Memorial, ¶ 4.

[250] **RL-0077**, *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Final Award, 18 April 2002 ¶ *87*.

[251] **RL-0078**, *Jan Oostergetel & Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (redacted version), 23 April 2012, ¶ 319.

418. For an investor's claim to be upheld, it has to demonstrate a factual causal link between the alleged wrongful act of the State and the alleged harm.[252] Said causal link cannot be established if the destruction of the investment was not the result of actions and omissions attributable to the respondent State, but from the actions or omissions of the claimant itself or of third parties. This is clearly established by public international law[253] and international jurisprudence.[254]

419. As explained below, Sargeant's claims must be dismissed because, *inter alia*, there is no causal link between the alleged Sate conduct and, any damages or losses suffered by Sargeant in connection with its so-called investment in the Dominican Republic.

(iv) The legal standard of creeping expropriation is more demanding than the one of a simple indirect expropriation

420. The concept of creeping expropriation is recognized in international law, but its scope is significantly limited, making it hard to be proven. As a result, very few tribunals have accepted claims for creeping expropriation.

421. In *Generation Ukraine v. Ukraine*, the tribunal explained that:

> *A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation.*[255]

422. A creeping expropriation cannot simply consist of a series of unrelated and unconnected acts. Instead, it must be part of a coordinated process or scheme consisting of a series of actions that, taken as a whole, deprive the investor of the economic value of its property. In this regard, the tribunal in the *Siemens* case stated "[*b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an* expropriation".[256]

423. When explaining the concept of creeping expropriation, the tribunal stated –citing Article 15 of the Draft Articles on State Responsibility[257]– that,*"*[w]*e are dealing here with a composite*

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[252] **RL-0079**, *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 786-787; **RL-0080**, *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, ¶ 200; **RL-0081**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 366, dismissing a claim of expropriation because, *"[i]n the view of the Tribunal, the termination of the Contract and the subsequent actions by the Turkmen courts were largely either the result of choices made by Garanti Koza, including the decision not to seek an extension or renewal of the bank guarantee, or were caused by circumstances within its control*"; **CL-0033-ENG**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶¶ 215-216.

[253] **RL-0082**, Yearbook of the International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, International Law Commission, 2001.

[254] **RL-0083**, *Elettronica Sicula S.p.A. (ELSI), United States of America v. Italy,* CIJ, Judgment, 20 July 1989, ¶¶ 98, 101.

[255] **RL-0084**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.26.

[256] **RL-0085**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 263.

[257] **RL-0086**, Responsibility of States for Internationally Wrongful Acts, resolution / adopted by the UN General Assembly, 28 January 2002, Article 15, para. 1: " *The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*"

act in the terminology of the Draft Articles".[258] In any case, the individual acts claimed must be "*ssufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system*".[259]

424. Therefore, for a creeping expropriation claim to succeed, the claimant must prove that the measures adopted by the State share a common pattern.[260] When analyzing the concept of creeping expropriation, several tribunals have referred to this interconnection of individual measures as "*steps under a common* denominator",[261] "*coordinated* pattern",[262] "*an overall confiscatory* scheme"[263] or "*series of acts leading in the same* direction".[264]

425. Sargeant has not proven any of this. The reason is evident, one cannot prove what does not exist. Sargeant remains the sole owner of the property rights over its so-called investments. Sargeant has not identified which property rights were supposedly expropriated, nor specified the set of actions constituting the alleged confiscatory scheme, nor how these actions would have caused any of the damages it has invoked.

4.1.2 The Dominican Republic has not expropriated Sargeant's so-called investment

(i) Sargeant has not identified which property right was allegedly expropriated pursuant to Annex 10-C (2) of CAFTA-DR

426. Annex 10-C (2) of CAFTA-DR clearly states that "[a]*n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment*".

427. In this regard, Sargeant only provides a list of supposed investments made in the Dominican Republic, stating they would be:

- The 2013 Contract itself;
- The Dock Lease;
- The investments in Terminals 1, 2 and 3 […];
- The lease of storage tanks […];
- Investments in the permits and plans […];
- The pipeline […]; and

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[258] **RL-0085**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 264; See also, **RL-0064**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 516: "*According to the Tribunal, this series of measures amounts to a composite act, as suggested by the International Law Commission in its Articles on State Responsibility (Article 15).*"

[259] **RL-0087**, *Ireland v. United Kingdom*, European Court of Human Rights, Case No. 5310/71, Final Judgement, 10 September 2018, ¶ 159.

[260] **RL-0088**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 271. See also, **RL-0034**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 545, "[T]*he Tribunal will endeavor to establish whether an overall pattern of conduct has emerged from these instances and whether that overall pattern of conduct does indeed breach the standard*"

[261] **RL-0089**, *RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. 079/2005, Final Award, 12 September 2010, ¶ 621. Russian Federation*, SCC Case No. 079/2005, Final Award, September 12, 2010, ¶ 621.

[262] **RL-0090**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 308.

[263] **RL-0091**, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A, Alos 34 S.L, v. Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, ¶ 147.

[264] **RL-0092**, *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic,* Preliminary Objections to Jurisdiction, UNCITRAL, LCIA Case No. UN 7927, 19 September 2008, ¶ 91.

- The purchase orders issued under the 2013 Contract which have not yet been paid for, together with product inventory acquired by Sargeant under the 2013 Contract"[265]

428. However, Sargeant makes no effort to explain how the Dominican Republic's alleged expropriatory acts would have interfered with these property rights. In any event, there is no interference whatsoever with the Claimant's tangible or intangible property rights nor the property interests of its so-called investments.

429. The Claimant's own expert expressly states that "*Sargeant continues to own and operate the infrastructure assets and has not claimed that the Measures have resulted in a diminution in value of the physical investments themselves* [...]".[266]

430. This is a clear indication that this claim has no basis whatsoever, neither factual nor legal, and should be completely dismissed.

(ii) The alleged credits under the 2013 Contract are not subject to expropriation since pursuant to Article 10.28 note 12 they are not an investment, so no expropriation is possible

431. Article 10.28 (Definitions) of CAFTA-DR provides that:

> *investment means any asset owned or controlled by an investor, directly or indirectly, that has the characteristics of an investment, including characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. The forms that an investment may take include:*
>
> *(a) a company;*
>
> *(b) shares, capital and other forms of participation in the equity of a company;*
>
> *(c) bonds, debentures, other debt instruments and loans;* (emphasis added*)*

432. On this last point, and as we have already seen, the CAFTA-DR refers us to footnote 9 which expressly states that "[f]*or purposes of this Agreement, claims to payment that are immediately due and result from the sale of goods or services are not investments.*" (emphasis added)

433. Therefore, the alleged unpaid invoices invoked by Sargeant, which in any case would be the result of the sale of goods or the provision of services, are excluded from the concept of protected investment under the CAFTA-DR and, therefore, are not susceptible expropriation.

434. In any event, as it will be explained below, the non-payment of a debt, even if it qualifies as an investment under the CAFTA-DR –*quod non*– does not constitute expropriation.

[265] Claimant's Memorial, ¶ 139.

[266] Richard Indge Expert Report, ¶ 3.5.2.

