

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE AGREEMENT ON
RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE CARIBBEAN
COMMUNITY AND THE DOMINICAN REPUBLIC AND THE UNCITRAL ARBITRATION RULES
(1976)**

In the arbitration proceeding between

MICHAEL ANTHONY LEE-CHIN

Claimant

and

THE DOMINICAN REPUBLIC

Respondent

ICSID Case No. UNCT/18/3

FINAL AWARD

Members of the Tribunal

Prof. Diego P. Fernández Arroyo, President
Mr. Christian Leathley
Prof. Marcelo Kohen

Secretary of the Tribunal

Ms. Marisa Planells-Valero

Place of Arbitration: Washington D.C.

Date of dispatch to the Parties: October 6, 2023

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TABLE OF DEFINED TERMS

Framework Agreement	Framework Agreement for the Contract for the Purchase and Sale of Shares in Lajun Corporation S.R.L., Duquesa Landfill Operator and Contract for the Purchase and Sale of the Land, dated June 26, 2013, between José Antonio López Díaz and Darleny López on behalf of Lajun Corporation S.R.L. and Nagelo Enterprises, S.A. and Wilkison Company S.R.L.
Settlement Agreement 1 or First Settlement Agreement	Settlement Agreement between the ASDN and Lajun, signed on February 10, 2014
Settlement Agreement 2 or Second Settlement Agreement	Settlement Agreement between the ASDN and Lajun, signed on May 24, 2017
Addenda 1	Addenda to amend the Contract for the Management and Operation of the Duquesa Landfill, dated April 27, 2009 between the ASDN and Lajun
Addenda 2	Addenda to amend the Contract for the Management and Operation of the Duquesa Landfill, dated June 6, 2011 between the ASDN and Lajun
Addenda 3	Addenda to amend the Contract for the Management and Operation of the Duquesa Landfill, entered into on March 3, 2014
CEA's Appeal	Appeal filed by the Consejo Estatal del Azúcar, dated December 21, 2021
Final Hearing	Final Hearing held from January 24 to 30, 2022
ASDN	Municipality of Santo Domingo Norte
C-[#]	Claimant's Factual Exhibit
ILC	International Law Commission
CEA	Consejo Estatal del Azúcar
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice

CL-[#]	Claimant's Legal Authority
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)
Concession Agreement	Concession Agreement entered into on March 1, 2007 between the Dominican company Lajun Corporation, S.R.L. and the Municipality of Santo Domingo Norte for the administration and operation of the Duquesa Landfill
Shares Contract	Contract for the Purchase and Sale of Shares in Lajun entered into on June 26, 2013 between José Antonio López Díaz and Darleny López on behalf of Lajun Corporation S.R.L. and Nagelo Enterprises, S.A. and Wilkison Company S.R.L.
Land Contract	Contract for the Purchase and Sale of the Land entered into on June 26, 2013 between José Antonio López Díaz and Darleny López on behalf of Lajun Corporation S.R.L. and Nagelo Enterprises, S.A. and Wilkison Company S.R.L.
Statement of JD Canó	Witness Statement of JD Ángel S. Canó, dated December 14, 2020
Statement of Dr. López Castillo	Witness Statement of Dr. Evelyn López Castillo, dated December 14, 2020
Statement of Mr. Pérez Lorenzo	Witness Statement of Mr. Sócrates Pérez Lorenzo, dated December 14, 2020
Environmental and Health Emergency Declaration	Environmental and Health Emergency Declaration of the Province of Santo Domingo and the National District, dated July 21, 2017
Rejoinder on the Merits and Quantum and Reply on Additional Objections or R2	Respondent's Rejoinder Memorial on the Merits and Quantum and Reply on Additional Jurisdictional/Admissibility Objections, dated August 11, 2021
Rejoinder on Jurisdiction	Claimant's Rejoinder Memorial on Jurisdiction, dated December 12, 2019
Rejoinder on Additional Objections or C3	Claimant's Rejoinder on Additional Jurisdictional/Admissibility Objections, dated October 12, 2021

Respondent's Post-Hearing Brief or RPHB	Dominican Republic's Post-Hearing Brief, dated March 28, 2022
Claimant's Post-Hearing Brief CPHB	Claimant's Post-Hearing Brief, dated March 28, 2022
Opinion of Prof. Bianchi	Legal Expert Opinion of Professor Andrea Bianchi, dated March 26, 2021
Lajun	Lajun Corporation S.R.L.
Partial Award and Dissenting Opinion, respectively (and, collectively, Partial Award and Dissenting Opinion)	Partial Award on Jurisdiction and Dissenting Opinion of Prof. Marcelo Kohen, dated July 15, 2020
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction, dated July 3, 2019
Counter-Memorial or R1	Respondent's Memorial on Jurisdictional/Admissibility Objections and Counter-Memorial on the Merits and Quantum, dated December 14, 2020
Statement of Claim or C1	Claimant's Statement of Claim, dated January 18, 2019
Memorial on Jurisdiction	Respondent's Memorial on Objections to Jurisdiction, dated May 6, 2019
Notice of Arbitration	Notice of Arbitration, dated April 6, 2018
Opposition to Bifurcation	Opposition to Respondent's Request for Bifurcation, dated February 19, 2019
First Report of Deltaway	First Expert report of Deltaway, dated April 9, 2019
First Report of J.S. Held	First Technical Expert Report prepared by Messrs. Guillermo Martínez Ochoa and Enrique Abiega Encina, dated December 14, 2020
First Report of Quadrant Economics LLC	First Expert Report of Quadrant Economics LLC, prepared by Dr. Daniel Flores, dated December 14, 2020
First Report of Mr. Kaczmarek	First Expert Report of Mr. Brent C. Kaczmarek (IAV Advisors LLC), dated January 18, 2019
First Declaration of Mr. Adrian Christopher Lee-Chin	Declaration of Mr. Adrian Christopher Lee-Chin, dated January 9, 2019

First Declaration of Mr. Michael Anthony Lee-Chin	Declaration of Mr. Michael Anthony Lee-Chin, dated January 8, 2019
First Legal Expert Report of Prof. Pauwelyn	Legal Expert Report of Professor Joost H.B. Pauwelyn, dated December 22, 2018
R-[#]	Respondent's Factual Exhibit
UNCITRAL Rules	1976 Arbitration Rules of the United Nations Commission on International Trade Law
Reply on Jurisdiction	Respondent's Reply on Objections to Jurisdiction, dated October 21, 2019
Reply on the Merits and Counter-Memorial on Additional Objections or C2	Claimant's Reply on the Merits and Counter-Memorial on Additional Jurisdictional/Admissibility Objections, dated April 13, 2021.
RL-[#]	Respondent's Legal Authority
Second Declaration of Mr. Michael Anthony Lee-Chin	Declaration of Mr. Michael Anthony Lee-Chin, dated December 5, 2019
Second Legal Expert Report of Prof. Pauwelyn	Rebuttal Legal Expert Report of Professor Joost H.B. Pauwelyn, dated June 18, 2019
Second Report of Deltaway	Expert Rebuttal Report of Deltaway, dated April 13, 2021
Second Expert Report of J.S. Held	Second Technical Expert Report of J.S. Held prepared by Messrs. Guillermo Martínez Ochoa and Enrique Abiega Encina, dated August 10, 2021
Second Expert Report of Quadrant Economics LLC	Second Expert Report of Quadrant Economics LLC, prepared by Dr. Daniel Flores, dated August 11, 2021
Second Expert Report of Mr. Kaczmarek	Second Expert Report of Mr. Brent C. Kaczmarek (IAV Advisors LLC), dated April 13, 2021
Judgment of September 23, 2021	Judgment rendered on September 23, 2021 by the Fourth Chamber of the Dominican Court of Original Jurisdiction regarding the Dominican Republic's request to nullify Claimant's title over the Land against the companies Nagelo Enterprises, S.A. and Wilkison Company, S.R.L.
Judgment on Interim Measure	Superior Administrative Court Judgment No. 0030-2017-SSMC-00082, dated September 27, 2017

Request for Bifurcation	Respondent's Request for Bifurcation, dated February 4, 2019
Third Declaration of Mr. Michael Anthony Lee-Chin	Declaration of Mr. Michael Anthony Lee-Chin, dated March 29, 2021
FET	Fair and Equitable Treatment
Tr. Day [#] [language] [page:line]	Hearing Transcript
Treaty	Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic, signed on August 22, 1998 and which entered into force on February 5, 2002
Tribunal	Arbitral Tribunal constituted on August 7, 2018

LIST OF CASES

<i>AES v. Hungary</i>	<i>AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Hungary</i> , ICSID Case No. ARB/07/22, Award, dated September 23, 2010 (RL-462)
<i>Alapli v. Turkey</i>	<i>Alapli Elektrik B.V. v. The Republic of Turkey</i> , ICSID Case No. ARB/08/13, Excerpts of the Award, dated July 16, 2012 (RL-328)
<i>Alps Finance v. Slovakia</i>	<i>Alps Finance and Trade AG v. The Slovak Republic</i> , Ad Hoc/UNCITRAL, Award, dated March 5, 2011 (RL-318)
<i>Álvarez y Marín v. Panama</i>	<i>Álvarez y Marín Corporación S.A. and others v. Republic of Panama</i> , ICSID Case No. ARB/15/14, Award, dated October 12, 2018 (RL-314)
<i>American Manufacturing v. Zaire</i>	<i>American Manufacturing & Trading, Inc. v. Republic of Zaire</i> , ICSID Case No. ARB/93/1, Award, dated February 21, 1997 (CL-140)
<i>Anderson v. Costa Rica</i>	<i>Alasdair Ross Anderson and others v. Republic of Costa Rica</i> , ICSID Case No. ARB(AF)/07/3, Award, dated May 19, 2010 (RL-314)
<i>Anglo v. Venezuela</i>	<i>Anglo American PLC v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/14/1, Award, dated January 18, 2019 (CL-51)
<i>Apotex v. United States of America</i>	<i>Apotex Holdings Inc. and Apotex Inc. v. United States of America</i> , ICSID Case No. ARB(AF)/12/1, under NAFTA Chapter 11, Award, dated August 25, 2014 (RL-377)
<i>Asian Agricultural Products v. Sri Lanka</i>	<i>Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/87/3, Dissenting Opinion of K. B. Assante, dated June 15, 1990 (RL-392)
<i>AWG Group v. Argentina</i>	<i>AWG Group v. Argentine Republic</i> , UNCITRAL, Decision on Liability, dated July 30, 2010 (CL-142)
<i>Azinian v. Mexico</i>	<i>Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States</i> , ICSID Case No. ARB (AF)/97/2, Award, dated November 1, 1999 (RL-480)
<i>Azurix v. Argentina</i>	<i>Azurix Corporation v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Award, dated July 14, 2006 (CL-24, RL-471)
<i>Bayindir v. Pakistan</i>	<i>Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/29, Award, dated August 27, 2009 (RL-445)
<i>BG Group v. Argentina</i>	<i>BG Group Plc. v. The Republic of Argentina</i> , UNCITRAL, Award, dated December 24, 2007 (CL-141)
<i>Bewater v. Tanzania</i>	<i>Bewater Gauff (Tanzania) Limited. v. United Republic of Tanzania</i> , ICSID Case No. ARB/05/22, Award, dated July 24, 2008 (CL-35)
<i>Bosh v. Ukraine</i>	<i>Bosh International, Inc and B&P LTD Foreign Investments Enterprise v. Ukraine</i> , ICSID Case No. ARB/08/11, Award, dated October 25, 2012 (CL-107)
<i>Bureau Veritas v. Paraguay</i>	<i>Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay</i> , ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, dated May 29, 2009 (CL-92)
<i>Burlington v. Ecuador</i>	<i>Burlington Resources Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/5, Decision on Liability, dated December 14, 2012 (RL-470)

<i>Capital Financial v. Cameroon</i>	<i>Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon</i> , ICSID Case No. ARB/15/18, Award, date June 22, 2017 (RL-306)
<i>Caratube v. Kazakhstan</i>	<i>Caratube International Oil Company LLP v. Republic of Kazakhstan</i> , ICSID Case No. ARB/08/12, Award, dated June 5, 2012 (RL-315)
<i>Cargill v. Mexico</i>	<i>Cargill, Incorporated v. United Mexican States</i> , ICSID Case No. ARB(AF)/05/02, under NAFTA Chapter 11, Award, dated September 18, 2009 (RL-419)
<i>Churchill Mining v. Indonesia</i>	<i>Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia</i> , ICSID Case No. ARB/12/14 and ARB/12/40, Award, dated December 6, 2016 (RL-340)
<i>CME v. Czech Republic</i>	<i>CME Czech Republic B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL, Partial Award, dated September 13, 2001 (CL-16)
<i>CMS v. Argentina</i>	<i>CMS Gas Transmission Company v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Award, dated May 12, 2005 (CL-33)
<i>CMS v. Argentina (Annulment)</i>	<i>CMS Gas Transmission Company v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Decision of the <i>Ad Hoc</i> Committee on the Application for Annulment of the Argentine Republic, dated September 25, 2007 (RL-381)
<i>Consutel v. Algeria</i>	<i>Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria</i> , PCA Case No. 2017-33, Final Award, dated February 3, 2020 (RL-447)
<i>Continental Casualty v. Argentina</i>	<i>Continental Casualty Company v. Argentine Republic</i> , ICSID Case No. ARB/03/9, Award, dated September 5, 2008 (RL-368)
<i>Crystallex v. Venezuela</i>	<i>Crystallex International Corporation. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/11/2, Award, dated April 4, 2016 (CL-79)
<i>Desert Line v. Yemen</i>	<i>Desert Line Projects LLC v. Republic of Yemen</i> , ICSID Case No. ARB/05/17, Award, dated February 6, 2008 (CL-42)
<i>Deutsche Telekom v. India</i>	<i>Deutsche Telekom AG v. Republic of India</i> , PCA Case No. 2014-10 (UNCITRAL), Interim Award, dated December 13, 2017 (RL-355 & CL-100)
<i>Devas v. India</i>	<i>CC/Devas (Mauritius) Ltd. and others v. Republic of India</i> , PCA Case No. 2013-09 (UNCITRAL), Award on Jurisdiction and Merits, dated July 25, 2016 (RL-367)
<i>EDF v. Argentina</i>	<i>EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/23, Award, dated June 11, 2012 (CL-39)
<i>EDF v. Romania</i>	<i>EDF (Services) Limited v. Romania</i> , ICSID Case No. ARB/05/13, Award, dated October 8, 2009 (RL-431)
<i>Emilio Agustín v. Spain</i>	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Award, dated November 13, 2000 (RL-433)
<i>El Paso v. Argentina</i>	<i>El Paso Energy International Company v. Argentine Republic</i> , ICSID Case No. ARB/03/15, Award, dated October 31, 2011 (RL-335)
<i>Electrabel v. Hungary</i>	<i>Electrabel S.A. v. Hungary</i> , ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, dated November 30, 2012 (RL-430)
<i>Enron v. Argentina</i>	<i>Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Award, dated May 22, 2007 (RL-461 and CL-86)

<i>Eureko v. Poland</i>	<i>Eureko B.V. v. the Republic of Poland</i> , UNCITRAL, <i>Ad Hoc</i> , Partial Award, dated August 19, 2005 (CL-20)
<i>Flemingo v. Poland</i>	<i>Flemingo DutyFree Shop Private Limited. v. The Republic of Poland</i> , UNCITRAL, Award, dated August 12, 2016 (CL-54)
<i>Flughafen v. Venezuela</i>	<i>Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/19, Award, dated November 18, 2014 (RL-411)
<i>Fraport AG v. Philippines</i>	<i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</i> , ICSID Case No. ARB/03/25, Award, dated August 16, 2007 (RL-343)
<i>Fraport AG v. Philippines II</i>	<i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</i> , ICSID Case No. ARB/11/12, Award, dated December 10, 2014 (RL-339)
<i>Frontier v. Czech Republic</i>	<i>Frontier Petroleum Services Ltd. v. The Czech Republic</i> (UNCITRAL), Final Award, dated November 12, 2010 (CL-101)
<i>Gaëta v. Guinea</i>	<i>Société Civile Immobilière de Gaëta v. Republic of Guinea</i> , ICSID Case No. ARB/12/36, Award, dated December 21, 2015 (RL-330)
<i>GEA v. Ukraine</i>	<i>GEA Group Aktiengesellschaft v. Ukraine</i> , ICSID Case No. ARB/08/16, Award, dated March 31, 2011 (RL-321)
<i>Genin v. Estonia</i>	<i>Alex Genin, Eastern Credit Limited, Inv. and A. S. Baltoil v. The Republic of Estonia</i> , ICSID Case No. ARB/99/2, Award, dated June 25, 2001 (RL-421)
<i>Glamis v. United States of America</i>	<i>Glamis Gold, Ltd. v. United States of America</i> , Case under NAFTA Chapter 11 (UNCITRAL), Award, dated June 8, 2009 (RL-418)
<i>Gold Reserve v. Venezuela</i>	<i>Gold Reserve Inc. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/09/1, Award, dated September 22, 2014 (CL-31)
<i>Gremcitel v. Peru</i>	<i>Renée Rose Levy and Gremcitel S.A. v. Republic of Peru</i> , ICSID Case No. ARB/11/17, Award, dated January 9, 2015 (RL-352)
<i>Guaracachi v. Bolivia</i>	<i>Guaracachi America, Inc. & Rurelec PLC v. The Plurinational State of Bolivia</i> , UNCITRAL, Award, dated January 31, 2014 (CL-56)
<i>Hamester v. Ghana</i>	<i>Gustav F W Hamester GmbH & Co KG v. Republic of Ghana</i> , ICSID Case No. ARB/07/24, Award, dated June 18, 2010 (RL-305)
<i>Hochtief v. Argentina</i>	<i>Hochtief Aktiengesellschaft v. Argentine Republic</i> , ICSID Case No. ARB/07/31, Award, dated December 21, 2016 (RL-435)
<i>IGB v. Spain</i>	<i>Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain</i> , ICSID Case No. ARB/12/17, Award (Excerpts), dated August 14, 2015 (RL-434)
<i>Impregilo v. Argentina</i>	<i>Impregilo S.p.A. v. Argentine Republic</i> , ICSID Case No. ARB/07/17, Award, dated June 21, 2011 (RL-438)
<i>Impregilo v. Pakistan</i>	<i>Impregilo S.p.A. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/3, Decision on Jurisdiction, dated April 22, 2005 (RL-473)
<i>Karkey Karadeniz v. Pakistan</i>	<i>Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/13/1, Award, dated August 22, 2017 (CL-76)
<i>Koch v. Venezuela</i>	<i>Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/11/19, Award, dated October 30, 2017 (RL-412)

<i>LESI v. Algeria</i>	<i>LESI S.p.A and Astaldi, S.p.A v. People's Democratic Republic of Algeria</i> , ICSID Case No. ARB/05/3, Award, dated November 12, 2008 (RL-390)
<i>LG&E v. Argentina</i>	<i>LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc v. Argentine Republic</i> , ICSID Case No. ARB/02/1, Decision on Liability, dated October 3, 2006 (RL-371 and CL-29)
<i>M.C.I. v. Ecuador</i>	<i>M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/03/6, Award, dated July 31, 2007 (RL-409)
<i>Malicorp v. Egypt</i>	<i>Malicorp Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/08/18, Award, dated February 7, 2011 (RL-326)
<i>Mercer v. Canada</i>	<i>Mercer International Inc. v. Canada</i> , ICSID Case No. ARB(AF)/12/3, Award, dated March 6, 2018 (RL-464)
<i>Metalclad v. Mexico</i>	<i>Metalclad Corporation v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award, dated August 30, 2000 (CL-12)
<i>Middle East v. Egypt</i>	<i>Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/99/6, Award, dated April 12, 2002 (CL-14)
<i>MTD v. Chile</i>	<i>MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Award, dated May 25, 2004 (CL-34)
<i>MTD v. Chile (Annulment)</i>	<i>MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Decision on Annulment, dated March 21, 2007 (RL-413)
<i>Murphy v. Ecuador II</i>	<i>Murphy Exploration and Production Company International v. The Republic of Ecuador</i> , PCA Case No. 2012-16 (before AA 434), Partial Final Award, dated May 6, 2016 (CL-99)
<i>Mytilineos v. Serbia</i>	<i>Mytilineos Holdings S.A. v. The State Union of Serbia & Montenegro and Republic of Serbia</i> , UNCITRAL, Partial Award on Jurisdiction, dated September 8, 2006 (CL-134)
<i>National Grid v. Argentina</i>	<i>National Grid P.L.C. v. Argentine Republic</i> , UNCITRAL, Award, dated November 3, 2008 (CL-96 and RL-446)
<i>Noble v. Romania</i>	<i>Noble Ventures, Inc. v. Romania</i> , ICSID Case No. ARB/01/11, Award, dated October 12, 2005 (CL-36)
<i>Nova Scotia Power v. Venezuela</i>	<i>Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, dated April 30, 2014 (RL-322)
<i>Occidental v. Ecuador</i>	<i>Occidental Exploration and Production Company v. The Republic of Ecuador</i> , LCIA Case No. UN3467, Final Award, dated July 1, 2004 (CL- 32)
<i>OI v. Venezuela</i>	<i>OI European Group B.V. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/11/25, Award, dated March 10, 2015 (RL-410)
<i>Oostergetel v. Slovak Republic</i>	<i>Jan Oostergetel & Theodora Laurentius v. The Slovak Republic</i> , UNCITRAL, Decision on Jurisdiction, dated April 30, 2010 (CL-133)
<i>Orascom v. Algeria</i>	<i>Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria</i> , ICSID Case No. ARB/12/35, Award, dated May 31, 2017 (RL-262)
<i>Öztaş Construction v. Libya</i>	<i>Öztaş Construction, Construction Materials Trading Inc. v. Libya</i> , ICC Arbitration No. 21603/ZF/AYZ, Final Award, dated June 14, 2018 (RL-391)
<i>Pac Rim v. El Salvador</i>	<i>Pac Rim Cayman LLC. v. Republic of El Salvador</i> , ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, dated June 1, 2012 (RL-108)

<i>Pantechniki S.A. v. Albania</i>	<i>Pantechniki S.A. Contractors & Engineers v. Republic of Albania</i> , ICSID Case No. ARB/07/21, Award, dated July 30, 2009 (RL-320)
<i>Parkerings v. Lithuania</i>	<i>Parkerings-Compagniet AS v. Republic of Lithuania</i> , ICSID Case No. ARB/05/8, Award, dated September 11, 2007, (RL-140)
<i>Philip Morris v. Australia</i>	<i>Philip Morris Asia Limited v. The Commonwealth of Australia</i> , PCA Case No. 2012-12 (UNCITRAL), Award on Jurisdiction and Admissibility, dated December 17, 2015 (RL-350)
<i>Philip Morris v. Uruguay</i>	<i>Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay</i> , ICSID Case No. ARB/10/7, Award, dated July 8, 2016 (RL-376)
<i>Phoenix v. Czech Republic</i>	<i>Phoenix Action, Ltd. v. The Czech Republic</i> , ICSID Case No. ARB/06/5, Award, dated April 15, 2009 (RL-309)
<i>Plama v. Bulgaria</i>	<i>Plama Consortium Limited v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Award, dated August 27, 2008 (RL-344)
<i>Private v. Sri Lanka</i>	<i>Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/16/25, Award, dated March 5, 2020 (RL-323)
<i>Romak v. Uzbekistan</i>	<i>Romak S.A. (Switzerland) v. The Republic of Uzbekistan</i> , PCA Case No. AA280 (UNCITRAL), Award, dated November 26, 2009 (RL-317)
<i>Saipem v. Bangladesh</i>	<i>Saipem S.p.A. v. People's Republic of Bangladesh</i> , ICSID Case No. ARB/05/7, Award, dated June 30, 2009 (CL-78)
<i>Saluka v. Czech Republic</i>	<i>Saluka Investments B.V. (The Netherlands) v. The Czech Republic</i> , UNCITRAL, Partial Award, dated March 17, 2006, (CL-25)
<i>Sempra v. Argentina</i>	<i>Sempra Energy International v. Argentine Republic</i> , ICSID Case No. ARB/02/16, Award, dated September 28, 2007 (RL-370 y CL-94)
<i>Sempra v. Argentina (Annulment)</i>	<i>Sempra Energy International v. Argentine Republic</i> , ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, dated June 29, 2010 (RL-382)
<i>SGS v. Philippines</i>	<i>SGS Société Générale de Surveillance S.A. v. la Republic of Philippines</i> , ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, dated January 29, 2004 (CL-37)
<i>SGS v. Paraguay</i>	<i>SGS Société Générale de Surveillance S.A. v. Republic of Paraguay</i> , ICSID Case No. ARB/07/29, Award, dated February 10, 2012 (CL-38)
<i>Siemens v. Argentina</i>	<i>Siemens A.G. v. Argentine Republic</i> , ICSID Case No. ARB/02/8, Award, dated February 7, 2007 (CL-17)
<i>Sistem v. Kyrgyz</i>	<i>Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic</i> , ICSID Case No. ARB(AF)/06/1, Award, dated September 9, 2009 (CL-77)
<i>Strabag v. Libya</i>	<i>Strabag SE v. Libya</i> , ICSID Case No. ARB(AF)/15/1, Award, dated June 29, 2020 (CL-91)
<i>Suez v. Argentina</i>	<i>Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/19, Decision on Liability, dated July 30, 2010 (CL-23)
<i>SWM v. Spain</i>	<i>Stadwerke München GmbH, RWE Innogy GmbH and others. v. Kingdom of Spain</i> , ICSID Case No. ARB/15/1, Award, dated December 2, 2019 (RL-463)

<i>Tecmed v. Mexico</i>	<i>Técnicas Medioambientales Tecmed, S.A. v. United Mexican States</i> , ICSID Case No. ARB(AF)/00/2, Award, dated May 29, 2003 (CL-8 and RL-448)
<i>Thunderbird v. Mexico</i>	<i>International Thunderbird Gaming Corporation v. The United Mexican States</i> , UNCITRAL, Award, dated January 26, 2006 (CL-30)
<i>Tidewater v. Venezuela</i>	<i>Tidewater Investment SRL and Tidewater Caribe, C.A. Inc. et al. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/5, Decision on Jurisdiction, dated February 8, 2013 (RL-109)
<i>Total v. Argentina</i>	<i>Total S.A. v. Argentine Republic</i> , ICSID Case No. ARB/04/1, Decision on Liability, dated December 27, 2010 (RL-259)
<i>Toto v. Lebanon</i>	<i>Toto Costruzioni Generali S.p.A. v. Lebanese Republic</i> , ICSID Case No. ARB/07/12, Award, dated June 7, 2012 (RL-422)
<i>Transglobal v. Panama</i>	<i>Transglobal Green Energy, LLC and Transglobal Green Energy Panama S.A. v. Republic of Panama</i> , ICSID Case No. ARB/13/28, Award, dated June 2, 2016 (RL-353)
<i>Tza Yap Shum v. Peru</i>	<i>Mr. Tza Yap Shum v. Republic of Peru</i> , ICSID Case No. ARB/07/6, Award, dated July 7, 2011 (RL-380)
<i>Unglaube c. Costa Rica</i>	<i>Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica</i> , ICSID Cases Nos. ARB/08/1 and ARB/09/20, Award, dated May 16, 2012 (RL-509)
<i>Vivendi II v. Argentina</i>	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Award, dated August 20, 2007 (CL-11)
<i>White Industries v. India</i>	<i>White Industries Australia Limited. v. The Republic of India</i> , UNCITRAL, Final Award, dated November 30, 2011 (CL-132)
<i>WNC Factoring v. Czech Republic</i>	<i>WNC Factoring Limited v. The Czech Republic</i> , PCA Case No. 2014-34, Award, dated February 22, 2017 (RL-472)

I. INTRODUCTION AND THE PARTIES

1. This case concerns a dispute submitted on the basis of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Agreement Establishing the Free Trade Area between the Caribbean Community (“**CARICOM**”) and the Dominican Republic, signed on August 22, 1998 and which entered into force on February 5, 2002 (the “**Treaty**”), and the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules.**”)
2. The Claimant is Mr. Michael Anthony Lee-Chin (“**Claimant**”), a national of Jamaica.
3. The Respondent is the Dominican Republic (the “**Republic**” or “**Respondent.**”)
4. Claimant and Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed on pages (i) and (ii) *supra*.

II. PROCEDURAL HISTORY FOLLOWING THE ISSUANCE OF THE PARTIAL AWARD

5. On July 15, 2020, the Tribunal issued the Partial Award on Jurisdiction jointly with the Dissenting Opinion of Prof. Marcelo Kohen (“**Partial Award**” and “**Dissenting Opinion,**” respectively (and, collectively, “**Partial Award and Dissenting Opinion.**”)
6. The *dispositif* of the Partial Award provided as follows:

For the foregoing reasons, the Tribunal decides:

- (i) To declare that this dispute is within the jurisdiction of the Tribunal;*
 - (ii) To reject the jurisdictional objections filed by Respondent;*
 - (iii) To continue the arbitral proceeding as per the calendar to be fixed in consultation with the Parties in accordance with Option I of the Procedural Timetable (Revised Annex A ^[190] to Procedural Order No. 1;)*
 - (iv) To defer the adoption of the decision on costs.*
7. On July 20, 2020, the Tribunal invited the Parties to confer and try to agree on the procedural calendar to be followed for the conduct of the proceeding in accordance with

Option I of Revised Annex A to Procedural Order No. 1, including the possible dates for the Final Hearing.

8. On July 23, 2020, the Parties informed the Tribunal of the lack of agreement between them and submitted separate proposals for the Tribunal's consideration.
9. On July 29, 2020, the Tribunal issued Procedural Order No. 4 incorporating, as Annex A, the procedural calendar to be followed during the merits stage and offering several alternative dates to hold the Final Hearing.
10. On July 30, 2020, Respondent requested the Tribunal to reconsider Procedural Order No. 4 and issue a new procedural calendar.
11. On August 5, 2020, following the Tribunal's invitation of July 31, 2020, Claimant made comments regarding Respondent's proposal to modify the procedural calendar.
12. On August 7, 2020, the Tribunal observed that the Parties agreed to an extension from 60 to 120 days regarding the deadlines for submission of Claimant's Reply on the Merits and Counter-Memorial on Additional Jurisdictional/Admissibility Objections and for Respondent's Rejoinder Memorial on the Merits and Reply on Additional Jurisdictional/Admissibility Objections. In view of this, the Tribunal adopted this modification to the procedural calendar and offered new dates to hold the Final Hearing.
13. On August 8, 2020, Claimant confirmed his availability for the Final Hearing on the dates proposed by the Tribunal.
14. On August 13, 2020, Respondent requested the Tribunal to order production of certain documents by Claimant related to his ownership of the Panamanian companies through which he would own Lajun Corporation S.R.L.
15. On August 14, 2020, Respondent confirmed its availability for the Final Hearing on the dates proposed by the Tribunal.
16. On the same date, the Tribunal issued a revised version of Annex A to Procedural Order No. 4 incorporating its decision of August 7, 2020.

17. On August 17, 2020, Claimant observed certain miscalculations in revised Annex A to Procedural Order No. 4 and requested the Tribunal to issue a new revised version of the document correcting those miscalculations.
18. On August 18, 2020, the Tribunal issued a revised version of Annex A to Procedural Order No. 4 incorporating the correct dates for the remaining submissions to be made by the Parties in the arbitral proceeding.
19. On August 20, 2020, Claimant submitted his opposition to the request for production of documents made by Respondent on August 12, 2020.
20. On September 1, 2020, the Tribunal issued its decision rejecting Respondent's request for production of documents and confirming the dates reserved for the Final Hearing.
21. On October 30, 2020, Prof. Leathley made a disclosure to the Parties.
22. On December 14, 2020, Respondent submitted its Memorial on Jurisdictional/Admissibility Objections and Counter-Memorial on the Merits and Quantum (the "**Counter-Memorial**" or "**R1**"), jointly with exhibits R-76 to R-167 and legal authorities RL-273 to RL-552, and accompanied by the witness statements of Dr. Evelyn López Castillo, JD Ángel S. Canó, and Mr. Sócrates Pérez Lorenzo, the first expert report of Quadrant Economics LLC prepared by Dr. Daniel Flores and the first Technical Expert Report of J.S. Held, prepared by Messrs. Guillermo Martínez Ochoa and Enrique Abiega Encina.
23. In accordance with the procedural calendar, on January 4, 2021, the Parties submitted their requests for production of documents related to the merits phase. On January 19, 2021, each Party submitted their observations regarding the other Party's request. On February 3, 2021, each Party submitted their reply relating to their respective request for production of documents. On February 18, 2021, the Tribunal issued Procedural Order No. 5 containing the decision on the Parties' requests for production of documents.
24. On February 24, 2021, Respondent requested the Tribunal to make certain clarifications with respect to the decisions made in its Procedural Order No. 5 and order the production of documents by Claimant related to Respondent's requests for production of documents

Nos. 40, 52 and 53. On the same date, the Tribunal invited Claimant to provide comments regarding Respondent's request.

25. On March 3, 2021, Claimant informed the Tribunal that he had provided Respondent with documents relating to Request No. 40. Claimant further proposed that Respondent sign a confidentiality order so that Claimant could thereby meet Request No. 52 related to Deltaway's live financial model. Finally, with respect to Request No. 53, Claimant confirmed that the documents requested by Respondent had been previously provided with exhibit numbers C-42, C-118, C-121, C-122, C-127, C-128 and confirmed there were no additional documents.
26. On March 4, 2021, Respondent requested an additional clarification by the Tribunal regarding Request No. 40 and an order that Claimant produce the documents requested with respect to the legal due diligence process conducted by Langa & Abinader or, alternatively, that the Tribunal direct Claimant to submit a privilege log regarding said documents. With respect to Request No. 52, Respondent did not oppose to signing a confidentiality order, for the purpose of receiving Deltaway's live financial model in whole. With reference to Request No. 53, Respondent took note of Claimant's assertion that there were no additional documents in response to its request.
27. On March 8, 2021, the Tribunal invited Claimant to provide comments on Respondent's communication of March 4, 2021.
28. On March 9, 2021, Claimant reaffirmed his position on Request No. 40 as per his communication of March 3, 2021 and requested the Tribunal to confirm its directions in Procedural Order No. 5 regarding this Request.
29. On March 11, 2021, in accordance with the procedural calendar, the Parties informed the Tribunal that they had provided the opposing party with the documents requested following the Tribunal's directions in its Procedural Order No. 5.
30. On March 15, 2021, the Tribunal issued its decision regarding Respondent's requests of February 24 and March 4, 2021. The Tribunal rejected Respondent's request for the Tribunal to reconsider the decision made with respect to Request No. 40, explaining that Respondent had failed to submit any new element warranting it. Additionally, the

Tribunal took note that Respondent did not oppose signing the confidentiality order proposed by Claimant for the purpose of receiving Deltaway's live financial model in whole, and it accepted such proposal. Accordingly, the Tribunal ordered that production, use and disclosure of Deltaway's live version of the Excel model was to be exclusively limited to Respondent's legal representatives and experts and it should only be used for the purposes of this arbitration. Finally, the Tribunal also took note of Respondent's acceptance of Claimant's assertion that there were no additional documents in response to Request No. 53.

31. On March 17, 2021, Claimant informed the Tribunal of the delivery of Deltaway's live version of the Excel model to Respondent.
32. On March 24, 2021, Claimant informed the Tribunal of certain deficiencies in the production of documents conducted by Respondent pursuant to Procedural Order No. 5 and requested an order from the Tribunal directing Respondent to produce certain missing documents with respect to requests Nos. 3, 24, 25, 30, 31, 35, 36, 46, 47, and 48 or, otherwise, to provide an explanation in that regard. In the alternative, Claimant requested that, absent the production of the documents, the Tribunal make any necessary negative inferences. On the same date, the Tribunal invited Respondent to make comments regarding this request.
33. On March 30, 2021, Respondent objected to Claimant's request by arguing that it had made a diligent and reasonable effort and had produced all documents responsive to Claimant's requests identified as to that date. Respondent also alleged that Claimant's document production was deficient and, on such grounds, requested the Tribunal to order the production of certain additional documents related to Respondent's Requests Nos. 4, 6 (iii) and (iv), 11, 17, 18, 19, 20, 22, 29, 42, 47, and 48, and the documents requested in Requests Nos. 8 and 27, which Claimant had undertaken to produce voluntarily.
34. On April 2, 2021, the Tribunal took note of the allegations made by the Parties in their communications of March 24 and 30, 2021. In this regard, the Tribunal referred to its prior decisions regarding the Requests for Production of Documents and reiterated its order that the Parties comply with such decisions. Additionally, the Tribunal invited the Parties to make any additional comment with respect to the compliance with the

Tribunal's decisions on document production in their remaining pleadings and noted that it would make any assessments and inferences it might deem necessary based on the evidence and arguments submitted by the Parties in due course.