(iii) The alleged non-payment of a debt does not constitute expropriation

435. Numerous tribunals have established that "[t]*he mere non-performance of a contractual obligation is not to be equated with a taking of property, nor […] is it tantamount to expropriation*".[267]

436. Specifically concerning the non-payment of contractual debts, the tribunal in *SGS v. Philippines* held that:

> *In the Tribunal's view, in the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. A fortiori, a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.*[268] (emphasis added)

437. Similarly, the tribunal in *Bureau Veritas v. Paraguay* stated:

> *Where a debt arising under a contract continues to exist, and where the contractually agreed forum for the resolution of disputes relating to that debt remains available, it appears self-evident that a contracting party's rights in relation to that debt cannot be said to have been expropriated, whether directly or indirectly. In the present case there is no allegation that the debt under the contract does not continue to exist, or that the contractual forum provided for by the Contract is not available: BIVAC has freely chosen not to go to the courts of Asunción to recover the sums which it says are due to it under the Contract.* [...]
>
> [...] *Whether a contracting party refuses to pay once or five times, the contractual debt continues to exist, and the legal characterization of the obligation to pay cannot be said to have been altered. Nor can it be said that a refusal to pay on five (or even more) occasions can alter BIVAC's legal rights in the debt that is owed to it.* [...]
>
> […] *Even assuming there to have been "a final refusal" to pay, which Paraguay apparently disputes, BIVAC does not allege any obstruction of the legal remedies provided for by the Contract. The fact that BIVAC has opted not to have recourse to such remedies, or believes them for some unstated reason to be unattractive or ineffective, cannot contribute to a claim of expropriation.*
>
> *Our conclusion may be put simply: in circumstances in which there is no dispute that the alleged contractual debt continues to exist, or that the forum for the*

[267] **CL-0024-ENG**, *Waste Management v. United States of United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 174; **RL-0059**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, ¶ 194.

[268] **CL-0031-ENG**, *SGS Societe Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Award on Preliminary Objections, January 29, 2004, ¶ 161.

resolution of contractual disputes remains fully available, the materials put forward by BIVAC do not raise the possibility of an arguable case of expropriation.[269] (emphasis added).

438. Therefore, even in the hypothetical case that the allegedly unpaid invoices by the MOPC were considered a protected investment under the CAFTA-DR –*quod* non–, it cannot be considered that an expropriation has taken place.

439. If Sargeant believed that the MOPC owed it the invoices it claims, it should have initiated the appropriate administrative procedure for payment. Sargeant did not do so, nor did it alleged any obstacles to the exercise of the legal remedies provided for in the 2013 Contract. If Sargeant opted not to resort to these remedies for any reason, that was its own choice, but such a decision cannot be used as the basis for an expropriation argument.

(iv) The alleged exclusion from the asphalt market did not exist and Sargeant makes no claim for this alleged measure

440. Among the alleged "*measures adopted or maintained by the* Dominican Republic"[270] that, according to Sargeant, would have breached the substantive protections granted by Chapter 10 of CAFTA-DR would be the *"deliberate exclusion of Sargeant from the Dominican AC-30 market in favor of local competition*."[271]

441. However, reality is that Sargeant is still today part of the Dominican AC-30 market. In fact, it is still registered in the Registry of Suppliers of the State[272] as a company that provides services to the Dominican Republic. Thus, the alleged exclusion did not exist:

GOBIERNO DE LA REPÚBLICA DOMINICANA
HACIENDA

Dirección General Contrataciones Públicas

Registro de Proveedores del Estado (RPE)
Constancia de inscripción
RPE: 31508

Fecha de registro: 6/6/2013	**Fecha actualización:** 29/3/2017
Razón social: Sargeant Petroleum, LLC	**No. Documento:** 131001262 - RNC
Género: Male	**Provee:** Servicios
Certificación MIPYME: false	**Registro de beneficiario:** false
Clasificación empresa: Gran Empresa	**Estado:** Activo
Ocupación:	**Motivo:**
Domicilio: Calle Dr. Carlos Sanchez y Sanchez, 2, Ens. Naco 10100 - REPÚBLICA DOMINICANA	
Persona de contacto: Ambiorix M. Popoter Zapata	

[269] **CL-0034-ENG,** *Bureau Veritas v. Paraguay*, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶¶ 110, 114, 116-117.

[270] Claimant's Memorial, Section IV B.

[271] Claimant's Memorial, ¶¶ 131, 171 and 181.

[272] **R-0044**, Proof of registration of Sargeant Petroleum LLC with the Registry of State Suppliers.

442. The clearest evidence that there was no such exclusion can be found in the damages report of Sargeant's own expert, which expressly states that he was not instructed to provide an assessment of the losses suffered by Sargeant due to the alleged exclusion from the Dominican Republic asphalt market.[273]

443. It is indeed telling that Sargeant, after claiming that the State had expelled it from the Dominican AC-30 asphalt market, told its expert that it was not necessary to assess the losses caused by said exclusion.

444. If the so-called exclusion from the Dominican market alleged by the Sargeant was true, would it not be relevant for the expert hired by Sargeant to have assessed the damages resulting from this act?

445. The answer is obvious: the Claimant has not commissioned its expert for this valuation because it is fully aware that (i) the alleged market exclusion has not occurred; (ii) the Dominican Republic has not breached the CAFTA-DR; and (iii) there is no damage to claim for this concept.

(v) <u>The remaining so-called investments invoked by Sargeant have not been expropriated</u>

446. Sargeant also claims that its purported investments in the Dominican Republic would include: (i) a 27,000-gallon capacity AC-30 storage tank, an emulsion plant, offices and warehouses, at Terminal 1;[274] (ii) a 1.9 million gallon AC-30 storage tank and a 2 million gallon capacity AC-30 storage tank, together with associated pumps, boilers and diesel storage tanks, at Terminal 2;[275] (iii) a 1 million gallon AC-30 storage tank and a 1.1 million gallon AC-30 storage tank at Terminal 3;[276] (iv) pipelines running from the facility to the terminals;[277] (vi) permits to build a fourth terminal;[278] (v) a long-term lease for exclusive use of Dock 3;[279] and (vi) the use of a floating barge with a capacity of 2.7 million gallons to store AC-30, berthed at Terminal 1.[280]

447. Sargeant does not provide, beyond Mr. Abu Naba'a's own statement and a lease contract for Dock 3, any evidence in support of these so-called investments. The remaining investments invoekd by Sargeant are absolutely devoid of evidence, both as to their existence and as to the alleged amounts that the Claimant would have disbursed.

448. One could wonder why Sargeant makes no claim for these supposed investments.

449. As we saw, the Claimant's damages expert states in his report that "*Sargeant* […] *has not claimed that the Measures have resulted in a diminution in value of the physical investments*

[273] Richard Indge Expert Report, ¶ 1.2.3.

[274] Witness Statement of Mustafa Abu Naba'a, ¶ 27a.

[275] Witness Statement of Mustafa Abu Naba'a, ¶ 27b.

[276] Witness Statement of Mustafa Abu Naba'a, ¶ 27c.

[277] Witness Statement of Mustafa Abu Naba'a, ¶ 31.

[278] Witness Statement of Mustafa Abu Naba'a, ¶ 30.

[279] Claimant's Memorial, ¶ 24.

[280] Witness Statement of Mustafa Abu Naba'a, ¶ 29, 32.

themselves. As such, there are no losses claimed in respect of these assets and I have not sought to estimate such losses."[281] .

450. Therefore, if Sargeant itself acknowledges that it continues to own and operate its so-called investments[282] and, that the alleged actions taken by the Dominican Republic have not led to a decrease in their value,[283] how can it seriously claim that the Dominican Republic has expropriated them? The claim is simply untenable.

4.2 THE DOMINICAN REPUBLIC HAS NOT BREACHED THE NATIONAL TREATMENT CLAUSE OF ARTICLE 10.3 CAFTA-DR CONCERNING SARGEANT

451. In Section VII of its Memorial, Sargeant affirms that the Dominican Republic failed to grant it national treatment as required by Article 10.3.[284] National treatment is a standard designed to prevent discrimination against foreign investors and their investments based on their nationality or by reason of their nationality.

452. As previously stated, the Tribunal lacks jurisdiction to hear Sargeant's national treatment claim, as the national treatment clause does not apply to procurement matters pursuant to CAFTA-DR Article 10.13.5(a). But even if it did apply, Sargeant has failed to establish that it has been accorded less favorable treatment than to domestic investors in like circumstances.

453. In its Memorial, Sargeant does not devote a single word to explain why it regards the treatment given by the Dominican Republic to its competitors as more favorable than the treatment afforded to Sargeant. The Claimant simply states that the Dominican Republic has continued to pay to its competitors while allegedly not paying what is supposedly owed to Sargeant.

454. Therefore, even if the National Treatment clause was applicable, the Dominican Republic has not granted less favorable treatment to Sargeant than to its domestic investors.

455. The purpose of Article 10.3 CAFTA-DR is to protect foreign investments and investors against discrimination when compared to domestic investments or investors "*in like circumstances*".

456. The national treatment standard – just like the MFN standard – has three elements: (i) the claimant must have received a certain treatment from the State; (ii) other investors or their investments (the "comparators") must have been in like circumstances to those of the claimant; and (iii) the claimant must have been treated less favorably than the comparators in like circumstances.[285] The burden of establishing each of these elements rests entirely on

[281] Richard Indge Expert Report, ¶ 3.5.2.

[282] Richard Indge Expert Report, ¶ 3.5.2.

[283] Richard Indge Expert Report, ¶ 3.5.2.

[284] Claimant's Memorial, Section VII.

[285] **RL-0041**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, UNCITRAL, Award, 24 May 2007, ¶ 83; **RL-0093**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶ 163; **RL-0094**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 by Arbitral Tribunal, 10 April 2001, ¶¶ 73-104.

the claimant and this burden never shifts to the State.[286] As we will see below, Sargeant has not satisfied that burden.

457. Sargeant argues that the applicable standard is an objective one, and that authorities have confirmed that it is sufficient to prove discrimination against an investor who happens to be a foreigner, without such discrimination being based on the investor's nationality.[287] However, authorities are not unanimous on this point.

458. Like all other provisions of the Treaty, Article 10.3 must be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[288] The objective of Article 10.3 CAFTA-DR is not to prohibit all differential treatment between investors and investments, but to ensure that States Parties do not treat investors and investments "in like circumstances" differently on the basis of their nationality, i.e., to prevent discrimination based on nationality.

459. This was confirmed by the United States' submission in the *Mercer* case, regarding NAFTA Articles 1102 (National Treatment) and 1103 (MFN), which operate identically to their equivalents under CAFTA-DR:

> *10. These articles are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA*.[289]

460. For example, the tribunal in *Gramercy v. Peru* emphasized that the national treatment standard "*does not prohibit differential treatment between the foreign investor and the nationals; what it prohibits is that, on the basis of nationality, the host State discriminates between local and foreign investors that are in "like circumstances*"."[290]

461. Similarly, the tribunal in *Loewen* stated that national treatment protection "*is direct*[ed] *only to nationality-based discrimination and* [ ] *it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality*".[291]

462. Therefore, if the evidence does not suggest such discrimination or if the State can establish a link between its conduct and rational, non-discriminatory government policies, the claims will fail. That is, the evidence presented by Sargeant must demonstrate nationality-based discrimination by the Dominican Republic, which it does not.

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[286] **RL-0041**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, ¶ 84: "*Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts...*".

[287] Claimant's Memorial, ¶¶ 179-180.

[288] **CL-0001-ENG,** Vienna Convention on the Law of Treaties, Article 31.

[289] **RL-0042**, *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, 8 May 2015, ¶ 10.

[290] **RL-0095**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 1235.

[291] **RL-0096**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 139. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 139. See also, **RL-0038**, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶ 7.7: rejecting Claimant's contention that "*it did not have to establish discriminatory intent on the Respondent's part.*"

463. As explained below, just like under its MFN claim, Sargeant has failed to particularize its national treatment claim. Accordingly, this claim too must fail.

464. As mentioned, Sargeant bears the burden of proving the three constituent elements of Article 10.3 CAFTA-DR. Regarding treatment, Sargeant once again reiterates the same three alleged measures by the Dominican Republic that were relied upon for its expropriation claim.[292]

465. As comparable domestic investors, Sargeant proposes Refidomsa, Bluport Asphalt, Inversiones Titanio and General Asphalt (the "**Comparable Companies**"), which, according to Sargeant, "*are all competitors of Sargeant and provide the Dominican Republic with AC-30 and related services, but have not been the victims of any of the measures that have been applied to Sargeant"*.[293] That is all Sargeant's argument on this point.

466. True to the overall vague narrative of the Memorial, Sargeant leaves it to the Dominican Republic and the Tribunal to piece together its claims and determine how each conduct would fit within the applicable standard. However, simply listing a series of domestic companies and asserting that they were not subject to the same measures –expecting this to be true for any of them– is not enough to satisfy the standard of Article 10.3 CAFTA-DR. Sargeant must prove its case, and it has failed to do so.

467. Sargeant attempts to elude its burden to prove the existence of differential treatment by negatively framing its claim. However, the Tribunal should not permit this. Sargeant has the burden of proving how each of the alleged measures apply to the Comparable Companies;[294] i.e., how each of these companies actually received more favorable treatment concerning each alleged measure. This is assuming that the companies are in like circumstances, which Sargeant has also failed to prove, as it also fails to identify any characteristics or reasons why the Comparable Companies should be considered as suitable comparators.

468. The mere fact that the Comparable Companies sell AC-30 and related services to the Dominican Republic is not sufficient to satisfy the "in like circumstances" test of Article 10.3. Identifying appropriate comparators requires taking into account more than just the business or economic sector, it also involves considering the regulatory framework and policy objectives, among other possible relevant characteristics. In other words, the proposed comparator must be similar in all pertinent aspects, except for its nationality.[295]

469. As noted by the tribunal in *Pope & Talbot v. Canada,* the concept of "*like circumstances"* will differ in accordance with the facts of the specific case:

> *It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, "circumstances" are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of "like" can have a range of meanings, from "similar" all the way to "identical." In other words, the application of the like circumstances*

[292] Claimant's Memorial, ¶ 181.

[293] Claimant's Memorial, ¶ 182.

[294] **RL-0041**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award, 24 May 2007, ¶ 84: "*This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party*."

[295] **RL-0043**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, 19 February 2021, ¶ 33.