35. On April 13, 2021, Claimant submitted his Reply on the Merits and Counter-Memorial on Additional Jurisdictional/Admissibility Objections (the “**Reply on the Merits and Counter-Memorial**” or “**C2**”), jointly with the third witness statement of Mr. Michael Anthony Lee-Chin, the expert report of Prof. Andrea Bianchi, the second expert report of Mr. Brent C. Kaczmarek, the second expert report of Deltaway, and Exhibits C-0146 to C-0194 and Legal Authorities CL-0076 to CL-0125.
36. On April 15, 2021, Claimant sent a letter in response to the allegations made by Respondent in its letter of March 9, 2021. On the same date, Respondent informed Claimant that it would respond to the allegations in its written submission of August 11, 2021.
37. On August 11, 2021, Respondent filed its Rejoinder Memorial on the Merits and Quantum and Reply on Additional Jurisdictional/Admissibility Objections (the “**Rejoinder on the Merits and Quantum and Reply on Jurisdiction**” or “**R2**”), accompanied by the second expert report of Quadrant Economics LLC, prepared by Dr. Daniel Flores, the second Technical Expert report of J.S. Held, prepared by Messrs. Guillermo Martínez Ochoa and Enrique Abiega Encina, and Exhibits R-168 to R-280 and Legal Authorities RL-553 to RL-582.
38. On September 8, 2021, Claimant requested from the Tribunal a 3-week extension for the submission of his Rejoinder on Additional Jurisdictional/Admissibility Objections. On the same date, the Tribunal invited Respondent to provide comments in that regard. On September 13, 2021, Respondent objected to Claimant's request.
39. On September 15, 2021, the Tribunal granted Claimant a 2-week extension for the submission of his Rejoinder on Additional Jurisdictional/Admissibility Objections.
40. On October 12, 2021, Claimant submitted his Rejoinder on Additional Jurisdictional/Admissibility Objections (the “**Rejoinder on Additional Objections**” or

“C3”), jointly with Exhibits C-0195 to C-0206 and Legal Authorities CL-0126 to CL-0148.

41. On October 14, 2021, Respondent requested the Tribunal to remove Section III of the Rejoinder on Additional Objections from the record jointly with the Exhibits and Legal Authorities cited by Claimant in such section. On the same date, Claimant requested an opportunity to respond to Respondent’s request.
42. On October 20, 2021, Claimant objected to Respondent’s request of October 14, 2021.
43. On October 22, 2021, Claimant requested leave from the Tribunal to introduce as new evidence into the record the Judgment rendered on September 23, 2021 by the Fourth Chamber of the Dominican Court of Original Jurisdiction regarding the Dominican Republic’s request to nullify Claimant’s title over the Land against the companies Nagelo Enterprises, S.A. and Wilkison Company, S.R.L. (the “**Judgment of September 23, 2021**”).
44. On October 28, 2021, the Tribunal issued Procedural Order No. 6 rejecting Respondent’s request of October 14, 2021.
45. On the same date, Respondent agreed to the introduction of the Judgment requested by Claimant as evidence, making certain clarifications in that regard, jointly with Exhibits 1-3, which it asked the Tribunal to take into account when analyzing the Judgment of September 23, 2021.
46. On November 3, 2021, the Tribunal issued Procedural Order No. 7, where, in view of the Parties’ agreement, the Tribunal granted leave to introduce the Judgment of September 23, 2021 into the record of the arbitration and took note of the Parties’ comments with respect to its content.
47. On the same date, Claimant filed his new List of Exhibits adding the Judgment of September 23, 2021 as Exhibit C-0207.
48. On November 4, 2021, the Parties requested from the Tribunal that the Final Hearing scheduled to take place from January 24 to 28, 2022 (with January 29 held on reserve) be

held in person at the ICSID's facilities in Washington, D.C. The Parties further requested the Tribunal to propose alternative dates for the prehearing organization call.

49. On November 5, 2021, the Tribunal proposed two alternative dates for the pre-hearing organization call.
50. On November 15, 2021, in accordance with Section 17.2 of Procedural Order No. 1, the Parties exchanged the lists of witnesses and experts to be examined during the Final Hearing. In its communication, Respondent informed that it had decided not to examine Prof. Andrea Bianchi (Respondent's public international law expert) during the Final Hearing.
51. On November 17, 2021, the Tribunal informed the Parties of certain logistical aspects and restrictions regarding protection against COVID-19 that had to be taken into account for the purpose of organizing the in-person Final Hearing.
52. On November 18, 2021, Claimant requested leave from the Tribunal to retain the presentation and participation of Prof. Bianchi at the Final Hearing. On November 23, 2021, the Tribunal rejected Claimant's request.
53. On December 14, 2021, the Tribunal held the pre-hearing organizational meeting with the Parties by videoconference.
54. On December 21, 2021, the Tribunal issued Procedural Order No. 8 concerning the organization of the Final Hearing.
55. On January 3, 2022, in view of the state of the pandemic in Washington, D.C. and given that the World Bank had decided to continue with the temporary closure of its facilities, the Tribunal proposed that the Parties hold the Hearing virtually.
56. On January 6, 2022, the Parties exchanged communications regarding holding the Final Hearing virtually.
57. On January 10, 2022, the Tribunal confirmed to the Parties that the Hearing would be held virtually between January 24 and 30, 2022, and proposed a revised Hearing time, inviting the Parties to make comments.

58. On January 12 and 13, 2022, the Parties sent communications to the Tribunal concerning the logistical arrangements for the Final Hearing and their lists of participants for the Hearing.
59. On January 13, 2022, the Tribunal proposed a protocol to the Parties for holding the Hearing virtually (the “**Virtual Hearing Protocol**”) to be incorporated as Annex E into Procedural Order No. 8. On January 14, 2022, the Parties made comments on the Virtual Hearing Protocol proposed by the Tribunal.
60. On the same date, the Tribunal approved revised Annex A (the “**Procedural Calendar**”) and Annex E to Procedural Order No. 8.
61. On January 14 and 15, 2022, the Parties exchanged communications regarding their disagreement with respect to the preparation of the Electronic Bundle for the Hearing. On January 15, 2022, the Tribunal provided additional instructions regarding the preparation of such Bundle. Additional communications in this regard were received on January 20 and 21, 2022. On January 22, 2022, the Tribunal took note of such additional comments by the Parties stating that it would take them into consideration at the appropriate procedural time.
62. On January 17, 2022, Respondent requested leave from the Tribunal to introduce as new evidence into the record the appeal filed by the Consejo Estatal del Azúcar (the “**CEA’s Appeal**”), dated December 21, 2021, against the Judgment of September 23, 2021. On January 19, 2022, Claimant objected to Respondent’s request. On the same date, Respondent submitted an additional communication in that regard.
63. On January 20, 2022, the Tribunal issued Procedural Order No. 9 granting leave for the incorporation of the CEA’s Appeal into the record of the proceeding. In doing so, the Tribunal confirmed that the Parties would have the opportunity to make additional comments in that regard during oral arguments and, if necessary, in the post-Hearing briefs.
64. On January 21, 2022, Respondent incorporated the CEA’s Appeal as Exhibit R-0281.
65. The Final Hearing was held by videoconference between January 24 and 30, 2022. The following persons were in attendance:

Tribunal:

Prof. Diego P. Fernández Arroyo	President
Mr. Christian Leathley	Arbitrator
Prof. Marcelo Kohen	Arbitrator

ICSID Secretariat:

Ms. Marisa Planells-Valero	Secretary of the Tribunal
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Counsel:

Mr. Richard C. Lorenzo	Hogan Lovells US LLP
Mr. Mark R. Cheskin	Hogan Lovells US LLP
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Ms. Juliana De Valdenebro	Hogan Lovells US LLP
Mr. William Homer	Hogan Lovells US LLP
Ms. Maria Lucia Echandia Uruena	Hogan Lovells US LLP
Ms. Marta M. Urrea	Hogan Lovells US LLP
Mr. Gonzalo Rodriguez-Matos	Hogan Lovells US LLP

Party Representatives:

Mr. Michael Anthony Lee-Chin	Claimant
Mr. Adrian Christopher Lee-Chin	Portland Investment Counsel, Inc.
Ms. Lorraine Sullivan	AIC Global Holdings Inc.

Witnesses:

Mr. Michael Anthony Lee-Chin	Claimant
Mr. Adrian Christopher Lee-Chin	Portland Investment Counsel, Inc.

Experts:

Mr. Brent C. Kaczmarek, CFA	IVA Advisor LLC
Mr. Gabriel Perkinson	IVA Advisor LLC
Mr. Thomas Tullo	Deltaway
Mr. Steve Passage	Deltaway

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Ms. Dori Yoldi
Ms. Elisa Botero
Ms. Belén María Ibañez
Mr. Amrane Medjan
Ms. Jaclyn Messemer
Ms. Stephania Ocampo Bermudez

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Ms. Rosa Otero	Ministerio de Medio Ambiente y Recursos Naturales
Ms. Johanna Montero	Ministerio de Medio Ambiente y Recursos Naturales
Ms. Noelia Rivera	Consultoría Jurídica del Poder Ejecutivo
Ms. Nathalie Hernández	Consultoría Jurídica del Poder Ejecutivo
Ms. Sara Patnella	Consultoría Jurídica del Poder Ejecutivo
Ms. Karina Leonardo	Consultoría Jurídica del Poder Ejecutivo
Mr. Carlos Guzmán	Ayuntamiento de Santo Domingo Norte
Mr. Marcelo Heredia	Ayuntamiento de Santo Domingo Norte
Mr. José Antonio Cipión	Ayuntamiento de Santo Domingo Norte
Mr. Julio Rojas	Procuraduría General de la República
Mr. Frinette Padilla	Procuraduría General de la República

Witnesses:

Ms. Evelyn López
 Mr. Sócrates Pérez Lorenzo
 Mr. Ángel Canó

Experts:

Mr. Daniel Flores	Quadrant Economics
Mr. Jordan Heim	Quadrant Economics
Mr. David Lenders	Quadrant Economics
Mr. Iván López	Quadrant Economics
Mr. Guillermo Martínez	J.S. Held
Mr. Enrique Abiega Encina	J.S. Held
Mr. João Pedro Mendonça	J.S. Held
Mr. Juan Troyano	J.S. Held

Stenographers:

Mr. Dante Rinaldi	D-R Esteno
Mr. Rodolfo Rinaldi	D-R Esteno
Mr. Paul Pelissier	D-R Esteno
Ms. Marjorie Peters	Worldwide Reporting, LLP

Interpreters:

Ms. Silvia Colla

Mr. Charles Roberts
Mr. Luis Eduardo Arango

66. On January 29, 2022, during the Hearing, Respondent made two exceptional requests for production of documents and Claimant made preliminary comments in this regard, suggesting the possibility of also making an exceptional request for production of documents. On January 30, 2022, the Tribunal invited Respondent to provide the reasons for its request no later than February 4, 2022, and Claimant to also submit his request, if any, on the same date, stating that, after that, both Parties would have the opportunity to provide additional comments. The Tribunal also invited the Parties to provide their comments in relation to the question asked by Prof. Kohen on day 4 of the Hearing regarding the origin of documents C-47, C-48 and C-52, simultaneously on Monday, January 31, 2022.
67. On January 31, 2022, the Parties made their comments on the origin of documents C-47, C-48 and C-52.
68. On February 4, 2022, Respondent explained the reasons for its two exceptional requests for production of documents. On the same date, Claimant opposed both requests, stating that should the Tribunal decide to reopen the document production stage, he would also make three requests for production of documents from Respondent. As per the Tribunal's instructions, the Parties also made additional comments on the origin of documents C-47, C-48 and C-52.
69. On February 11, 2022, the Parties provided additional comments in relation to their communications of February 4, 2022, on the exceptional production of documents.
70. On February 14, 2022, the Tribunal issued Procedural Order No. 10, whereby it rejected Respondent's exceptional requests for production of documents.
71. On the same date, the Tribunal sent to the Parties a list of questions to be addressed in their Post-Hearing Briefs.
72. On February 17, 2022, Respondent requested the redaction of the personal e-mail address of one of the Dominican Republic's representatives from the Hearing videos to be published on the ICSID's web page. On February 20, 2021, the Tribunal invited Claimant

to provide comments with regard to Respondent's request. On February 21, 2022, Claimant confirmed that he had no objection to Respondent's request. After that, the Secretariat made the redactions requested by Respondent and published the videos of the Hearing on the ICSID's web page.

73. On March 1, 2022, the Parties submitted their agreed corrections to the Hearing transcripts.
74. On March 3, 2022, Claimant requested leave to incorporate new legal authorities in his Post-Hearing Brief in response to the Tribunal's questions dated February 14, 2022.
75. On March 7, 2022, the Secretary of the Tribunal sent to the Parties and the Tribunal the final versions of the Hearing transcripts prepared on the basis of the corrections to the transcripts sent by the Parties on March 1, 2022.
76. On March 10, 2022, Respondent objected to Claimant's request of March 3, 2022. On March 15, 2022, the Tribunal issued Procedural Order No. 10 rejecting Claimant's request of March 3, 2022.
77. On March 28, 2022, the Parties submitted their Final Post-Hearing Briefs.
78. On April 18, 2022, the Parties filed their respective Statements of Costs.
79. On April 19, 2022, Claimant requested the Tribunal to strike pages 1 and 2 from Respondent's Statement of Costs on the grounds that their content failed to comply with the Tribunal's directions of February 1, 2022. On April 20, 2022, Respondent, while positing that it had not failed to comply with the Tribunal's directions, did not oppose Claimant's request. On April 21, 2022, in view of Respondent's agreement, the Tribunal decided to strike pages 1 and 2 from Respondent's Statement of Costs.
80. On June 14, October 14 and November 16, 2022, and March 28, May 15, and July 5, 2023, the Tribunal provided updates to the Parties on the progress in its deliberations and the preparation of the award.

III. FACTUAL BACKGROUND

81. The Tribunal provides the following overview of the dispute and Claimant's claims in order to contextualize the Parties' arguments. Nothing stated in this section reflects any finding of fact or conclusion of law relating to the merits of the case.
82. This dispute has its origin in the Concession Agreement entered into on March 1, 2007 between the Dominican company Lajun Corporation, S.R.L. ("**Lajun**") and the Municipality of Santo Domingo Norte ("**ASDN**", by its acronym in Spanish) for the administration and operation of the Duquesa Landfill, in which final disposal of urban solid waste was carried out in the area of the Gran Santo Domingo in the Dominican Republic¹ (the "**Concession Agreement**"). The Parties disagree on whether the Concession Agreement also provided for Lajun's right, and not only the eventuality, to build a waste-to-energy plant ("**WTE Plant**").² The Parties further disagree on the existence and scope of the due diligence performed by Claimant at the time of the investment.³
83. On June 26, 2013, Mr. José Antonio López Díaz and Ms. Darleny Indhira López Polanco, owners of Lajun's aggregate share capital, sold 50% of that share capital to the Panamanian entity Nagelo Enterprises, S.A. ("**Nagelo**") and the remaining 50% to the Dominican entity Wilkison Company, S.R.L. ("**Wilkison**"). On the same date, Mr. López Díaz sold Nagelo and Wilkison a 875,373.12 m² plot of land on which the Duquesa Landfill was located (the "**Land**" or "**Portion of Land**").⁴ According to Respondent, Nagelo and Wilkison have owned the Portion of Land not since June 26, 2013 upon execution of the Land Contract, as submitted by Claimant, but since December 6, 2016 when, anticipating a Dispute and clearly in preparation for this Arbitration, they recorded

¹ Notice of Arbitration, § 23; Memorial on Jurisdiction, § 9; R-6 (C-1), Concession Agreement. The Concession Agreement was amended in four occasions: two of them before Claimant made its alleged investments in the Republic in mid-2013 ("**Addenda 1 and 2**"), and the remaining two after that date ("**Addenda 2A and 3**"). See C-2 and C-3 (amendments before June 26, 2013) and R-8 and C-6 (amendments after June 26, 2013).

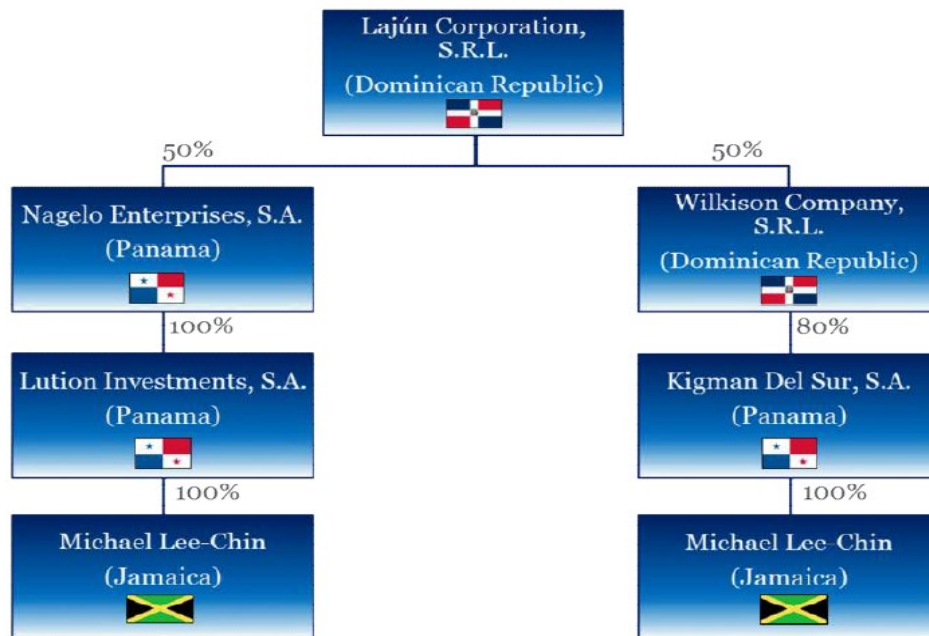
² C1 — § 61; R1 — § 3.

³ C1 — § 40; R1 — § 69.

⁴ C1 — § 82; R1 — §§ 99-100.

the Land Contract before the Dominican Republic's National Registry ("*Registro de Títulos*").⁵ The Parties thus disagree on the time of acquisition of the Land.

84. The sale of the Land included the opportunity to purchase 362,879.05 m² of additional land located by the Duquesa Landfill which Claimant was going to use as an additional space for the Landfill and to potentially build the WTE Plant. In Claimant's submission, this additional purchase of land was never consummated in view of the unlawful actions taken by Respondent.⁶
85. Claimant alleges that, on June 26, 2013, it became the indirect owner of 90% of Lajun and the Land through two Panamanian companies: Lution Investments, S.A. ("**Lution**"), owner of 100% of the share capital of Nagelo, and Kigman Del Sur, S.A. ("**Kigman**"), owner of 80% of the share capital of Wilkison,⁷ as follows:



86. On the basis of the foregoing, Claimant asserts that his investment in the Dominican Republic includes (i) the acquisition of ownership interests in Lajun, (ii) the acquisition

⁵ R1 — § 122.

⁶ C1 — § 83.

⁷ C1 — § 27. Claimant explains that the remaining 10% minority interest is owned by Dominican entrepreneur, Dr. José Luis Asilis.

of the Land, (iii) the right to develop a recycling facility and the WTE Plant, and (iv) the Concession Agreement executed and delivered by the ASDN.⁸

87. According to Respondent, the money purportedly invested to acquire the Shares and the Land does not belong to Claimant, and therefore, the actual investors behind Lajun are others and not Claimant.⁹
88. In turn, Claimant explains that, since he became the indirect owner of Lajun and the Land, he made substantial investments in the Duquesa Landfill,¹⁰ fully complied with his contractual obligations, as acknowledged by the ASDN in many occasions,¹¹ and continued to render services despite Respondent's contractual breaches and political interferences focused on depriving Claimant of his property.
89. As consideration for the performance of services under the Concession Agreement, Lajun was authorized to charge the Municipalities of the Gran Santo Domingo area a tipping fee per ton of waste.¹² Claimant explains that the tipping fee was not sufficient to cover the operating costs of the Duquesa Landfill and to make the investments required by the Concession Agreement, and that Respondent also acknowledged that the fee was inadequate both in the amendments to the Concession Agreement and in the settlement agreements executed thereafter.¹³ Claimant further recognizes that the situation at the Duquesa Landfill increasingly deteriorated over the years, but alleges that this was due to the lack of adequate compensation by the Dominican authorities for the services rendered by Lajun.¹⁴
90. According to Claimant, on July 9, 2013 (that is, 13 days following the acquisition of Lajun by Nagelo and Wilkison), under the pretext of Lajun's failure to comply with certain environmental regulations, the ASDN notified Lajun of its decision to rescind the

⁸ C1 — § 215.

⁹ RPHB — §§ 12-15.

¹⁰ C1 — §§ 9-11.

¹¹ See, *inter alia*, C-52, Verification of Compliance with Obligations dated July 1, 2013; C-47, Verification of Compliance with Obligations dated October 16, 2016; C-48, Verification of Compliance with Obligations dated November 16, 2016.

¹² Notice of Arbitration, § 24; R-6 (C-1), Concession Agreement, Clauses 3 and 4, C1 — §§ 4, 8 (a tipping fee per ton "averaging USD 2.50 per ton of waste"); R1 — § 5 (a tipping fee per ton "of approximately USD 2.").

¹³ C1 — § 11.

¹⁴ C1 — §§ 107, 159.

Concession Agreement, taking possession of the Landfill and ejecting Lajun and their employees from the property.¹⁵

91. Claimant explains that in February 2014 the ASDN and Lajun concluded a settlement agreement whereby the ASDN returned the possession of the land and authorized Lajun to continue with the operation and administration of the Landfill (the “**First Settlement Agreement**” or “**Settlement Agreement 1**”).¹⁶ Claimant alleges that, on the basis of the commitments made by Respondent in the First Settlement Agreement and in the subsequent amendments to the Concession Agreement, it continued to invest substantially in the upgrading of the machinery and technology used at the Duquesa Landfill and for construction of the WTE Plant.¹⁷
92. According to Respondent, in February 2014, two civil society organizations filed a complaint before the General Directorate of Public Procurement—an instrumentality of the Treasury Department of the Republic acting as a governing agency of the Dominican State’s public procurement system—alleging that the procurement process advanced by the ASDN which led to awarding the Concession Agreement to Lajun had violated Law No. 340-06 on Public Procurement. By Resolution No. 53/2014 of July 25, 2014, the General Directorate of Public Procurement determined that the Concession Agreement had been executed in breach of certain provisions of Law No. 340-06.¹⁸
93. In 2016 and 2017, the Ministry of Environment imposed sanctions on Lajun for violations of its environmental permit and Law No. 64-00 of Environment.¹⁹
94. Claimant contends that in May 2017, following an alleged new interference by Respondent in the Duquesa Landfill operation,²⁰ the ASDN and Lajun executed a second

¹⁵ C1 — § 6; C-37, Act No. 817-2013, Notice of Termination of the Agreement of the Municipality of Santo Domingo Norte dated July 9, 2013; C-29, Notice of Taking of Possession of the Landfill Site of the Duquesa Landfill and Verbal Process of Asset Inventory No. 470/2013, dated July 17, 2013.

¹⁶ C-5, Settlement Agreement 1 between the ASDN and Lajun dated February 10, 2014.

¹⁷ C1 — § 118.

¹⁸ R1 — §§ 159, 160, R-17, Resolution No. 53/2014 of the General Directorate of Public Procurement dated July 25, 2014.

¹⁹ C1 — §123, R1 — § 176.

²⁰ C1 — §§ 165-167.

settlement agreement pursuant to which Claimant regained control of his property (the “**Second Settlement Agreement**” or “**Settlement Agreement 2**”).²¹

95. According to Respondent, by July 2017, Lajun had considerably cut the operation hours, seriously affecting waste collection and leading to deterioration which had an impact on public health; in addition, it had announced that it would cease providing waste dumping services to the municipalities of Santo Domingo Oeste, Pantoja and Los Alcarrizos, in breach of the Concession Agreement and the constitutional mandate that enshrines the principle of continuity of the provision of public services.²²
96. On July 19, 2017, the ASDN decided to exercise its unilateral termination right provided for under the Concession Agreement, notifying Lajun of alleged breaches of its obligations under the Concession Agreement and giving Lajun thirty days to cure them.²³ The Parties disagree on the existence of any such breaches.
97. According to Respondent, in the meantime, the Dominican authorities endeavored to control the crisis and avoid more serious impacts on public health and the environment.²⁴ On July 21, 2017, the Ministry of Environment and the Ministry of Public Health declared an environmental and health emergency at the Duquesa Landfill “due to the health problems and imminent risk caused by improper management of solid waste” [Tribunal’s Translation]²⁵ (“**Environmental and Health Emergency Declaration**”). As alleged by Claimant, the Environmental and Health Emergency Declaration constitutes in fact a merely “symbolic” declaration with no judicial or legal effect and was only issued with the goal of expropriating Claimant’s investment.²⁶
98. Claimant explains that on August 10, 2017, before the expiration of the cure period, the ASDN initiated an administrative proceeding before the Superior Administrative Court of the Dominican Republic seeking the nullification of the Concession Agreement (the

²¹ C-8, Settlement Agreement 2 between the ASDN and Lajun dated May 24, 2017.

²² R1 — § 217.

²³ C1 — § 174; C-9, Complaint for Breach of the Agreement, Act No. 179/2017 dated July 19, 2017.

²⁴ R1 — § 219.

²⁵ R-37 (C-149), Environmental and Health Emergency Declaration.

²⁶ C2 — § 356.

“**Nullification Action**”)²⁷ and, concurrently, a request for interim measures seeking judicial administration of the Duquesa Landfill until the conclusion of the Nullification Action.²⁸

99. According to Claimant, on August 29, 2017, the State (through the ASDN and other municipalities) covertly discarded its waste along the corridor leading to the front gates and entrance of the Landfill. The State made these waste deposits in the dead of night, when Lajun was not open for business.²⁹
100. On September 27, 2017, the Superior Administrative Court issued an interim measure whereby it ordered the provisional intervention and administration of the Duquesa Landfill by a commission composed of the Minister of Environmental and Natural Resources, the Minister of Public Health, and the Mayor of the ASDN (“**Judgment on Interim Measure**”).³⁰ The following day, this commission took control of the Duquesa Landfill.³¹ According to Claimant, this act constituted a forced expropriation with no compensation whatsoever.³² Moreover, Claimant alleges that the State actions were unreasonable and discriminatory, were motivated by political interests only, and violated the State’s international obligations to refrain from taking actions that deprive Claimant of its investment with no fair compensation, as well as its obligations to afford Claimant fair and equitable treatment without frustrating its legitimate expectations.³³
101. On December 19, 2017, Claimant sent Respondent a Notice of Controversy, inviting the latter to resolve the dispute amicably.³⁴
102. On April 6, 2018, Claimant sent Respondent a Notice of Arbitration in compliance with Article 3 of the UNCITRAL Rules.

²⁷ C1 — §§ 177-178; C-11, Administrative Proceeding filed by the ASDN in order to nullify the Concession Agreement, dated August 10, 2017; R-38, Act No. 1535/2017 dated August 1, 2017 whereby the ASDN was given notice of Resolution No. 53/2014 of the General Directorate of Public Procurement.

²⁸ C1 — § 179; C-93, Request for Interim Measures filed by the ASDN, dated August 15, 2017.

²⁹ C1 — § 181.

³⁰ C1 — § 184, C-13, Judgment on Interim Measure.

³¹ R-41, Minutes No. 0001/2017 of the Commission for the Provisional Administration of the Duquesa Landfill dated September 28, 2017.

³² C1 — § 185.

³³ C1 — § 186.

³⁴ C-15, Notice of Controversy dated December 19, 2017.

103. On October 25, 2018, the Superior Administrative Court ruled on the Nullification Action filed by the ASDN, declaring the nullification of the Concession Agreement on the basis of violations of Law No. No. 340-06 of Public Procurement.³⁵ According to Claimant, this judgment was not served until January 10, 2019.³⁶ Claimant submits that the proceedings to terminate the Concession Agreement and the declaration of nullification of the Concession Agreement show an inconsistent, ambiguous and arbitrary behavior of the State, all in violation of both the Treaty and international law.³⁷

IV. THE PARTIES' REQUESTS

104. Claimant requests that the Tribunal:

- (i) declare that the dispute is within the jurisdiction and competence of the Arbitral Tribunal;
- (ii) declare that the Dominican Republic breached the Treaty and international law;
- (iii) order the State to pay damages to Claimant in an amount ranging from USD 632.5 million to USD 676.2 million, an amount that may be further modified during the course of these arbitral proceedings;
- (iv) order the State to pay moral damages to Claimant in an amount no less than USD 5 million, an amount that may be further modified during the course of these arbitral proceedings;
- (v) order the State to pay pre-award and post-award interest to Claimant at the applicable rate until the date of the State's full and effective payment;
- (vi) order the State to pay all of Claimant's costs relating to the present arbitration proceedings, including all of his attorneys' fees and expenses;
- (vii) issue an order with negative inferences against the Dominican Republic for the State's failure to comply with the orders from the Tribunal concerning the production of documents (as further explained in Mr. Lee-Chin's prior submissions);

³⁵ C-130, Superior Administrative Court Judgment No. 0030-02-2018-SS-00357 dated October 25, 2018.

³⁶ C1 — § 188.

³⁷ C2 — § 127.

- (viii) dismiss Respondent's Motion to Compel the Production of Documents from Claimant (as further explained in Mr. Lee-Chin's prior submissions); and
- (ix) issue an order granting any further relief the Arbitral Tribunal deems just and proper under the circumstances.³⁸

105. In turn, Respondent requests that the Tribunal:

- (i) declare itself incompetent to hear this dispute and/or declare that Claimant's claims are inadmissible;
- (ii) reject all of Claimant's claims on the merits; and
- (iii) order Claimant to pay all costs relating to these proceedings, including all of Respondent's attorneys' fees and expenses, as well as the interest accrued thereon.³⁹

V. PRELIMINARY CONSIDERATIONS ON THE CRITERIA INFORMING THE FINAL AWARD – THEIR CONNECTION WITH THE PARTIAL AWARD

106. The Tribunal recalls that following a Request filed by Respondent on February 4, 2019, in Procedural Order No. 2, it decided to bifurcate the arbitral proceedings.⁴⁰

107. Following the Parties' exchanges and a hearing, the Tribunal rendered the Partial Award on July 9, 2020, in which it rejected several jurisdictional objections raised by Respondent.⁴¹

108. In particular, in the Partial Award, the Tribunal was tasked with interpreting the investor-State dispute settlement clause ("**Article XIII**") of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Treaty. Claimant

³⁸ CPHB — p. 38.

³⁹ RPHB — § 109.

⁴⁰ PO2, Decision on Respondent's Request for Bifurcation. See §§ 51-52: "Respondent has reserved the right to submit other so far unspecified jurisdictional objections, some which are '*ratione materiae*' and others which are 'related to the merits of the case', and Claimant has reserved the right to answer them, in a potential merits phase. [...] If any such objections are ultimately submitted by Respondent in a potential merits phase, the Tribunal, after hearing Claimant, shall decide on them in due course." [Tribunal's Translation]

⁴¹ Partial Award, § 222 (reproduced *supra*, § 6).

relies on the clause in Article XIII as the basis for the Tribunal's jurisdiction and, alternatively, the most-favoured nation clause contained in Article III for UNCITRAL arbitration. Respondent relied on two objections to jurisdiction: that Article XIII does not allow an investor to directly institute international arbitration proceedings and that, in any event, Claimant is not a direct investor and, therefore, its claim falls outside the scope of the Treaty. The Tribunal, by a majority, rejected both objections to jurisdiction, as summarized *infra*.

109. First, the Tribunal decided, by a majority, that paragraph 1 of Article XIII contains the expression of consent of the Contracting Parties to the Treaty to submit the disputes referred to therein to one of the three mechanisms mentioned.⁴² Paragraph 2 of Article XIII, in particular, establishes what happens when a choice is made to institute an international arbitration. The choice is given to the investor, who has the unilateral power to invoke its right to arbitrate, provided that both the investor and the investment on which the claim is based meet the conditions imposed by the Treaty.⁴³ Moreover, the Tribunal rejected, by majority, Respondent's argument that for consent to UNCITRAL arbitration to exist, the investor and the State (Contracting Party to the Treaty) must conclude a *de novo* agreement once a dispute has arisen between them.⁴⁴ In the case at hand, the Parties have opted for a three-member tribunal and have followed the UNCITRAL Rules for its constitution, even considering that Respondent has done so for procedural reasons and reserved its objections to the Tribunal's jurisdiction.⁴⁵ The Tribunal also decided, by a majority, that the UNCITRAL Rules are applicable to this arbitration⁴⁶. In light of the previous finding that Respondent has clearly and unambiguously given its consent to international arbitration, the Tribunal found it unnecessary to address the argument on the most-favored nation clause.⁴⁷
110. Regarding Respondent's second jurisdictional objection, the Tribunal recalled that the Parties agreed that Mr. Lee-Chin's investments in the Dominican Republic were indirect

⁴² *Ibid.*, § 134.

⁴³ *Ibid.*, § 144.

⁴⁴ *Ibid.*, § 156.

⁴⁵ *Ibid.*, § 174.

⁴⁶ *Ibid.*, § 194.

⁴⁷ *Ibid.*, § 196.

and that Mr. Lee-Chin was, therefore, an indirect investor.⁴⁸ The Tribunal noted, by a majority, that the Treaty neither expressly included nor excluded indirect investors and that it included broad definitions of the terms “investment” and “investor.”⁴⁹ The Tribunal found, by a majority, that the fact that other treaties expressly include indirect investors and indirect investments under the protection offered thereby is not enough by itself to prove that the Treaty does not include them.⁵⁰ The Tribunal emphasized, by a majority, that it is cognizant of the existence of a debate in international investment law regarding the protection of indirect investors and indirect investments but that it should be noted that an important part of this debate has revolved around the claims filed by minority shareholders.⁵¹ With respect to the doctrine whereby shareholders may not seek to recover the damages suffered by the companies in which they hold interests it is worth pointing out that that is not the situation in this arbitration: Mr. Lee-Chin claims on his own behalf for the loss in value of his investments in the Republic purportedly arising from the alleged violation by the Republic of several obligations set out in the Treaty.⁵² The Tribunal found, also by a majority, that the Treaty applies to Claimant’s investments in the Dominican Republic as well as to Mr. Lee-Chin as an investor from one of the States bound by the Treaty (Jamaica).⁵³

111. Upon rendering of the Partial Award, Respondent raised additional jurisdictional and admissibility objections regarding which the Tribunal now rules. The Tribunal notes, for the sake of clarity, that it has carefully referred to its previous findings in relevant cases. As a matter of principle, the Tribunal is only open to reviewing previous findings in exceptional circumstances in which the Parties submit new decisive elements for its consideration. Barring the observations *supra*, the findings of the majority of the Tribunal in the Partial Award are evidently final.

⁴⁸ *Ibid.*, § 208.

⁴⁹ *Ibid.*, § 212. In other words, the text makes no specific reference to direct or indirect investments, rather using the formula “though not exclusively, includes.”

⁵⁰ *Ibid.*, § 214.

⁵¹ *Ibid.*, § 216.

⁵² *Ibid.*, § 218.

⁵³ *Ibid.*, § 219.

112. In the Partial Award, the Tribunal already ruled on the “basic elements” for its analysis.⁵⁴ These elements — particularly those related to the sources of the criteria for the interpretation of the Treaty⁵⁵ and the invocation of judicial precedents⁵⁶ — are applied *mutatis mutandis* in the Tribunal’s Analysis regarding the Final Award and must be deemed incorporated hereto.
113. Here, the Tribunal must decide on, among other issues, Claimant’s claims that Respondent has allegedly breached several clauses of the Treaty. The Tribunal notes at the outset that the Parties have once again referred extensively to precedents in their submissions in order to illustrate the standards and thresholds that, in their respective views, are applicable. For that analysis, the Tribunal has particularly taken into account the need to distinguish between the rules applicable in this case and other rules (from other treaties or customary international law).
114. The Tribunal wishes to note that, for the reasons set out in his dissenting opinion, Professor Kohen disagrees with the decisions, as well as the findings of fact and legal analysis supporting them, on Respondent’s jurisdictional and admissibility objections and on the question of the general exemption regarding the measures adopted for the protection of national security interests. Therefore, these decisions are made by majority.
115. Lastly, to conclude this section, the majority wishes to make certain observations regarding the idea that any tribunal is entitled to raise *motu proprio* matters of law and fact relating to its own jurisdiction. The majority’s view is that procedural precision and compliance with due process require that the parties indicate to the tribunal what matters of law and fact should inform the tribunal’s assessment of its jurisdiction. In this case, Respondent has had ample opportunity to raise said questions. In fact, Respondent has availed itself of those opportunities on more than one occasion, and Claimant has been granted the corresponding right of reply. In turn, the Tribunal has accommodated those submissions and addressed them in the Award on Jurisdiction and in this Final Award. Therefore, it is the majority’s opinion that the scope of the Tribunal’s analysis on its jurisdiction has been properly confined to the issues raised by Respondent and addressed

⁵⁴ *Ibid.*, Section IV: The basic elements for the Tribunal’s analysis.

⁵⁵ *Ibid.*, §§ 71-73.