> *standard will require evaluation of the entire fact setting surrounding, in this case, the genesis and application of the Regime*.[296]

470. For example, the fact that two companies produce competing goods in a given market does not imply, by itself, that they are in like circumstances. This was recognized by the tribunal in *Corn Products v. Mexico*:

> *the Tribunal would not suggest that the fact that a foreign investor and a domestic investor are producing like products will necessarily mean that they are to be considered as being in like circumstances for the purposes of Article 1102.*[297]

471. In other words, there may be instances where the claimant and the domestic comparator(s) are competitors but are not considered in like circumstances within the context of a specific treatment. For example, due to the existence of different contractual terms, specific market conditions, and any other differences that would allow distinguishing the treatment that was accorded to each party.[298]

472. Nonetheless, in this case Sargeant has merely claimed that these companies are comparable, provides no evidence to support its case, nor has it made the slightest effort to illustrate the Tribunal why it considers these companies to be in "like circumstances".

473. For instance, to substantiate its claim regarding the alleged non-payment of amounts supposedly owed under the 2013 Contract, Sargeant must prove that the Comparable Companies were "in like circumstances" and that they actually received all payments under their respective contracts with the MOPC in a timely manner.[299]

474. However, Sargeant has not demonstrated that these companies are in similar circumstances. As previously indicated, the contractual conditions, as well as any type of differences that may serve to distinguish the treatment accorded must be considered to satisfy this requirement. In the present case, the 2013 Contract is tainted by multiple irregularities, in addition to its object being exhausted. These circumstances are sufficient to differentiate Sargeant from the Comparable Companies.

475. Moreover, the alleged lack of payment was not due to any discrimination, but to a legitimate dispute by the MOPC over the validity of the 2013 Contract and the existence and origin of the amounts claimed by Sargeant.

476. Sargeant's failure to substantiate its claim of exclusion from the Dominican Republic's AC-30 market in favor of local competition is even more evident. In its Memorial, Sargeant does not indicate the acts or measures adopted by the Dominican Republic that led to this outcome.

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[296] **RL-0094**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 by Arbitral Tribunal, 10 April 2001, ¶75.

[297] **RL-0097**, *Corn Products International v. United Mexican States,* ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, ¶122.

[298] **RL-0042**, *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of Mexico, 8 May 2015, ¶ 12.

[299] Request for Arbitration, ¶ 44: "*Sargeant's Dominican competitors received timely (or slightly delayed) payment in full from the MOPC*".

477. When referring to Article 10.3 in its Request for Arbitration, Sargeant seems to imply that the conduct that led to its alleged market exclusion is the Dominican Republic repeatedly granting AC-30 supply contracts to the Comparable Companies without carrying a public and transparent tender.[300] [301]

478. The supply of asphalt under the 2003 Contract, and the supply option included in the 2013 Contract, were not the result of any bidding. Sargeant has been supplying AC-30 without a public tender since 2005.[302]

479. It is ironic, to say the least, for Sargeant to claim that it has been discriminated in favor of the Comparable Companies due to the Dominican Republic allegedly awarding them AC-30 supply contracts without any public tender. Particularly, considering that Sargeant has sold AC-30 to the Dominican Republic under the 2003 Contract and the 2013 Contract without any public tender whatosever for fifteen years. In fact, since late 2013 to date, Sargeant has been the main supplier of AC-30 to the MOPC, selling 56% of the total volume purchased by the MOPC according to its own expert.[303]

480. In any event, it is to be noted that the Dominican Republic has no exclusivity commitment with the Claimant. In fact, in order to maintain stability in the public works sector, it was the government's responsibility to diversify the risk of AC-30 supply shortages by having multiple suppliers, ensuring they were not solely reliant on any one supplier. Having several suppliers of AC-30 is a reasonable and justified practice that the Dominican Republic has been implementing for many years, as acknowledged by Mr. Abu Naba'a himself.[304]

481. Based on the foregoing, the present claim must be rejected, as Sargeant has not adequately satisfied the essential elements of Article 10.3 CAFTA-DR.

4.3 THE DOMINICAN REPUBLIC HAS NOT BREACHED CUSTOMARY INTERNATIONAL LAW UNDER ARTICLE 10.5 OF CAFTA-DR

482. According to Sargeant, the Dominican Republic breached Article 10.5 CAFTA-DR by allegedly failing to provide its covered investment treatment in accordance with customary international law.

483. Sargeant argues that:

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[300] Request for Arbitration, ¶ 44: "*Sargeant's contracts were awarded pursuant to a transparent tender process, the Dominican government has repeatedly awarded Sargeant's Dominican competitors numerous AC-30 contracts without a transparent or lawful tender process.*"

[301] Robert Indge Expert Report, ¶ 2.4.8.

[302] **MAN-0007-SPA**, Addendum No. III of January 22, 2008, p. 2, reference to the August 6, 2005 Contract for the purchase of 4,595,467.00 gallons of AC-30 to be used in the Northeast Highway; **MAN-0007-SPA**, Addendum No. IV of November 1, 2009, p.3-4, which authorized the purchase from Sargeant of AC-30 in the amount of US$45,000,000.00; **MAN-0007-SPA**, Addendum No. X dated October 17, 2011, p. 4, for the purchase of AC-30 in the amount of US$5,000,000.00, intended to initiate the National Asphalting Plan.

[303] Expert Report Indge, ¶ 2.3.4.

[304] Witness statement of Mustafa Abu Naba'a, ¶ 60: "*In June and July 2020, all of the Dominican Republic's other AC-30 companies stopped supplying AC-30 to the MOPC in anticipation of the new government coming to power in the next months and potentially refusing to pay any outstanding invoices.*" (emphasis added)

> *The Dominican Republic's conduct towards Sargeant, as summarized in paragraphs 163-176 is grossly unfair and unjust. It can also be characterized as arbitrary and idiosyncratic. It has deprived Sargeant of the cashflow it is legitimately entitled to expect for payment for services rendered under a legally binding agreement, and has effectively pushed Sargeant out of the Dominican Republic market for the supply of AC-30 asphalt and the provision of services relating to AC-30 asphalt. There is no good reason to justify such conduct, and on occasion it has manifestly been to the detriment of the Dominican Republic's own tax-payers.*[305]

484. And, in its opinion, "[s]*uch conduct is a clear breach of the minimum standard of treatment required by customary international law, and consequently a breach of Article 10.5 of the DR- CAFTA*".[306]

485. Again, Sargeant's argumentative effort in support of its claim is practically non-existent.

486. Sargeant refers the Tribunal to thirteen paragraphs of its Memorial (¶¶ 163-176) which are supposed to summarize the Dominican State's conduct. However, eleven of those thirteen paragraphs are quotes to legal authorities regarding expropriation of investments. Only two of the paragraphs to which Sargeant refers deal with the specific circumstances at issue in this arbitration.

487. What is even more concerning is that Sargeant offers no explanation for its claims that the Dominican Republic's conduct is "unfair and unjust" or "arbitrary and idiosyncratic".

488. Sargeant's Memorial offers no clarification on these matters. Sargeant merely presents baseless allegations without any supporting evidence or reasoning, which do not stand up to a minimum analysis.

489. In any event, Respondent explains below which is the applicable minimum standard of treatment under Article 10.5 of CAFTA-DR (**Section 4.3.1**) and that the Dominican Republic has not breached the minimum standard of treatment (**Section 4.3.2**).

4.3.1 CAFTA-DR Article 10.5 sets forth the customary international law minimum standard of treatment of aliens

490. With respect to the obligation to provide fair and equitable treatment, CAFTA-DR Article 10.5 provides that:

[305] Claimant's Memorial, ¶ 191.

[306] Claimant's Memorial, ¶ 192.

> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*
>
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.* (emphasis added)

491. Therefore, from a simple reading of the CAFTA-DR it is clear that the standard required for the obligation of fair and equitable treatment is the minimum standard of treatment under customary international law.

492. As the Claimant rightly points out, the analysis of the content of this standard begins with the reference to the *Neer* case, where it was ruled that a breach of the minimum standard of treatment "*in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*."[307]

493. Sargeant argues that "*the minimum standard of treatment is an evolutionary notion, which now affords much greater protection to investors than that contemplated in the Neer decision*".[308]

494. However, several recent decisions reached a different conclusion and, contrary to Sargeant's contention, upheld the Neer test.

495. For example, the tribunal in *Eli Lilly and Company v. Canada stated:*

> *the Tribunal accepts in principle the analysis and conclusions of the NAFTA Chapter Eleven tribunal in Glamis Gold on the content of the customary international lay minimum standard of treatment addressed in NAFTA Article 1105(1) and, in particular, its conclusion as follows:*
>
> *The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking - a gross denial of*

[307] **CL-0022-ENG**, *Neer and Neer (USA) v United Mexican States,* Decision, 15 October 1926, ¶ 4.

[308] Claimant's Memorial ¶ 187.

> *justice. Manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons- so as to fall bellow accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;" [...]. The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105 (1)*.[309] (emphasis added)

496. In the same vein, the tribunal in *Glamis Gold v. United States of America* understood the standard of fair and equitable treatment to be that enshrined in the Neer case[310] and concluded that "*a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking*"[311] (emphasis added).

497. The standard is currently, and has always been, a very restrictive one that is not easily met. This standard provides the State a certain degree of discretion in its actions. Numerous tribunals, both under CAFTA-DR and NAFTA, have emphasized that the threshold for establishing a violation of the minimum standard of treatment, as established in customary international law, is extremely high.

498. This was affirmed by the tribunals in the *SD Myers* and *Waste Management II* cases, respectively:

> *The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. The determination must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.* [312]

> *What is analyzed here is the standard of review of Article 1105* [...]. [...] *a general standard for Article 1105 emerges. Taken together, the cases S.D. Myers, Mondev, ADF and Loewen suggest that the minimum standard of fair and equitable treatment is breached by conduct attributable to the State and is prejudicial to the claimant if such conduct is arbitrary, grossly unfair, unjust or idiosyncratic, and discriminatory if the claimant is subjected to rational or regional bias or if it involves an absence of due process leading to a result that offends judicial discretion, as might occur with a manifest failure of natural justice in judicial proceedings or a total lack of transparency and fairness in an administrative process.*[313]

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[309] **RL-0098**, *Eli Lilly and Company v. Government of Canada,* Case No. UNCT/14/2, Award, 16 March 2017, ¶ 222.

[310] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL, Case No. UNCT/14/2, Award, 8 June 2009,* ¶ 612 "*It appears to this Tribunal that the NAFTA State Parties agree that, at a minimum the fair and equitable treatment standard is that as articulated in Neer.*"

[311] **RL-0063**, *Glamis Gold, Ltd. V. United States of America, UNCITRAL, Case No. UNCT/14/2, Award, 8 June 2009, ¶ 627.*

[312] **RL-0099**, *S.D. Myers, Inc v. the Government of Canada*, Partial Award, 13 November 2000, ¶ 263.

[313] **CL-0024-ENG**, *Waste Management v. United States of United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98.

499. The standard set in the *Waste Management II* case has been generally accepted and followed by tribunals hearing claims related to fair and equitable treatment.[314] The case is also highly relevant because, as explained in the following section, the standard was analyzed in the context of a claim for alleged non-payment of debts.

500. The tribunal in *GAMI v. Mexico* highlighted that the standard is a restrictive one:

> *Four implications of Waste Management II are salient even at the level of generality reflected in the passages quoted above. (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole - not isolated events – determines whether there has been a breach of international law*.[315]

501. Similarly, the tribunal in the *International Thunderbird* case held that:

> *The threshold for finding a violation of the minimum standard of treatment still remains high,* […]. *For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.*[316]

502. The tribunal in the *Glamis* case took an even more stringent stance:

> *The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.* [...]
>
> *It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking -a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or manifest lack of reasons- so as to fall below accepted international standards and constitute a breach of Article 1105(1).*[317]

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[314] **RL-0100**, *TECO Guatemala Holding, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶454; **RL-0101**, *Gami Investments, Inc. v. Government of the United Mexican States,* UNCITRAL, Final Award, 15 November 2004, ¶¶ 95-96.

[315] **RL-0101**, *Gami Investments, Inc. v. Government of the United Mexican States,* UNCITRAL, Final Award, 15 November 2004, ¶ 97.

[316] **RL-0007**, *Thunderbird Gaming Corporation v. United Mexican States,* UNCITRAL, Arbitral Award, 26 January 2006, ¶ 194.

[317] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL, Case No. UNCT/14/2, Award, 8 June 2009, ¶¶ 615-616.*

503. From all the above, it is clear that the relevant case law establishes an extremely restrictive standard for determining whether a breach of the minimum standard of treatment under customary international law has occurred, as evidenced by the abundant use of adjectives such as "manifest", "gross", "flagrant", "scandalous" or "aberrant".

504. Accordingly, to establish a breach of the minimum standard, Sargeant must prove that the Dominican Republic engaged in outrageous or aberrant misconduct, far exceeding a mere "*inconsistency or inadequacy in [ ] [the Dominican Republic's] regulation of its internal affairs*."[318]

505. In any event, as set out in the following section, the contested measures by Sargeant did not breach Article 10.5, regardless of how narrowly the minimum standard is interpreted.

4.3.2 The Dominican Republic has not breached the minimum standard of treatment

506. Throughout the Memorial, Sargeant challenges the three alleged "measures" of the Dominican Republic already mentioned for its other claims.[319] However, it does not explicitly mention those under its analysis of the fair and equitable treatment standard.

507. According to Sargeant, the State's conduct would have been "*arbitrary and idiosyncratic*," depriving the Claimant of "*the cashflow it is legitimately entitled to expect for payment for services rendered under a legally binding agreement, and has effectively pushed Sargeant out of the Dominican Republic market for the supply of AC-30 asphalt and the provision of services relating to AC-30 asphalt."* with an alleged "*grossly unfair and unjust*" treatment[320] .

508. The Dominican Republic neither discriminated Sargeant, nor treated it arbitrarily, nor in any other way acted unfairly or unjustly against the Claimant.

(i) The Dominican Republic has not discriminated against Sargeant

509. The standard for proving a claim of discrimination is high and requires more than just different treatment. The tribunal in *Eli Lilly* explained that when a measure is not visibly discriminatory, the claimant must prove discriminatory intent:[321]

> *The Tribunal notes that Claimant has advanced another allegation of discrimination, "relating to nationality". Specifically, Claimant's position is that "the promise utility doctrine discriminates in favour of a prominent domestic industry at the expense of foreign patent holders." Claimant does not allege that the promise utility doctrine discriminates against foreign patent holders on its face, or that Canadian courts have shown any intent to discriminate against foreign patent holders. Rather, Claimant argues that, in practice, the application of the promise utility doctrine has resulted in the invalidation of patents held by foreign firms only, and that the primary beneficiaries have been domestic generic drug manufacturers.*
>
> *It appears to the Tribunal that Claimant has not made much effort to fully develop this theory of the de facto nationality-based discrimination. The only facts*

[318] **RL-0102**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 390.