⁵⁶ *Ibid.*, §§ 79-81.

by Claimant. Any other line of argument that the Tribunal may attempt on its own initiative could leave the Parties without a full opportunity to present their case, which, in the eyes of the majority, would be incompatible with the respect for due process.

VI. ADDITIONAL JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS

1. *The issue of the characterization of an “investment” pursuant to the Treaty*

A) The Respondent’s position

116. Respondent argues that Claimant failed to prove that its alleged investments have the necessary elements to receive the protection of the Treaty. Specifically, Respondent contends that mere ownership or formal ownership of an asset does not constitute an “investment” under the Treaty if the investor himself did not make a relevant contribution to acquire that asset.⁵⁷ While the Treaty defines the term “investments” broadly, according to Respondent, it is not enough to show that certain assets owned by Claimant could fit within the definition of “investments” set forth in Article I(1) of the Treaty in order to receive protection thereunder; Claimant must also prove that such assets meet the objective elements of an “investment.”⁵⁸ Respondent refers to multiple tribunals that have held that for an asset to qualify as an “investment” protected under an investment treaty, it must possess certain basic, objective, inherent or intrinsic qualities which are typical of the concept of an “investment,” such as the making of a contribution and the assumption of a certain risk by the investor. According to Respondent, absent those elements, an asset cannot be considered an “investment”; thus, it cannot receive protection under an investment treaty.⁵⁹

⁵⁷ R2 — § 219.

⁵⁸ R1 — § 268.

⁵⁹ R1 — § 268, referring to RL-317, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280 (UNCITRAL), Award dated November 26, 2009, § 207 (“*Romak v. Uzbekistan*”) (“[T]he term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. . . [I]f an asset does not correspond to the inherent definition of ‘investment,’ the fact that it falls within one of the categories listed in Article 1 does not transform it into an ‘investment.’”); RL-318, *Alps Finance and Trade AG v. The Slovak Republic, Ad Hoc/UNCITRAL*, Award dated March 5, 2011, §§ 231, 240; RL-319, *Italian Republic v. Republic of Cuba, Ad Hoc*, Interim Award dated March 15, 2005, § 81; RL-320, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award dated July 30, 2009, § 46; RL-321, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award dated March 31, 2011, § 141; RL-322,

117. In this vein, Respondent contends that Claimant failed to demonstrate any risk inherent in the alleged investment.⁶⁰ Specifically, according to Respondent, the certificates or minutes of meetings indicating that Claimant is a shareholder do not prove the existence of a contribution made by Claimant or the assumption of any risk.⁶¹
118. Respondent also states that mere ownership or formal ownership of an asset does not constitute an “investment” under the Treaty if the investor himself did not make a relevant contribution to acquire that asset.⁶² There must be an economic commitment by an investor.⁶³
119. In particular, Respondent argues that the investment must have been made by the same investor bringing a claim under the Treaty⁶⁴ and that this requirement is derived from the very language of the Treaty, which requires that protected investments be made “by” an investor.⁶⁵ In support of its position, Respondent draws particular attention to the decision in *Alapli v. Turkey*:

“In each instance, the investor is assumed to be an entity which has engaged in the activity of investing, in the form of having made a contribution. An alleged investor must have made some contribution to the host state permitting characterization of that contribution as an investment ‘of the investor.

Consequently, [...] (the Second Project Company) cannot be considered an investment ‘of Claimant. Although not a very long word, the term ‘of constitutes the operative language for determining investor status in both relevant treaties. Pursuant to the interpretative principles of the Vienna

Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award dated April 30, 2014, §§ 80-81; RL-262, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award dated May 31, 2017, § 372; RL-323, *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award dated March 5, 2020, § 293; see also RL-324, Katia Yannaca-Small, “Definition of ‘Investment’: An Open-ended Search for a Balanced Approach,” in Katia Yannaca-Small (ed.) *Arbitration under international investment agreements* (Oxford University Press 2010), p. 250.

⁶⁰ R2 — §§ 216, 227.

⁶¹ R2 — §§ 222-223.

⁶² R2 — § 219.

⁶³ R2 — § 219.

⁶⁴ R2 — § 220.

⁶⁵ R2 — § 220.

Convention on the Law of Treaties, which instruct that treaty terms are to be read in their ordinary meaning in context, reference to the investment ‘of’ an investor must connote active contribution of some sort. Put differently, the treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal must find an action transferring something of value (money, know-how, contracts, or expertise) from one treaty-country to another.”⁶⁶

120. Respondent argues that while the origin of the funds is not relevant to the acquisition of the property (given that a person other than the one who offered the resources to acquire such property may acquire it), the Tribunal cannot merely verify formal ownership. The “owner” (the person who holds formal ownership) and the “investor under the Treaty” (the person who makes a contribution with resources of their own) are two attributes that may or may not co-exist in the same person. As explained by the tribunal in *Caratube v. Kazakhstan*, although the origin of the funds used for the investment is immaterial, “the capital must still be linked to the person purporting to have made an investment” for the person to be considered an investor.⁶⁷ This was also the view of the tribunal in *Gaëta v. Guinea*, which explained that “[t]he requirement that the investor has made a substantial contribution implies that it has agreed to make a sacrifice that represents a certain economic value, which may consist in a contribution of funds or other assets. In this respect, even if the origin of the funds is irrelevant, it is necessary that the person invoking the protection under the [Treaty] ... be the one who actually incurred the expenditure in connection with the transaction at issue or the one who bears, in one way or another, the actual burden of the transaction.”⁶⁸ [Tribunal’s Translation]

⁶⁶ RL-328, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award dated July 16, 2012 (“*Alapli v. Turkey*”), §§ 358-360.

⁶⁷ RL-315, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award dated June 5, 2012 (“*Caratube v. Kazakhstan*”).

⁶⁸ RL-330, *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award dated December 21, 2015, (“*Gaëta v. Guinea*”), § 231 (Tribunal’s translation). See also RL-306, *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award dated June 22, 2017 (“*Capital Financial v. Cameroon*”), § 426.

121. In this regard, Respondent maintains that all certifications and statements submitted by Claimant are merely declaratory and, in any event, they were submitted on behalf of Lajun.⁶⁹ Respondent further holds that the evidence related to electronic transfers and bank accounts that allegedly prove payments of approximately USD 10 million to acquire shares in Nagelo, Lution, Kigman and Wilkison are irrelevant since they are not covered by the Treaty.⁷⁰ According to Respondent, the acquisition was not conducted using Claimant's own funds.⁷¹ Respondent argues that:

- the alleged bank transfers would have been made by AIC (Barbados) Limited and AIC Global Holdings, two companies incorporated in Barbados and Canada, not by Claimant, and that Claimant has failed to prove that the transfers have actually been made with funds of his own. Besides, with respect to the alleged “investment” in the amount of USD 10 million referred to by Claimant, it is necessary to explain that, from Claimant's evidence and arguments on his – indirect – investment in Lajun Shares and the Portion of Land, it follows that at the most, USD 6.075 million “were paid”⁷² [Tribunal's Translation];
- neither has Claimant filed any evidence in the record which proves that Mr. Asilis Elmudesi is the owner of 100% of the company Metro Country Club S.A., recipient of the bank transfers, nor is it possible to confirm that those payments were in fact made in turn for Claimant's alleged investment in Lajun;⁷³ and
- the document submitted by Claimant to prove that, from 2013 to 2018, he invested USD 4 million of his own funds to “maintain and upgrade Lajun, the Portion of Land, and the Duquesa Landfill” also consists of a compilation of bank transfers and bank account statements requests in which AIC (Barbados) Limited and AIC Global Holdings, and not Claimant, are featured as senders.⁷⁴

⁶⁹ R2 — § 222.

⁷⁰ R2 — § 224.

⁷¹ R2 — § 225.

⁷² R2 — §§ 76 and 225.

⁷³ R2 — § 83.

⁷⁴ R2 — § 81, footnote 277.

122. Respondent concludes that, even if Claimant may indirectly hold formal title to the shares and the Land (and only through a structure merely on paper), he did not contribute funds of his own for his alleged investment in the Dominican Republic.⁷⁵ The “investors” in any event would be the AIC Companies, that make the “contribution”, but these companies have a legal standing different from that of their shareholders.⁷⁶
123. In Respondent’s opinion, in the Final Hearing, the money allegedly invested for the Shares and the Portion of Land acquisition was proven not to belong to Claimant, but to the AIC Companies, which are not parties to this proceeding. Respondent contests Claimant’s insistence regarding the fact that he is the indirect owner of the AIC Companies because he controls their parent companies, two Canadian companies named Portland Holdings. First, Respondent draws attention to the fact that the evidence of that alleged corporate structure was filed with Claimant’s last submission of October 2021, and it could not be contested by Respondent in its submissions. Secondly, Respondent asserts that, as it arose from the Hearing, that evidence is incomplete and insufficient to discharge Claimant’s burden of proof⁷⁷ and that, from the certificates of incumbency that Claimant did submit accompanying his last submission, it does not arise that Claimant has been the owner of such companies at all relevant times, that is, since 2013.⁷⁸
124. For Respondent, in the Final Hearing, the AIC Companies were also proven to have made a transfer “on behalf” of the company A2Z as a contribution of capital, despite the fact that Claimant presents this transfer as an investment of his own. Respondent alleges that these amounts cannot be deemed as Claimant’s investments.⁷⁹
125. Respondent concludes that it should also be considered the fact that Claimant was not able to explain the reasons why, if he allegedly contributed funds of his own, he told the

⁷⁵ RPHB — § 26.

⁷⁶ RPHB — § 26.

⁷⁷ RPHB — § 12.

⁷⁸ RPHB — § 12, referring to Tr. Day 1, English, pp. 116, 385-387 (ll. 1-22); Tr. Day 1, English, p. 162 (ll. 3-20).

⁷⁹ RPHB — § 13.

Vice President of the Republic that he had invested foreign investors' funds in Duquesa, representations that his son repeated in a televised interview of the time.⁸⁰

B) The Claimant's position

126. Claimant holds that the definitions in the Treaty memorialize the understanding and agreement of the Contracting Parties as to what constitutes an “investment,” and that this should be the end of the inquiry.⁸¹
127. The Treaty's definition of “investment” set forth in Article I of Annex III, does not impose any additional requirement(s) related to the origin of funds. In fact, the Treaty provides a very broad definition of “investment” that includes “every kind of asset” without any further conditions or requirements as to how the investment should be made. Thus, imposing a new requirement not included in the definition of investment” – or elsewhere in the Treaty – would go against the rule of interpretation of Article 31 of the 1986 Vienna Convention (also, “**VCLT**”), since it would defeat the purpose of the Treaty and, in particular, the purpose set forth in Annex III which specifically seeks to “protect investments.”⁸²
128. Claimant points out that counsel for Respondent has unsuccessfully attempted, on multiple occasions, to raise this same jurisdictional objection in other investment cases.⁸³ In addition, Claimant emphasizes that while Respondent relied on the case *Caratube v. Kazakhstan* in an attempt to support some of its jurisdictional objections related to the source of financing, Respondent failed to mention that in that same case its own counsel, Curtis Mallet-Prevost, accepted and admitted that the source of funds is irrelevant for purposes of determining if the *ratione materiae* and *ratione personae* requirements are met.⁸⁴

⁸⁰ RPHB — § 14; R-12, minute 2:15-2:55; Tr. Day 1, English, pp. 206, (l. 22), 207, (ll. 1-10); Tr. Day 2, English, pp. 543-546 (ll. 1-22).

⁸¹ C3 — § 35.

⁸² CPHB — p. 18.

⁸³ CPHB — pp. 18-19.

⁸⁴ CPHB — p. 19.

129. Claimant maintains that UNCITRAL tribunals and other non-ICSID Convention tribunals have held that the *Salini* test is irrelevant outside the ICSID Convention.⁸⁵ Neither the *Salini* test nor Respondent's rebranded version of it are applicable to this UNCITRAL arbitration.⁸⁶ In *Guaracachi v. Bolivia*, the UNCITRAL tribunal held that it was not appropriate to import the *Salini* test to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration such as the present case; the tribunal clarified that the definition of a protected investment, at least in non-ICSID arbitrations, "is to be obtained only from the (very broad) definition contained in the BIT."⁸⁷
130. Claimant further asserts that he assumed a risk through his investment. The financial gain that Claimant expected to reap was contingent on Respondent's municipalities' performance of certain contractual duties, and Respondent's compliance with the Treaty. As with any investment involving a third party, the risk that Respondent's municipalities or Respondent would not comply with their duties was real.⁸⁸ Each of these risks was identified in the due diligence that Claimant undertook prior to acquiring his investments.⁸⁹
131. In any event, Claimant holds that the acquisition was conducted using Claimant's own funds. Claimant paid more than USD 1 million to acquire his ownership in Nagelo, Kigman, Lution and Wilkison; and approximately USD 8.9 million to acquire 90 % of Lajun and the Land.

⁸⁵ C3 — §§ 40-45; CL-132, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award dated November 30, 2011, §§ 7.4.8-7.4.9; CL-133, *Jan Oostergetel & Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction dated April 30, 2010, § 159 ("*Oostergetel v. Slovak Republic*"). Claimant points out that in *Oostergetel v. Slovak Republic*, the tribunal proceeded to consider whether the investment satisfied the *Salini* test but only because both parties relied on the *Salini* test in discussing the existence of an investment; CL-54, *Fleming DutyFree Shop Private Ltd. v. Republic of Poland*, UNCITRAL, Award dated August 12, 2016, § 298; CL-134, *Mytilineos Holdings S.A. v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction dated September 8, 2006, §§ 117-118.

⁸⁶ C3 — § 55.

⁸⁷ CL-56, *Guaracachi America, Inc. & Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, Award dated January 31, 2014, § 364.

⁸⁸ C3 — § 76.

⁸⁹ C3 — § 77.

132. Claimant asserts that he subsequently invested (from 2013 to 2018) approximately USD 4 million of his own money to upgrade and maintain Lajun, the Land and the Duquesa Landfill.⁹⁰ Finally, Claimant underscores that:

- Claimant owns AIC (Barbados) Limited and AIC Global Holdings; each payment was preceded by a “direct instruction from Mr. Lee-Chin,” thus satisfying the “active participation” requirement;
- the ownership of Metro Country Club and Operadora de Golf is no secret and the fact that Dr. Elmudesi owns and controls Metro Country Club is set forth in the public registry certificate of Metro Country Club, and Operadora de Golf public registry certificate shows that the same holds true for such entity;
- Mr. Lee-Chin paid for his investments through wire transfers issued to, for instance, Dr. Elmudesi’s company Metro Country Club.⁹¹

133. Claimant maintains that a full week of testimony during the Hearing, coupled with the evidence in this arbitration file,⁹² confirmed that Claimant:

- is the owner of the investment;
- is an “investor” under the Treaty;
- owns an “investment” under the Treaty;
- spent approximately USD 10 million of his own money to acquire the investment and the Claimant subsequently invested, approximately USD 4 million of his own money to upgrade and maintain Lajun, the Land and the Duquesa Landfill; and
- is the owner of AIC (Barbados) Limited and AIC Global Holdings, Inc.⁹³

⁹⁰ C3 — § 61.

⁹¹ C3 — §§ 63-74.

⁹² CPHB — p. 7; See also C-22; C-25; C-26; C-27; C-121; C-122; C-126; C-152; C-155; C-156; C-157; C-169; C-173; C-174; C-175; C-176; C-177; C-178; C-179; C-196; C-202; C-203; C-204; CL-5; CL-110; CL-117.

⁹³ CPHB — pp. 5-7, Partial Award and Dissenting Opinion, § 208: “Claimant’s Jamaican nationality has not been disputed so far ...”; *id.*, § 208: “The Parties agree that Mr. Lee-Chin’s investments in the Dominican Republic are indirect and that Mr. Lee-Chin is, thus, an indirect investor;”) *id.*, § 217: “In the instant case, Mr. Lee-Chin owns virtually the entire investment, and, ... it can hardly be doubted that the investment is closely linked to his person;” Testimony of Michael Anthony Lee-Chin, Tr. Day 2, English, pp. 382 (ll. 15-21), 383 (ll. 1-7), 399 (ll. 4-

C) The Tribunal's analysis

134. In order to determine whether Claimant has made any investments protected by the Treaty or not, the Tribunal shall first determine the requirements set forth by this Treaty. The Tribunal takes note of the Parties' agreements and disagreements in this regard.⁹⁴ Respondent argues there is no investment in the case at hand, for two reasons:

- the lack of the link required between the investor and the invested capital, and
- the lack of a risk linked to the investment.

135. The Tribunal shall consider each of said arguments advanced by Respondent *infra*.

a. The link between the investor and the investment

136. Both Parties are in agreement, and the Tribunal also agrees, that the language of the Treaty defines the term "investment" broadly. The Tribunal has already considered this element in its Partial Award.⁹⁵ It is undisputable that the language of the Treaty does not explicitly require that the capital be linked in a particular fashion to the person who allegedly made an investment for this person to be considered an investor.

137. Nevertheless, this could not put an end to the question of whether it would be necessary to establish any such additional and particular link for the investment to be protected under the Treaty. According to Respondent, the requirement that an investment be made "by" an investor expressly appears in several Treaty provisions,⁹⁶ which are transcribed *infra*:

6), 400 (ll. 9-16), 491 (ll. 17-22), 492 (ll. 1-16), 504 (ll. 2-8). Testimony of Adrian Christopher Lee-Chin, Tr. Day 3, English, p. 544 (ll. 10-12).

⁹⁴ The Tribunal takes note of Claimant's arguments regarding the different submissions made by Respondent's Counsel in other cases. The Tribunal is unaware of any rule, particularly within the VCLT, inviting or ordering to take into account possibly contradictory positions of the Parties' representatives. The Tribunal does not need to address the irrelevant but possibly debatable question in the instant case of whether a Party's declaration in another case could become relevant in the present proceeding.

⁹⁵ Partial Award, §§ 209-212.

⁹⁶ R1 — § 272. See R-1, Treaty (emphasis added by Respondent).

ARTICLE II(I)

ADMISSION AND PROMOTION

Each Party shall in its territory promote, as far as possible, the investment made in its territory by investors of the other Party, and shall admit these investments in accordance with its law. [...]

ARTICLE III(I)

GENERAL PRINCIPLES GOVERNING TREATMENT

Each Party shall admit and treat investments in a manner not less favourable than the treatment granted in similar situations to investments of its investors except for investments in areas to be identified in the Appendix to this Annex.

ARTICLE XVI

APPLICATION OF OTHER RULES

If the provisions of law of either Party, or obligations under international law existing at present or established hereafter between the Parties in addition to the present Agreement, contain rules, whether general or specific, entitling investments by investors of the other Party to treatment more favourable than is provided for by the present Agreement, such rules shall, to the extent that they are more favourable prevail over the present Agreement.

138. Taking due account of the rules of interpretation set forth in the 1986 Vienna Convention, the Tribunal notes that the interpretative exercise should not stop with the mere consideration of the language of the Treaty. The language is only one of the elements to be taken into account according to Art. 31 of the VCLT. Only through taking into account all other elements, along with the text, can the Tribunal meet the requirements set forth in the 1986 Vienna Convention. In this case, Respondent invokes the term “by” as a textual point of support for this additional requirement of a link between the capital invested and the person introducing himself as investor.

139. Respondent submits that Claimant’s interpretation — i.e., the rejection of the existence of said additional requirement that there must be an economic commitment by an investor — would render invalid the provisions of the Treaty⁹⁷ as well as the Preamble.⁹⁸
140. The Tribunal cannot see in the Preamble, nor, in fact, in the Treaty or in the use of the word “by,” any element that would suggest the intention of the Parties to the Treaty to effectively condition the protection of an investment on proving a particular link between the invested capital and the investor. The Preamble merely includes a reference to the economic development of the Parties to the Treaty and the importance accorded by the Parties to the Treaty to the development of closer, more dynamic and balanced trade and investment relations between them. Additionally, the Preamble cannot be the basis for introducing the requirement of a particular type of link between the investor and the capital invested.
141. Respondent has referred to a series of cases that, in its view, support the existence of a mandatory link between the invested capital and the investor.⁹⁹ The Tribunal does not find it hard at all to fully subscribe to the quoted excerpt from the decision of the tribunal in *Caratube v. Kazakhstan*, which acknowledges that the origin of the capital used in the investments is irrelevant but that the capital must nevertheless be linked to the person claiming to have made an investment.¹⁰⁰ However, what is at stake here, what this Tribunal has to determine, is precisely what that link consists of.
142. The tribunal in *Gaëta v. Guinea* elaborates on this requirement as follows:

“it is necessary that the person invoking the protection under the [Treaty] ... be the one who actually incurred in the expenditure in connection with the transaction at

⁹⁷ *Supra*, § 136.

⁹⁸ R-1, Treaty, Preamble (mentioning the objective of “achiev[ing] levels of cooperation and integration that favour the economic development of both Parties” and “the importance that the Parties accord to economic co-operation between them for their economic development”).

⁹⁹ RPHB — § 25, RL-306, *Capital Financial v. Cameroon*, § 429: “[T]he Tribunal must determine if Claimant, in this case, has made a substantial financial contribution itself of its own accord” (emphasis added by Respondent). [Tribunal’s Translation]

¹⁰⁰ RL-315, *Caratube v. Kazakhstan*, § 456.

issue or the one who bears, in one way or another, the actual burden of the transaction.”¹⁰¹ [Tribunal’s Translation]

143. The Tribunal sees no need to elaborate on these precedents as they do not provide any particular explanation of the conditions that must actually be met to satisfy the requirement of a link between the investor and the capital invested in this case.
144. The Tribunal asked the Parties to specifically elaborate, in their Post-Hearing Briefs, on the applicable standard for assessing the source of the funds.
145. Respondent underlined that Claimant bears the burden to prove this Tribunal’s jurisdiction and that Respondent has only consented to submit to arbitration disputes “related to an investment.” According to Respondent, the standard applicable to this issue is the standard applicable to any factual issue, i.e., a “balance of probabilities.” In view of the foregoing, Respondent submits that the evidence provided by Claimant is incomplete and, thus, does not satisfy his burden of proof,¹⁰² regardless of the standard of proof adopted by the Tribunal in order to assess the source of the funds, whose ownership Claimant has not established.¹⁰³
146. Claimant emphasized that there is no provision in the Treaty (explicit or implicit) requiring proof of an “economic commitment of an investor.” Notwithstanding, a claimant in an investment arbitration still has the burden to prove that there is a *prima facie* basis for a tribunal’s jurisdiction. In this respect, pursuant to the Treaty and established jurisprudence, Claimant only needs to demonstrate that he is an “investor” with an “investment” in accordance with the terms of the Treaty in order to establish this Tribunal’s jurisdiction *ratione personae* and *ratione materiae*.¹⁰⁴
147. For the Tribunal, absent an express requirement in the Treaty — or otherwise applicable general principle or other international law rule or in the specific context of arbitrations operating under UNCITRAL Rules — it is not necessary for Claimant to specifically establish the origin of the funds used. Instead, the Tribunal’s task is to exercise its

¹⁰¹ RL-330, *Gaëta v. Guinea*, § 231; RL-306, *Capital Financial v. Cameroon*, § 426.

¹⁰² RPHB — § 29. The Tribunal is not persuaded that Claimant has indeed withheld information in this regard, as argued by Respondent.

¹⁰³ RPHB — § 29.

¹⁰⁴ CPHB — p. 28.

discretion and assess whether Claimant has been able to demonstrate a link between himself and the capital invested. This link may be direct or indirect and, absent specific requirements, must be assessed by the Tribunal.

148. The Tribunal is persuaded that Claimant has submitted sufficient elements to show that the investments in question were made “by” Claimant. The Tribunal already concluded in the Partial Award that:

“[i]n the instant case, Mr. Lee-Chin owns virtually the entire investment, and, regardless of what might be thought about how that investment was conceived and managed (...) it can hardly be doubted that the investment is closely linked to his person. Besides, as stated *supra*, the only minority shareholder, which allegedly holds 10% of the shares of Lajun, is described as a national of the Dominican Republic, which would exclude him from any claim against Respondent under the Treaty.”¹⁰⁵

149. Respondent has failed to undermine the evidence (including the testimonial evidence) that Mr. Lee-Chin has a link to the funds used. In the absence of additional evidence that could have been furnished during the second phase of the arbitration, the Tribunal has found no other element to revise its previous conclusion. For the sake of clarity, the Tribunal confirms that it carefully considered whether such additional elements were submitted and, particularly, the evidence which, in Respondent’s view, was confirmed at the Hearing.¹⁰⁶ In the Tribunal’s view, taking into account the applicable standard of a “balance of probabilities” correctly relied on by Respondent, Respondent’s questioning of certain transactions does not alter the conclusion reached by the Tribunal in the Partial Award that there is a clear link between Claimant and the investment.

150. Likewise, the Tribunal cannot find any supporting elements, by any standard, to accept Respondent’s characterization that Claimant’s contribution is “riddled with irregularities” and that the ownership structure presented is “paper thin.”¹⁰⁷ [Tribunal’s Translation]

¹⁰⁵ Partial Award, § 217.

¹⁰⁶ *Supra*, particularly §§ 122-124.

¹⁰⁷ RPHB — § 14.

The complexity of an investment and the way in which it is structured is not a standard that the Tribunal can take into account when assessing the existence of an investment. The Treaty provides no basis for such a conclusion; on the contrary, it is clear that, as already stated, the drafters of the Treaty have adopted a very broad definition of the investments covered by it.¹⁰⁸ Whatever view each of the Parties to this arbitration may have of the manner in which international investments are often channeled, the Tribunal's task is strictly to interpret and apply the Treaty to adjudicate this issue. The Treaty contains the language chosen by its drafters rather than the language desired by its potential interpreters.

151. The Tribunal takes note of Respondent's argument that Claimant told the Vice President of the Republic that he had invested foreign investors' funds in Duquesa and that his son reiterated these statements in a televised interview at the time.¹⁰⁹ The Tribunal has reviewed both the email sent by Claimant on November 13, 2013, to the then Vice President, Ms. Margarita Cedeño,¹¹⁰ and the televised interview given by Mr. Adrian Lee-Chin to the *Enfoque Matinal* show on November 3, 2013,¹¹¹ and analyzed the Parties' statements in this regard, both in the pleadings and during the Hearing. The email in question, written in an informal tone and addressed to a private email address, indeed mentions a number of official entities and pension funds as investors on behalf of which Claimant would be investing. Meanwhile, in the aforementioned interview, Mr. Adrian Lee-Chin vaguely refers to foreign investors that he would be representing. The Tribunal notes that both statements were made — almost at the same time — in the period between the unilateral termination of the Agreement (notified to Lajun by the ASDN on July 9, 2013) and the execution of the First Settlement Agreement (February 10, 2014), whereby, *inter alia*, the ASDN withdrew the unilateral termination and returned the Duquesa Landfill to Lajun.¹¹² These statements would therefore fall within the actions adopted by Claimant to recover Lajun. When asked about this matter during the Hearing, Mr. Michael

¹⁰⁸ Partial Award, § 211.

¹⁰⁹ *Supra*, § 124.

¹¹⁰ C-126, Email from Michael Anthony Lee-Chin to the Dominican Republic's Vice President (Margarita Cedeño Lizardo de Fernández), dated November 13, 2013.

¹¹¹ R-12, Interview to Adrián Lee Chin, Lajun's General Manager, in *Enfoque Matinal*, dated November 3, 2013.

¹¹² *Supra*, §§ 90-91.

Anthony Lee-Chin clarified that he referred to other investments.¹¹³ Mr. Adrian Lee-Chin, in turn, simply stated that he had made a mistake.¹¹⁴ The Tribunal has no basis to rule on informal statements such as those mentioned *supra* nor on the value of the clarifications provided by their authors. What the Tribunal can and must do is base its decision on this point on the specific issues regarding which there is evidence in the record of this arbitration.

152. Among other evidence, the First Settlement Agreement states that “LAJUN has demonstrated that it is economically and financially solvent to carry out these investments, given the incorporation as shareholder partners of the following companies: a) NAGELO ENTREPRISES, S.A., commercial entity incorporated under the laws of the Republic of Panama, duly registered in the Dominican Republic (...), duly represented by Mr. MICHAEL LEE-CHIN (...); and b) WILKISON COMPANY, S.R.L. (...);”¹¹⁵ and that “[t]he ASDN has verified that LAJUN’s new partners have the experience, knowledge and resources necessary to achieve the transformation of the Duquesa Landfill.”¹¹⁶ [Tribunal’s Translation] All documents submitted attest to Claimant’s ownership and/or control of the companies that have channeled the investments and of their operations.¹¹⁷

153. Therefore, the Tribunal finds that it has been established that Claimant is the owner of the investments, in accordance with the definition set forth in the Treaty, regardless of the origin of the funds contributed by Claimant to obtain this ownership. In addition, Claimant is the one who controls the companies through which the investments were channeled, ordered the transfers, and has controlled Lajun at all relevant times. This has not been disproved by Respondent, despite its multiple attempts.

¹¹³ Testimony of Adrian Christopher Lee-Chin, Tr. Day 2, English, pp. 410 (ll. 11, 13-20, 22), 411 (ll. 1-3, 8-9). Specifically, Claimant asserts: “Separately, separately. We are also investors separately from Lajun for all of those entities listed. Separately. And these are investors through our private equity fund who have invested—who have—who—that invested in Metro Country Club—Las Olas, and, secondly, InterEnergy (...) So that’s inferring that they are investors in Lajun, but they’re not.”

¹¹⁴ Testimony of Adrian Christopher Lee-Chin, Tr. Day 3, English, pp. 540 (ll. 5-7, 10-13), 541 (ll. 1-3, 8-9, 15, 18): “This is a private investment. I’m going to clarify now. A private investment that is solely owned by my father (...) That was a misstatement by me. I was on live television for my first time, and to be honest, I misspoke then.”

¹¹⁵ C-5, First Settlement Agreement between the ASDN and Lajun dated February 10, 2014, § 7.

¹¹⁶ *Ibid.*, § 8. It is worth noting that a few days after the signing of Settlement Agreement 1, on March 3, 2014, the duration of the Concession Agreement was extended from fifteen to twenty-seven years, C-6, Addenda 3.

¹¹⁷ *Supra*, footnote 92.

154. In any event, Respondent's arguments leave no room for questioning the existence of the link between Claimant and its investments. As a matter of fact, the Tribunal's conclusion is also consistent with the finding that Respondent, both through its executive branch,¹¹⁸ through the ASDN, and the municipalities that dealt with Lajun,¹¹⁹ has interacted directly and indirectly with Claimant as the owner of the investment subject to this dispute.

a. The requirement that there be a risk

155. Respondent argues that Claimant must prove the existence of a risk in making the investment in order for it to qualify as such.

156. The Tribunal reiterates that it cannot read into the Treaty additional requirements that would otherwise be used in the specific context of arbitrations operating under the ICSID Convention.¹²⁰ The Tribunal is not persuaded that there is any legal basis, in this case, to require the demonstration of a certain risk in order for the investment to qualify as an investment protected under the Treaty. The Tribunal agrees with Claimant that there is no reason to introduce in this case the conditions generally referred to as the "*Salini* test,"¹²¹ and, in particular, to the existence of a risk as an essential element of the very definition of investment. It is well-known that the test in question originated as a result of the absence of a definition of "investment" in the ICSID Convention. When this

¹¹⁸ The Tribunal refers to the meeting of November 9, 2016, with Mr. Lee-Chin, his son, Mr. Adrian Christopher Lee-Chin, Mr. Asilis Elmudesi and the then President of the Republic, Mr. Danilo Medina. The Tribunal fails to see any element that could lead to the conclusion that said meeting did not take place, as Respondent seems to suggest. See C1 — § 137; R1 — §§ 183-184.

¹¹⁹ In addition to the above references to the First Settlement Agreement, multiple communications between the municipal representatives have been incorporated as evidence. These communications, which took place in March 2017, were exchanged between the mayors of the various Dominican municipalities, as well as with the Dominican Federation of Municipalities. See C1 — §§ 147-149.

¹²⁰ The Tribunal notes that the precedents referred to by Respondent deal with very different scenarios, in which there is: a reference to specific conditions in the applicable treaty, a reference to specific conditions of an "investment" within the meaning of the ICSID Convention, or a reference to specific conditions pursuant to international law. *Supra*, § 116. In this case, the Tribunal cannot follow the approach of the tribunal in *Romak v. Uzbekistan*, which held that "[T]he term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk." RL-317, *Romak v. Uzbekistan*, § 207. The Tribunal notes that, in any event, the tribunal's analysis in *Romak v. Uzbekistan* concerned a contractual relationship (*i.e.*, a wheat supply transaction) and concluded that the risk assumed by the claimant was limited to the potential non-payment for the wheat supplied, which is the ordinary commercial or business risk assumed by all those who enter into a contractual relationship. On this basis, the tribunal in *Romak v. Uzbekistan* concluded that the economic activity did not involve the risk normally associated with an investment. Said situation cannot be likened to that of the present case.

¹²¹ CPHB — p. 23.

Convention is not applicable, and the applicable Treaty contains a specific definition of “investment,” it is difficult, if not impossible, to justify the need and relevance of resorting to other criteria to define what is already defined.

157. Consequently, the reasoning stated *supra* regarding the alleged requirement of a particular link between the investor and the capital invested applies *mutatis mutandis* to the potential requirement of a specific risk linked to the investment.
158. The Tribunal is aware that more recent investment treaties may contain further guidance on the matter and that a tribunal acting in the context of one of those treaties would inevitably have to follow such guidance. However, in the case at hand, in the absence of supporting language and other elements to be taken into account in accordance with the 1986 Vienna Convention, the Tribunal cannot “read” such a requirement into the applicable Treaty. Nonetheless, for the avoidance of doubt, the Tribunal emphasizes that this conclusion does not mean that the existence of a risk and, more specifically, the extent to which a risk was assumed is completely irrelevant for the purposes of this arbitration. Rather, such issues may prove to be significant in other stages of the Tribunal’s reasoning, in particular — but not limited to — when assessing the potential existence of legitimate expectations.
159. On the basis of the foregoing, despite the absence of an express requirement that a risk exists, the question arises as to when this requirement can be considered satisfied. In the case at hand, the Tribunal accepts that, in any event, Claimant’s investment entailed a series of risks that have been confirmed by the very course of events.¹²² This is not a merely speculative investment. There was an actual investment in a company dedicated to the disposal, collection and management of urban, industrial and hazardous solid waste, with the inherent risks of such business activity. Among others,¹²³ it is worth mentioning that the financial return on the investment hinged on the adequacy of the tipping fee received by Claimant. Subsequently, the Tribunal will consider the extent to

¹²² This has been accepted by Respondent itself. See R1 — § 381: “The investor [...] decided to assume a risk by investing in Lajun.” [Tribunal’s Translation]

¹²³ See *supra*, § 130.

which these risks were effectively identified by Claimant through a proper due diligence process.¹²⁴

160. Lastly, the Tribunal takes note of Respondent's decision not to additionally raise and argue a separate jurisdictional objection related to the investor's nationality. The Tribunal understands that Respondent does not formally challenge this particular requirement¹²⁵ and, therefore, considers that it should refrain from analyzing it.

161. As a result of the foregoing, the Tribunal finds that the investments made by Claimant that constitute the subject matter of this dispute are protected under the Treaty.

2. The issue of the legality of the investments

A) The Respondent's position

162. Respondent argues that Claimant's investments were not made legally and that the investments acquired through illegal maneuvering are not protected by investment treaties; accordingly, they are not protected by this Treaty.¹²⁶

163. According to Respondent, the Lajun Shares were acquired in clear violation of the Republic's tax regulations by concealing the real sale price from the Dominican authorities. Respondent refers, in particular, to a discrepancy between the purchase price stated in the Framework Agreement and the price stated in the Shares Contract.¹²⁷ Indeed, there are two notarized deeds with different prices for the purchase of the Lajun Shares:

- a Framework Agreement for the contract for the sale of the Lajun Shares and the purchase and sale of the Portion of Land entered into by José Antonio López Díaz and Darleny Indhira López Polanco with

¹²⁴ See *infra*, § 439.

¹²⁵ Respondent has stressed on several occasions the undisputed fact that Claimant, in addition to being Jamaican, is also Canadian when referring to the exercise of his business activities invoking the latter nationality. See, e.g., Testimony of Michael Anthony Lee-Chin, Tr. Day 2, English, pp. 409-413. However, Respondent has refrained from raising an objection to the Tribunal's jurisdiction on this basis.

¹²⁶ R2 — § 236; R1 — § 283; RL-337, Jeswald W. Salacuse, *The law of investment treaties* (Oxford University Press, 2015), p. 219; CL-42, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 February 2008, § 104; RL-338, Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017), § 6.110; RL-339, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award dated December 10, 2014, ("*Fraport AG II v. Philippines IP*") § 332.

¹²⁷ R2 — § 237.