[319] Claimant's Memorial, ¶ 181.

[320] Claimant's Memorial, ¶ 191.

[321] **RL-0098**, *Eli Lilly and Company v. Government of Canada,* Case No. UNCT/14/2, Award, 16 March 2017, ¶¶ 440-441.

> *Claimant has come close to establishing are that (i) since 1 January 2005, the pharmaceutical patents invalidated on the ground of inutility [...] have been held by foreign pharmaceutical companies, and (ii) the largest pharmaceutical companies in the world are not Canadian. The Tribunal will not infer discrimination from such a bare record. Claimant has wholly failed to demonstrate that the promise utility doctrine discriminates against foreign patent holder*. (emphasis added)

510. Sargeant merely argues that it was treated differently compared to other Dominican companies, making no effort to demonstrate intent or anything beyond differential treatment. Consequently, this claim must be rejected.

511. In any case, as previously discussed in Section 4.2 concerning national treatement, Sargeant has not even demonstrated that there was an unjustified differential treatment.

(ii) The Dominican Republic has not acted arbitrarily towards Sargeant

512. Arbitral awards issued under CAFTA-DR and NAFTA have stated that for a State conduct to be regarded as arbitrary, there must be a manifest lack of reasons:

> *the Tribunal notes the standard articulated above as to when an act is so manifestly arbitrary as to breach a State's obligations under Article 1105: this is not a mere appearance of arbitrariness [...]. The act must, in other words, "exhibit a manifest lack of reasons". [...] It is Claimant's burden to prove a manifest lack of reasons for the legislation, and the Tribunal holds that it has not met this burden*.[322] (emphasis added)

513. The tribunal in *Glamis v. United States* defined the term "arbitrary" in the context of the minimum standard of treatment:

> *The Tribunal finds that, in this situation, both Parties are correct. Previous tribunals have indeed found a certain level of arbitrariness to violate the obligations of a State under the fair and equitable treatment standard. Indeed, arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals.*
>
> *This is not a mere appearance of arbitrariness, however-a tribunal's determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as International Thunderbird put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards*.[323] (emphasis added)

514. The International Court of Justice held in *Elettronica Sicula v. Italy* that "[a]*rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law* [...] *It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial* propriety".[324] (emphasis added)

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[322] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL, Case No. UNCT/14/2, Award, 8 June 2009, ¶ 803.*

[323] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL,* Case No. UNCT/14/2, Award, 8 June 2009, ¶ 625.

[324] **RL-0083**, *Elettronica Sicula S.p.A. (ELSI), United States of America v. Republic of Italy,* CIJ, Judgment, 20 July 1989, ¶ 128.

515. Consequently, as long as a measure is reasonable or, rather, not manifestly unreasonable, it cannot be considered arbitrary. The tribunal in *Glamis v. United States* indicated that conduct is reasonable when it is "*rationally related to its stated purpose and reasonably drafted to address its objectives.*"[325]

516. Therefore, Sargeant has the burden of proving that the acts of the Dominican Republic that it considers arbitrary were not related to a rational policy, nor reasonably designed to achieve said rational policy. As the tribunal in *Glamis v. United States* noted, the "mere illegality"[326] of the Dominican Republic's acts is not enough, nor is a mere disagreement with the technical conclusions and discretionary choices of the Dominican government in matters of procurement policy.

517. As it was explained by the tribunal in *Glamis v. United States*:

> *It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of customary international law standard embedded in Article 1105.*[327]

518. Sargeant was therefore required to demonstrate that the MOPC's conduct was manifestly arbitrary, so unjust and shocking as to be unacceptable from an international perspective. However, it has failed to do so.

519. Furthermore, Sargeant had to satisfy a two-pronged test to demonstrate the alleged arbitrariness of the MOPC's contested actions. First, it had to show that the policy behind the actions lacked rationality, and second, it had to prove that the actions were not reasonably related to or designed to achieve that objective.

520. The MOPC's conduct was not arbitrary, but entirely reasonable and legitimate. The alleged non-payment is the result of a legitimate dispute by the MOPC over the validity of the 2013 Contract, and over the existence, merit and amount of the invoices claimed by Sargeant. The circumstances underlying the MOPC's conduct include the Comptroller General Office's observations on the "*libramientos*" issued to Sargeant, ongoing investigations into the asphalt industry's irregularities, the 2013 Contract's illegalities, including the fact that Sargeant supplied asphalt to MOPC without a public tender during several years, , collecting hundreds of millions of dollars, without paying a single penny in taxes, all in contravention of the Dominican Republic Constitution and several Dominican laws. In addition, more than half of Sargeant's claim refers to a fabricated claim for storage invoices, based on an opportunistic and *ex post facto* interpretation of the 2013 Contract. Furthermore, Sargeant operated with the MOPC under an expired contract, and the dispute in this regard preceded the inauguration of the new Administration.

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[325] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL,* Case No. UNCT/14/2, Award, 8 June 2009, ¶ 803.

[326] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL,* Case No. UNCT/14/2, Award, 8 June 2009, ¶ 626.

[327] **RL-0063**, *Glamis Gold, Ltd. v. United States of America, UNCITRAL,* Case No. UNCT/14/2, Award, 8 June 2009, ¶ 779.

521. Therefore, against this background, it was completely reasonable and legitimate for the MOPC not to allocate public resources for payment of sums that were and still are disputed. As has been demonstrated, the actions taken by the MOPC were reasonable and responded to a general policy objective of addressing and resolving all irregularities in the asphalt industry.

522. Moreover, concerning claims for non-payment of debts, investment tribunals have noted that lack of payment does not constitute a breach of the fair treatment standard, where the contractual remedies for debt collection are still in place. In this regard, the tribunal in *Waste Management* held:

> *the availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as Article 1105(1) have been complied with by the State. Were it not so, Chapter 11 would become a mechanism of equal resort for debt collection and analogous purposes in respect of all public (including municipal) contracts, which does not seem to be its purpose.*[328] (emphasis added)

523. If Sargeant believed that the MOPC owed some invoices, it should have initiated the corresponding debt collection procedure before the competent forum. The forum provided for in the 2013 Contract is readily available.

524. In conclusion, Sargeant has failed to establish that the Dominican Republic has breached the minimum standard of treatment by failing to demonstrate that the MOPC's conduct was manifestly arbitrary.

4.4 THE DOMINICAN REPUBLIC HAS NOT BREACHED THE MFN CLAUSE OF CAFTA-DR ARTICLE 10.4

525. For the hypothetical case that, contrary to what is argued in sections 3.5.2 and 3.5.3, the Tribunal understands that the MFN clause allows Sargeant to import the umbrella clause of other treaties; that the Tribunal decides to ignore the forum selection clause of the 2013 Contract; and that, therefore, the tribunal considers that it has jurisdiction over Sargeant's contractual claim, there is no breach of the MFN clause.

526. First, because the 2013 Contract is absolutely void (**Section 4.4.1**). Second, even if the 2013 Contract was valid, the MOPC owes Sargeant nothing for storage invoices (**Section 4.4.2**). Third, even if the Contract was valid and the Tribunal were to find that the MOPC has a debt with Sargeant and breached its contractual obligations, this is not a violation of the CAFTA-DR, even in the presence of an umbrella clause (**Section 4.4.3**).