- Nagelo and Wilkison on 26 June, 2013 (“**Framework Agreement**”), establishing a sales price of USD 7,250,000 for Lajun Shares,¹²⁸ and
- a contract for the purchase and sale of the Lajun Shares (“**Shares Contract**”), also entered into by José Antonio López Díaz and Darleny Indhira López Polanco with Nagelo and Wilkison on the same date, establishing a sales price of DOP 7,500,000 for Lajun Shares (equivalent to around USD 180,000).¹²⁹

164. Respondent submits that the fact that such contracts were drafted by the same legal firm—as argued by Claimant—does not preclude the fact that the Framework Agreement has not been filed with the Dominican authorities, nor does it cure the discrepancy in the sales price of the Lajun Shares under both contracts.¹³⁰ Nor does it help explain why two different notaries were hired, one to notarize the Framework Agreement and the Land Contract and the other to notarize the Shares Contract.¹³¹ Respondent argues that Claimant illegally concealed the purchase price paid for the Lajun shares when he registered only the Shares Contract with the Santo Domingo Chamber of Commerce, and not the Framework Agreement. However, as Respondent contends, the real value should have been disclosed to the Chamber of Commerce.¹³² Inasmuch as Respondent has been unaware of the existence of the Framework Agreement until this arbitration, Claimant’s argument that there is abundant evidence that the Republic recognized the legality of Claimant’s investment in public and official documents should be flatly rejected.¹³³
165. Furthermore, Respondent alleges that Claimant defrauded the Dominican tax authorities when it failed to pay the taxes related to the Shares Contract, and that tax fraud resulted from Claimant’s reporting a sales price for the sale of the Lajun Shares that was lower

¹²⁸ R2 — § 237, R-91, Framework Agreement, Article 4.2.

¹²⁹ R2 — § 237, R-95, Shares Contract, Article 3.1. This contract was the only one submitted to the Dominican authorities (since, as shown in the document itself, it bears the seal of the Santo Domingo Chamber of Commerce and Production). The Republic was not aware of the existence of the Framework Agreement until it was submitted in this Arbitration by Claimant. The Land Contract (R-96) was also entered into on that date and was also filed with the Dominican authorities.

¹³⁰ R2 — § 238.

¹³¹ *Ibid.*

¹³² R2 — §§ 239, 246.

¹³³ R2 — § 239.

than the real price.¹³⁴ Respondent submits four certificates issued by the General Internal Revenue Office in which such agency affirms that there is no record of a tax return or payment made by either Nagelo or Wilkison.¹³⁵

166. According to Respondent, pursuant to Law No. 11-92, Claimant was jointly and severally liable for the tax liabilities deriving from the sale of the Lajun shares.¹³⁶ Furthermore, pursuant to Article 1 of General Norm 07-2011, Claimant was a withholding agent that should have withheld 1% of the purchase price for the Lajun shares.¹³⁷ Such withholding is a payment against the capital gains tax to be paid by a seller of shares, which must be remitted to the General Internal Revenue Office no later than the 10th day of the month following the payment made to the seller.¹³⁸ Accordingly, Respondent adds, the purchasers of the Lajun Shares were required to withhold the tax and remit the payment to the Dominican Republic's Tax Authorities. Respondent goes on by saying that the purchasers were jointly and severally required to pay the income tax on capital gains, and such payment was not made.¹³⁹

167. Respondent notes that the General Law on Business Associations sets forth that “the transactions carried out by the commercial companies shall rely upon reliable documents and information that provide certainty as to the transactions supporting them.”¹⁴⁰ [Tribunal's Translation] According to Respondent, this implies that the price to be reported to the Dominican authorities is necessarily the actual price of the transaction. However, Respondent notes that, in this case, the Shares Contract, which contains the

¹³⁴ R2 — § 241; Claimant himself admits that the purchase of the Lajun Shares is subject to the payment of Income Tax on capital gains. See CL-113, Law No. 11-92 dated May 16, 1992, Article 289; CL-114, Regulation No. 139-98 for the Application of Title II Income Tax dated February 8, 2001, Article 41.

¹³⁵ R2 — § 241; R-248, ALSCA General Revenue Office Certification – Income No. 064-2021, dated July 22, 2021 (stating that “to this date, there is no record of returns and/or payments of Income Tax on capital gains being filed” by Ms. Darleny Indhira López Polanco); R-249, ALSCA General Revenue Office Certification – Income No. 065-2021, dated July 22, 2021 (stating that “to this date, there is no record of returns and/or payments of Income Tax on capital gains being filed” by Mr. José Antonio López Díaz); R-250, ALALGC General Revenue Office Certification – 00001-2021, dated July 22, 2021 (stating that Nagelo “has not filed any tax return to this date”); R-251, ALHE CC General Revenue Office Certification – 0012-2021, dated July 22, 2021 (stating that Wilkison “has not entered any tax return and/or payment of tax liabilities” in the DGII systems). [Tribunal's Translation]

¹³⁶ R2 — § 243.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ R2 — § 245; RL-289, General Law on Business Associations and Sole Proprietorships (479-08), dated December 11, 2008, Article 32.

lower price, is the only contract that was filed with the Santo Domingo Chamber of Commerce and the General Internal Revenue Office, and not the Framework Agreement.¹⁴¹

168. In Respondent's view, it is not true—as Claimant posits regarding the “Transfer of Shares Statement” draft form available at the Santo Domingo Chamber of Commerce's website—that the parties were only required to report the “nominal value” of such acquired shares rather than their “commercial value.” It notes that such statement is in a form provided by the Commercial Registry to users, but this in no way implies that the real value of the transaction must not be reported. In fact, as submitted by Respondent, one of the documents to be filed with the Chamber of Commerce is the original and copy of the sale or assignment agreement which must include the actual sale value.¹⁴²
169. For the sake of clarity, Respondent notes that it has never asserted that Claimant breached the law in connection with the payment of taxes for the purchase of the Portion of Land.¹⁴³
170. According to Respondent, Claimant errs when he submits that the burden to show illegality of an investment in order to challenge an arbitral tribunal's jurisdiction is very high, and violations of domestic law must be gross and severe in order to deprive a tribunal of jurisdiction.¹⁴⁴ Respondent insists that Claimant himself alleges that the tribunal in *Anderson v. Costa Rica* determined that an investment was illegal because it violated the Organic Law of the Central Bank of Costa Rica, and emphasized that this law sought to “prevent economic hardship to individual citizens and reduce the risk of financial crises [...] [by protecting] the savings of the public from fraud and other harms that can do significant injury not only to individuals but to the economy as a whole.”¹⁴⁵

¹⁴¹ R2 — § 245; R-253, GR General Revenue Office Certification No. 159-2021, dated July 21, 2021, stating that the Framework Agreement “has not been registered” with the Office; R-254, GR General Revenue Office Certification No. 158-2021, dated July 21, 2021, stating that Lajun “registered the Update of its shareholder structure, dated December 9, 2014 as per the Minutes of the Extraordinary General Meeting, dated June 27, 2013 and the Shares Contract, dated June 26, 2013.” [Tribunal's Translation]

¹⁴² R2 — § 246.

¹⁴³ R2 — § 247.

¹⁴⁴ R2 — § 248.

¹⁴⁵ RL-314, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award dated May 19, 2010 (“*Anderson v. Costa Rica*”). Claimant does not cite any specific paragraph of the award, but Respondent believes he is referring to § 54 of that decision.

According to Respondent, there is no clearer example of laws pursuing the same purpose as those pointed out by the tribunal in *Anderson v. Costa Rica* than the regulations of the Dominican Republic Tax Code allegedly breached in this case.¹⁴⁶

171. Respondent also refers to *Álvarez y Marín v. Panama*, where claimant's legal counsel invoked the same allegations and defended the same objection whose dismissal by the Tribunal is now being sought by the Claimant in this case.¹⁴⁷ According to Respondent, Claimant merely argues that the tribunal in *Álvarez y Marín v. Panama* reasserted that, for a tribunal to not have jurisdiction over a claim, the violations to the host State's domestic law must be gross and severe, and, applying a test put forward by that tribunal, the violations in the instant case would not meet such requirements. According to Respondent, however, even if the test proposed by Claimant were applied (according to factors which the tribunal in *Álvarez y Marín v. Panama* itself recognized as merely illustrative), the truth is:

- (i) the regulations violated in this case are indeed substantial, since even the Constitution of the Dominican Republic establishes the fundamental duty to pay taxes by individuals;
- (ii) furthermore, the interest protected by the Republic's tax regulations is indeed fundamental and substantial, as recognized by Claimant when it cites the rationale of the tribunal in *Anderson v. Costa Rica*;
- (iii) the Republic had not known of the existence of the Framework Agreement or the discrepancy between the sales prices until Claimant submitted the issue in this Arbitration; therefore, Claimant's arguments related to the Republic's failure to investigate are invalid; and
- (iv) the criminal sanction for the crime of tax fraud is not only circumscribed to the payment of the tax and a penalty; it may also include imprisonment.¹⁴⁸

¹⁴⁶ R2 — § 251.

¹⁴⁷ R1 — § 291, RL-346, *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Award dated October 12, 2018 ("*Álvarez y Marín v. Panama*").

¹⁴⁸ R1 — §§ 8, 99-112, 282-294; R2 — §§ 249-252; CL-113, Law No. 11-92, dated May 16, 1992, Article 239. See also RL-288, Commercial Registry Law (3-02), dated January 18, 2002, Article 24.

172. Lastly, in regard to Claimant's final allegation that the action for tax fraud is time-barred under the statute of limitations under Dominican criminal law, Respondent insists that the issue here is not the statute of limitations for a criminal action under domestic law; rather, by virtue of the fraudulent maneuvering pursued to acquire the Lajun Shares, Claimant's alleged investment was not made in accordance with the laws of the Republic.¹⁴⁹

B) The Claimant's position

173. Claimant alleges that his investment was made legally and there is a perfectly legitimate reason behind:

(i) the difference between the price listed in the Shares Contract and the Framework Agreement; and

(ii) Claimant's decision to register only the Shares Contract and not the Framework Agreement with the Santo Domingo Chamber of Commerce.¹⁵⁰

174. Claimant submits that the purchase prices listed in the Shares Contract and the Framework Agreement differ because the Shares Contract covers only the Lajun shares, and only includes their nominal value, while the Framework Agreement includes more than just the nominal value of Lajun's shares— it includes the commercial and market value of all rights inherent to the Lajun shares.¹⁵¹

175. Claimant notes that the form available in the Santo Domingo Chamber of Commerce's website only requires that shareholders report the nominal value of the acquired shares and not their commercial value, nor the price paid for them.¹⁵² Claimant's decision to not

¹⁴⁹ R2 — §§ 252-253.

¹⁵⁰ C3 — § 82; C2 — §§ 165-171.

¹⁵¹ C3 — § 83; C-169, Third Declaration of Mr. Michael Anthony Lee-Chin, § 37; C-152, Minutes of the Extraordinary General Meeting of the Shareholders of Lajun Corporation, S.R.L., dated June 27, 2013, unanimously ratifying the contract for the sale, purchase, and transfer of 50,000 Lajun shares to Wilkison Company (25,000 shares) and Nagelo Enterprises (25,000 shares), with a nominal value of DOP 150.00 each, for a total nominal value of DOP 7,500,000.00; Claimant filed the three contracts together as part of the same exhibit (C-22) with two annexes, Framework Agreement (R-91), accompanied by Annex A (R-95) (Shares Contract) and Annex B (R-96) (Land Contract)).

¹⁵² C3 — § 84; CL-116, Commercial Registry Law No. 03-02, dated January 18, 2002; CL-113, Law No. 11-92, dated May 16, 1992, approving the Dominican Republic's Tax Code; C-180, (No date) "Draft Form" of "Share Transfer Statement, obtained from the Santo Domingo Chamber of Commerce.

disclose additional information in a situation where the law and applicable regulations did not require him to do so is not—in Claimant’s view—a sign of corruption or malfeasance, it is an exercise in discretion and prudence.¹⁵³

176. Claimant avers that Respondent errs when it alleges that, pursuant to Law No. 11-92, Claimant was jointly liable for any tax debts arising from the sale of the Lajun shares and, pursuant to Article 1 of General Norm 07-2011, Claimant was a withholding agent that should have retained 1% of the purchase price of the Lajun shares. For the reasons discussed *infra*, both arguments are—in Claimant’s view—incorrect.¹⁵⁴
177. Claimant argues that, contrary to Respondent’s allegations, he did not defraud the Dominican tax authority when failing to pay the taxes related to the Shares Contract. Claimant asserts that the first obligation specified by Respondent refers exclusively to the tax debts of the company itself at the time of the transaction, and not to the tax debts of the seller. Furthermore, according to Claimant, at the time Claimant purchased the Lajun shares there was no way of knowing whether the sale would result in a capital gain for the seller. Claimant adds that, at any rate, the obligations in question do not apply to foreign entities.¹⁵⁵
178. In any event, Claimant asserts that the burden to show the illegality of an investment is very high, and thus minor infractions do not suffice to dislodge a tribunal’s jurisdiction.¹⁵⁶
179. In fact, Claimant asserts, a close analysis of the cases cited by Respondent show that those cases are not applicable to the present dispute because their fact patterns relate to gross and severe violations of local law, which were “fundamental” for the acquisition of the investments in question or to protect significant interests, which is not the case here. Claimant underlines Respondent’s mischaracterization and his own emphasis on *Álvarez y Marín v. Panama*.¹⁵⁷ According to Claimant, unlike the present case, the violation at issue in *Álvarez y Marín v. Panama* pertained to a fundamental law, punishable by much more

¹⁵³ C3 — § 84.

¹⁵⁴ C3 — § 85.

¹⁵⁵ C3 — §§ 86-87; CL-135, *Gaceta Judicial, Silvio Hodos, La Controversial Responsabilidad Tributaria del Comprador de Bienes en cuanto a la Ganancia de Capital Generada*, Edición 390, dated October 23, 2019; CL-136, *Dirección General de Impuestos Internos, Guía Informativa: Impuesto a la Ganancia de Capital* (February 2019).

¹⁵⁶ C3 — § 88; C2 — §§ 175-178.

¹⁵⁷ C3 — § 92; RL-346, *Álvarez y Marín v. Panama*.

than just symbolic fines, a violation which was prosecuted diligently by Panama. Nonetheless, Claimant maintains, *Álvarez y Marín v. Panama* is instructive for the standard it formulates, according to which, a tribunal presented with an illegality objection must weigh four factors in assessing whether it has properly been seized of jurisdiction:

- (i) the importance of the legal provisions allegedly breached;
- (ii) the public interest that is being protected by such legal provisions;
- (iii) the sanctions contained in the local law for such breach; and
- (iv) the conduct of the State once the breach was discovered.¹⁵⁸

180. According to Claimant, failure to pay the nominal taxes due in connection with the purchase of Lajun would not amount to a gross and severe violation of local law, such that Claimant's investments would be rendered illegal *vis-à-vis* the Treaty.¹⁵⁹ Claimant particularly stresses that the Dominican Tax Code expressly states that the infraction of formal duties is not a tax crime, and is therefore not subject to the criminal laws of the Dominican Republic.¹⁶⁰ In reality, the penalty for infringing the formal duties Respondent has accused Claimant of infringing is minimal and limited to symbolic monetary sums. Claimant argues that the formal duties that Claimant allegedly infringed do not represent the Dominican Republic's fundamental norms and laws and that there is no public interest that is preserved or protected through enforcement of the formal duties allegedly infringed. Moreover, in the almost eight years that have passed since the purchase of the Lajun shares, the Dominican tax authorities have never investigated or sanctioned Claimant for alleged tax evasion or tax fraud with regards to the purchase of the Lajun shares or the acquisition of his investments. Nor can they now, considering that the statute of limitations for prosecuting Claimant on the basis of his alleged tax violations has lapsed.¹⁶¹

¹⁵⁸ C3 — § 92; C2 — §§ 177-178; RL-346, *Álvarez y Marín v. Panama*, § 317.

¹⁵⁹ C3 — §§ 88-93.

¹⁶⁰ C3 — § 89.

¹⁶¹ *Ibid.*

C) The Tribunal's analysis

181. The Tribunal considers that, in the case at hand, it should first determine the legal consequence of a declaration of illegality. Respondent claims that investments acquired through an illegal scheme are not protected under investment treaties, while Claimant alleges that only certain “gross and severe” violations of local law could ultimately deprive an investment of treaty protection.
182. Claimant has presented a line of arbitral precedent that evidences a tendency towards addressing the matter with reference to a certain standard or threshold, which accepts that not every violation of local law can warrant deprivation of investment protection under the Treaty, but just those having certain significance. The Tribunal accepts that there is a general principle, which applies here, precluding investments acquired illegally from enjoying treaty protection. In that vein, the tribunal in *Fraport AG v. Philippines II* held as follows:

“The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would [sic] 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.”¹⁶²

183. However, a case-by-case approach is to be adopted in considering whether, in the present circumstances, there is a violation of the law that is clear and has certain significance. In the Tribunal's opinion, the cases cited by Respondent clearly indicate that tribunals distinguish and thoroughly analyze the type and level of a breach.¹⁶³
184. The Parties invoked the specific test used by the tribunal in *Álvarez y Marín v. Panama*. While this test is not directly applicable as such, the Tribunal accepts that the elements

¹⁶² RL-339, *Fraport AG v. Philippines II*, § 332.

¹⁶³ C2 — § 175; R1 — §§ 286-289; RL-343, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award dated August 16, 2007, § 404; RL-344, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated August 27, 2008 (“*Plama v. Bulgaria*”), §§ 143-145; RL-346, *Álvarez y Marín v. Panama*, and RL-314, *Anderson v. Costa Rica*.

listed by such tribunal are important elements to be taken into account: the importance of the legal provisions breached; the public interest that is being protected by them and violated as a result of the breach; the sanction contained in the local law for such breach; and the conduct of the host State once the breach was discovered.¹⁶⁴

185. Consideration of the elements referenced from the specific perspective of this case permits the adoption of a favorable position towards the arguments raised by Claimant. Indeed, even if the existence of a tax violation by Claimant were established, it would not suffice to undermine the fact that the purchase of the Lajun shares—which constitutes only a portion of Claimant’s investments—has actually occurred. What we have here would not be an illegal act that is conducted in order to carry out the investment (*i.e.*, which could be deemed to “constitute” the investment, like in *Anderson v. Costa Rica*)¹⁶⁵, but rather—if Respondent’s allegations were accepted—an illegal act that allegedly took place after the investment was made. The tax violation at issue (which would stem from Claimant’s failure to declare the commercial value of the transaction) would refer to specific tax provisions, and thus the generic reference made by Respondent to the Constitution in connection with the duty to pay taxes can hardly be considered persuasive. Respondent’s generic reference to tax crimes that might be punishable by imprisonment is also unpersuasive since what matters here is the specific infraction attributed to Claimant. While it is undeniable that tax duties are evidently relevant from a general standpoint, it is no less true that not all infringements that might be committed with respect to them have the same scope and potential severity. Furthermore, in this particular case, the tax violation invoked by Respondent has not been sanctioned—and, seemingly, not even investigated—by any Dominican authority.

186. In addition to the foregoing, this Tribunal deems the following assertion contained in the award in *Álvarez y Marín v. Panama* regarding the need to demonstrate the severity of an infringement to be particularly important and endorses it in full:

“In regard to the thresholds at which an infringement warrants the penalty of loss of protection, the Tribunal understands that the infringement must be severe. A general principle of Law requires

¹⁶⁴ RL-346, *Álvarez y Marín v. Panama*, §§ 317 and 398.

¹⁶⁵ RL-314, *Anderson v. Costa Rica*, esp. § 25.

proportionality between the nature of the infringement and the severity of the penalty. Loss of legal protection under international law is a severe penalty, which, in addition, allows for no mitigation. Such a sanction should only be imposed if the infringement committed by the foreign investor is significant. In cases where the infringement is minor, the State may impose the sanctions provided for in its domestic law, but it would be disproportionate to deprive the investor of legal protection under international law.”¹⁶⁶ [Tribunal’s Translation]

187. The Tribunal finds that, in the present case and for the reasons stated when analyzing the test proposed by the award itself, the violations adduced by Respondent are not severe enough so as to reach, even if established, the highest threshold mentioned in the preceding paragraph. The Tribunal must necessarily distinguish between different levels of breaches, as ultimately each regulation, at least indirectly, can be linked to a legitimate and genuine public purpose. In the present case, assuming that the alleged illegality of the investment—as described by Respondent—is established, it cannot justify declining jurisdiction over the case. As indicated by the reasoning excerpted from the award in *Alvarez and Marín v. Panama*, the sanction would be disproportionate.

188. While the above finding is sufficient to reject Respondent’s objection, the Tribunal emphasizes that it has found no sufficient basis for establishing in fact the existence of illegality as argued by Respondent. The Tribunal notes that, with respect to Respondent’s arguments that Claimant was jointly liable for any taxes due on the sale of the shares of Lajun and that moreover he had the obligation to act as a withholding agent, the explanation provided by Claimant, in light of the regulations relied upon, is consistent.¹⁶⁷ Further, the Tribunal finds that the evidence submitted by Respondent in connection with the alleged tax fraud does not demonstrate the existence of unlawful activity. Rather, as advanced by Claimant, it evidences that the matter had not been considered until very recently by local authorities.

¹⁶⁶ *Ibid.*, § 151.

¹⁶⁷ *Supra*, § 176196.

189. Accordingly, in view of the reasons stated in the preceding paragraphs, the Tribunal finds that the objection raised by Respondent based on the alleged illegality of the investment cannot be admitted in the present case.

3. *The issue of Abuse of Right*

A) The Respondent's position

190. According to Respondent, the Tribunal lacks jurisdiction over a portion of Claimant's alleged indirect investment in Lajun and over the Portion of Land as Lajun Shares (indirectly held through the shares in Kigman), as well as the Portion of Land (indirectly held through the shares in Nagelo and Wilkison), which were acquired through a clear abuse of right scheme; that is to say, acquired when a dispute with the Republic already existed, or at least it was reasonably foreseeable, and for the sole purpose of falling within the scope of protection of the Treaty.¹⁶⁸
191. Respondent claims that the institution of arbitration proceedings constitutes an abuse of right when the investor carries out corporate changes or ownership transfers for the sole purpose of benefitting from treaty protection when disputes with the State already exist, or when such disputes are reasonably foreseeable,¹⁶⁹ and that this has been the view of a number of arbitral tribunals.¹⁷⁰
192. Thus, Respondent notes, the tribunal in *Tidewater v. Venezuela* clearly established that the decisive factor in determining the existence of an abuse of right rests on whether “the

¹⁶⁸ R1 — § 295.

¹⁶⁹ R2 — § 255.

¹⁷⁰ R1 — § 301, RL-350, *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12 (UNCITRAL), Award on Jurisdiction and Admissibility dated December 17, 2015, § 554: “[T]he initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise”, RL-109, *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated February 8, 2013, (“*Tidewater v. Venezuela*”); RL-328, *Alapli v. Turkey*, § 403; RL-351, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction dated February 21, 2014, § 76; RL-108, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections dated June 1, 2012, § 2.99; RL-352, *Renée Rose Levy and Gremcotel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award dated January 9, 2015, § 185; RL-353, *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A v. Republic of Panama*, ICSID Case No. ARB/13/28, Award dated June 2, 2016, § 102; RL-333, Zachary Douglas, *The International Law of Investment Claims*, (Cambridge University Press 2009), p. 465.

existence of the [] dispute was within the reasonable contemplation” of the investor, or, in other words, whether the dispute was “reasonably foreseeable.”¹⁷¹

193. Respondent adds that investments made through an abuse of right cannot be considered investments made in good faith and, therefore, do not deserve protection under the Treaty. To support this argument, Respondent relies on the decision in *Phoenix v. Czech Republic* that the arbitral tribunal has to “prevent an abuse of the system of international investment protection” thus “ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.”¹⁷²

194. Respondent argues that, prior to December 2015, Claimant was not a shareholder in Kigman. A share certificate regarding Kigman shares under Claimant’s name was issued in December 2015.¹⁷³ In fact, before Kigman shares were transferred to Mr. Lee-Chin, there was no protected investor under the Treaty who could make a claim for the direct or indirect ownership of that 40% shareholding in Lajun – since no one in the corporate chain had the nationality of any of CARICOM’s member countries.¹⁷⁴

195. According to Respondent, Claimant merely cites in support of his position his Third Declaration and Kigman’s Board of Directors’ meeting minutes dated July 12, 2013 (together with two bearer share certificates), whereby Claimant was granted a power of attorney to represent Kigman’s interests and manage its business and assets. Claimant also asserts that, under Panamanian Law No. 18 enacted in 2015, Kigman issued nominal

¹⁷¹ RL-109, *Tidewater v. Venezuela*, §§ 148, 193. See also RL-354, Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press 2016), p. 224.

¹⁷² RL-309, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated April 15, 2009, § 113, and also §§ 92, 106, 107, 143: “To change the structure of a company complaining of measures adopted by a State for the sole purpose of acquiring an ICSID claim that did not exist before such change cannot give birth to a protected investment. (...) In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. (...) Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused. (...) The Tribunal is concerned here with the international principle of good faith as applied to the international arbitration mechanism of ICSID. (...) The abuse here could be called a ‘*détournement de procédure*’, consisting in the Claimant’s creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled;” RL-340, *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Award dated December 6, 2016, § 492.

¹⁷³ R2 — § 258.

¹⁷⁴ R1 — § 297. Even though Kigman is a Panamanian company and there is a bilateral investment treaty between Panama and the Dominican Republic, such treaty contains a restrictive definition of the term “investor”, because it only protects legal entities organized in Panama and exercising actual economic activities in Panama, which is why it may be assumed that Kigman could not have made a claim under such treaty as it was a company on paper.

shares under his name, in replacement of the bearer shares that had been previously issued and were allegedly in his possession. According to Respondent, these documents are insufficient to prove that Claimant owned Kigman shares prior to December 29, 2015, as Kigman was a company whose ownership was represented by bearer shares, and it is indisputable that the ownership of bearer shares corresponds to whoever possesses them. That is why bearer shares must be issued in physical certificates. Respondent goes on to state that what matters is possession of physical certificates, and Claimant has failed to demonstrate that he was in possession of such physical certificates at the relevant moment and prior to December 29, 2015.¹⁷⁵

196. Respondent avers that, in December 2015, the dispute between Claimant and Respondent was already foreseeable.¹⁷⁶ At that time (i.e., on December 29, 2015), a series of events that Claimant himself describes as violations of the Treaty standards had already occurred. In Respondent's opinion, this shows that there was already a dispute over the Concession Agreement and the management of the Duquesa Landfill, or, at least, that such dispute was reasonably foreseeable, namely:

- (i) on July 9, 2013, the ASDN terminated the Concession Agreement for the first time on account of serious contract breaches, such as the non-operation of the Duquesa Landfill as a sanitary landfill, the failure to construct a perimeter fence, the failure to protect the environment and the aquifer, as well as the improper handling of leachates and biogases, and then took possession of the landfill¹⁷⁷ (which Claimant himself describes in his Statement of Claim as the “initial expropriation”);¹⁷⁸
- (ii) on February 19, 2014, after the conclusion of the Settlement Agreement 1, whereby Lajun regained control and management of the landfill, two Civil Organizations filed complaints regarding the Concession Agreement before

¹⁷⁵ R2 — §§ 260-262.

¹⁷⁶ R2 — § 259.

¹⁷⁷ R1 — §§ 142, 299.

¹⁷⁸ C1 — §§ 86-98.

the General Directorate of Public Procurement, requesting that it be annulled on the grounds of violation of Law No. 340-06 of Public Procurement;¹⁷⁹

(iii) on March 12, 2014, the Ministry of Environment requested that an environmental management and compliance program be submitted for the Duquesa Landfill within a term of three months; Lajun submitted such program a year and a half later, on December 1, 2015.¹⁸⁰

197. According to Respondent, throughout that period, Lajun's breaches of its obligations were constant, and the disagreements between Lajun and the ASDN or other agencies of the Dominican government due to mismanagement of the Duquesa Landfill were repeated.¹⁸¹

198. Respondent further argues that, prior to December 2016, Claimant did not own the Land. The Portion of Land was registered under Nagelo and Wilkison's names in December 2016.¹⁸² Respondent contends that it is not until registration of the Portion of Land that ownership may be deemed to have been transferred.¹⁸³ For Respondent, pursuant to Dominican real estate law, it is only when a land purchase agreement is registered before the Dominican Republic's National Registry that the purchaser acquires a real property right that is effective against third parties.

199. Respondent insists that, when Nagelo and Wilkison allegedly acquired ownership of the Portion of Land through its registration in the National Registry, there was already a dispute with the Republic over the Concession Agreement and the management of the Duquesa Landfill, or, at least, such dispute was reasonably foreseeable. Respondent completes its account of the events mentioned *supra* by recalling that, by late 2016, other additional events that Claimant himself includes as part of his purported "creeping expropriation" had already occurred, namely:

- the imposition of the 2016 Environmental Sanction;

¹⁷⁹ R1 — §§ 159-160, 299.

¹⁸⁰ R1 — §§ 163, 175, 299.

¹⁸¹ R1 — §§ 55-56, 62, 97, 136-138, 163, 299.

¹⁸² R1 — § 300; R2 — § 264. See C-66, Certificate of Title issued by the National Registry of Land Jurisdiction of the Dominican Republic's Judiciary, dated December 6, 2016.

¹⁸³ R2 — § 266.

- the alleged conflict over the renewal of the Environmental Permit;¹⁸⁴ and
- the alleged incident concerning medical waste of November 2016.¹⁸⁵

B) The Claimant's position

200. Claimant asserts that the investment was acquired in 2013 when he purchased Lajun and the Land.¹⁸⁶ Claimant highlights that Respondent's objection is based on the following events:

- Kigman bearer shares were replaced by a new share certificate issued under Claimant's name in December 2015; and
- the Land was not registered under Nagelo and Wilkison's names until December 2016.

201. Claimant maintains that, in July 2013, he acquired two bearer share certificates representing 250,000 shares of Kigman each, for a grand total of USD 500,000.¹⁸⁷ In addition, Claimant asserts that he has been the sole owner of Kigman, a Panamanian company, since 2013 when he acquired the bearer share certificates and was granted full and ample powers ("*Poder Amplio y General*") to represent Kigman and to administer and manage the company's assets, businesses, and interests without restriction.¹⁸⁸

202. According to Claimant, the issuance of a replacement nominal share certificate was necessary in order to comply with a law enacted by the Republic of Panama in 2015 prohibiting the issuance of bearer share certificates and requiring that all existing certificates that had previously been issued be replaced.¹⁸⁹

¹⁸⁴ R1 — §§ 123-127, 300.

¹⁸⁵ R1 — §§ 184, 300.

¹⁸⁶ C2 — § 181.

¹⁸⁷ C3 — § 96.

¹⁸⁸ C2 — § 182; C3 — § 96; C-169, Third Declaration of Mr. Michael Anthony Lee-Chin, §§ 12, 15, 43-44; C-173, Kigman Del Sur, S.A.'s Board of Directors' Meeting Minutes, dated July 12, 2013, with accompanying bearer share certificates; C-174, Kigman Del Sur, S.A.'s Shareholders' Extraordinary General Meeting Minutes, dated July 15, 2013, granting Michael Anthony Lee-Chin full power and authority to represent Kigman's interests in any part of the world as well as the power to manage the company's business and assets.

¹⁸⁹ C2 — §§ 183-184; C3 — § 99; C-169, Third Declaration of Mr. Michael Anthony Lee-Chin, §§ 15, 43-44; CL-110, Law No. 18 of April 23, 2015 (Panama). Claimant's Kigman bearer share certificates Nos. 001 and 002 fell within the scope of Article 4 of Law No. 18 because they were issued on July 12, 2013, that is, prior to the May

203. Claimant recalls that he acquired the Land on June 26, 2013. However, Claimant avers that the parties to the transaction agreed that the Land would not be registered under Nagelo and Wilkison's names until such time as every payment that was due had been received.¹⁹⁰ According to him, the Land "was not cheap", and the payments were meant to be spread across several years; accordingly, there was a lag between the execution of the Sales Purchase Agreement and the Land's registration.¹⁹¹ Claimant contends that, from the moment he acquired the Land on June 26, 2013, he was the only person who had property rights thereon (through Nagelo and Wilkison).

204. Claimant argues that Respondent's efforts to distinguish Claimant's rights through the parsing of *inter partes* and *erga omnes* rights are "purely academic."¹⁹² Claimant emphasized that, on December 6, 2016, Nagelo and Wilkison registered the Land before the Dominican Republic's National Registry, and that the registration certificate/certificate of title clearly states that the property was acquired on June 26, 2013, evidencing that, under Dominican law, the property is acquired when the sale/purchase agreement of the parties is complete.¹⁹³

C) The Tribunal's analysis

205. First of all, the Tribunal notes that Claimant does not seem to dispute that the Tribunal may, in principle, sanction a potential abuse of right.

206. For the sake of clarity, the Tribunal confirms that the legal basis to sanction an abuse of right need not be enshrined in the Treaty. The Tribunal accepts that – consonant with the tribunal's statement in *Tidewater v. Venezuela* – the institution of arbitration proceedings constitutes an abuse of right when the investor carries out corporate changes

4, 2015 entry into force of Law No. 18; see also C-173, Kigman Del Sur, S.A.'s Board of Directors' Meeting Minutes, dated July 12, 2013, with accompanying bearer share certificates.

¹⁹⁰ C2 — § 186; C-169, Third Declaration of Mr. Michael Anthony Lee-Chin, § 45; C-153, Receipt of Payment from José Antonio López Díaz regarding the Land dated November 11, 2016; C-172, Relinquishment of Rights and Withdrawal of Actions, issued by José Antonio López Díaz dated November 11, 2016, authorizing the Dominican Title Registrar to transfer the title of the Land to Nagelo Enterprises, S.A. and Wilkison Company, S.R.L., following receipt of USD 2.5 million payment in full with regards to the Land, in accordance with the Land Purchase Agreement executed on June 26, 2013.

¹⁹¹ C3 — § 100.

¹⁹² C3 — § 101.

¹⁹³ C2 — § 188; C-66, Certificate of Title issued by the National Registry of Land Jurisdiction of the Dominican Republic's Judiciary, dated December 6, 2016.

or ownership transfers for the sole purpose of benefitting itself from treaty protection when disputes with the State already exist, or when such disputes are reasonably foreseeable.¹⁹⁴ It is equally clear to this Tribunal that it certainly has the duty – in the words of the tribunal in *Phoenix v. Czech Republic* – to “prevent an abuse of the system of international investment protection.”¹⁹⁵

207. In the instant case, it is worth analyzing whether the constituent elements of an abuse of right have been shown to exist in Claimant’s activities as described by Respondent. That is to say, on the one hand, whether the issuance of share certificates under Claimant’s name in December 2015 and the fact that the Land was not registered under Nagelo and Wilkison’s name until December 2016 are circumstances that may give rise to an abuse of right linked to the “fabrication” of an arbitration. On the other hand, the Tribunal must verify whether, as Respondent contends, the dispute was already foreseeable before Claimant carried out the above-mentioned activities.
208. Claimant maintains that, in July 2013, i.e., before 2015, he acquired two bearer share certificates representing 250,000 shares of Kigman each, for a grand total of USD 500,000. In such regard, it should be noted that Respondent itself recognizes how “difficult” it is to prove ownership of bearer shares.¹⁹⁶ The Tribunal accepts that the issuance of a replacement nominal share certificate was necessary in 2015 in order to comply with a law enacted by the Republic of Panama prohibiting the issuance of bearer share certificates and requiring that all existing certificates that had previously been issued be replaced by nominal shares. The Tribunal also accepts that Claimant has submitted sufficient and consistent evidence in support of the conclusion that Claimant became a holder of bearer share certificates in July 2013.¹⁹⁷

¹⁹⁴ RL-109, *Tidewater v. Venezuela*, § 148.

¹⁹⁵ RL-309, *Phoenix v. Czech Republic*, § 113.

¹⁹⁶ R2 — § 263; According to Respondent, in view of how “difficult” it is to prove ownership of bearer shares, there are methods that are frequently used by companies with good standing in order to establish ownership of those shares at all times, such as their deposit with a notary public or a bank duly approved to have custody thereof by means of a trust or similar agreement. Claimant has not made use of any of those options and has no sufficient evidence to prove ownership of Kigman shares at the relevant time.

¹⁹⁷ The Tribunal agrees with Claimant – though less emphatically – that, in light of the ample rights and powers granted to Mr. Lee-Chin, it is unfathomable that any other party could credibly assert ownership over Kigman. See C3 — § 96; C-174, Kigman Del Sur, S.A.’s Shareholders’ Extraordinary General Meeting Minutes, dated July 15, 2013 (see *supra* footnote 186).

209. Concerning registration of the Land, the Tribunal also finds that Claimant offered a plausible and reasoned explanation about why the Land was registered only in 2016: Claimant acquired the Land on June 26, 2013, but the parties to the transaction agreed that the Land would not be registered under Nagelo and Wilkison's names until such time as every payment that was due had been received. Respondent has provided no conclusive evidence to dispute that Nagelo and Wilkison executed the Land Purchase Agreement on June 26, 2013 ("**Land Contract**").
210. The Tribunal takes note of the Parties' disagreement as to the effect of registration under the law of the Dominican Republic:
- Respondent argues that, in accordance with Dominican law, the sale/purchase agreement transfers ownership between purchaser and seller (i.e., a personal or *inter partes* right is acquired), but, in the case of real property, it is only through registration of such agreement in the Dominican Republic's National Registry that the purchaser acquires a right of ownership effective against third parties, i.e., a real property right with *erga omnes* effects.¹⁹⁸
 - Claimant argues that, from the moment he acquired the Land on June 26, 2013, Claimant was the only person who had property rights thereon (through Nagelo and Wilkison), and that is what counts. Respondent's efforts to distinguish Claimant's rights through the parsing of *inter partes* and *erga omnes* rights are purely academic. Under Dominican law, a property right is not acquired through the registration in the Public Registry, but rather is acquired through the means established in the Dominican Civil Code, such as via a contract that predates the registration in the Public Registry.¹⁹⁹
211. The Tribunal believes that it does not need to engage in this discussion, which is not based on a discrepancy, as there is no dispute between the Parties as to the fact that, in any event, the purchase of the Land originated in 2013 and was certainly not decided in 2015. Thus, it was in 2013 that Nagelo and Wilkison became owners of the Land, pursuant to Dominican law. Nor is there, or could there be, any dispute on this matter,

¹⁹⁸ R1 — § 123; R2 — § 266.

¹⁹⁹ C3 — §§ 101-103.

since the Civil Code is clear about it, as recognized by the Supreme Court of Justice of the Republic in Judgment No. 1048 of May 31, 2017,²⁰⁰ where it pointed out that real property is acquired through the means established in the Republic's civil laws, such as succession or civil contracts, not through registration in the land registry.

212. Respondent is correct – as confirmed by the Court in the same decision mentioned in the foregoing paragraph – when stating that only through registration of the relevant certificate of title in the land registry does the property right become effective before third parties.²⁰¹ But what is under discussion here is the date of acquisition of the property, i.e., the date on which the existence and ownership of the real property right are established. And, as the Court recalls – always in the same decision – “existence and ownership are proven by the certificate of title.”²⁰² [Tribunal's Translation] On this point, there is no discussion as to the effectiveness of a duly proven property right, but merely as to the title of the owner of the property.
213. Therefore, the Tribunal cannot ground its conclusion about a potential abuse of right on the mere fact that registration of the real property right has been voluntarily delayed by the parties to the relevant transaction. Nor can it do it on the basis that Claimant's shares in Kigman were bearer shares at the time of acquisition.
214. Furthermore, the Tribunal is of the opinion that it has not been demonstrated that the only reason for such activities – which were, by the way, lawful – was to artificially create the conditions for instituting an arbitration. The Tribunal admits that it is difficult to find direct evidence of such intention; nevertheless, sufficient indirect evidence to show that a claimant has actually taken a series of measures to artificially seek protection under a treaty (*e.g.*, through a given restructuring or the acquisition of relevant assets) will, in any event, inescapably need to be provided.
215. Albeit unnecessary in light of the conclusion *supra*, the Tribunal goes on to briefly analyze Respondent's assertion about the foreseeable nature of the dispute at the time when Claimant carried out the activities discussed in the foregoing paragraphs. The Tribunal

²⁰⁰ R-0098, Judgment No. 1048 issued by the Supreme Court of Justice, dated May 31, 2017.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

deems it proven that certain discrepancies had already arisen in 2013.²⁰³ However, such discrepancies were not inevitably to lead to a dispute or, specifically, an arbitration. The Tribunal needs to elaborate no further for purposes of this objection, but it stresses that there is actually no discrepancy in that the Parties managed to overcome different problems that arose during their mutual relationship and that the solutions reached were reflected in the different modifications of the contractual framework. In other words, it is difficult to assume as conclusive evidence that a Party has taken certain actions to abusively bring an arbitration, when, after the dates of such actions, it continued entering into settlement agreements with the other.²⁰⁴

216. For the foregoing reasons, the Tribunal determines that Respondent has failed to demonstrate that the threshold to establish an abuse of right in order to gain access to arbitration has been met in this case.

VII. PRELIMINARY OBJECTIONS ON THE MERITS

1. The issue of the general exemption as regards any action taken to protect a State's own national security interests

217. Article XVII(2) of Annex III of the Treaty, relied upon by Respondent, sets forth:

ARTICLE XVII(2)

GENERAL EXEMPTIONS

This Agreement shall not preclude the application by either Party of measures necessary for the protection of its own national security interests.

A) The Respondent's position

218. Respondent first indicates that Article XVII(2) of Annex III of the Treaty expressly includes some "general exemptions" from application thereof, such as taking "measures necessary for the protection of [the host State's] own national security interests." Thus, by virtue of the general exemption under the Treaty, the host State has the power to take

²⁰³ *Supra*, § 196.

²⁰⁴ It should be noted that the Second Settlement Agreement (C-8) was entered into on May 24, 2017.

any action necessary for the protection of its own national security interests without incurring any liability whatsoever under any of the substantive provisions of the Treaty.²⁰⁵

219. First of all, Respondent submits that an action taken for the protection of essential national security interests—as purportedly taken by Respondent herein—should not be subject to an advanced review; it is not for Claimant or the Tribunal to either determine what action can be taken to protect a State’s essential national security interests, or to assess the appropriateness, effectiveness or wisdom of such action.²⁰⁶ Rather, Respondent invites the Tribunal to just determine whether the action taken by Respondent is related to the protection of the State’s essential national security interests.²⁰⁷ Respondent emphasizes that it has never argued that Article XVII(2) of Annex III of the Treaty was self-judging, and thus all that discussion is irrelevant for purposes of this Arbitration.²⁰⁸

220. Respondent emphasizes, in particular, the following conclusion reached by the investment tribunal in *CC/Devas v. India*:

“[T]hese terms [of the ‘essential security interests’ clause] provide the State with considerable freedom as to the action it can take (...) [T]he Tribunal has also no difficulty in recognizing the ‘wide measure of deference’ mentioned by the Respondent. An arbitral tribunal may not sit in judgment on national security matters as on any other factual dispute arising between an investor and a State. National security issues relate to the existential core of a State. An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof,

²⁰⁵ R1 — §§ 307-308; Respondent emphasizes that the application of this exemption should be distinguished from the state of necessity defense under customary international law, and therefore an analysis thereof should not include its requirements (including the fact that the action taken is the only one available or that the State has not contributed to the emergency situation). See RL-355 (CL-100), *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10 (UNCITRAL), Interim Award dated December 13, 2017 (“*Deutsche Telekom v. India*”), § 229; RL-337, Jeswald W. Salacuse, *The law of investment treaties* (Oxford University Press, 2015), p. 385; RL-356, Peter Tomka, “Defenses Based on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties”, in M. Kinnear and others (eds.), “*Building international investment law: The first 50 years of ICSID*” (Kluwer International Law, 2015, p. 493).

²⁰⁶ R2 — § 280, R1 — § 317.

²⁰⁷ R2 — § 281.

²⁰⁸ R2 — § 277.

such as bad faith, absence of authority or application to measures that do not relate to essential security interests.”²⁰⁹

221. Respondent further stresses that it is not invoking here a state of emergency under customary international law; therefore, it asserts, the related conditions are not applicable to Article XVII(2) of Annex III of the Treaty.²¹⁰ Accordingly, Respondent submits that it is not required to show that the action taken was the only available option in the circumstances, or that it did not contribute to the situation.²¹¹
222. In any event, if the Tribunal decided to conduct an in-depth analysis of the matter at issue, Respondent asserts that it validly invoked the clause, as threats to public health or the environment are included within the concept of “national security.”²¹² Respondent submits that the essential or national security interest protection clauses have been interpreted broadly by arbitral tribunals, which have even considered that an economic crisis may amount to an essential security interest.²¹³ In particular, Respondent refers to an UNCTAD Report, which reads:

²⁰⁹ R2 — § 282; RL-367, *CC/Devas (Mauritius) Ltd. and Others v. The Republic of India*, PCA Case No. 2013-09 (UNCITRAL), Award on Jurisdiction and Merits dated July 25, 2016, (“*Devas v. India*”) §§ 235, 244, 245. See also RL-368, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award dated September 5, 2008 (“*Continental Casualty v. Argentina*”), § 181: “[T]his objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight”; RL-355 (CL-100), *Deutsche Telekom v. India*, § 238; see also R2 — § 284; Respondent refers to the case-law of specific human rights organizations within the context of its argument on deference to a State’s essential security interests, to establish that the findings on national security are also entitled to some special deference in that regard.

²¹⁰ R2 — § 289.

²¹¹ R2 — § 282.

²¹² R1 — § 318; R2 — § 283.

²¹³ R1 — § 318; RL-370, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated September 28, 2007 (“*Sempra v. Argentina*”), § 374 (“The Tribunal considers that there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI. Essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law.”); RL-368, *Continental Casualty v. Argentina*, § 181; RL-371 (CL-29), *LG&E Energy Corp and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated October 3, 2006 (“*LG&E v. Argentina*”), § 238; RL-335, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award dated October 31, 2011 (“*El Paso v. Argentina*”), § 611; according to Respondent, this broad interpretation of the concept of “national or essential security” is consistent with the interpretation adopted by the International Court of Justice (“ICJ”). See RL-372, William W. Burke-White and Andreas Von Staden, “Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties”, *Virginia Journal of International Law*, vol. 48(2), 2008, p. 351. Indeed, as alleged by Respondent, public health and environmental issues have also been considered by the ICJ as an “essential interest” of the State, and thus should be deemed included within the

“The concept of ‘national security’ is broad and potentially ambiguous. The Oxford English Dictionary defines the term as the ‘safety of a nation and its people, institutions, etc., especially from military threat or from espionage, terrorism, etc.’ This definition is neither exhaustive concerning the object of protection nor concerning the origin of the threat. Thus, while the safety of the nation and its people is clearly at the core of the provision, one could reasonably argue that threats to the health of the population or the environment are covered too, as well as threats to the general political, economic and financial system of a country, including the domestic infrastructure and cultural traditions. Likewise, there may be a variety of causes for a threat to the national security. In addition to the above-mentioned examples of a military threat, espionage and terrorism risks may emerge too, for instance in connection with the spreading of diseases, natural disasters, civil strife, severe economic crises or attempted foreign control of vital national industries.”²¹⁴

223. Respondent insists that the tribunal in *Philip Morris v. Uruguay* has specifically recognized that the host State should be afforded a broad margin of appreciation and great deference in matters related to the protection of public health, as the responsibility for public health measures rests with the government of the host State:

concept of “essential or national security interests” of investment treaties. See RL-373, Peter Muchlinski, “Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate. The Issue of National Security”, in Karl Sauvant (ed.), *Yearbook on international investment law and policy* (Oxford University Press, 2008-2009, pp. 57-58; RL-374, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment dated September 25, 1997, *ICJ Reports*, 7 (1997), § 53: “The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an ‘essential interest’ of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission. The Commission, in its Commentary, indicated that one should not, in that context, reduce an ‘essential interest’ to a matter only of the ‘existence’ of the State, and that the whole question was, ultimately, to be judged in the light of the particular case; at the same time, it included among the situations that could occasion a state of necessity, ‘a grave danger to... the ecological preservation of all or some of [the] territory [of a State]’; and specified, with reference to State practice, that ‘It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an *essential interest* of all States.’”

²¹⁴ R1 — § 318; RL-366, UNCTAD, *The Protection of National Security in ILAs*, p. 7. See also RL-375, Tamara Chapman and Raymond Zilinskas, “Security and Public Health: How and Why Do Public Health Emergencies Affect the Security of a Country,” *NTI*, January 24, 2007.

“The Tribunal agrees with the Respondent that the ‘margin of appreciation’ (...) ‘applies equally to claims arising under BITs,’ at least in contexts such as public health. The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health (...) Substantial deference is due in that regard to national authorities’ decisions as to the measures which should be taken to address an acknowledged and major public health problem.”²¹⁵

224. According to Respondent, when a situation threatens national security (including public health or environmental reasons), it should be noted that the application of such general exemption means that the substantive obligations under the Treaty are not applicable. Numerous investment arbitral tribunals in different cases have established that, when the measures taken are necessary to protect a host State’s own national security interests, there cannot be a violation of the substantive obligations as regards treatment under the Treaty.²¹⁶
225. Respondent argues that the health and environmental situation resulting from Lajun’s breaches clearly undermined national security, as the Duquesa Landfill managed almost half of the solid waste of the country, and there was certain risk of a national health and

²¹⁵ R1 — § 319; RL-376, *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated July 8, 2016 (“*Philip Morris v. Uruguay*”), §§ 399, 418. See also RL-377, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, under NAFTA Chapter 11, Award dated August 25, 2014, § 9.37; RL-380, *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award dated July 7, 2011, § 145 (“The sources of international law have often found the State bears no responsibility when acting in the exercise of its police power and on a reasonable and necessary basis in order to protect public health, security, moral o welfare” [Tribunal’s Translation]); RL-378, Andrew Newcombe and Lluís Paradell, *Law and practice of investment treaties: Standards of treatment* (Kluwer International Law, 2009), p. 178, n. 157; RL-379, Stephan Schill and Vladislav Djanic, “Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law,” *ICSID Review*, vol. 33, 2018, pp. 47-48.

²¹⁶ R1 — §§ 320-321; RL-381, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic dated September 25, 2007 (“*CMS v. Argentina (Annulment)*”), § 129; RL-382, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, dated June 29, 2010, § 187; RL-368, *Continental Casualty v. Argentina*, § 164. See also RL-335, *El Paso v. Argentina*, § 554; RL-371, *LG&E v. Argentina*, § 261; RL-355, *Deutsche Telekom v. India*, § 227; RL-367, *Deras v. India*, § 293; see also RL-383, Christina Binder, “Circumstances Precluding Wrongfulness,” in M. Bungenberg and others (eds.) *International Investment Law: A Handbook*, (C.H. BECK, Hart, Nomos, 2015), pp. 476-477.

environmental crisis if Respondent failed to take all necessary measures to control this situation.²¹⁷

226. Respondent recalls that final disposal of solid waste is a basic public service which, by constitutional mandate, should be provided on an ongoing, regular and permanent basis.²¹⁸ According to Respondent, both public health and the protection and conservation of the environment have been declared by the Republic as a social and national interest.²¹⁹

227. Respondent submits that the ASDN based its application for annulment of the Agreement, *inter alia*, on the social alarm provoked by this conflict, due to the adverse effects on the public health of individuals near the area, thus leading to an increasing number of diseases and even the death of some citizens.²²⁰ The ASDN also mentioned that the improper management had caused a negative impact and serious environmental issues that posed a risk to the health of the inhabitants of Gran Santo Domingo, and that the attack and damage to health, the environment and public order constituted a high-priority national security concern that should be dealt with in the interest of public welfare and the rights of the inhabitants of these areas.²²¹

B) The Claimant's position

228. Claimant rejects Respondent's interpretation of Article XVII(2) of Annex III of the Treaty.

²¹⁷ R2 — § 286.

²¹⁸ R2 — Footnote 739.

²¹⁹ R1 — § 322; RL-281, Law No. 42-01 on Public Health, Article 4, dated March 8, 2001; RL-274, Law No. 64-00 on the Environment, Article 4, dated August 18, 2000.

²²⁰ R1 — § 329; according to Respondent, the neighbors of the Duquesa Landfill revealed the serious damage suffered by the nearby communities and threatened to hold protests and demonstrations, alleging that "there are countless sick people and many have died... due to the contamination as a result of an improper management" of the Duquesa Landfill, "many have died, kids and adults," and that "they are killing us little by little, nobody is healthy in this area" [Tribunal's Translation]. See R-145, Summary of communications from Neighbors' Committees of the Duquesa Landfill to the ASDN, dated August 28, 2017, pp. 3, 4, 7 (letters from "El Progreso", "25 de febrero", "Los Pinos de los Casabes" and "Barrio Norte" Neighbors' Committees, respectively).

²²¹ C-11, Administrative Proceeding filed by the ASDN in order to nullify the Concession Agreement, dated August 10, 2017.

229. Claimant submits that Article XVII(2) of Annex III of the Treaty does not specify whether the necessity of a measure is subject to the State's discretion or appreciation.²²² Claimant argues that Article XVII(2) of Annex III of the Treaty is not a self-judging clause since it does not include the expression "which the state considers" necessary. According to Claimant, the Tribunal has the power to conduct a full-blown review as to whether the criteria for successfully invoking the security exception have been met.²²³ Claimant argues that, in any event, even with self-judging clauses, the wide discretion that is afforded to the invoking state is still subject to a good faith review.²²⁴
230. In this respect, according to Claimant, the standard of judicial review of non-self-judging clauses—such as Article XVII(2) of Annex III of the Treaty—is that a tribunal will determine:
- (i) whether the measure was principally targeted at addressing a national emergency and protecting the essential security interests at stake, and
 - (ii) whether the measure was objectively required in order to achieve that protection or whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations.²²⁵
231. Notably, as pointed out by Claimant, investment arbitral tribunals have interpreted the scope of a national security exception as primarily relating to military and defense matters or a situation of serious economic distress.²²⁶
232. Claimant invites the Tribunal to conduct an in-depth scrutiny of the issue and conclude that Respondent's declaration was not targeted at a qualifying emergency (that is, the declaration does not primarily relate to military and defense matters or a situation of

²²² C3 — § 112.

²²³ C2 — § 201; C3 — § 110; C-162, Expert Opinion of Professor Andrea Bianchi.

²²⁴ C2 — § 200.

²²⁵ § 204; C-162, Expert Opinion of Prof. Andrea Bianchi.

²²⁶ *Ibid.* See also C2 — § 207; Claimant argues that one cannot use, unlike Respondent, the jurisprudence and case law of human rights to interpret investment treaties and produce outcomes that are unintended by the parties and difficult to justify in terms of Article 31 of the Vienna Convention of 1986.

serious economic distress for the State where security interests were at stake and needed to be protected).²²⁷

233. The declaration was targeted at allegedly remedying a sanitary situation that—according to Claimant–Respondent itself created, and likely could have avoided.²²⁸ Specifically, in Claimant’s submission, each and every one of the breaches argued by Respondent arose directly from the dire financial situation Lajun found itself in as a result of the low tipping fees it received for its services (as acknowledged by Respondent through the ASDN.)²²⁹ Therefore, Claimant asserts that Respondent was in fact the catalyst that caused any environmental or health emergency that resulted from the operation of the Duquesa Landfill.²³⁰

234. Claimant lists the following irregularities of the Environmental and Health Emergency Declaration:

- (i) it is extremely simple, short, concise, and not reasoned;
- (ii) it is highly generic, imprecise, and not based on scientific evidence;
- (iii) it is not substantive and has no substantiation with regards to the so-called “state of emergency;”
- (iv) it contains no reference to which specific measures will be taken during the “state of emergency;”
- (v) it does not explain which fundamental rights will be affected by the declaration;
- (vi) it makes no reference at all (and does not even contain) the phrase “national security;”
- (vii) it does not specifically describe the territories within the State that are affected by the declaration (“*ámbito territorial*”);
- (viii) it was not issued through a decree, and was not published in the Dominican “*Gaceta Oficial*” or publicized via other public communication methods as required by Dominican law; and

²²⁷ C2 — § 212; C3 — § 115.

²²⁸ C3 — § 115.

²²⁹ C3 — § 115.

²³⁰ C2 — § 220.

- (ix) it contains no temporal limitation or expiration date as to when the emergency will expire and when the situation will return to the *status quo*.²³¹

235. Thus, as asserted by Claimant, Respondent failed to comply with its own law. It adds that, by definition and pursuant to Dominican law, a true “state of emergency” is an extraordinary and exceptional situation declared for a limited time only (not in perpetuity), that is issued by the Dominican President with the authorization of the Dominican Congress (which did not occur here), to address a grave crisis or a particular danger, that is eventually lifted by the Dominican President.²³² As a result, the environmental emergency declaration issued by the Ministry of Environment and the Ministry of Public Health does not constitute a “state of emergency” (or, much less, a so-called “national security” emergency) as established and defined by the Dominican Constitution, which specifically states, in Article 262, that “[t]he President of the Republic, with the authorization of the National Congress, may declare the states of exception in three modalities: State of Defense, State of Interior Commotion and State of Emergency.”²³³
236. Claimant asserts that Respondent’s declaration was not objectively required to protect the Dominican Republic’s interests. According to Claimant, Respondent could have revised, adjusted, or amended the deficient tipping fee, or liaised with the Landfill’s users and municipalities to convince them to accept adjustments to the tipping fee.²³⁴
237. Claimant lastly submits that a true “state of emergency” does not even exempt the State, or its representatives or government agencies, from complying with the law or with their

²³¹ C2 — § 214; C-162, Expert Opinion of Prof. Bianchi; C-149 (R-37), Environmental and Health Emergency Declaration; CL-119, Constitution of the Dominican Republic dated July 10, 2015, Articles 262-266; CL-120, Organic Law No. 21-18 on the regulation of the States of Exception under the Constitution of the Dominican Republic dated June 4, 2018, “Article 25. Contents” (containing the mandatory requirements for “states of emergencies”) and “Article 26. Publication. The decree declaring the state of exception shall be published in the Official Gazette and disseminated by all such public mass media as determined.” [Tribunal’s Translation]

²³² C2 — § 215.

²³³ Ibid., see also R-0005, Law No. 04-00 on the Environment and Natural Resources, dated August 18, 2000. Claimant submits that Article 55 does not grant the Ministry of the Environment and Natural Resources or the Ministry of Public Health the authority to declare a State of National Emergency.

²³⁴ C3 — § 116.

respective obligations under the law, as laid out in Article 266(4) of the Dominican Constitution.²³⁵

C) The Tribunal's analysis

a. *The general framework of the analysis*

238. As a preliminary unavoidable observation, the Tribunal wishes to emphasize that, like any transnational or international adjudicator, it cannot ignore concerns for the environmental risks involved in a wide range of disputes, including the one before it. The Tribunal has no doubt that protection of the environment is currently an essential priority in all human activities, in the face of the verification of the degradation suffered by the environment for decades and, in particular, since the industrial revolution and the exploitation of all the resources provided by our planet have been developed to a much larger extent. Specifically, the Tribunal further considers that environmental measures may be necessary, in certain circumstances, to ensure national security interests. Additionally, the Tribunal is especially sensitive to the need to take into account any such concerns when they exist and, where appropriate, determine that they constitute situations contemplated in the applicable legal framework and decide them accordingly. In fact, in the Tribunal's view, the Treaty at issue clearly opens the doors for the Tribunal to act in that way should it consider it appropriate, although this does not exempt it from verifying whether certain formal and substantial conditions for the application of the rule invoked are met.

239. The Tribunal recalls, first and foremost, the general context invoked by Respondent. According to Respondent, all the measures adopted (*i.e.*, in particular, the Environmental and Health Emergency Declaration, the request for termination and afterwards nullification of the Concession Agreement, the request for interim measures, the judicial intervention of the Duquesa Landfill and the subsequent resolution ordering its technical closing) were necessary to protect the Republic's own national security interests, since absent said measures, the Republic would have reached the point of a serious health and environmental crisis in Gran Santo Domingo, and both the health and the environment

²³⁵ C2 — § 216, CL-119, Constitution of the Dominican Republic dated July 10, 2015, Article 266(4): "The states of exception do not exempt the authorities and other servants of the State from the fulfillment of the law and their responsibilities."

would have been put at greater risk.²³⁶ According to Respondent, the health and environmental crisis was caused by the actions and omissions of Lajun, which failed to comply with its essential sanitary and environmental obligations. The Tribunal enumerates *verbatim infra*, for the sake of completeness, a list of facts invoked by Respondent to show that all the measures were necessary for the protection of its own “national security interests:”

- The repeated breaches of the Concession Agreement and the environmental rules by Lajun seriously threatened the Republic’s public health and environment due to the fact that the Duquesa Landfill functioned as an “unsanitary landfill that causes air and water pollution every day that it is in operation.”²³⁷
- The situation worsened in April 2017 due to the blockage of trucks and the waste accumulation at the entrance of the Duquesa Landfill caused by the closings that took place as a result of the reduction in the Duquesa Landfill’s hours of operation and Lajun’s unilateral decision to prevent access for the disposal of solid waste originating from many of the Municipalities, which resulted in serious health problems in Gran Santo Domingo.²³⁸
- Given countless violations of the substantial obligations of the Concession Agreement which were not remedied, the ASDN had no choice but to exercise its right of unilateral termination provided for in the Concession Agreement itself.²³⁹

²³⁶ R1 — § 334, R2 — § 287.

²³⁷ R2 — §§ 174-197, 286; C-164, Second Deltaway Report, p. 5. Especially, according to Respondent, the unilateral decision adopted by Lajun in March 2017 to substantially reduce the hours of operation of the Duquesa Landfill to Mondays through Fridays from 8 a. m. to 5 p. m. and to completely stop operations during Saturdays and Sundays and in July 2017 to reduce operations to just seven daily hours caused serious health problems in the region and had the potentiality to result in a pandemic in Gran Santo Domingo and give rise to a “situation of environmental crisis.” See R1 — §§ 192-194, 324; Statement of Dr. López Castillo, §§ 20, 28.

²³⁸ R2 — §§ 176-181, 286; R1 — §§ 198-199, 201, 217, 324; Statement of Dr. López Castillo, §§ 18-21; Statement of Mr. Pérez Lorenzo, §§ 27-28.

²³⁹ R2 — §§ 186, 286; R1 — §§ 202-208, 218, 235.

- The sanitary crisis triggered by Lajun’s breaches resulted in the Ministry of Environment and the Ministry of Public Health being forced to declare the environmental and health emergency in the Duquesa Landfill.²⁴⁰
- As soon as a number of irregularities in the execution of the Concession Agreement came to light, on August 10, 2017, the ASDN filed a petition (*recurso contencioso administrativo*) to initiate an administrative proceeding before the Superior Administrative Court seeking the nullification of the Concession Agreement.²⁴¹ The ASDN substantiated its petition, *inter alia*, on the following grounds: “the social alarm this conflict [had] provoked, as a result of the damage to health . . . which [had] echoed to the detriment of the public health of those people close to the sector, thus increasing a number of diseases, and even causing some citizens’ deaths,” and the fact that “the inappropriate handling of the Duquesa Landfill had created serious environmental impacts that threaten[ed] the healthiness of inhabitants of Gran Santo Domingo,” and that the “threat and damage to health, the environment and public order [were] a question of national security and high priority, which had to be resolved in the interest of public welfare and the rights of the people inhabiting those territories.”²⁴² [Tribunal’s Translation]
- Given the seriousness of the situation, five days later, the ASDN requested from the Superior Administrative Court an interim measure, in order to preserve “the health of over 4 million people who interact on a daily basis in the National District and the Province of Santo Domingo,”

²⁴⁰ R2 — §§ 187-188, 286; R1 — §§ 219-221, 325; R-37 (C-149), Environmental and Health Emergency Declaration, Single Article (“The Duquesa Landfill located in the municipality of Santo Domingo Norte IS HEREBY DECLARED an Environmental Emergency due to the health problems caused and the imminent risk as a result of the improper management of solid waste;”) [Tribunal’s Translation]; Statement of Dr. López Castillo, § 28.

²⁴¹ R2 — §§ 189, 286; R1 — §§ 222-223, 326.

²⁴² R2 — § 286; C-11, Administrative Proceeding filed by the ASDN in order to nullify the Concession Agreement, dated August 10, 2017, pp. 10-13; R1 — §§ 224, 326.

[Tribunal's Translation], as well as the environment.²⁴³ The Ministry of Public Health voluntarily intervened in the process.²⁴⁴

- By the end of August 2017, the Duquesa Landfill crisis reached its most critical point when the delays caused by Lajun in the discharge and disposal of waste in the Duquesa Landfill affected trash collection of streets and households, resulting in large piles of trash and pollution sources in all of Gran Santo Domingo.²⁴⁵
- The Superior Administrative Court rendered a Judgment on Interim Measure on September 27, 2017 (the “**Judgment on Interim Measure**”), ordering the intervention and provisional management of the Duquesa Landfill until the risk of environmental or sanitary damage in the area came to an end, or a ruling on the merits was issued.²⁴⁶
- Finally, on March 22, 2018, the Ministry of Environment ordered the technical closing of the Duquesa Landfill. In its Resolution No. 0012/2018, the Ministry of Environment stated that, for more than five years, the Duquesa Landfill had been having fires and other problems which threatened “the safety of neighboring areas” and put “the health of the said neighboring areas at risk due to the potential development of acute respiratory infections.”²⁴⁷ [Tribunal's Translation]

²⁴³ R2 — §§ 194, 286; R1 — § 225, citing C-93, Request for adoption of an interim measure filed by the ASDN, dated August 15, 2017, § 10; R-28, Supplementary Submission of Conclusions on Interim Measures filed by the ASDN before the Superior Administrative Court, dated September 13, 2017.

²⁴⁴ R2 — § 286; R-39, Formal Request for Voluntary Intervention by the Ministry of Public Health and Social Assistance in the Request for Interim Measures filed by the ASDN, dated September 1, 2017, pp. 5-6; R1 — §§ 231, 331. See also R-145, Summary of Communications by the Neighbors' Committees of the Duquesa Landfill to the ASDN, dated August 28, 2017, pp. 3, 4, 7 (letters by “El Progreso,” “25 de febrero,” “Los Pinos de los Casabes” and “Barrio Norte” Neighbors' Committees, respectively); R-146, Environmental study report submitted by Geofitec to the ASDN, dated August 29, 2017, pp. 1, 5; R1 — §§ 228, 229, 329, 330.

²⁴⁵ R2 — §§ 190-192, 286; R-144, Follow-up report of the Duquesa Landfill's operations, prepared by the Ministry of Environment, for the August 21-26, 2017 period, p. 2; R1 — §§ 227, 328; Statement of Dr. López Castillo, § 30; Statement of Mr. Pérez Lorenzo, § 27-28.

²⁴⁶ R2 — §§ 195, 286; C-13, Judgment on Interim Measure, pp. 34-35; R1 — §§ 232, 332. The Superior Administrative Court emphasized that the general interest which was at stake had “as unavoidable assumption the undisputed fact that trash accumulation on the streets . . . of Santo Domingo cause[d] the national population a myriad of diseases, many of which are so serious that can be considered not only a threat to the health but also an aggression to the life of Dominicans and foreigners who live in the country.” [Tribunal's Translation]. See C-13, § 7.11 (a).

²⁴⁷ R2 — §§ 207, 286; R-48, Ministry of Environment Resolution No. 0012/2018, dated March 22, 2018, ordering the technical closing of the Duquesa Landfill, p. 2; R1 — §§ 237, 333.

240. In this regard, the Tribunal notes that Claimant's argument hinges on Respondent's invocation of a "national state of emergency" through its environmental emergency declaration.²⁴⁸
241. According to Claimant, any such declaration fails to meet the standard applicable to self-judging clauses. First, the declaration was not targeted at a qualifying emergency, that is, the declaration did not relate to military and defense matters or a situation of serious economic duress for the State involving essential security interests that required protection. Rather, the declaration was targeted at allegedly remedying a sanitary situation that Respondent itself created, and likely could have avoided.²⁴⁹ According to Claimant, this conclusion is not in any way affected by Respondent's laundry list of contractual breaches that Claimant (through Lajun) supposedly incurred: each and every one of the breaches argued by Respondent arose directly from the dire financial situation Lajun found itself in as a result of the low tipping fees it received for its services. According to Claimant, the State (through the ASDN) acknowledged this.²⁵⁰
242. Secondly, Claimant emphasizes that, even if the declaration had pertained to a qualifying emergency, the Environmental and Health Emergency Declaration was not objectively required to protect the Republic's interests.²⁵¹ Indeed, according to Claimant, the Dominican Republic had several reasonable alternatives that would have been consistent with Respondent's obligations under the Treaty. For instance, Respondent could have revised, adjusted, or amended the deficient tipping fee, or liaised with the Landfill's users and municipalities to convince them to accept adjustments to the tipping fee. But Respondent did nothing, and instead, undertook actions and measures that decimated Claimant's investments.²⁵²

b. On the review of Article XVII(2)

²⁴⁸ C3 — § 115.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ C3 — § 116.

²⁵² *Ibid.*

243. Now that the general context and the Parties' positions on key facts have been explained, the Tribunal turns to the first question on the level of review the Tribunal shall conduct with respect to Article XVII(2) of Annex III of the Treaty.
244. The matter is not new and it has been widely considered and discussed both in scholarly studies as well as in cases, especially through the academic debate in the context of the operation of the so-called "self-judging clauses." The Tribunal accepts that – as acknowledged by Respondent itself²⁵³ – the issue at stake is not whether it has the power to review, but to what extent (or degree) can it use this power to check that Respondent actually adopted a number of measures to protect its "national security interests." To put it simply, what is being discussed here is the applicable standard of review, not the very possibility of reviewing. An emergency declaration shall necessarily respond to the provisions set forth in the rule at issue and it shall thus be subject to some kind of review.
245. In reliance upon the *Phillips Morris v. Uruguay* case, Respondent underscores that, in matters related to public health, the State has "a broad margin of appreciation" and it shall be afforded "great deference."²⁵⁴ [Tribunal's Translation] The Tribunal has no objection to endorsing any such assertion as general matter, even acknowledging that it may be qualified in light of several experiences, such as those that took place during the COVID pandemic. Nevertheless, even accepting these State's prerogatives, measures adopted by a State in particular circumstances cannot be expected to be absolutely immune to the adjudicator's subsequent scrutiny, especially if any such measures are invoked by that State to exempt itself from fulfilling the obligations it freely and willfully undertook through an international treaty. In other words, the Tribunal should not be confined to analyzing whether the measures adopted by the Republic are "related"²⁵⁵ to the protection of the State's essential national security interests.

²⁵³ *Supra*, § 219. See also confirmation by Respondent, Tr. Day 2 (English), p. 342 (ll. 7-13).

²⁵⁴ *Supra*, § 223.

²⁵⁵ R2 — § 281. The Tribunal takes note of Respondent's reference to the decision of the tribunal in *CC/Devas v. India*, which stated that the measures shall be "related to" essential security interests after confirming that the State does not have to demonstrate that the measures adopted were the only ones available. However, this Tribunal notes the emphasis put by the tribunal in *CC/Devas v. India* to highlight that the State necessarily needs to show the relation to an "essential" security interest. See RL-367, *Devas v. India*, § 243: "While, in the present case, the Respondent does not have to demonstrate necessity in the sense that the measure adopted was the only one it could resort to in the circumstances, it still has to establish that the measure related to its essential security interests; it cannot therefore be any security interest but it has to be an 'essential' one."

246. The Tribunal finds no methodologic guidance in the language of the Treaty regarding how to address Respondent's declaration. In other words, it finds no support for addressing the issue with a presumption in one direction or the other. The Tribunal is persuaded that, it shall naturally exercise its discretion to review, first, Respondent's assertion that it was in a state of emergency, and to confirm, afterwards, that such state constitutes the scenario provided for in the now disputed rule. The Tribunal notes on this point that Respondent has clearly highlighted that it is not invoking a standard of customary international law. Accordingly, Respondent argues that the Tribunal shall not import conditions of such standard in its analysis of Article XVII(2) of Annex III of the Treaty. The Tribunal accepts that it shall not directly apply the conditions applicable to the standard under customary law. Nevertheless, the Tribunal points out that, it should not rule out taking into account considerations similar to those applying the standard under customary international law. In other words, to review whether the State acted or not in furtherance of the protection of its national security interests, it is not surprising that the analysis be focused on considerations similar to those relevant here to determine the existence of a state of necessity.

c. On the adoption of the Environmental and Health Emergency Declaration

247. Notably, in this case, the Tribunal must inquire into whether the procedures in accordance with the applicable legal framework have been duly complied with in order to allow a State to rely on Article XVII(2) of Annex III of the Treaty as a clause that would exempt it from complying with its obligations under the Treaty, and, more importantly, whether the existing factual situation matches the situation contemplated in that provision. Environmental protection measures may very well be appropriate, necessary and justified in a given case, even if they do not allow a State to claim that its national security interests are affected.

248. In the instant case, the Tribunal finds that Respondent has failed to prove that the situation in question, despite posing a very serious health and environmental situation that called for urgent measures, actually constituted a state of emergency associated with the impairment of national security, the latter being the specific condition required by Article XVII(2) of Annex III of the Treaty.