4.4.1 The 2013 Contract is null and void

527. There is no actionable contractual breach against the MOPC because the 2013 Contract is null and void, for the reasons already stated and explained by Dr. Dickson. [329]

[328] **CL-0024-ENG**, *Waste Management v. United States of United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 117.

[329] Rafael Dickson Expert Report, ¶¶ 48-49.

528. The issue of the nullity of the 2013 Contract is subject to the Dominican administrative justice, the competent jurisdiction to resolve this issue, by virtue of the lawsuit filed by the MOPC, and will be decided in due course.

529. The Respondent reserves the right to raise this issue for its determination by this Tribunal, in the hypothetical case that this Tribunal assumes jurisdiction and, in turn, the Dominican Administrative Court (mistakenly) determines, by a res judicata ruling, that it lacks jurisdiction due to this arbitration.

4.4.2 The MOPC owes nothing to Sargeant for storage invoices

530. Sargeant claims the amount of USD 29.62 million for storage.

531. This entire sum is reflected in invoices for “Storage Differential”, sent by Sargeant to the MOPC as of September 2020.

532. These invoices would represent storage volumes that, according to Sargeant, were not invoiced month-to-month from 2013 onwards, supposedly “as a courtesy”, but now claims those volumes are due. The invoices correspond to unprovided storage services, more precisely, to alleged minimum volumes that, according to Sargeant, remained outstanding.

533. These amounts are not owed by the MOCP because those minimum volumes were already consumed and paid for through the supply of asphalt.

534. This claim is based on an opportunistic, abusive, and erroneous interpretation of the 2013 Contract, which is not supported by either its text or its performance by the Parties. It is also contradicted by documents issued by Sargeant, by sections of its Memorial, and by the testimony of its witness.

535. Sargeant argues that, under the 2013 Contract, supply and storage were "*entirely separate,"* and that the gallons supplied did not count toward the MOPC's obligation to use 74.5 million gallons of storage nor toward the monthly minimum of 1.26 million gallon. In this regard, Sargeant claims that it “*was entitled to invoice the MOPC for the 1.26 million gallon monthly storage use minimum at $0.75 per gallon (i.e., $945,000), and also separately charge the MOPC for whatever AC-30 it had ordered from Sargeant at $2.90 per gallon*". [330]

536. This is false, for the following reasons.

(i) The text of the 2013 Contract, the Asphalt Purchase Agreement with Intercaribe, and the 2017 Contract disprove Sargeant's position

537. First, Article 2(a1) of the 2013 Contract, when providing for the minimum monthly and annual consumption, states that "*If every twelve months* ***the material dispatched*** *is less than the amount of 15,120,000 US gallons, the MOPC will pay the SUPPLIER the difference between what was dispatched and what was agreed for the agreed price [...]."* (emphasis added)

538. The article does not provide for the payment of the difference between what is stored and the minimum amount, but between what is *dispatched* and the minimum volume Set forth therein. The term dispatch is again used in article 2(B) when referring to the supply and is

[330] Claimant’s Memorial, ¶ 42.

the term used in Sargeant's invoices to refer to the supply (in their original in Spanish).[331] Therefore, the contract itself leads to the conclusion that the volumes supplied count towards the minimum of article 2(a1).

539. Article 11 provides that "*this contract will remain in force until the 74,536,312.52 million gallons of AC-30 Asphalt Cement contracted and described in Article b2 of this contract are consumed*". The article (b2) referenced therein governs the supply option, which again indicates that the Parties agreed to count the volume supplied towards the total volume of the contract.

540. Second, in the Asphalt Purchase Agreement between Sargeant and Intercaribe, by which Sargeant purchased from Intercaribe the 74,536,312.52 gallons to supply the MOPC, Sargeant itself describes the 2013 Contract as "*a contract by which they agreed to the supply, storage and handling of asphalt products, for an amount of 74,536,312.52 gallons of asphalt cement, to be supplied by the company to that Ministry during the term of this contract.*"[332] (emphasis added)

541. Its article FIRST states that "*INTERCARIBE MERCANTIL, SAS, agrees to sell to the company SARGEANT PETROLEUM LLC, the amount of 74,536,312.52 gallons of AC-30 asphalt cement. This operation includes the supply, transport, storage, and handling of the product*." (emphasis added)

542. That is, Sargeant refers both to supply and storage as a single component to calculate the total volume contracted for.

543. Moreover, in its article SECOND, the Asphalt Purchase Agreement provides that Intercaribe would supply Sargeant exactly the same minimum volume set forth in the 2013 Contract, which now according to Sargeant is independent from the amounts supplied which should not be counted towards that minimum volume, which does not make any sense.[333]

544. Third, the 2017 Contract, as explained above, clearly refutes Sargeant's opportunistic argument.

545. Under said contract, the MOPC and Sargeant agreed on the supply of AC-30 and PG-76 asphalt. With express reference to the 2013 Contract, it was provided that "*the number of gallons dispatched under this agreement shall be deducted from the minimum guaranteed volume set forth in the supply contract referenced in this article.*"[334] (emphasis added)

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[331] **LC-0003-ENG/SPA**, Contract 2013, article 2(B): "*The eventual issuance of the Letter of Credit under the modality determined by the MOPC, shall only guarantee the payment of the consumption of the PRODUCT dispatched after the signature of this contract*". (emphasis added); In their original in Spanish, Sargeant invoices use the term "*Despachados"*.

[332] **R-0008**, Asphalt cement purchase agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013.

[333] **R-0008**, Asphalt Cement Purchase Agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013: ***SECOND:*** *The supply in question will be partially delivered by THE SELLER to THE BUYER by mutual agreement between the parties, at the Haina Pier, in the Dominican Republic. Agreeing the parties that each delivery will be for the minimum amount of one million two hundred sixty thousand— (1,260,000) gallons per month of AC-30.*"

[334] **R-0008**, Asphalt Cement Purchase Agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013.

546. This document is unequivocal – please note the use of the word "dispatched" again here – and leaves no room for doubt that Sargeant and the MOPC considered that the volume supplied did count toward the guaranteed minimums under the 2013 Contract.[335]

547. Therefore, Mr. Abu Naba'a's assertion that "*any AC-30 that the MOPC received from Sargeant pursuant to this optional supply provision did not count toward the [...] MOPC's related 1.26 million gallon monthly storage use minimum*" is simply false.[336]

(ii) The performance of the 2013 Contract disproves Sargeant's position

548. As explained in the prior section, the performance of the 2013 Contract also shows that Sargeant considered the volume supplied as part of the guaranteed monthly minimum, as provided by the text of the contract.

549. In fact, month after month, as explained by Dr. Sabbioni, Sargeant systematically invoiced the MOPC for the difference between what was supplied and the guaranteed minimum of 1.26 million as "Storage Differential", whenever the amount supplied was less than the minimum gallonage.[337]

550. If the volume supplied did not count towards the guaranteed minimum as argued now by Sargeant, it would make absolutely no sense for Sargeant to name the item charged as "Storage Differential".

551. Accordingly, if the volume supplied did not count towards the guaranteed minimum, there was no reason for Sargeant not to invoice the 1.26 million minimum volume in full each month.