249. For the avoidance of doubt, the Tribunal is not questioning the deplorable conditions in which the Landfill was found due to the accumulation of waste and the inability to adequately treat it, nor the health situation caused by the lack of trash collection and its subsequent accumulation, with all the consequences that this entails and which have been detailed. When asked specifically about the justification for the Environmental and Health Emergency Declaration discussed *supra*, Dr. Lopez Castillo noted that there was a “tangible risk” of a health crisis unleashing due to the waste that was accumulating; this accumulation leads to the proliferation of rats and mosquitoes that are vectors of leptospirosis and endemic diseases. The Declaration, in her opinion, was intended to prevent the situation from becoming serious and very difficult to control.²⁵⁶
250. However, as deplorable as the health situation may be at a given time and taking into consideration the risks it entails for health and the environment, this case is a matter of whether that situation constituted an “emergency” and whether that characterization can be likened to a situation affecting “national security” within the specific applicable legal framework.
251. With this in mind, the first question that arises relates to the scope of this situation. Thus, although a situation involving a “serious health and environmental crisis”²⁵⁷ [Tribunal’s Translation] could very well be occurring — and the Tribunal indeed believes that to be the case — the Tribunal considers that, nevertheless, it has not been proven that such a crisis had a national scope or impact. The Tribunal recalls that Dr. Lopez Castillo, who reported directly to the Office of the Ministry of Public Health and who had the responsibility of communicating to the Minister of Health any information she could obtain at the local level, represented that she did not recall the specific dates but that she visited the site “on two or three occasions” during the crisis,²⁵⁸ which does not seem to match up with the seriousness alleged by Respondent. In relation to a different matter, Dr. Lopez Castillo stated that she was surprised that a series of monthly reports that *inter*

²⁵⁶ Tr. Day 3 (English), p. 755 (ll. 5-12).

²⁵⁷ R1 — § 2.

²⁵⁸ Tr. Day 3 (English), p. 711 (ll. 21-22).

alia included information on the site disappeared and were not found after her departure from the Ministry.²⁵⁹

252. The Environmental and Health Emergency Declaration is two pages long, and it reads as follows in its relevant parts:

“WHEREAS: A potential sanitary risk has been identified in the Province of Santo Domingo and the National District due to the accumulation of exposed solid waste, the presence of domestic animals, vectors, the emission of unpleasant odors and the burning of waste, all of which constitute sources of infections and pollution due to their rapid decomposition, and, above all, due to the administrative measures executed by the company in charge of managing the Duquesa open-air landfill.

WHEREAS: It is imperative that the Ministry of Environment and Natural Resources and the Ministry of Public Health intervene in the recovery of the environmental and health situation of the Province of Santo Domingo and the National District as soon as possible by adopting the appropriate environmental and health measures since the degree of the impact caused by the solid waste of this landfill is quite high and can become a cluster for the outbreak of various diseases and pose a serious health problem for the entire population.

[...] SINGLE ARTICLE: The Duquesa Landfill located in the municipality of Santo Domingo Norte IS HEREBY DECLARED an Environmental Emergency due to the health problems caused and the imminent risk as a result of the improper management of solid waste.”²⁶⁰
[Tribunal’s Translation]

²⁵⁹ Tr. Day 3 (English), p. 702 (ll. 17-22).

²⁶⁰ R-37 (C-149), Environmental and Health Emergency Declaration.

253. The Environmental and Health Emergency Declaration's Single Article clearly defines its material and territorial scope by limiting itself to declaring an environmental emergency, specifically, "[t]he Duquesa Landfill located in the municipality of Santo Domingo Norte." It is also clear that the Declaration distinguishes between the already existing situation of local environmental emergency and the "potential risk" of disease outbreak on a different level.
254. From the Environmental and Health Emergency Declaration itself and from the numerous arguments raised by the Parties in this regard, it is clear that the situation invoked as a reason for the declaration was confined to a limited portion of the national territory and to a populated area, which, although relatively large, was also limited.²⁶¹ A national emergency has to affect the general population to such an extent that it takes on such importance that the entire nation must respond, allocate resources, take impact measures, or be prepared to absorb the consequences of such an emergency.
255. Second, notwithstanding the above, the Tribunal could consider, *arguendo*, that a serious local crisis may have, under certain circumstances and depending on the type of crisis, a considerable — and even inescapable — national repercussion. However, this would in not exempt it from verifying how and on what basis the State has adopted measures to protect its interests. In other words, the Tribunal could not neglect to assess the regularity of the adoption of the Environmental and Health Emergency Declaration, that is, its observance of the applicable regulations and its suitability to cause the intended effects.
256. The Tribunal deems it crucial in this regard to focus its analysis on the Environmental and Health Emergency Declaration. Respondent invites the Tribunal to determine whether the measures adopted were necessary for the protection of its national security interests. The Tribunal must carefully consider all of the facts surrounding the measures adopted. Moreover, it must take into account the entire factual context and must pay particular attention to any direct reaction of the State through which it — in whatever manner — qualifies or characterizes the ongoing situation.²⁶² For the sake of clarity, the

²⁶¹ R1 — § 329; R-145, Summary of communications from Neighbors' Committees of the Duquesa Landfill to the ASDN, dated August 28, 2017, pp. 3, 4, 7 (Letters from "El Progreso," "25 de febrero," "Los Pinos de los Casabes" and "Barrio Norte" Neighbors' Committees, respectively).

²⁶² Similarly, the Tribunal is not implying that the absence of a declaration would also put an end to its analysis, given that no formal requirements are listed in Article XVII(2) of Annex III of the Treaty. See *supra*, § 246.

mere existence of the Environmental and Health Emergency Declaration is not sufficient evidence; the Tribunal still has the duty to analyze it. In this case, there is no doubt that the Environmental and Health Emergency Declaration was issued by the State and that it provides clear evidence as to how Respondent perceived the situation, both in terms of the situation at the time and the potential risks that the development of said situation could bring about.

257. Claimant lists a series of considerations to prove the irregularities that, in his opinion, can be found in the Environmental and Health Emergency Declaration.²⁶³ Claimant places particular emphasis on the fact that Respondent did not adopt a typical declaration of a state of emergency, i.e., the declaration issued by the President in cases of security exceptions in accordance with the Dominican Republic's Constitution and Organic Law No. 21-18.²⁶⁴ Claimant also argues that the true purpose of the Environmental and Health Emergency Declaration was only to provide a reason to "kill" the underlying concession agreement.²⁶⁵ During the Hearing, Claimant invited the Tribunal to pay special attention to a document issued two months prior — prepared with the active participation of several of Respondent's organizations — indicating that virtually all of the 325 identified landfills had leachates and that they lacked the capacity to treat them.²⁶⁶ Claimant insists that, when it comes to the other landfills, there is no mention of an environmental challenge or problem and no mention of an environmental emergency either.²⁶⁷

258. In this respect, Respondent clarified that it indeed did not invoke the existence of a security exception pursuant to the provisions of the Dominican Republic's Constitution.²⁶⁸ According to Respondent, this does not detract from the Environmental and Health Emergency Declaration or the causes that led to its issuance.²⁶⁹ In fact, it was within the purview of both the Ministry of Environment and the Ministry of Public Health to issue the Environmental and Health Emergency Declaration, which was clearly

²⁶³ *Supra*, § 234.

²⁶⁴ *Supra*, §§ 235, 237.

²⁶⁵ Tr. Day 1 (English), 33 (ll. 1-7).

²⁶⁶ R-18, Policy for the Comprehensive Management of Municipal Solid Waste of the Ministry of Environment and Natural Resources, dated May 2017.

²⁶⁷ Tr. Day 1 (English), p. 31 (ll. 17-22), 32, 33 (ll. 1-7).

²⁶⁸ R2 — § 288.

²⁶⁹ R2 — § 288.

justified by the critical circumstances of the case, and the Declaration had the applicable legal effects.²⁷⁰ Respondent also submits that, while it is true that the Duquesa operation (managed by Lajun since 2007) was fairly negligent, it had never reached the level of alarm it reached in 2017 (by then under Claimant's management) due to the reduction of operating hours and the closing of Duquesa by Lajun. Respondent points out that it cannot be overlooked that Duquesa serves Gran Santo Domingo, which accounts for 40% of the country's population. According to Respondent, the reduction of Duquesa's operating hours and the closing of Duquesa by Lajun are the events that triggered the crisis and led the Ministry of Public Health and the Ministry of Environment to issue the Environmental and Health Emergency Declaration.²⁷¹

259. According to Respondent, the scientific evidence that served as the basis for the Environmental and Health Emergency Declaration is in the record.²⁷² Respondent underscores that Claimant merely focused on questioning the formal aspects of the Declaration and complaining that Lajun was allegedly not notified of this Declaration and other documents,²⁷³ as well as questioning the absence of emails and reports in addition to those already on the record, suggesting that its absence proves that no such crisis existed.²⁷⁴ Respondent insists that Claimant cannot use such formalities as an excuse for the seriousness of the situation and ignore the evidence on the record, which, according to Respondent, Claimant did not refute at all. Lastly, Respondent notes that Claimant said nothing with regard to the Ministry of Environment's decision to order the technical closing of all of the open-air landfills in the Republic for environmental and health reasons, among which Duquesa is, of course, included, thus proving that Duquesa was

²⁷⁰ R2 — § 288, R-37 (C-149), Environmental and Health Emergency Declaration, Third Whereas Clause, pointing out that Article 55 of Law No. 64-00 on the Environment “provides that, in environmental emergency situations, the Ministry of Environment and Natural Resources and the relevant Municipality, in coordination with the Ministry of Public Health and related agencies, shall immediately adopt the safety measures approved for the benefit of the common good.” [Tribunal's Translation]

²⁷¹ RPHB — § 83.

²⁷² RPHB — § 84; Respondent insists that it submitted documentary evidence to the record, such as contemporary newspaper articles, which include graphic evidence of the seriousness of the situation. See R-29; R-37; R-126; R-127; R-128; R-219; R-131; R-141; R-142; R-143; R-219; R-239; R-240; R-241; R-242; R-243; R-244.

²⁷³ RPHB — § 84, Tr. Day 3 (English), pp. 757-763 (no indication of lines).

²⁷⁴ RPHB — § 84, Tr. Day 3 (English), pp. 702-703; Tr., Day 6 (English), p. 1354 (no indication of lines).

not the only one against whom sanctions were imposed for violating the Republic's environmental regulations.²⁷⁵

260. The Tribunal finds that all of these references made by Respondent do not lead to any convincing justification as to why, despite the apparent ability to declare a security exception pursuant to the provisions of the Dominican Republic's Constitution, Respondent failed to do so. This is a key element from which the Tribunal can, absent any justification, only conclude that the issue was not perceived as an exceptional matter of national interest warranting the intervention of the highest State authorities, as suggested by the evidence submitted by Claimant. In any event, in the Tribunal's view, the factual matrix and the arguments submitted by Respondent are not enough to explain the irregularities mentioned in relation to the adoption of the Environmental and Health Emergency Declaration.

d. On the characterization of the Emergency Declaration as a measure necessary to protect national security interests

261. Third and lastly, it should finally be noted that even if the Tribunal's conclusion were the opposite, we would still not be in a position to say that Article XVII(2) of the Treaty is applicable and that the consequences desired by Respondent should occur. Indeed, even if we were to assume that the situation invoked by Respondent was extremely serious with national repercussions — and once again, assuming *arguendo* that the Environmental and Health Emergency Declaration was adopted in compliance with all the applicable substantive and formal requirements — it would still be necessary to verify, for the purposes of the “general exemption” claimed by Respondent, that national security was affected. As is the case with the two previous issues, the burden of proof lies with Respondent.

262. Respondent insists that the determination of a State's national security interests and how they should be protected is up to that State's national authorities, who are clearly in a better position than an international tribunal to assess the risks at stake in a given situation.²⁷⁶ The Tribunal sees no drawback to admitting that national security issues are

²⁷⁵ RPHB — § 85.

²⁷⁶ R1 — § 309.

obviously crucial for States and that they are certainly in a privileged position to assess these interests. National security is so important to States that the concept has recently been introduced to a field in which it had never been expressly mentioned before: the recognition and enforcement of judicial decisions in civil and commercial matters.²⁷⁷

263. Nevertheless, the disputed issue here is not the significance of national security but whether it can be determined that the situation invoked to declare the emergency affected national security. And, in this regard, none of the arguments advanced by Respondent expressly seek to demonstrate the existence of such a relationship between the situation and the impact on national security. In other words, Respondent has devoted considerable time and effort to show that environmental concerns could be a national security problem — which is not ruled out by this Tribunal — but, conversely, has failed to establish why, in this case, the situation had reached the point where the nation's own interests and its security were at risk.
264. All of these considerations mean that, notwithstanding the seriousness of the situation from an urban health perspective and the need that the authorities — at different levels — may have felt to take action in the matter, the Tribunal cannot consider as established that the Environmental and Health Emergency Declaration adopted by the Ministry of Environment and the Ministry of Public Health on July 21, 2017, responded to a situation that could be linked to national security.
265. In light of the above, in the Tribunal's view, Respondent cannot validly invoke the benefit provided for in Article XVII(2) of Annex III of the Treaty. Once again, for the sake of clarity, the Tribunal is not suggesting that the State does not have genuine environmental concerns, which the Tribunal shares. However, in order to validly invoke Article XVII(2) of Annex III of the Treaty, more than the existence of these concerns is required. In particular, in addition to invoking and proving the temporary unhealthy situation and the potential risks that could derive from it, Respondent should have furnished a coherent

²⁷⁷ Indeed, the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters upholds national security as an issue that may potentially prevent a foreign judicial decision from taking effect, in the following terms: "Recognition or enforcement may be refused if [...] recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;" (Article 7(1)(c)).

explanation as to how that situation and those risks affected its “national security interests,” which is what is specifically required by the Article in question. In the case at hand, Respondent fell far short of offering evidence that would have enabled it to effectively put an end to this dispute in reliance upon the aforementioned provision.

2. The issue of compensation in situations involving war or other conflicts

266. Article X of Annex III of the Treaty, relied upon by Respondent, sets forth:

ARTICLE X

COMPENSATION FOR LOSSES

Investors of one Party whose Investments in the territory of the other Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Party shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Party accords to investors of any third State.

A) The Respondent’s position

267. Respondent argues that, should the Tribunal find that the measures taken by the Republic were unnecessary to protect its own national security interests and, therefore, that the general exemption under the Treaty should not be applied, there is no doubt that, in any event, the alleged losses sustained by Claimants were caused by a state of national emergency. Thus, Respondent argues that the special clause on compensation for losses under the Treaty that regulates such exceptional circumstance is applicable herein and asserts that the only treatment the Republic was required to afford in case of a national emergency consisted in not providing more favorable compensation to investors of any third country, which was not the case here (and is not even alleged by Claimant.)²⁷⁸

268. Respondent asserts that Article X of the Treaty limits its responsibility to merely offering a most-favored-nation (“MFN”) treatment to foreign investors.²⁷⁹ As pointed out by

²⁷⁸ R1 — § 336.

²⁷⁹ R2 — § 292.

Respondent, unlike the general exemption of national security, the clause on compensation for losses does not release the Republic from responsibility under the Treaty but limits such responsibility to that MFN treatment only. Consequently, according to Respondent, when no compensation has been provided to any investor of a third country in a state of national emergency, there is no duty to compensate for losses under the Treaty.²⁸⁰

269. Said interpretation is consistent – as added by Respondent – with the historical origin of clauses on compensation for losses. Respondent insists that under customary international law there is no duty of compensation for losses or damage caused by extraordinary circumstances, such as a war or a state of emergency.²⁸¹

270. Respondent makes specific reference to *Lesi v. Algeria*, where no investor of a third country had received more favorable compensation; such a situation, as alleged by Respondent, is comparable to this one and was not challenged by Claimant.²⁸² According to Respondent, the tribunal in *Lesi c. Algeria* held that the clause on compensation for losses provides a special rule that derogates general rules such as the obligation to provide full protection and security, and that said clause cannot therefore apply jointly with other provisions of the treaty. The tribunal considered that the only standard the State had to meet in that exceptional circumstance was to provide compensation no less favorable than that accorded to national investors or to investors of a third country. As in that case there was no less favorable treatment, the tribunal found no breach of the compensation clause and hence there was no treaty violation.²⁸³

²⁸⁰ R2 — § 295.

²⁸¹ R1 — § 339; RL-390, *LESI SpA and ASTALDI SpA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award dated November 12, 2008 (“*LESI v. Algeria*”) (Tribunal’s translation); RL-384, Facundo Pérez-Aznar, “Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs,” 32(3) *ICSID Review* 696 (2017), pp. 715-716, p. 701; RL-385, 1929 Harvard Draft Convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners, *American Journal of International Law*, Special Supplement, vol. 23, 1929, p. 146, Article 4 and Commentary to Article 4; according to Respondent, this interpretation is also in accordance with the analysis performed by authors that commented on the first model investment treaties containing similar clauses of compensation for losses. See, RL-386, Wayne Sachs, “The ‘New’ U.S. Bilateral Investment Treaties,” *International Tax & Business Lawyer* 192, vol. 2, 1984, p. 219; RL-387, Joachim Karl, “The Promotion and Protection of German Foreign Investment Abroad,” *ICSID Review*, vol. 11-1, 1996, pp. 16-17.

²⁸² R2 — § 296.

²⁸³ R1 — § 340; RL-390, *LESI v. Algeria*, §§ 174, 175, 182 (translated from French). Likewise, according to Respondent, in *Öztaş Construction v. Libya*, claimant argued that Libya had violated the fair and equitable treatment

271. For Respondent, it is clear that the purpose of Article X of the Treaty, taking into account the ordinary meaning given to the terms of the provision in its context, interpreting it in good faith, and in the light of its object and purpose, is to regulate the obligations of the Contracting Parties to the Treaty in those exceptional circumstances envisaged in that provision.²⁸⁴ Respondent argues that its interpretation of Article X of the Treaty results from applying the *lex specialis* principle – according to which, if the contracting parties to a treaty agreed on a specific provision to address a certain issue, their intent was to address such issue by application of that specific provision, without considering the general provisions of the treaty – which should be considered together with the context of the provision for interpretation purposes.²⁸⁵
272. Respondent submits that Claimant and his legal expert have failed to address the arguments on the application of the *lex specialis* and *effet utile* principles in interpreting Article X of the Treaty. Rather, Respondent argues that the interpretation advanced by Claimant would be absurd and unreasonable, as the Contracting Parties would be imposing an additional or more burdensome obligation in exceptional circumstances. According to Respondent, it would make no sense to impose upon the Contracting Parties to the Treaty an additional or more burdensome obligation in exceptional circumstances when the Contracting Parties, by including any such special provision in investment treaties, clearly intend to produce the opposite effect.²⁸⁶ Moreover, as asserted by Respondent, Claimant’s interpretation would render the provision meaningless, because the Treaty already contains a MFN clause in Article III(2) of Annex III of the Treaty.²⁸⁷

standard, the full protection and security standard, and the prohibition to take arbitrary or discriminatory measures due to its inadequate response to the civil war. However, the tribunal rejected this claim and highlighted that the BIT included a special provision for war or insurrection which was “the proper and only remedy” in respect of the losses suffered as a result of the Libyan Revolution, and that it was inappropriate to consider the general standards of protection under the BIT; RL-391, *Öztaş Construction, Construction Materials Trading Inc. v. The State of Libya*, ICC Arbitration No. 21603/ZF/AYZ, Final Award dated June 14, 2018, §§ 164,167. Similarly, in *Asian Agricultural Products v. Sri Lanka*, arbitrator Asante asserted in its dissenting opinion that Article 4 of the treaty restated the general customary international law principle that excludes liability for compensation where investments suffer losses owing to emergency situations, and such losses cannot be attributed to the host States. RL-392, *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, dated June 15, 1990, §§ 28-76.

²⁸⁴ R1 — § 344.

²⁸⁵ R1 — § 345; R2 — § 298.

²⁸⁶ R1 — § 346.

²⁸⁷ R2 — § 299.

273. In the instant case, Respondent argues that the measures in connection with the Duquesa Landfill were taken as a consequence of a state of national emergency. Indeed, the health crisis, triggered by Lajun's repeated breaches and extortive behavior, led to the Ministry of the Environment and the Ministry of Public Health being forced to declare an environmental and health emergency at the Duquesa Landfill, as they considered that the Duquesa Landfill was an infected and contaminated site, and thus it was "crucial" that the authorities got involved in the environmental and health remediation of the landfill "taking any relevant environmental and health action."²⁸⁸ [Tribunal's Translation]

274. Some of the measures taken in respect of the Duquesa Landfill within the context of the state of national emergency were:

- The administrative proceeding to nullify the Concession Agreement, filed by the ASDN before the Superior Administrative Court, based, *inter alia*, on "the social alarm this conflict [had] provoked, as a result of the damage to health... which [had] ensued to the detriment of the public health of those people close to the sector, thus increasing a number of diseases, and even causing some citizens' deaths," coupled with the fact that "the inappropriate handling of the Duquesa Landfill had created serious environmental impacts that 'threaten[ed] healthiness of inhabitants of Gran Santo Domingo'," and that the "threat and damage to health, the environment and public order [were] a question of national security and high priority, which had to be resolved in the interest of public welfare and the rights of the people inhabiting those territories."²⁸⁹ [Tribunal's Translation]
- The voluntary intervention by the Ministry of the Environment and the Ministry of Public Health in the ASDN's application for an interim measure to the Superior Administrative Court, where the Ministry of Public Health highlighted that insect-borne diseases had

²⁸⁸ R1 — § 347, R-37 (C-149), Environmental and Health Emergency Declaration, Single Article ("The Duquesa Landfill located in the municipality of Santo Domingo Norte IS HEREBY DECLARED an Environmental Emergency due to the health problems caused and the imminent risk as a result of the improper management of solid waste" [Tribunal's Translation]); Statement of Dr. López Castillo, § 28.

²⁸⁹ R1 — §§ 223-224, 326, 347.

spread widely, that said diseases and conditions had increased drastically, and that there was a “national concern” about the impact on Dominican people’s health and quality of life.²⁹⁰

- The Judgment on Interim Measure issued by the Superior Administrative Court, ordering the provisional intervention and administration of the Duquesa Landfill, noting that trash accumulation on the streets of Santo Domingo was causing “the national population a myriad of diseases, many of which are so serious that they can be considered not only a threat to health but also an attack on the life of Dominicans and foreigners who live in the country.”²⁹¹ [Tribunal’s Translation]
- The technical closing of the Duquesa Landfill ordered by the Ministry of the Environment on the basis of the fires and other problems at the landfill, which threatened “the safety of neighboring populations” and put “theses populations’ health at risk due to potential development of acute respiratory infections.”²⁹² [Tribunal’s Translation]

B) The Claimant’s position

275. Claimant rejects Respondent’s interpretation of Article X of the Treaty and argues that this interpretation is incompatible with the ordinary meaning of the Article and also with the object and purpose of the Treaty.²⁹³

276. According to Claimant, Respondent’s argument that a state is exempted from liability under an international investment treaty in the event of a “national emergency” and that, in that situation, only the “compensation for losses” clause applies (but not the other obligations under the treaty), finds very limited support in international investment case law. In fact, to date, only one case—*LESI v. Algeria*—supports Respondent’s view.²⁹⁴

²⁹⁰ R1 — §§ 231, 347.

²⁹¹ R1 — §§ 232, 347.

²⁹² R1 — §§ 237, 347.

²⁹³ C3 — § 128.

²⁹⁴ C2 — § 225; C-162, Expert Opinion of Prof. Bianchi; C3 — § 122.

277. Rather, Claimant submits, other arbitral tribunals have systematically rejected interpretations of “compensation for losses” clauses geared towards exempting the host state from liability originating from a violation of the treaty (such as the interpretation advanced by Respondent.) Claimant highlights that these tribunals have held that the purpose of a “compensation for losses” clause is not to exclude compensation for losses arising from a national emergency, for instance, but to ensure that the foreign investor does not lose out in such a situation and that the investor is treated no less favorably than the host state treats its own investors or investors from any other country.²⁹⁵
278. In particular, Claimant refers to *AMT v. Zaire*—a case concerning the destruction of property in a situation of civil unrest, riots, and looting carried out by elements of Zaire’s army—in which Zaire argued that the claimant had not advanced sufficient evidence to show that Zaire had accorded the foreign investor treatment less favorable than that accorded to its own nationals. First, the tribunal found that Zaire’s argument was “not pertinent” given that Zaire’s international responsibility is incontestably disputed by the very fact of an omission by Zaire to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory.²⁹⁶ Second, the tribunal found that the “compensation for losses” clause could not “in any way exonerate the objective responsibility of the State of Zaire for the breach of its obligations of the treatment of protection and security it owes to AMT.”²⁹⁷
279. According to Claimant, “war clauses” like Article X of Annex III of the Treaty are only meant to address the losses that can be incurred by foreign investors as a consequence of extraordinary events that occur in the host State.²⁹⁸ In other words, Claimant submits that such a clause is not an exculpatory clause nor an “escape” from liability clause in, for

²⁹⁵ C2 — § 226; C3 — §§ 124-126, CL-33, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award dated May 12, 2005 (“*CMS v. Argentina (Award)*”), § 375; CL-94, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated September 28, 2007, § 363; CL-141, *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award dated December 24, 2007, §§ 382-383; CL-96, *National Grid Plc. v. Argentine Republic*, UNCITRAL, Award dated November 3, 2008, §§ 252-253; CL-23 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability dated July 30, 2010 (“*Suez v. Argentina*”), § 271; CL-142, *AWG Group Limited v. Argentine Republic*, UNCITRAL, Decision on Liability dated July 30, 2010, § 271.

²⁹⁶ C3 — § 123; CL-140, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award dated February 21, 1997, §§ 6.09-6.12.

²⁹⁷ *Ibid.*

²⁹⁸ C2 — § 224.

example, emergency or war situations, but is rather a non-discrimination treaty provision that provides a further guarantee of equal treatment with nationals of the contracting party or nationals of a third State.²⁹⁹

280. Claimant submits that his position in this arbitration is that his losses and damages have been caused by the Respondent's arbitrary and discriminatory acts that were taken in violation of the Respondent's obligations contained in the Treaty; that is, his losses and damages have not been caused by an event in response to which the Respondent has adopted compensatory measures. Claimant asserts that only when the State has decided to indemnify or compensate for losses due to one of the events listed in Article X does the State have an obligation to grant treatment to foreign investors of the Contracting Party no less favorable than that granted to investors of any third State.³⁰⁰

281. Claimant further alleges that this type of clause applies to a situation of physical threat to property or an economic emergency resulting from armed conflict, an uprising, a civil disturbance, or an insurrection of huge proportions, rather than from regulatory measures taken by a State.³⁰¹ The above makes sense if one considers that, otherwise, a state could unilaterally declare a state of national emergency on whatever grounds it deems fit, as well as adopt measures prejudicial to the foreign investor, all while avoiding any liability under the international investment treaty on the grounds that no compensation has been paid to anyone else. According to Claimant, such an abusive interpretation would not stand scrutiny under the principle of good faith contained in Article 31 of the Vienna Convention of 1986.³⁰²

C) The Tribunal's analysis

282. The Tribunal notes from the outset that Claimant only raises arguments regarding the proper interpretation of Article X of the Treaty, while Respondent—besides stating its position as to the proper interpretation of such article—also argues that the measures taken in connection with the Duquesa Landfill were adopted as a result of a national state of emergency and that no investor from a third country has received more favorable

²⁹⁹ C2 — § 227.

³⁰⁰ C2 — § 229.

³⁰¹ C2 — § 231; C-162, Expert Opinion of Prof. Bianchi.

³⁰² C2 — § 232.

compensation. There appears to be no disagreement as a matter of fact between the Parties that no other investor has received any kind of compensation.

283. The Tribunal deems it logical to address first and foremost the issue of Respondent's interpretation of the Treaty. To that effect, pursuant to Article 31 of the 1986 Vienna Convention, the Tribunal shall interpret Article X of the Treaty in good faith in accordance with the ordinary meaning to be given to terms in their context and in light of the provisions of the Treaty, its object and purpose. On this basis, the interpretation purported by Respondent is at odds with the text of the Treaty.
284. First, the Tribunal cannot endorse Respondent's understanding that the provision might allow it to sidestep any obligation to pay compensation simply because no other investor has allegedly received any compensation. In the factual scenario at hand, it would be simply impossible to find another investor as the emergency at issue relates precisely to this very specific case and exclusively to a particular investor, Claimant.
285. As Claimant rightly asserts—with reference to a number of precedents—³⁰³ Article X *in fine* of the Treaty operates as a non-discrimination clause that provides a guarantee of equal treatment with nationals of the contracting party or nationals of a third State, but just under the limited circumstances set forth therein, and clearly, in the event that there are other investors with whom to make the comparison. When such circumstances are not present or no investors from a third country exist, what follows is not the exclusion of the obligation to pay compensation but simply the non-application of Article X of the Treaty. The interpretation of Article X of the Treaty purported by Respondent manifestly contradicts the text of the provision itself, which exclusively provides for circumstances “as regards restitution, indemnification, compensation or other settlement.” Nothing in Article X provides for the exclusion of such remedies.
286. The fact that the Treaty already contains a most-favored-nation provision in Article III(2) does not provide a basis for supporting the interpretation proposed by Respondent. On the contrary, the Tribunal fully endorses in this regard the argument that Respondent's interpretation would simply run counter to the object and purpose of the Treaty. Indeed, according to such interpretation, a State simply by unilaterally declaring a state of national

³⁰³ *Supra*, § 279.

emergency on whatever grounds it deems fit could adopt measures prejudicial to a foreign investor, thereby avoiding any liability under the applicable international investment treaty on the grounds that no compensation is due if no compensation has been paid to anybody else.³⁰⁴

287. Second, the Tribunal also concludes that the scope of Article X is very limited and refers to the extraordinary circumstances enumerated in the article. The Tribunal considers that the state of emergency invoked by Respondent in this dispute is not captured by such provision. It follows—without much effort—from the text and context of the provision that the concept of “emergency” contained in Article X of the Treaty is within the general notion of political or armed conflicts.³⁰⁵ There is no argument suggesting that the emergency referred to in Article X of the Treaty has anything to do with the “national health and environmental” emergency declared in this case with respect to a particular landfill situated in the ASDN.

288. The Tribunal reiterates here its prior finding that, despite the seriousness of the situation from the perspective of urban health, and the need the authorities might have felt—at their various levels—to step in, it has not been demonstrated that the situation in dispute could be linked to national security emergency within the meaning of Article X.

289. For the foregoing reasons, the Tribunal finds that Respondent’s attempt to rely on Article X of the Treaty to exclude any compensation due to Claimant cannot be accepted.

3. Exclusion of indirect investors and recovery of indirect damages

³⁰⁴ C-162, Opinion of Prof. Bianchi, § 142.

³⁰⁵ The Tribunal notes that the tribunal in *Lesi v. Algeria*—a case emphasized by Respondent in support of its interpretation—held that it should strictly delimit the scope of the circumstances justifying the application of the clause at issue. See, RL-390, *Lesi v. Algeria*, §§ 175, 180. In *Lesi v. Algeria*, the tribunal found that the last referred-to measures had been taken to protect the site and the investor; therefore, they should be related to those provided by the State to its nationals. As a preliminary matter, the tribunal concluded that the entire Algerian national territory was experiencing the same security issues at that time.

A) The Respondent's position

290. Respondent alleges that, under the Treaty, Claimant is not entitled to claim for indirect damages (*reflective loss*), *i.e.*, damages allegedly sustained by the company where he indirectly holds shares but for which he has not sustained direct injury as a shareholder in Lajun.³⁰⁶
291. In this vein, Respondent submits that international law recognizes that a company is a legal entity distinct from its shareholders, and that the assets of a company belong to that company.³⁰⁷ Thus, any harm suffered by Lajun's shareholders as a result of the alleged harm to Lajun would be, by definition, indirect damages.³⁰⁸
292. Consequently, according to Respondent, Claimant is not entitled to claim for the assets owned by Lajun (such as the Concession Agreement or the alleged right to develop a WTE Plant).
293. Respondent argues that the Treaty does not protect against indirect damages.³⁰⁹ Indeed, according to Respondent, Claimant acknowledges that the Treaty does not make any express reference to the concept of indirect damage ("reflective loss").³¹⁰
294. According to Respondent, the fact that the Treaty includes shares in the definition of "investment" does not justify derogating from the prohibition in international law regarding shareholders' claims for indirect damages.³¹¹ In support of its opinion, Respondent relies upon NAFTA Article 1117 as an example of express provision conditioning the possibility of claiming for that type of damages.³¹²

B) The Claimant's position

295. Claimant affirms that he is not seeking to recover a *derivative loss*. Claimant recalls that the Tribunal already concluded that:

³⁰⁶ R2 — § 303.

³⁰⁷ R2 — § 304.

³⁰⁸ R2 — § 311.

³⁰⁹ R2 — § 304.

³¹⁰ R2 — § 305.

³¹¹ R2 — § 306.

³¹² R2 — § 308.

“[w]ith respect to the doctrine whereby shareholders may not seek to recover the damages suffered by the companies in which they hold interests, it is worth pointing out that that is not the situation existing in this arbitration. Claimant in this case is Mr. Lee-Chin, who claims on his own behalf for the loss in value of his investments in the Republic purportedly arising from the alleged violation by the Republic of several obligations set out in the Treaty.”³¹³

296. Claimant asserts that his claim is one of *reflective loss*, and that there is a *jurisprudence constante* and global consensus on permitting shareholders to recover for their reflective losses.³¹⁴ According to Claimant, even though no single investment treaty has expressly enshrined the concept of “reflective loss” in its text, investment arbitration tribunals have extensively dealt with the issue.³¹⁵
297. Claimant alleges that excluding the type of remedy sought here would render treaties practically meaningless in many instances since a large number of countries require foreign investors to incorporate a local company in order to engage in activities which are considered of strategic importance.³¹⁶

C) The Tribunal’s analysis

298. The Tribunal notes that it has already expressed its opinion, by majority, in the Partial Award regarding the directly related issue of whether the Treaty provided protection to indirect investors.³¹⁷ None of the allegations made by Respondent in its subsequent submissions—which the Tribunal has carefully analyzed—have been sufficient to change the findings already made by the Tribunal.
299. Having recalled the Tribunal’s position, by majority, it should be noted that the Tribunal must reject Respondent’s objection in this regard.

³¹³ C3 — § 132; Partial Award, § 218.

³¹⁴ C3 — § 133.

³¹⁵ C2 — § 236.

³¹⁶ C3 — § 136.

³¹⁷ *Supra*, § 110.

VIII. THE MERITS OF THE CASE

1. *The issue of expropriation*

300. Article XI of Annex III of the Treaty, invoked by Claimant, provides:

ARTICLE XI

CONDITIONS FOR EXPROPRIATION

Investments shall not be expropriated or nationalised either directly or indirectly through the application of measures equivalent to expropriation, except for reasons of public interest, in non-discriminatory fashion, and after payment of prompt, adequate and effective compensation, in a freely convertible currency and in accordance with due process of law and with the general principles of treatment established in Articles III and IV.

A) The Claimant's position

301. Claimant notes that Article XI of Annex III of the Treaty prohibits the State from nationalizing or expropriating a foreign investment, or from taking any action that indirectly amounts to an expropriation. Claimant maintains that the Treaty does not define directly what constitutes an expropriation, but relies on the distinction drawn between direct and indirect expropriations in international law.³¹⁸ To establish an expropriation, always according to Claimant, an investor must demonstrate that it was deprived of the economic use and enjoyment of its investments, as if the rights related thereto had ceased to exist.³¹⁹ In this vein, Claimant cites *Middle East v. Egypt*, where the tribunal held that an expropriation results when measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights in the investment.³²⁰

³¹⁸ C1 — § 234. Thus, direct expropriation occurs when the State deliberately seizes property, and/or transfers title to private property to itself or a State-mandated third party, whereas, in contrast, indirect expropriation refers to a government measure that, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits. According to Claimant, indirect expropriations may be carried out by way of a single action, through a series of actions in a short period of time or through simultaneous actions.

³¹⁹ C1 — § 236.

³²⁰ C1 — § 236; CL-14, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated April 12, 2002, (“*Middle East v. Egypt*”) § 107.

302. Claimant insists that the mere retention of ownership of shares does not exonerate Respondent from its illegal taking; while Claimant continues to technically own shares in Lajun, through its expropriatory conduct, Respondent has substantially and permanently destroyed the value of those shares and deprived Claimant of his shareholding benefits in Lajun.³²¹
303. Claimant invokes two “alternative” factual points in demonstrating the existence of an expropriation.
304. Claimant argues in the first place that the State expropriated his investment and breached the Treaty when, in September 2017, the State’s military wrongfully and violently ejected Lajun (and all of its employees) from the Land, and simultaneously seized control of the administration and operation of the Landfill.³²² Claimant insists that, on the one hand, the State provided him with assurances through the two Settlement Agreements, while, on the other hand and simultaneously, took a number of actions that had the direct and immediate effect of removing the Land and Landfill from Claimant, and placing their ownership into the hands of the State.³²³ In the end, Claimant’s entire investment was lost when the military seized the Landfill and ejected Lajun and its employees from the Land.³²⁴
305. Claimant asserts that the State’s wrongful actions against Claimant are analogous to the measures taken by the respondent in *Middle East Cement Shipping v. Egypt* and *Tecmed v. Mexico*.³²⁵ In the first case, it was held that a decree was expropriatory because it had the effect of depriving the claimant of its rights under a ten-year license to import, store, and sell cement, as the claimant was actually forced to stop its cement sales in Egypt. The claimant carried forth its operations under its license for several years, until Egypt issued the decree prohibiting the import of cement through the private and public sector. In the second case, a resolution that rejected the claimant’s application for the renewal of a permit to operate a landfill and ordered the claimant to close the landfill was held to be

³²¹ C2 — § 244.

³²² C1 — § 237.

³²³ C1 — §§ 238-240.

³²⁴ C1 — § 245.

³²⁵ C1 — §§ 241, 243; CL-14, *Middle East v. Egypt*, § 107; CL-8, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated May 29, 2003 (“*Tecmed v. Mexico*”), § 96.

expropriatory. The tribunal in such case determined that the socio-political circumstances cited by the State to support its resolution were not sufficient justification to deprive the foreign investor of its investment with no compensation and that the State had violated the claimant's legitimate expectation of a long-term investment and also of the estimated return through the operation of the investment during its entire useful life.³²⁶

306. In Claimant's view, the fact that the military's forcible seizure of Lajun and the Land took place after the State had provided Claimant with repeated assurances that it would respect Claimant's investment and its obligations under the Concession Agreement is illustrative of Respondent's bad faith in this context.³²⁷ For example, the ASDN expressly guaranteed that Lajun would enjoy "peaceful" operation of the Landfill and its rights under the Concession Agreement.³²⁸

307. Claimant stresses that the Concession Agreement contained an exclusivity clause (clause 16.5) which provided that Lajun had the exclusive right to manage, administer, maintain, and operate the Duquesa Landfill, as well as the exclusive right to develop a WTE Plant; Claimant argues that it had a legitimate expectation that such contractual provisions would be honored.³²⁹ Claimant contends that Respondent's actions had the effect of depriving Claimant of the entire value of his investment which is inextricably linked to the terms of clause 16.5 of the Concession Agreement.³³⁰ The Concession Agreement, and its amendments, ensured that Claimant would possess these exclusive rights for a period of 27 years.³³¹ Yet, Claimant points out, the State refused to abide by its commitments under the Concession Agreement and international law, and instead unjustifiably ejected Lajun and Claimant from the Land and Landfill, thereby precluding Claimant from using and enjoying the benefits of his investment.³³² In this regard,

³²⁶ C1 — §§ 241-244.

³²⁷ C1 — § 238.

³²⁸ C1 — § 238. C-5, Settlement Agreement 1 between the ASDN and Lajun dated February 10, 2014, Clause 8: "The ASDN guarantees LAJUN the peaceful possession and enjoyment of the rights and privileges granted by the Agreement for the Administration of the Duquesa Landfill..." [Tribunal's Translation]

³²⁹ C2 — § 254; C-1 (R-6), Concession Agreement, Clause 16.5: Exclusivity: "The MUNICIPALITY OF SANTO DOMINGO NORTE agrees that this Agreement with THE COMPANY has an exclusive nature, and therefore undertakes not to negotiate with third parties for purposes similar to those that constitute the subject-matter of this Agreement during its term." [Tribunal's Translation]

³³⁰ C2 — § 247.

³³¹ *Ibid.*

³³² *Ibid.*

Claimant insists on the existence of a relationship between “expropriation” (both direct and indirect) and “legitimate expectations,” which, in his opinion, includes the expected economic benefit of the investment, by relying upon various precedents. Thus, the tribunal in *Tecmed v. Mexico* held that an investor’s legitimate expectations are relevant in assessing whether a measure is expropriatory.³³³ The tribunal recognized that expropriation also includes:

“(…) incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State”.³³⁴

308. According to Claimant, here, like the government resolution in *Tecmed v. Mexico*, the State’s September 2017 forcible intervention and takeover of the Landfill and the Land “fully and irrevocably destroyed” Claimant’s “economic and commercial operations in the Landfill” and the Land.³³⁵ Moreover, Claimant asserts, as with the resolution in *Tecmed v. Mexico*, Respondent’s actions unreasonably frustrated Claimant’s legitimate expectation to operate and profit from a 27-year concession, an expectation that was based on repeated promises, representations, and assurances by the State.³³⁶
309. Claimant also argues that in *Crystallex v. Venezuela*, the mine operations contract at issue permitted claimant the right to “design, build the plant, operate it, process the gold for subsequent commercialization and sale...[and] to exploit and extract gold in the area.” In particular, Claimant draws attention to the fact that the tribunal in *Crystallex v. Venezuela* held that respondent had expropriated the claimant’s investment in Las Cristinas, an area that reportedly contained one of the largest gold deposits in the world, despite the fact that the claimant had never obtained the necessary permits to develop or exploit Las Cristinas. The tribunal noted that the definition of “investments” provided for in the treaty was a broad one, and since the treaty did not place any limitations on the types or the nature of the contractual rights which were defined as “investments,” the tribunal

³³³ C2 — § 252. CL-8, *Tecmed v. Mexico*, § 122.

³³⁴ C2 — § 252; CL-12, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated August 30, 2000, § 103.

³³⁵ C1 — § 245.

³³⁶ *Ibid.*

held that Venezuela had expropriated the claimant's investment without providing prompt, adequate and effective compensation.³³⁷

310. Claimant notes that Respondent argues that its conduct does not amount to expropriation because the courts of the State nullified the Concession Agreement in accordance with local law.³³⁸ According to Claimant, the following facts show the falsehood of this argument. On July 19, 2017, the ASDN abruptly notified Claimant of its intent to unilaterally terminate the Concession Agreement, less than two months after it had executed the Second Settlement Agreement confirming the validity of the Concession Agreement, and had irrevocably released all claims it had, or could have had, against Lajun.³³⁹ Despite the fact that the notice provided Lajun thirty days to “cure” the alleged breaches, the State initiated an administrative proceeding with the Superior Administrative Court of the Dominican Republic seeking nullification of the Concession Agreement before the expiration of Claimant's thirty-day period.³⁴⁰
311. Claimant insists that, in any event, the mere fact that an expropriation was sanctioned by a State judicial body does not conclusively establish that there was no expropriation, and certainly does not excuse the State from compensating Claimant for the taking.³⁴¹ The Claimant adds that nor is this Tribunal bound by any judicial decisions rendered by the courts of the Dominican Republic. On this matter, Claimant refers to *Karkey v. Pakistan*, in which the tribunal found that Pakistan had expropriated the claimant's investment through the Judgment of the Supreme Court which declared the contract to be void *ab initio*.³⁴² Claimant also refers to *Azinian v. Mexico* which acknowledged that:

³³⁷ C2 — § 253, CL-79, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated April 4, 2016, §§ 659-665, 718 (“*Crystallex v. Venezuela*”).

³³⁸ C2 — § 245, R1 — § 432.

³³⁹ C2 — § 245; C-8, Settlement Agreement 2 between the ASDN and Lajun dated May 24, 2017; C-9, Complaint for Breach of the Agreement, Act No. 179/2017, dated July 19, 2017.

³⁴⁰ C2 — § 245; C-11, Administrative Proceeding aimed at Nullifying the Agreement for the Management and Operation of the Duquesa Landfill and its Amendment Addenda, dated August 10, 2017; C-92, ASDN Board of Councilors' Resolution No. 37/2017, dated August 8, 2017. This resolution authorizes the ASDN to commence a proceeding for the termination and nullification of the Concession Agreement resulting from breaches and mismanagement by Lajun.

³⁴¹ C2 — § 248.

³⁴² C2 — § 248; CL-76, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated August 22, 2017, §§ 561, 645, 648. See also CL-77, *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award dated September 9, 2009, §§ 118-119; CL-78, *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award dated June 30, 2009, §§ 127-129.

*“an international tribunal called upon to rule on a Government’s compliance with an international treaty is not paralyzed by the fact that the national courts have approved the relevant conduct of public officials.”*³⁴³

312. Claimant notes that Respondent also argues that the Land on which the Duquesa Landfill is located was made available to Lajun at no cost; thus, according to Respondent, no use or enjoyment was taken away, and in any event, the Land was acquired fraudulently.³⁴⁴ Claimant holds that Respondent’s argument regarding the supposed fraudulent acquisition of the Land is a pretext and has no factual basis, and Claimant paid USD 2.5 million (with his own personal funds) to purchase and acquire the Land.³⁴⁵
313. Secondly, in the alternative, Claimant argues that the State consistently subjected Claimant to capricious and arbitrary measures throughout the life of the investment that had the effect of entirely eroding Claimant’s rights to his investment.³⁴⁶ Claimant alleges that these actions constitute a “creeping expropriation” in violation of international law.³⁴⁷

³⁴³ C2 — § 249; According to Claimant, however, in *Azinian v. Mexico*, the claimant failed to allege and demonstrate an absence of due process or a denial of justice in the local Mexican proceedings with respect to his investment. RL-480, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated November 1, 1999 (“*Azinian v. Mexico*”), § 98.

³⁴⁴ C2 — § 250.

³⁴⁵ C2 — §§ 70-92 and 250. Claimant highlights that the due diligence he conducted did not create any red flag. Claimant agreed to pay (and paid) USD 2.5 million for the Land, as evidenced by the agreements related to its sale. See C-22, Framework Agreement, jointly with Annex A (R-95) (Shares Contract) and Annex B (R-96) (Land Contract); C-153, Receipt of Payment from José Antonio López Díaz regarding the Land dated November 11, 2016. Although Respondent argues that, in its opinion, this price is too high for a property on a landfill, Claimant holds that the State’s observations and personal opinions regarding the price of the Land are simply irrelevant, as the fact is that this was the price paid by Claimant for the Land. Claimant insists on the fact that during the three-month “cooling off” period provided for in the Treaty, Respondent initiated a new judicial proceeding in the Dominican Republic through which the State sought nullification of the title to the Land. This action was filed six weeks after Claimant submitted his Notice of Controversy, and it was not formally notified to Claimant or to his counsel. More specifically, on February 1, 2018, the State filed another action against Felipe Antonio Díaz, José Antonio López Díaz and Lajun (adding Nagelo and Wilkison to Respondents some four months later), seeking the nullification of the title of the sale of the Land so that the Land would be returned to the State, as well as an indemnification payment to the State amounting to DOP 1 billion (approximately USD 20 million). The Land Nullification Action is based on events that date back to 1986, when the Land was first sold by the Consejo Estatal del Azúcar, a State agency, to a third party, Felipe Antonio Díaz. Respondent argues that the Land Nullification Action was filed because the State allegedly discovered a massive fraud related to the Dominican State agency, the Consejo Estatal del Azúcar, and the original sale of the Lands conducted more than thirty years ago. Claimant holds that Respondent’s argument that multiple documents issued by the three branches of the Dominican Government (legislative, executive and judicial) for a thirty-year period are false is not believable and it shows once again that the Nullification Action is nothing but a pretext aimed at punishing Claimant.

³⁴⁶ C1 — § 248.

³⁴⁷ C1 — §§ 248-255; C2 — § 256.

314. Claimant holds that the creeping expropriation process began almost from the inception of Claimant's Investment, since, only thirteen days after Claimant acquired ownership of Lajun and the Land, the State abruptly notified Lajun of its decision to rescind the Concession Agreement via Act No. 817/2013, notifying the Rescission of the Agreement. The State justified its decision on the basis that Lajun, among other actions, had purportedly not complied with its obligations under the Concession Agreement or Dominican environmental law. Claimant holds that the State's decision to rescind the Concession Agreement was arbitrary and groundless. In fact, just 8 days before the State promulgated Act No. 817/2013, the State issued a report summarizing the results of its on-site inspection of the Landfill. In stark contrast to the allegations contained in Act No. 817/2013, the State's inspection report confirmed that Lajun was in compliance with all of its obligations under the Concession Agreement. Nonetheless, as a result of this Act, Claimant understands he was deprived of the ability to use and benefit from his investment for a period of six months.³⁴⁸ The creeping process carried on after Claimant regained possession of the Land and the operation of the Landfill via the First Settlement Agreement.³⁴⁹ Despite the State's assurances in the First Settlement Agreement that it would abide by its obligations and respect Lajun's rights under the Concession Agreement, Claimant asserts that it continued to be subject to persistent arbitrary and discriminatory behavior at the hands of the State as follows:

- On March 11, 2016, the State imposed an unsubstantiated fine on Lajun for allegedly violating fire code provisions under Dominican environmental law. At the time, Lajun was the only landfill operator in the Dominican Republic that was fined for alleged fire code violations.
- Thereafter, the State unreasonably refused to renew Lajun's environmental permit, notwithstanding that the State had, on multiple occasions, certified and represented that Lajun was in compliance with its obligations under the Concession Agreement and Dominican law. For example, in the 2014 Certification, the State confirmed that Lajun was operating the Landfill using high quality standards and was complying with all Dominican environmental laws.

³⁴⁸ C1 — § 248.

³⁴⁹ C1 — § 249.

- On November 9, 2016, the ASDN deposited prohibited biomedical and biohazardous waste at the Landfill in camouflaged trash bags, which would have subjected Lajun to significant fines if not discovered by Lajun's personnel. Notably, this waste was deposited by the ASDN on the same day Claimant met with the Dominican President and was assured that the State would not wrongfully interfere with Lajun's business.
- On December 14, 2016, approximately a month after Claimant's meeting with the Dominican President, seventeen representatives of the ASDN forcefully and violently entered the Landfill while carrying firearms. The ASDN representatives staged a press conference, during which they accused Claimant of committing fraudulent acts and alleged that Claimant was not the true owner of the Land. The ASDN's actions interfered with Claimant's management of the Landfill and adversely impacted Claimant's reputation in the Dominican Republic.
- On April 11, 2017, the ASDN once again positioned the State's military in the Landfill and unlawfully occupied the Land. While doing so, the State ordered its municipal trucks to block the entrance to the Landfill, thus impeding Lajun's ability to effectively and peacefully operate the Landfill. The State's actions took place a few weeks after Claimant's representatives and the Ministry of Environment met and came to an agreement that the tipping fees being charged by Lajun would be revised.
- On July 19, 2017, the ASDN, without justification, notified Claimant of its intent to unilaterally terminate the Concession Agreement. As detailed above, the State's purported reasons for terminating the Concession Agreement were baseless and nothing more than part of a manufactured attempt to deprive Claimant of his Investment. In fact, less than two months before the State delivered its termination notice, the State had executed the Second Settlement Agreement, in which it

confirmed the validity of the Concession Agreement and irrevocably released all claims it had, or could have, against Lajun.³⁵⁰

315. Claimant highlights in this regard that even when confronted with the State's abusive behavior, Claimant continued to maintain his investment in Lajun and the Landfill in order to allow his company to meet its obligations under the Concession Agreement and provide its services to the Dominican community.³⁵¹ Claimant did so even though the tipping fees being received by Lajun were woefully inadequate and insufficient to support Lajun's operational costs.³⁵² The State continually refused to revise the tipping fees charged by Lajun, despite repeated acknowledgments and representations by the State that Lajun's tipping fees were much too low and needed to be increased.³⁵³
316. Claimant argues that the creeping process culminated with Lajun's forcible removal and ejection from the Land in September 2017.³⁵⁴ With its forced intervention and takeover, Claimant adds, the State completed the creeping process and realized its expropriation of Claimant's investment.³⁵⁵ In this regard, Claimant particularly insists on the relevance of *Vivendi II v. Argentina* in which the State's interference with the peaceful maintenance and operation of a landfill had made it impossible for claimant to enjoy and benefit from his investment. For Claimant, the State's measures, ultimately, hit the economic heart of the investment.³⁵⁶

³⁵⁰ C1 — § 249; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 40, 48, 55; C-16, Attestation of Compliance and Conformity dated July 9, 2014. Claimant holds that this Attestation of Compliance and Conformity evidences that the ASDN previously admitted and confirmed, among other items, (i) that the Concession Agreement had been executed following all proper Dominican public bidding procedures; (ii) that Lajun had complied, and was complying, with all of its obligations under the Concession Agreement and its amendments as well as under the First Settlement Agreement; (iii) that Lajun was complying with all Dominican environmental laws; (iv) that the tipping fee that Lajun received from users was woefully low and inadequate; and (v) that the ASDN was pleased with Lajun's management and operation of the Duquesa Landfill; C-65, Internal report regarding the unannounced visit of the "Board of Councilors of Santo Domingo Norte" to Duquesa Landfill, with accompanying links to videos and photographs. See also, C-8, Settlement Agreement 2 between the ASDN and Lajun dated May 24, 2017; C-9, Complaint for Breach of the Agreement, Act No. 179/2017 dated July 19, 2017.

³⁵¹ C1 — § 250.

³⁵² *Ibid.*

³⁵³ C1 — §§ 250-251.

³⁵⁴ C1 — § 252.

³⁵⁵ *Ibid.*

³⁵⁶ C1 — §§ 253-255; CL-11, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated August 20, 2007 ("*Vivendi II v. Argentina*"), §§ 5.3.10-11 and 7.5.25.

317. Consequently, Claimant argues that Respondent expropriated his investment and that it failed to fulfill the criteria in the Treaty to deem lawful its expropriation under international law.³⁵⁷ In this respect, Article XI of Annex III of the Treaty provides that the State may expropriate or nationalize an investment only if the expropriation is carried out in a nondiscriminatory fashion, for reasons of public interest, after payment of prompt, adequate and effective compensation and in accordance with due process of law.³⁵⁸
318. Claimant holds that Respondent did not even attempt to comply with the cumulative requirements for a lawful expropriation: therefore, the expropriation is unlawful.³⁵⁹
319. According to Claimant, the State's actions were aimed at ejecting Claimant from the Land and assuming control of the Landfill, thus, the actions were not driven by genuine and valid public concerns.³⁶⁰ Claimant recalls that the ASDN initiated proceedings on August 11, 2017 by filing a petition with the Superior Administrative Court of the Dominican Republic, in which the State sought the nullification of the Concession Agreement for alleged breaches. The State also filed a request for interim measures seeking a suspension of the Concession Agreement until the conclusion of the Nullification Action. Claimant emphasizes again that both of the State's filings were submitted prior to the expiration of the "cure" period provided to Lajun to remedy its alleged contractual breaches. According to Claimant, the State's initiation of legal proceedings was nothing more than a transparent attempt to evade the Concession Agreement's "cure" provision, and thereby expedite the State's takeover of the Landfill.³⁶¹ The nullification action was initiated more than ten years after the Concession Agreement's execution and after the State had executed multiple amendments and various settlement agreements in relation to the Concession Agreement.³⁶² The State, at no point throughout this ten-year period, argued that the Concession Agreement was null and void.³⁶³

³⁵⁷ C1 — § 256.

³⁵⁸ *Supra*, § 300.

³⁵⁹ C1 — § 256.

³⁶⁰ C1 — § 261.

³⁶¹ C1 — § 262.

³⁶² C1 — § 263.

³⁶³ C1 — § 263.

320. Claimant also argues that Respondent has failed to demonstrate how the public interest was served after the intervention.³⁶⁴ According to the Dominican Republic's own press reports, it is now evident that Respondent has not been able to adequately operate and maintain the Landfill and is instead contaminating the environment and threatening the health of the population. In fact, horrific smells, piles of trash and waste that have not been collected, burning garbage, billowing smoke, infestation of flies, rats, and roaches, are only a few of the problems that have arisen since Respondent forcefully took over the management and operation of the Landfill.³⁶⁵

321. Claimant submits that the expropriation was carried out in a discriminatory fashion, and was targeted exclusively at Claimant and his investment.³⁶⁶ Claimant adds that the fact that 10% of Lajun's shares are owned by Asilis Elmudesi does not absolve Respondent of its discriminatory acts against Claimant's investment.³⁶⁷ Claimant insists on the fact that at the time the fines were imposed on Lajun, Lajun was the only landfill operator of the more than hundreds in the Dominican Republic that was subject to such fines.³⁶⁸ Claimant stresses that the State imposed these fines on Lajun even though the ASDN had contemporaneously issued inspection reports confirming that Lajun was in compliance with all its obligations under the Concession Agreement.³⁶⁹ Furthermore, Claimant notes that the State's intervention took place after the State initiated a media campaign of false and injurious information against Claimant and his son; after the State imposed further unsubstantiated sanctions against Lajun; and after the State commenced an entirely specious criminal prosecution against Claimant's son.³⁷⁰

322. Claimant also submits that Respondent failed to both comply with due process and abide by the law. Claimant emphasizes that, under international law, due process might be breached in a variety of ways, including failure to provide notice or a fair hearing, non-compliance with local law, or failure to provide a means for legal redress.³⁷¹ Specifically,

³⁶⁴ C1 — §§ 263-266.

³⁶⁵ C2 — § 265.

³⁶⁶ C2 — § 259.

³⁶⁷ C2 — § 260.

³⁶⁸ C1 — § 259.

³⁶⁹ *Ibid.*

³⁷⁰ C1 — § 260.

³⁷¹ C1 — § 270.

according to Claimant, Respondent failed to comply with its own Constitution and expropriation laws that contain rigorous and detailed expropriation requirements (that is, e.g., a declaration by the President and a deposit of a fixed amount prior to taking possession of the property);³⁷² the termination requirements contained in the Concession Agreement were not met either.³⁷³ He also notes that Respondent ostensibly gave Lajun a 30 working-day “cure” period, only to file its nullification petition prior to the expiration of the cure period and, not coincidentally, on the very same date Lajun responded to the State’s Termination Notice.³⁷⁴ Claimant adds that the Termination Notice and subsequent Nullification Action were also issued in violation of the State’s commitments undertaken via the Second Settlement Agreement that had been executed between the ASDN and Claimant (through Lajun) less than two months before, and through which the State reconfirmed the validity of the Concession Agreement and guaranteed Claimant’s peaceful control of his investment.³⁷⁵

323. Lastly, Claimant also submits that Respondent provided no compensation whatsoever. The Superior Administrative Court’s nullification does not excuse Respondent from compensating Claimant, and Claimant argues that this Tribunal is not bound by any judicial decisions rendered by the Respondent’s courts in this regard.³⁷⁶

B) The Respondent’s position

324. Respondent’s overall position is that there was no direct or indirect expropriation — either through a single act or in a creeping manner — of Claimant’s investments. In any event, even if the Tribunal were to find that there was an expropriation of any of Claimant’s alleged investments in this case, Respondent asserts that such expropriation was lawful and no compensation was due.³⁷⁷
325. Respondent notes that, even if Claimant’s argument is in the alternative, it is conceptually contradictory to argue that a series of actions up to and including September 2017

³⁷² C2 — § 267.

³⁷³ C2 — § 274.

³⁷⁴ C2 — § 273.

³⁷⁵ C2 — § 276.

³⁷⁶ C2 — §§ 270-271.

³⁷⁷ R1 — § 428.

constituted an indirect creeping expropriation of Claimant's investments and, at the same time, to argue that the judicial intervention of the Duquesa Landfill in September 2017 constituted, in and of itself, an expropriation of those investments.³⁷⁸ Respondent submits that neither of the two alternative factual bases invoked by Claimant constitutes an expropriation.

326. First, Respondent argues that there was no direct expropriation of Claimant's investment as a result of the judicial intervention of the Duquesa Landfill mandated in September 2017.³⁷⁹ In this respect, it points out that there has been no transfer of ownership since none of the investments invoked by Claimant, including the shares, were expropriated.³⁸⁰

327. Duquesa Landfill's takeover was made in full compliance with Dominican law.³⁸¹ Nor was there an intervention with the involvement of the Dominican military as Claimant wrongly submits, but rather the environmental police (the SENPA) were involved in the judicial intervention in exercise of its legal powers for the purpose of enforcing compliance with Law No. 64-00 on the Environment and the Judgment on Interim Measures, as well as providing coordinated support to the mission of the Technical Administrative Commission³⁸² that took on the temporary administration of the Duquesa Landfill.³⁸³

328. According to Respondent, it also cannot be argued that there was an expropriation of the Concession Agreement in this case. In particular, Respondent explains that the ASDN and Lajun entered into the Second Settlement Agreement to work out their differences regarding certain amounts owed by Lajun to the ASDN, but that this does not "confirm the validity of the Concession Agreement," [Tribunal's Translation] as alleged by Claimant.³⁸⁴ Respondent recalls that the ASDN first attempted to terminate the Concession Agreement for cause, in accordance with the termination clause provided for

³⁷⁸ R1 — § 440.

³⁷⁹ R2 — § 374.

³⁸⁰ R2 — §§ 378-379.

³⁸¹ R1 — § 429.

³⁸² The operation of which is the responsibility of an executing unit made up of delegates from the Ministry of Environment, the Ministry of Public Health and the ASDN. C-13, Judgment on Interim Measure; R-166, Minutes No. 0002-2017 of the Technical Administrative Commission dated October 2, 2017; Statement of Mr. Pérez Lorenzo, §§ 29-30.

³⁸³ R1 — § 429.

³⁸⁴ R1 — § 432; R2 — § 381.

in the Agreement itself, which could not have constituted an expropriation.³⁸⁵ However, Respondent points out, once evidence came to light that the Concession Agreement had been entered into in violation of Law No. 340-06 on Public Procurement, the ASDN requested that it be nullified before the Dominican courts. As a result, the Superior Administrative Court declared the Concession Agreement null and void and, as a result of the nullification declared by a competent court, it was determined that no compensation was due under Dominican law.³⁸⁶ Respondent argues that when the courts of a State nullify or cancel a concession in accordance with the conditions set forth in the agreement itself or in the rules of domestic law, this does not amount to expropriation.³⁸⁷

329. In this regard, it is illustrative, according to Respondent, to refer to the *Azinian v. Mexico* decision, which is reminiscent of the facts of the present case as it involved the termination of a trash collection and disposal concession agreement entered into with local authorities. In *Azinian v. Mexico*, the arbitral tribunal rejected that the contractual annulment ordered by a competent Mexican court, applying Mexican legal standards, could amount to an expropriation:

“The Ayuntamiento believed it had grounds for holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA’s initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento’s determination? Further, the

³⁸⁵ R1 — § 432; RL-438, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated June 21, 2011, § 272 (“*Impregilo v. Argentina*”): “[T]he termination of the concession is not necessarily equal to expropriation. In fact, the Concession Contract provided for termination in various defined circumstances, and if the Contract is terminated in conformity with these provisions, this is not an act of expropriation by the State but an act performed by the public authorities in their capacity as a party to the Contract;” RL-445, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB03/29, Award dated August 27, 2009, § 460; RL-326, *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award dated February 7, 2011, § 137.

³⁸⁶ R2 — § 382.

³⁸⁷ R1 — § 432; RL-481, Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009), p. 275; RL-482, Andrew Newcombe, “The Boundaries of Regulatory Expropriation in International Law,” 20 *ICSID Review* 1 (2005), p. 19.

Claimants have neither contended nor proved that the Mexican legal standards for the annulment of concessions violate Mexico's Chapter Eleven obligations; nor that the Mexican law governing such annulments is expropriatory.”³⁸⁸

330. The Concession Agreement — Respondent recalls — establishes that the Land on which the Duquesa Landfill is located was made available to Lajun at no cost for its operation, which could not be interpreted as a transfer of ownership.³⁸⁹ Moreover, Respondent asserts that the Portion of Land does not belong to Lajun, but is listed as property of Nagelo and Wilkison.³⁹⁰ Respondent also contends that Claimant should have realized that the chain of ownership of the Portion of Land was irregular.³⁹¹ Respondent emphasizes that the Nullity action was filed by the Consejo Estatal del Azúcar (“CEA”) in view of the findings that arose in relation to the fraud perpetrated in the acquisition of the Portion of Land.³⁹²

331. Moreover, Respondent argues that affecting Claimant's mere expectations cannot amount to expropriation; the award rendered in *Tecmed v. Mexico* — cited by Claimant — was criticized by the annulment committee in *MTD v. Chile* for having determined that an expropriation had occurred on the basis of the investor's expectations, rather than its property rights.³⁹³ Respondent also points out that the facts in *Tecmed v. Mexico* — cited by Claimant — were not similar to the Duquesa Landfill situation. In *Tecmed v. Mexico*, the claimant's claim related to an investment in land, buildings and other assets in connection

³⁸⁸ RL-480, *Azinian v. Mexico*, § 96.

³⁸⁹ R1 — § 434.

³⁹⁰ R2 — §§ 383-385.

³⁹¹ R2 — §§ 69-72. Respondent recalls that Claimant alleges that Wilkison and Nagelo acquired the Portion of Land on June 26, 2013, by entering into the Land Contract with Mr. López Díaz; in turn, Mr. López Díaz would have acquired the ownership of the Portion of Land from Mr. Felipe Antonio Díaz, who allegedly purchased it from the Consejo Estatal del Azúcar. According to Respondent, the Portion of Land left the CEA's estate through fraud. Respondent notes that Claimant alleges that the actions of the CEA and the Republic related to the Portion of Land were initiated as a “retaliation” against Claimant for initiating this Arbitration. Respondent explains that, in 2016, the President of the Republic initiated an inventory of CEA's lands and assets for reasons completely unrelated to Claimant or his alleged investments. Said inventory showed irregularities that led the CEA to attempt to recover the lands that illegally left its estate. In other words, the President and the CEA exercised rights that even Claimant does not question, and he knew — or would have known if he had performed basic due diligence — that there was a risk of the Republic challenging the validity of the chain of transactions. The actions of which Claimant complains are nothing more than the materialization of a risk of which he should have known.

³⁹² R2 — § 385.

³⁹³ R2 — § 387; RL-413, *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment dated March 21, 2007, § 67.

with a controlled landfill of hazardous industrial waste. The State decided not to renew the authorization to operate this waste disposal site, among other reasons, due to strong resistance from the local population. It also points out that there was no decree of annulment issued by the competent judicial authority. Respondent adds that the tribunal in *Tecmed v. Mexico* also noted that the controlled landfill operation by the company had in no way compromised “the ecological balance, the protection of the environment or the health of the people” and that the decision was based solely on reasons related to the social or political circumstances.³⁹⁴

332. In any event, Respondent submits that Claimant did not have a vested right to build and develop a WTE Plant since none of the provisions of the Concession Agreement granted Lajun the right to build and develop a WTE Plant.³⁹⁵ In fact, the subject matter of the Concession Agreement is solely the disposal of solid waste.³⁹⁶ No Municipality could have granted it, as it comes exclusively within the purview of the President of the Republic.³⁹⁷ Indeed, under Dominican law, the right in question only arises through a Definitive Concession for the Exploitation of Electrical Works, the granting of which is the exclusive prerogative of the Executive Branch and which Lajun lacked.³⁹⁸ Respondent emphasizes that during the Hearing, Claimant affirmed that it was aware of the requirement of a definitive concession, the obtainment of which was conditional upon obtaining a provisional concession and registration in the Registry of Production Facilities under the Special Regime.³⁹⁹ Respondent argues that Lajun never started the appropriate procedures and that Claimant did not even begin with the first of the steps: obtaining a provisional concession.⁴⁰⁰ Even if it had succeeded in obtaining a definitive concession giving it the right to build and develop a WTE Plant, Respondent argues that this would not have guaranteed the obtainment of an electricity supply agreement: under Dominican law, a definitive concession is a necessary, but not sufficient, condition for obtaining an

³⁹⁴ R2 — § 387; RL-448, *Tecmed v. Mexico*, §§ 115, 132, 148.

³⁹⁵ RPHB — § 51; Statement of JD Canó, §§ 7-13; R1 — §§ 37-39, 470-472; R2 — §§ 54-67; Tr. Day 1 (English), pp. 189-191, 258 (no indication of lines).

³⁹⁶ *Ibid.*

³⁹⁷ R2 — § 389.

³⁹⁸ RPHB — § 52.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

electricity supply agreement.⁴⁰¹ Finally, Respondent insists that Nagelo and Wilkison never exercised the purchase option on the Additional Land where they were supposed to build the WTE Plant.⁴⁰²

333. Respondent contends that, in any event, the actions invoked by Claimant do not amount to creeping expropriation. The Tribunal lacks jurisdiction — according to Respondent — to hear violations of international law in general and can only hear claims with respect to violations of substantive Treaty obligations, so Claimant cannot allege that there has been a creeping expropriation.⁴⁰³

334. Specifically, Respondent states that none of the actions and measures disputed by Claimant (which he considers arbitrary, capricious and discriminatory), either individually or collectively, caused a substantial deprivation of the alleged investments:

- The first termination of the Concession Agreement was caused by the serious breaches on the part of Lajun, including: (i) the improper management of the Duquesa Landfill, the findings of the ASDN's environmental managing unit in regard to the poor condition of the perimeter area of the landfill, and the diseases and conditions that affected the neighboring municipalities; (ii) the warnings issued by the Ministry of the Environment and the Ministry of Public Health about the ASDN's duty to ensure the proper management of the Duquesa Landfill and the protection of the environment, and (iii) Lajun's breaches and violations of its obligations under the Concession Agreement. The notice of termination of the Concession Agreement stated as grounds for termination the non-operation of the Duquesa Landfill as a sanitary landfill, the failure to construct a perimeter fence, the failure to protect the environment and the aquifer, as well as the improper handling of leachates and biogases. In any event, it was an

⁴⁰¹ RPHB — § 53.

⁴⁰² Respondent recalls that said option expired in 2014, long before the State “intervened” in Duquesa. Claimant argues that it could have renegotiated that purchase option, but Respondent insists that by 2017 the Additional Land had already been returned to the CEA, as it was discovered that said property had also left the CEA's estate through fraud; RPHB — § 54.

⁴⁰³ R1 — § 440.

interim (non-permanent) measure, as Lajun’s “new directive” promised that it would comply with the provisions of the Concession Agreement, and upon return of control over the Duquesa Landfill to Lajun, Settlement Agreement 1 was executed whereby Lajun agreed to perform the obligations under the Concession Agreement and to take specific action in relation to the infrastructure and equipment of the Duquesa Landfill (which it never did), and under which the ASDN waived unilateral termination.

- The penalty for violation of the fire code, the alleged denial of renewal of the environmental permit, and certain isolated facts that took place at the Duquesa Landfill did not substantially deprive Claimant of his investment on a permanent basis. Be that as it may, all those facts resulted from Lajun’s breaches of different regulations. For instance, the 2016 Environmental Sanction was due to violations of the Environmental Permit evidenced by the on-site inspection conducted in January 2016. Despite said violations, Lajun’s Environmental Permit was renewed by the authorities, so there was no such denial as alleged by Claimant. The certifications referred to by Claimant were not issued by the national bodies in charge of enforcing environmental regulations, so they are completely irrelevant. Also, in regard to the incident of the two bags of medical waste in November 2016 mentioned by Claimant, such waste was concealed in black bags (used for ordinary garbage), so ASDN’s collectors could not have realized that they were collecting medical waste rather than ordinary domestic waste.
- It is not true that in December 2016 the ASDN’s councilors entered the Duquesa Landfill “while carrying firearms.” The councilors visited the Duquesa Landfill simply to make lawful claims against the reckless conduct of Lajun, the company engaged in the final disposal of waste in its municipality.
- The municipal trash truck blockage at the entrance to the Duquesa Landfill in April 2017 was caused by Lajun’s unilaterally preventing such trucks from entering the landfill—in blatant violation of its obligations under the Concession Agreement—which therefore parked at the

entrance to the landfill. It is not true that Dominican military officers had occupied the landfill, instead, they were just environmental police officers (SENPA), acting within the scope of their legal duties to enforce environmental rules.

- The termination of the Concession Agreement on July 19, 2017, was for cause, as set forth under the agreement itself, and based on grounds that supported such termination. The complaint for non-compliance identified several contractual obligations violated by Lajun, such as: (i) the failure to construct a perimeter fence, (ii) the lack of equipment and maintenance of heavy equipment required for the proper operation of the Duquesa Landfill; (iii) the lack of control of biogases produced at the Duquesa Landfill, (iv) the failure to implement a solid waste utilization system, (v) the implementation of a leachate processing system, and (vi) the lack of a continuous coverage of waste.
- The intervention of the Duquesa landfill in September 2017, ordered by a competent court within the scope of an interim measure in a proceeding to nullify the Concession Agreement, was broadly justified on account of the serious health and environmental crisis triggered by Lajun's breaches. The Concession Agreement was finally annulled by the Dominican courts in an administrative proceeding filed by the ASDN, as it was deemed executed in violation of the provisions of Law No. 340-06 on Public Procurement.⁴⁰⁴

335. Contrary to Claimant's case, Respondent asserts that it is not true that Lajun made the investments it had agreed to implement at the Duquesa Landfill. In fact, as alleged by Respondent, Lajun itself recognized, a month prior to termination of the Concession Agreement, that it was a landfill rather than a sanitary landfill, and that it had not made "the investments in infrastructure and personnel to turn it into a real solid waste management project."⁴⁰⁵ [Tribunal's Translation]

⁴⁰⁴ R1 — § 441.

⁴⁰⁵ R1 — § 442; R-34, Request for Reconsideration against Resolution No. RSA-4-2017-0121-VGA of the Vice-Ministry of Environmental Management, dated June 9, 2017, § 8.