552. The reason provided by Mr. Abu Naba'a is that Sargeant did this "as a courtesy", when the MOPC purchased a considerable amount of asphalt, and the amount not invoiced was somehow "saved" for a later stage. However, he does not produce any document whatsoever reflecting the understanding between the Parties behind this supposed (and hereby denied) courtesy. Moreover, the alleged courtesy is neither reflected by the invoicing practice, which consistently follows the same pattern, regardless of whether the amount supplied was "considerable" or not.

553. This is because the statement is false.

554. Sargeant's *ex post facto* interpretation is a fabrication in an attempt to collect improper amounts from the MOPC. The interpretation is further contradicted by its own Memorial and Mr. Abu Naba'a's witness statement.[338]

555. Sargeant's and Mr. Abu Naba'a's additional argument is that the MOPC would have confirmed Sargeant's interpretation by virtue of a draft internal memorandum from an MOPC

[335] Billing immediately following the 2017 Contract also shows that AC-30 and PG-76 volumes are billed together and deducted from the guaranteed minimum, with the difference being billed by Complementary Differential. See for example Invoice No. 2018-0458, **RI-0017.**

[336] Witness Statement of Mustafa Abu' Naba, ¶ 46.

[337] Expert Report by Dr. Guillermo Sabbioni, V.A. section.

[338] Claimant's Memorial, ¶¶ 65-66; Witness Statement of Mustafa Abu' Naba, ¶¶ 72-73.

official, from December 2020, which refers to a supposed amount of gallons pending to be stored.[339]

556. This is disingenuous. Minister Deligne Ascención explains in his witness statement that said document is merely an internal memorandum, it does not bind the MOPC, and it does not reflect the position of the MOPC, which, in fact, is the opposite.[340] Dr. Dickson also explains that, from a legal standpoint, this document has no binding force upon the MOPC.[341]

557. Minister Ascención also explains that this is an internal document, not available to the public, and that he is unsure how the document might have come to Mr. Abu Naba'a's hands. Dr. Dickson explains the same, from a legal perspective.[342]

558. In any case, what the content of this document and its possession by Mr. Abu Naba'a reflects is the opaque way he operates and has operated all these years in his dealings with the Dominican Public Administration, which also explains many of the things described in this submission.

559. For all of the reasons explained above, there is no debt whatsoever corresponding to guaranteed minimum storage volumes, because those volumes have already been dispatched and consumed.

4.4.3 Even if the Tribunal were to find that the Dominican Republic has breached its contractual obligations, such breaches do not amount to a violation of the umbrella clause

560. Finally, in the unlikely event that the Tribunal finds that the Dominican Republic has breached its obligations under the 2013 Contract, it must still reject Sargeant's claim as such supposed breaches would be ordinary commercial breaches that do amount to a violation of the umbrella clause.

561. According to the tribunal in *BP v Argentina*:

> *an umbrella clause cannot transform any contract claims into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims. These far-reaching consequences of a broad interpretation of the so-called umbrella clauses, quite destructive of the distinction between the national legal orders and the international legal order […]. It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law "with regard to investments*".[343]

[339] **MAN-0023**.

[340] Testimonial Statement of Minister Ascención.

[341] Rafael Dickson Expert Report, ¶¶ 94-104.

[342] Rafael Dickson Expert Report, ¶¶ 105-108.

[343] **RL-0103**, *BP America Production Company and others v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 110.

562. In *Sempra*, the tribunal specifically addressed the issue of whether any breach of contract can give rise to a breach of an umbrella clause. The tribunal rejected this possibility with the following explanation:

> *The Tribunal fully shares the view that ordinary commercial breaches of a contract are not the same as Treaty breaches, as was well explained by the tribunal in SGS v. Philippines when distinguishing a contractual dispute over payment from a Treaty dispute. So too, the Tribunal can only agree with the view adopted in SGS v. Pakistan that such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause. The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect*.[344]

563. Also, in a section of the award not affected by the annulment decision, the tribunal in *CMS v. Argentina* stated that the umbrella clause would not be breached in all cases of contractual breach, but only when the host State deployed its sovereign or governmental power in contravention of its prior commitments. Specifically, the tribunal found that the respondent State was correct in arguing that not all contractual breaches result in Treaty breaches.[345]

564. The *Karkey v Pakistan* tribunal noted that, even assuming that the alleged contractual breaches were "*attributable to Pakistan (whether under domestic or international law), simple commercial breaches are not within the protection offered by an umbrella clause*".[346]

565. For the reasons already explained, in the present case, the MOPC did not exercise *jus imperium* powers in the performance of the 2013 Contract. Sargeant has not even alleged this, much less proven so.

566. Therefore, even if the conduct relied upon by Sargeant – failure to pay invoices – was considered a breach of the 2013 Contract, it would not meet the standard necessary to qualify as a breach of the umbrella clause. Thus, Sargeant's claim under the umbrella clause that it purports to import must be dismissed.

5 RESERVATION OF RIGHTS

567. The Dominican Republic expressly reserves the right to supplement this Counter-Memorial on Merits and Memorial on Jurisdiction to present additional arguments and evidence in further submissions and pleadings before the Tribunal. This Counter-Memorial is submitted without prejudice to any other rights of the Dominican Republic.

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[344] **RL-0065**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 310.

[345] **RL-0104**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 299.

[346] **RL-0105**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 401. see also, **CL-0027-ENG,** *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Final Award, 11 June 2012, ¶ 941.

6 REQUEST FOR RELIEF

568. For all the reasons set forth in this Counter-Memorial on Merits and Memorial on Jurisdiction, and with express reservation of the right to supplement, expand or clarify this request at a future opportunity, the Dominican Republic respectfully requests this Tribunal to:

i. Dismiss all of Claimant's claims for lack of jurisdiction and lack of admissibility; or

ii. Dismiss all of Claimant's claims in this arbitration for lack of merit; and

iii. Order Claimant to reimburse in full the costs incurred by the Dominican Republic for its defense in this arbitration, including the attorneys' fees and expenses of the Dominican Republic, and any other expenses incurred by the Dominican Republic in this arbitration, plus a compound interest on those amounts before and after the award is rendered until the date of payment, calculated on the basis of a reasonable interest rate.

Respectfully submitted on behalf of the Dominican Republic on August 13, 2023, by

Index of abbreviations

Abbreviation	Complete reference
Asphalt Purchase Agreement	Asphalt Cement Purchase Agreement between Sargeant and Intercaribe Mercantil SAS, 15 July 2013.
2003 Contract	Contract No. 25-2003 for the Transportation, Storage and Handling of Asphalt Materials between the Ministry of Public Works and Communications and Sargeant Petroleum LLC dated February 26, 2003.
2013 Contract	Contract No. 13-2013 between the Ministry of Public Works and Communications and Sargeant Petroleum LLC dated May 10, 2013.
2017 Contract	Contract No. 606-2017 between the Ministry of Public Works and Communications and Sargeant Petroleum LLC dated December 21, 2017.
CAFTA-DR and/or Treaty	Free Trade Agreement between the United States, Central America and Dominican Republic
Intercaribe Mercantil SAS	Intercaribe
CAFTA-DR or Treaty	Free Trade Agreement between the United States, Central America and the Dominican Republic
MOPC	Ministry of Public Works and Communications
Plea Agreement	Sargeant Marine Inc. plea agreement with the U.S. Department of Justice, Fraud Division and the U.S. Attorney's Office for the Eastern District of New York dated 21 September 2020.
RD$	Dominican peso
Sargeant and/or Plaintiff	Sargeant Petroleum LLC
USD	U.S. Dollars