336. In a nutshell, Respondent adds, none of the measures adopted by the ASDN or the Republic prior to September 2017 prevented Claimant from continuing, on a permanent basis, to operate the Duquesa Landfill, or somehow affected the economic terms of the Concession Agreement, which Claimant knew or should have known when investing in Lajun.⁴⁰⁶
337. The termination of the Concession Agreement on July 19, 2017 was for cause, as stipulated under the agreement itself, and based on grounds for such termination, as put forth by Respondent, and the complaint identified several contractual obligations breached by Lajun.⁴⁰⁷ Thus, in Respondent's view, the intervention of the Duquesa Landfill in September 2017, ordered by a competent court within the scope of an interim measure in a proceeding to nullify the Concession Agreement, was broadly justified on account of the serious health and environmental crisis triggered by Lajun's breaches.⁴⁰⁸
338. Respondent submits that, in any event, the alleged expropriation was carried out for reasons of public interest as the measures were justified by the serious health and environmental crisis caused by Lajun's multiple breaches, as well as the reckless and poor operation of the Duquesa Landfill.⁴⁰⁹ Respondent recalls that the Environmental and Health Emergency Declaration specifically mentioned that the Duquesa Landfill was an infected and contaminated site, which made State intervention critical for environmental and health recovery.⁴¹⁰ Currently, Respondent is addressing the multiple issues related to the Duquesa Landfill "though it is clearly a long, hard process, in light of the serious dilapidated condition of said landfill."⁴¹¹ [Tribunal's Translation]
339. Respondent further submits that there was no discrimination. According to Respondent, the fact that 10% of Lajun's Shares were held by a Dominican national (and that even Lajun's direct shareholders are Panamanian and Dominican) shows that it cannot be asserted that the alleged expropriation was somehow related to Claimant's nationality.⁴¹²

⁴⁰⁶ R1 — § 443.

⁴⁰⁷ R2 — § 393.

⁴⁰⁸ R2 — § 394.

⁴⁰⁹ R2 — § 397.

⁴¹⁰ R2 — § 398.

⁴¹¹ R2 — § 401.

⁴¹² R2 — § 404.

Nor was it discriminatory in any other way, it adds, as there was no other landfill in like circumstances.⁴¹³ Respondent recalls Claimant's position that, in retaliation for having instituted these arbitration proceedings, Respondent filed a criminal action against its local partner for tax fraud, use of false documents, and money laundering.⁴¹⁴ Respondent explains that the accusation of tax fraud is not surprising in view of the manner in which the purchase operations whereby Claimant made his "investments" in the Republic were arranged (Mr. Asilis Elmudesi was actively involved in those operations as the legal representative of Nagelo and Wilkison) evinces this fraudulent pattern of Mr. Asilis Elmudesi.⁴¹⁵ Respondent notes that several private parties, unrelated to Respondent, have charged Mr. Asilis Elmudesi with unlawful behaviors, and that this entrepreneur has been involved in multiple criminal proceedings not filed by public authorities, which took place before this arbitration.⁴¹⁶ Respondent also explains that the complaint for alleged environmental crimes was filed by the Ministry of the Environment against Lajun and against Mr. Adrian Lee-Chin given his capacity as Lajun's legal representative. It asserts that Mr. Adrian Lee-Chin has not been charged by the Prosecution with any crime and no penalty has been imposed upon Lajun.⁴¹⁷

340. Moreover, Respondent argues that the proceedings complied with due process and the law. According to Respondent, within the 30-day term under the complaint for breach notified to Lajun, a civil society organization informed the ASDN's mayor of Resolution No. 53/2014 of the General Directorate of Public Procurement 1064 which, years earlier, had determined that the Concession Agreement had been executed in violation of the provisions of Law No. 340-06 on Public Procurement. It was thanks to the communication of the aforementioned civil society organization, Respondent adds, that the new administration of the ASDN became aware of its existence. Later, on October 25, 2018, the Superior Administrative Court rendered the Concession Agreement null and void for violation of Law No. 340-06 on Public Procurement.⁴¹⁸ Respondent, the ASDN and Lajun executed the Second Settlement Agreement to settle their differences

⁴¹³ R1 — § 450.

⁴¹⁴ R2 — footnote 1058.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ R2 — footnote 1058.

⁴¹⁸ R2 — §§ 406-407.

regarding certain amounts owed by Lajun to the ASDN; this—Respondent insists—does not “confirm[] the validity of the Concession” as alleged by Claimant.⁴¹⁹

341. Lastly, Respondent argues that no compensation whatsoever is due. The Superior Administrative Court rendered the Concession Agreement null and void as it was executed in violation of Law No. 340-06 on Public Procurement, and the court itself determined that any payment of compensation under Dominican law as a result of such nullity, was inappropriate.⁴²⁰ Notwithstanding the foregoing, in any event, Respondent argues that the mere failure to pay compensation could not render the expropriation unlawful, as purported by Claimant.⁴²¹

C) The Tribunal’s analysis

a. The general framework of the analysis

342. At the outset, the Tribunal makes three preliminary observations to outline the scope of its task in addressing this issue.

343. First, the Tribunal generally agrees with Respondent that if no formal transfer of property has taken place, there cannot be a direct expropriation.⁴²² At the same time, the Tribunal also generally agrees with Claimant that this does not prevent it from assessing whether Respondent’s actions could amount to indirect expropriation.⁴²³ In this regard, the Tribunal understands that an expropriation could also result from a behavior which substantially and permanently deprives an investor of the value of its investment.⁴²⁴ To that effect, the Tribunal notes that, except in order to make a conceptual distinction of the terms, Claimant has not referred to “indirect” expropriation; however, the Tribunal

⁴¹⁹ R2 — § 408.

⁴²⁰ R2 — § 409.

⁴²¹ R2 — § 411.

⁴²² *Supra* § 324.

⁴²³ *Supra* § 301.

⁴²⁴ *Supra* §§ 301-302.

understands that Claimant has never argued that in this case there was a transfer of property.⁴²⁵

344. Second, the Tribunal believes it is necessary to distinguish among the different factual points which, in Claimant's view, amount to indirect expropriation. It is for the Tribunal to decide whether only one, more or indeed all of the elements relied upon by Claimant actually amount to expropriation. The Tribunal is not satisfied that the two lines of argument alternatively submitted by Claimant in this respect (that is, the ejection of Lajun and its employees from the Land and the takeover of the administration and operation of the Landfill, on the one hand, and the constructive expropriation, on the other hand) are indeed alternative.⁴²⁶ Having considered all the factual elements submitted to it, the Tribunal has decided to focus its analysis on the second "alternative" factual scenario (i.e., the constructive expropriation), taking into account all the measures adopted by Respondent regarding Claimant and his investment throughout the life of the Project.

345. Third, the Tribunal takes note, in particular, of Respondent's argument that the Concession Agreement has been validly terminated,⁴²⁷ while Claimant questions the validity of such termination.⁴²⁸ In the Tribunal's opinion, however, neither the termination of the Agreement nor the qualification thereof may be analyzed as isolated issues, regardless of the context in which such termination took place or the preceding facts. Hence, any reliance upon the different paragraphs of the decision in *Arxinian v. Mexico* by the Parties⁴²⁹ is only partially relevant to this arbitration. Specifically, it seems obvious that § 96 of such decision (relied upon by Respondent and transcribed *supra*)⁴³⁰ may be appropriate in such case, with reference to its specific facts and in view of the allegations and evidence submitted by the parties, though it could hardly be extrapolated in general. Otherwise, any decision to terminate a contractual relationship, adopted by a local entity and upheld by a local court, no matter how ludicrous and irregular it may be,

⁴²⁵ Nothing in the Treaty prevents the Tribunal from analyzing the characterization of the potential expropriation at issue. Article XI of Annex III of the Treaty refers specifically to expropriations made "directly or indirectly through the application of measures equivalent to expropriation." See *supra* § 300.

⁴²⁶ The Tribunal takes note of Respondent's argument that Claimant's position is, in this regard, contradictory. See *supra* § 325.

⁴²⁷ *Supra*, § 334.

⁴²⁸ *Supra*, §§ 310-311.

⁴²⁹ *Supra*, §§ 311 and 329, respectively.

⁴³⁰ *Supra*, § 329.

could never be assessed as a potential violation of the applicable treaty. Based on the considerations *supra*, the Tribunal understands that, even though termination of a contract may be formally valid and upheld by a local court, it may be part of a series of actions that amount to creeping expropriation.

b. On the existence of expropriation

346. The Tribunal's inquiry begins with the confirmation that, indeed, no ownership transfer has been established in the present case. Nonetheless, the Tribunal understands that Claimant is arguing that his investment has been indirectly expropriated through Respondent's conduct. In Claimant's opinion, he has been deprived of the value of his investment, which is inextricably linked to the terms of the Concession Agreement granted to Lajun and, in turn, to Claimant, and grants him the exclusive right to operate and maintain the Duquesa Landfill, as well as the exclusive right to develop a recycling facility and a WTE Plant.⁴³¹ Conversely, Respondent alleges that Claimant was not entitled to build, develop or operate a Waste-to-Energy Plant.⁴³² Respondent referred in this regard to Claimant's "fantasy" as purely speculative since, in its view, the Concession Agreement and its amendments do not mention or reference the potential development of a waste-to-energy plant.

347. The Tribunal distinguishes between, on the one hand, the exclusive right to operate and maintain the Duquesa Landfill, and, on the other hand, the exclusive right, also relied upon by Claimant, to develop a recycling facility and a WTE Plant. These two aspects can be easily distinguished as the latter refers to a potential construction that evidently has not been carried out. Claimant himself, when initially referring to the opportunity to purchase an additional piece of land, submits that he was going to use it for additional landfill space and to "potentially build" the WTE Plant.⁴³³

348. Claimant asserts that he legitimately relied on the State's representations contained in the Concession Agreement to invest in the State via the acquisition of Lajun, the Land, and

⁴³¹ *Supra*, § 307.

⁴³² *Supra*, § 332.

⁴³³ C1 — § 83.

the Project.⁴³⁴ The Tribunal accepts that the Concession Agreement actually includes a number of references to the construction of a WTE Plant, which is also defined in its text. The Tribunal thus notes a clear reference to a Phase 1 and a Phase 2 of the Project in the “whereas” section, where Phase 2 refers explicitly to the construction of a WTE Plant and to certain factors derived from its operation, as follows:

“Phase 2 of the Project. The term ‘Phase 2 of the Project’ shall refer to the construction and operation of the Energy Plant, the sale of energy, or any other commercial product, generated thereby to third parties.”⁴³⁵
[Tribunal’s Translation]

349. Accordingly, the Tribunal finds that the fact that the Agreement considered the construction and operation of such plant has been actually established.
350. However, the Tribunal cannot accept that the Agreement at issue provides any kind of assurance or specific obligations for the State concerning the construction of such plant, and that, consequently, Claimant had a legitimate expectation in this regard.
351. In the Tribunal’s opinion, Respondent has abundantly demonstrated that the initiation of such Project, in any event, would have required the satisfaction of a series of additional formal requirements, including, but not limited to, the specific question of the piece of land where a WTE Plant would have purportedly been constructed, and which Claimant ultimately decided not to purchase. In this respect, the Tribunal understands that Claimant decided not to purchase such piece of land in view that thirteen days after Claimant acquired ownership of Lajun and the Land, the State notified Lajun of its decision to rescind the Concession Agreement, and finally took possession of the Land for six months, although, as Claimant himself recognizes, he would have been able to revisit the possibility of making such purchase later on.⁴³⁶ The truth is that he did not do so. As a result, it is not possible to know where Claimant intended to materialize his alleged legitimate expectation to build the WTE Plant.

⁴³⁴ C1 — § 62; CPHB — § 10.

⁴³⁵ C2 — § 51, C-1 (R-6), Concession Agreement, “Whereas” section.

⁴³⁶ C2 — §§ 75-77.

352. Additionally, Respondent has convincingly established that the subject-matter of the Concession Agreement is solely the disposal of solid waste and, most importantly, that no Municipality could have granted an exclusive right to build and develop a WTE plant, as doing so comes exclusively within the purview of the President of the Republic. In short, while the Tribunal accepts that the construction of a WTE plant was envisaged, it was in no way guaranteed, not even subtly or indirectly, by the State.
353. In this sense, the Tribunal concludes that Claimant cannot invoke an exclusive right and an assurance to build the WTE Plant. In other words, the Tribunal has not been able to find in this respect, by taking Claimant's reference to the decision of the arbitral tribunal in *Tecmed v. Mexico*, a deprivation of the reasonably-to-be-expected economic benefit of property.⁴³⁷ In the Tribunal's opinion, such expectations, in any event, can only become relevant when they are based on the contractual framework invoked by the investor.
354. The Tribunal notes in this regard Claimant's emphasis on *Crystallex v. Venezuela*,⁴³⁸ where the tribunal concluded that there had been an expropriation despite the fact that the claimant had never obtained the necessary resources or permissions to develop or exploit a certain piece of land. The Tribunal is not persuaded that the factual and legal matrix of such case resonates with the one before it. In such case, the contract actually provided for Crystallex's right to "undertake all of the investments and works necessary to reactivate and execute in its totality the Mining Project [...], design, build the plant, operate it, process the gold for its subsequent commercialization and sale, and return the mine and its installations [...] upon the termination of the Contract," as expressly found by the tribunal.⁴³⁹ In the present case, the Tribunal concludes—as mentioned *supra*—that the possibility that a WTE plant might be constructed and the exclusivity for Claimant to do so are not in dispute, but the certainty and guarantee that it would be constructed are by no means established. Moreover, Claimant has failed to demonstrate that he took any actions to further such operation, neither at the initial stage of his investment nor at a later time. Making a request for a report or having had such a request in mind at any time are not sufficient basis to that effect. Respondent persuasively submitted that the crucial

⁴³⁷ C2 — § 252.

⁴³⁸ *Supra*, § 309.

⁴³⁹ CL-79, *Crystallex v. Venezuela*, § 664. In the same paragraph, the tribunal holds that also the acting State entity expressly authorized Crystallex to "exploit and extract gold" in the area of the Mining Project.

steps were simply never initiated by Claimant.⁴⁴⁰ It is not only that the permits or resources were missing, as Claimant seeks to highlight in relying on *Crystallex*, but also that in the present case, the construction of the WTE plant appears to be a potential undertaking that Claimant never attempted to materialize in any possible way.

355. In the Tribunal's view, for an investor's expectations to be considered legitimate, in the sense of being capable of bringing about legal consequences and specifically serving as a basis—coupled with other elements—for compensation, such expectations need to be based on a certain right, the exercise of which is somehow guaranteed by the State and seems very likely to be realized. It cannot be a mere possibility. Otherwise, an ingenious investor could think of multiple legitimate expectations, and, where applicable, obtain large amounts of compensation on weak grounds, from minor investments. These are the considerations that lead the Tribunal to determine that Claimant cannot invoke a legitimate expectation regarding the construction and operation of a WTE Plant.
356. Nonetheless, the Tribunal also finds that, under the Concession Agreement, Claimant actually had an exclusive right to operate and maintain the Duquesa Landfill for a considerable period of time; namely, 27 years. Accordingly, the next question to be addressed by the Tribunal is whether the Agreement, as invoked and argued by Respondent, has been validly terminated, and, if so, what consequences, for purposes of the Tribunal's inquiry, result from the termination of the concession.
357. On this point, the Tribunal considers that Respondent's emphasis on *Azinian v. Mexico* is noteworthy. In particular, the Tribunal agrees with the tribunal's finding in that case that an international tribunal called upon to rule on a government's compliance with an international treaty is not paralyzed by the fact that the national courts have approved the relevant conduct of public officials.⁴⁴¹
358. In fact, the tribunal in *Azinian v. Mexico* held that the claimants had neither contended nor proved that the Mexican legal standards for the annulment of concessions violated Mexico's NAFTA Chapter XI obligations, nor that the Mexican law governing such

⁴⁴⁰ R2 — Footnote 1023.

⁴⁴¹ C2 — § 249.

annulments was expropriatory.⁴⁴² In this case, the Tribunal understands that Claimant's submission is not so much based on the incompatibility of the procedure for nullifying the Agreement as a whole with the Treaty, but rather on the way Respondent initiated such procedure in the particular context of the contractual relationship. Here, it is not so much a question of reviewing *de novo* and *in toto* the various actions complained of by Claimant, but rather assessing whether the State's actions met the minimum requirements that are also provided for in the Treaty, which the investor had every right to expect to be satisfied. It also follows that the Tribunal should ascertain whether it can find a general pattern in the factual matrix that suggests that, ultimately, all actions were predominantly aimed at harming the investor rather than responding to the invoked justifications, whatever they may be (*e.g.*, environmental protection due to the health situation, verification of property titles due to suspicions of fraud, etc.).

359. In this respect, the Tribunal concludes that the factual matrix particularly indicates that the termination of the Concession Agreement was part of a larger effort by the State to actually eject Claimant from the operation of the investment. The timing of the actions highlighted by Claimant in this particular case is revealing. It is clear that the Tribunal lacks the means to actually ascertain whether the actions taken by the CEA and the Republic related to the Portion of Land were initiated as “retaliation” against Claimant for initiating this Arbitration.⁴⁴³ However, the Tribunal finds a similar pattern in other elements convincingly presented by Claimant. The failure to comply with the term of thirty working days to cure the alleged breaches by Claimant, with the ASDN's notice of its intent to unilaterally terminate the Agreement is, in the Tribunal's opinion, particularly significant.⁴⁴⁴ It arises from the record that, after the State actually acknowledged the difficulties related to the operation of the investment, particularly low tipping fees, and genuinely offered prospects for future collaboration through the execution of a number of agreements, the investment was abruptly subjected to a series of actions on all fronts.⁴⁴⁵ Respondent's insistence that purportedly it never legally “confirmed” the validity of the Agreement in this regard is unpersuasive and inconsistent with its conduct. Indeed, several amendments were made during its ten years of existence without Respondent ever

⁴⁴² *Supra*, § 329.

⁴⁴³ *Supra*, §§ 330, 339.

⁴⁴⁴ C2 — § 245.

⁴⁴⁵ *Supra*, § 304.

invoking any argument regarding nullification. Accordingly, considering all the elements provided by the context and the history of the contractual relationship, the termination of the Concession Agreement cannot exclude, in this case, the existence of an expropriation and the consequences thereof.

360. The Tribunal concludes that the various elements described significantly affected the investment so much so that Claimant was actually deprived of its use and benefit. The Tribunal concludes that the factual pattern before it is one of an indirect creeping expropriation. What is difficult here is not to ascertain whether an impact exists but to assess whether any of the justifications advanced by Respondent apply. The Tribunal notes that the forceful takeover was only temporary; nonetheless, the occupation also had direct consequences on the operation of the Landfill, and ultimately contributed to the creeping expropriation.

c. On the justification of expropriation

361. The Tribunal turns now to address the question of whether the expropriation can be justified in light of the Treaty. It is the Tribunal's view that the expropriation failed to meet the criteria set forth in Article XI of Annex III of the Treaty for an expropriation to be considered lawful. In this respect, Article XI of Annex III of the Treaty provides that for an expropriation to be lawful, it shall be carried out:

- in non-discriminatory fashion,
- for reasons of public interest,
- after payment of prompt, adequate and effective compensation, and
- in accordance with due process of law.⁴⁴⁶

362. These requirements are cumulative. First, the Tribunal considers that, in the case at hand, Respondent's actions failed to meet certain due process requirements. The Tribunal accepts Claimant's demonstration that Respondent failed to comply with its own Constitution and expropriation laws that contain rigorous and detailed expropriation

⁴⁴⁶ *Supra*, § 230.

requirements and that the termination requirements contained in the Concession Agreement were also ignored.⁴⁴⁷

363. With regard to the public interest criterion, the Tribunal accepts that Respondent's general intervention in the matter may well have been justified, *inter alia*, by environmental considerations and therefore may have been carried out ultimately to serve a public purpose. However, the Tribunal considers that Respondent has not been able to provide sufficiently convincing justifications and, most importantly, specific for all the "steps" invoked by Claimant.⁴⁴⁸ The Tribunal notes that it is not persuaded that the current circumstances in the landfill could be used to show that the State's actions served a public purpose. What is apparent from the factual scenario, is that the State took a series of actions aimed at actually excluding Claimant from the operation of the investment.
364. As to the requirement that the expropriation is to be carried out in non-discriminatory fashion, the Tribunal finds that it is not satisfied that Claimant has been able to sufficiently demonstrate discriminatory intent to meet the necessary threshold required by Article XI of Annex III of the Treaty. The Tribunal notes that the specific focus on Lajun can be shown for certain events; however, the Tribunal has not been able to identify a discriminatory pattern throughout all the measures. For the sake of clarity, the Tribunal would not need to find an exactly continuous pattern throughout the entire period under analysis but a clear indication showing discriminatory intent based on Claimant's nationality. Respondent's justifications regarding the absence of any discriminatory intent are persuasive in this regard.⁴⁴⁹
365. Lastly, unlike with the other criteria, there is no disagreement between the Parties that no compensation has been offered in this case to Claimant at any stage of the expropriation process. Regardless of this clear agreement, the Tribunal can set aside the discussion on this particular criterion since it has already determined that the due process and public interest requirements were not met.

⁴⁴⁷ *Supra*, § 322.

⁴⁴⁸ *Supra*, § 314.

⁴⁴⁹ *Supra*, § 339.

366. In light of the above conclusion that not all the required criteria are met cumulatively (in actual fact, the only one satisfied is the requirement that the expropriation be carried out in non-discriminatory fashion), the creeping expropriation cannot be justified under Article XI of Annex III of the Treaty. The Tribunal concludes that in the present case there has been unlawful indirect expropriation of Claimant's investment and that, consequently, Article XI of Annex III of the Treaty was breached by Respondent.

2. The issue of fair and equitable treatment

367. Article IV of Annex III of the Treaty, providing for the obligation to accord Fair and Equitable Treatment (**"FET" or "FET Standard"**), sets forth:

ARTICLE IV

FAIR AND EQUITABLE TREATMENT

Each Party shall ensure, at all times, fair and equitable treatment for investments and returns, which shall thus enjoy full protection and security, and shall not receive a treatment less favourable than established under international law.

A) The Claimant's position

368. Claimant submits that, Respondent has, with its conduct, breached the FET standard arguing that other tribunals when interpreting this issue have held that the minimum standard has evolved to provide a broad scope of investment protection, and that there is no basis for equating principles of international law with the minimum standard of treatment.⁴⁵⁰ Consequently, Claimant argues that bad faith need not be proven.⁴⁵¹ Therefore, according to Claimant, Respondent's arguments in reliance on NAFTA cases requiring proof of "atrocious conduct" is grossly misplaced.⁴⁵²

369. Further, in Claimant's view, the FET standard is also defined by international law as a broad and flexible concept; the "dominant approach" by tribunals has been to "interpret fair and equitable treatment as an independent treaty standard with an autonomous

⁴⁵⁰ C2 — § 280.

⁴⁵¹ C2 — § 286.

⁴⁵² C2 — § 281.

meaning.”⁴⁵³ This “meaning,” in turn, has been expansively developed throughout investment treaty jurisprudence.

370. Claimant posits that, no matter its contours, FET unequivocally requires from States the four elements that are set out below—as expressed by Claimant—which, in Claimant’s view, explain the breach of the Treaty by Respondent.⁴⁵⁴

371. First, according to Claimant, Respondent violated Claimant’s legitimate expectations. To such end, Claimant relies on the decisions of various tribunals which have held that the protection of legitimate expectations requires States to respect guarantees and representations made to, and relied upon, by investors when making their investments.⁴⁵⁵ In this regard, legitimate expectations thus arise when an investor reasonably relies on State conduct when making his investment. Concurrently, these same legitimate expectations are violated when a State acts inconsistently with the conduct reasonably relied upon by the investor.⁴⁵⁶ In Claimant’s view, international law stresses that the FET standard includes a requirement to maintain a stable legal framework. In this respect, numerous arbitral decisions have addressed the close relationship between the protection of legitimate expectations and the need for consistency and stability in a State’s legal and business framework.⁴⁵⁷

372. Claimant asserts that his decision to invest in the Dominican Republic was not made haphazardly, but rather was based on “reasonable and justifiable expectations” created by

⁴⁵³ C2 — § 280; CL-10, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) pp. 254, 264; CL-26, R. Dolzer, “Fair and Equitable Treatment: Today’s Contours,” 12 *Santa Clara Journal of International Law*, 7 (2014), p. 10.

⁴⁵⁴ C2 — § 286.

⁴⁵⁵ C1 — § 277; CL-29 (RL-371), *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated October 3, 2006 (“*LG&E v. Argentina*”), § 127; CL-23, *Suez v. Argentina*, §§ 214-219; CL-8, *Tecmed v. Mexico*, § 154.

⁴⁵⁶ C1 — § 278; CL-29 *LG&E v. Argentina*, § 127; CL-16, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award dated September 13, 2001, § 157; CL-30, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award dated January 26, 2006, § 147; CL-31, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated September 22, 2014, § 570. See also, CL-10, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) pp. 279-280; CL-26, R. Dolzer, “Fair and Equitable Treatment: Today’s Contours,” 12 *Santa Clara Journal of International Law*, 7 (2014), p. 20.

⁴⁵⁷ C1 — § 279; *LG&E v. Argentina*, § 124; CL-32, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award dated July 1, 2004 (“*Occidental v. Ecuador*”), § 191; CL-33, *CMS v. Argentina*, § 274. See also, CL-10, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) p. 285; CL-26, R. Dolzer, “Fair and Equitable Treatment: Today’s Contours,” 12 *Santa Clara Journal of International Law*, 7 (2014), p. 21.

the State.⁴⁵⁸ In this regard, Claimant alleges that the extensive due diligence efforts undertaken by him lasted for over a year, and consisted of the following:⁴⁵⁹

- (i) technical due diligence - The technical due diligence was performed by A2Z Group, who helped Claimant collect and analyze data on the quality of municipal solid waste produced in the Dominican Republic. For instance, A2Z Group performed a composition study in the Dominican Republic in 2012 which described in detail the type of recyclable waste collected at various areas throughout the State.⁴⁶⁰ A2Z Group also helped Claimant develop a business plan for the construction of an Integrated Resource Recovery Facility (“IRRF”) at the Duquesa Landfill, a type of facility where a large portion of waste is recycled and processed to create economically viable products such as electricity and compost;⁴⁶¹
- (ii) financial due diligence – The financial due diligence was performed by Carlos N. Cortina, who eventually became the Chief Executive Officer of Lajun. Through the financial due diligence, Claimant was able to ascertain the tipping fees then being collected by Lajun in connection with its concession on the Duquesa Landfill.⁴⁶² The financial due diligence revealed that the tipping fees that were being collected at the time were too low, but it also confirmed that the tipping fees could eventually be renegotiated to become more competitive tipping fees in line with market standards;

⁴⁵⁸ C1 — § 280.

⁴⁵⁹ C2 — § 293.

⁴⁶⁰ C1 — § 42; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 27-29; C-56, Multiple photographs of the recycling plant at the Duquesa Landfill that were taken as part of Claimant’s extensive due diligence prior to acquiring his investment dated October 5, 2012; C-117, *Integrated Resource Recovery Facility for Municipal Solid Waste at Santo Domingo, Dominican Republic*, dated November 11, 2012. According to Claimant, it describes the business plan for the construction of an Integrated Resource Recovery Facility at the Duquesa Landfill.

⁴⁶¹ C1 — § 43; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 27-29; C-119, Diagram of a waste-to-energy plant demonstrating its components as well as the process of converting waste into energy (no date); C-124, Award to “Outstanding Vision and Innovation,” issued by Compete Caribbean (a program sponsored by, among other entities, the International Development Bank, the Overseas Private Investment Corporation, and the World Bank) and awarded to Claimant for his business plan on the “Integrated Resource Recovery Facility for Municipal Solid Waste” to be built in Santo Domingo, Dominican Republic, dated February 26, 2013.

⁴⁶² C1 — § 46; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, § 32; C-111, Lajun income received from the Dominican municipalities from January 2011 through July 2012, dated August 20, 2012.

(iii) environmental due diligence - Claimant also performed environmental due diligence. As part of this due diligence, Claimant reviewed a June 2006 Environmental Impact Statement concerning the Duquesa Landfill (“EIS”). The EIS described the environmental effects of a proposed project at the Duquesa Landfill whose main objectives were to expand and transform the Landfill to extend its useful life by at least twelve years, and to convert the Landfill into an updated and upgraded Landfill that would comply with all Dominican environmental and public health laws. The EIS confirmed that; with the construction and development of the proposed updates, any existing negative environmental impact concerning the Landfill would become a thing of the past: “This project involves the implementation of all necessary measures to eliminate the impact on the water source. By stopping the leachate into the river, by impermeabilizing the land where the cells will operate, and by introducing not only gas release stacks, but also medium and long-term capture and utilization plans for these gases, the damage to the soil, air and water would virtually disappear or be reduced to a minimum. Thus, the pollution that used to affect the population as a result of the fires, vectors and other elements will fade into oblivion.”⁴⁶³ [Tribunal’s Translation] The EIS further provided that the expansion of the Landfill would have a positive impact on the State’s economy as the construction of the upgrades would include the purchase of new equipment, fuel, and materials, as well as the payment of additional salaries to current employees at the Landfill.⁴⁶⁴ Claimant also reviewed a March 2007 study that had been performed by JICA at the request of the Government of the Dominican Republic. The study included certain recommendations to improve operations at Duquesa in order for the State to achieve

⁴⁶³ C1 — § 49; C-115, Environmental Impact Statement concerning the Duquesa Landfill, June 2006.

⁴⁶⁴ C1 — § 50.

its master plan goals concerning sustainable municipal solid waste management and its vision of a “clean city;”⁴⁶⁵ and

- (iv) legal due diligence - Legal due diligence was conducted by a local Dominican attorney, Fernando Langa Ferreira, from the Dominican law firm Langa & Abinader. Mr. Langa performed extensive due diligence on the Land where the Duquesa Landfill is located.⁴⁶⁶

373. During this period, Claimant visited the Dominican Republic at least twice a month to be briefed on the due diligence updates and his potential investment. None of these due diligence processes raised any red flags for Claimant, especially because most of the documents reviewed by Claimant and his team were documents that had been issued by the legislative, executive and judicial branches of the State for several decades.

374. Claimant’s legitimate expectations consisted, *inter alia*, of the following:

- (i) the understanding that Claimant would be afforded the exclusive right to operate, manage, maintain, and administer the Duquesa Landfill, as well as the exclusive right to receive a tipping fee for all waste deposited at the Landfill;

⁴⁶⁵ C1 — §§ 51-54; C-116, *Study on Integrated Solid Waste Management Plan in Santo Domingo de Guzman National District Dominican Republic*, Volumes I – IV, performed by the Japan International Cooperation Agency (JICA) in response to a request by the Government of the Dominican Republic, of March 2007.

⁴⁶⁶ C1 — § 55; According to Claimant, this due diligence consisted of the study and verification of the following documents: C-57, Land Purchase Agreement dated June 17, 1986 between Azucarera Haina, C. por A., represented by the Executive Director of the Consejo Estatal del Azúcar, and Felipe Antonio Díaz (evidencing, in Claimant’s view, that CEA, an agency of the Dominican State, legally sold, assigned, and transferred the Land to Felipe Antonio Díaz); C-58, Certification issued by the Senate of the Dominican Republic dated December 9, 2008; evidencing that, according to Claimant, the Dominican Senate approved the abovementioned Land Purchase Agreement dated June 17, 1986; C-59, Certification issued by the Chamber of Deputies of the Dominican Republic, dated April 14, 2009 which, according to Claimant, evidences that the Dominican Chamber of Deputies approved the abovementioned Land Purchase Agreement dated June 17, 1986; C-60, Judgment dated May 9, 2011 issued by the Dominican Court of Original Jurisdiction, evidencing that the Dominican court approved the sale of the Land and the abovementioned Land Purchase Agreement dated June 17, 1986, and ordered the issuance of the land title certificate in favor of the new Land owner, Felipe Antonio Díaz; C-61, Land Purchase Agreement dated September 5, 2011 between Felipe Antonio Díaz and José Antonio López Díaz, evidencing, according to Claimant, that Felipe Antonio Díaz legally sold, assigned, and transferred the Land to José Antonio López Díaz; C-62, Certificate of Legal Status of the Land issued by the National Registry of Land Jurisdiction of the Dominican Republic, dated February 28, 2013, confirming that, at the time, the Land was legally owned by José Antonio López Díaz; C-63, Certificate of Title issued by the National Registry of Land Jurisdiction of the Dominican Republic’s Judiciary dated July 12, 2011, confirming, according to Claimant, that, at the time, the Land was legally owned by Felipe Antonio Díaz.

- (ii) the ASDN's agreement to review and revise the tipping fee on a yearly basis (later amended to twice a year) and to liaise with the Landfill's users and municipalities so they would accept adjustments to the tipping fee;
- (iii) the Respondent's representations, through the ASDN and the Concession Agreement (and its amendments), that Claimant had the right to develop a recycling facility and a WTE Plant; and
- (iv) the Respondent's representations that the Concession Agreement had been executed following all proper Dominican public bidding procedures, and that the ASDN was pleased and satisfied with Lajun's management and operation of the Duquesa Landfill.⁴⁶⁷

375. Claimant highlighted the following language in the Agreement regarding tipping fees:

- (i) "Tipping fees shall be revised at least once (1) a year, so that these reflect in a realistic fashion any change in the operation of the Duquesa Landfill..." (Clause 4.9);
- (ii) "this revision shall be/is mandatory every time there is a variation of more than (10%) in the costs of operating the Duquesa Landfill" (Clause 4.9.1); and
- (iii) the ASDN "commits to make its best efforts to liaise with the Duquesa Landfill users, every time that pursuant to the preceding articles there is a need to increase the tipping fee, so that they will

⁴⁶⁷ C2 — § 295; C-1 (R-6), Concession Agreement, Definitions and Clauses 3, 4, 4.9, 4.9.1, 4.9.2, 8.4, 8.7, and 16.5; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 26, 34; C-2, Addenda 1; C-49, Resolution to Approve the Addenda to amend the Contract for the Management and Operation of the Duquesa Landfill dated April 16, 2009, recognizing that "the works to be developed by Lajun... cannot be objectively concluded within the remaining life of the Contract..." and "[t]he obligations undertaken by LAJUN CORPORATION S.A. under the Contract for the Management and Operation of the Duquesa Landfill... have not been performed strictly because of the declining state of the landfill at handover and the difference between the operation cost of such landfill and the current remuneration received from users..." [Tribunal's Translation], and approving the First Amendment to the Concession Agreement; C-30, Certification of Compliance and Conformity of the Concession Agreement, dated November 10, 2010. According to Claimant, this Certification of Compliance and Conformity evidences that the ASDN previously admitted and confirmed, among others, (i) that the Concession Agreement had been executed following all proper Dominican public bidding procedures; (ii) that Lajun had complied, and was complying, with all of its obligations under the Concession Agreement and the First Amendment of the Concession Agreement; (iii) that Lajun was administering the Duquesa Landfill utilizing high quality standards; (iv) that Lajun was complying with all Dominican environmental laws; (v) that Lajun was operating the Duquesa Landfill via a dire financial situation given that the tipping fee that Lajun received from users was woefully low and inadequate; and (vi) that the ASDN was pleased and satisfied with Lajun's management and operation of the Duquesa Landfill.

accept the variation in the tipping cost, for the purpose of proper performance of the Duquesa Landfill” (Clause 4.9.2).⁴⁶⁸
[Tribunal’s Translation]

376. Claimant insists on the fact that any tipping fee adjustments would entail increasing the tipping fee.⁴⁶⁹ Through the Second Amendment to the Concession Agreement, the ASDN agreed to increase the frequency by which the ASDN would revise the tipping fee received by Lajun from once a year to, at least, twice a year. The ASDN also agreed to revise the tipping fee every time the costs of operating the Duquesa Landfill varied by more than five percent (5%) (instead of the original 10%). The aforementioned clauses (Clauses 4.9 and 4.9.1) were amended as follows:

- “Tipping fees shall be revised at least twice (2) a year, so that these reflect in a realistic fashion any change in the operation of the Duquesa Landfill...” (Clause 4.9);
- “this revision shall be/is mandatory every time there is a variation of more than (5%) in the costs of operating the Duquesa Landfill” (Clause 4.9.1).⁴⁷⁰

[Tribunal’s Translation]

377. In the First Settlement Agreement, Claimant continues, the State, through the ASDN, expressly agreed to assist and support Lajun in adjusting the tipping fee as necessary, in the following terms: “[t]he ASDN commits to accompany and support LAJUN in the processes of negotiation and adjustment of the fee paid by the other municipalities for the tipping of solid waste.”⁴⁷¹ [Tribunal’s Translation]

378. In the Third Amendment to the Concession Agreement, Claimant points out, the State acknowledged that there was a need to revise the woefully low tipping fee then in place, accepting that the tipping fee being charged did not even cover the Landfill’s operational costs.⁴⁷² The State agreed to even further extend the term of the Concession Agreement

⁴⁶⁸ C2 — § 26; C-1 (R-6), Concession Agreement.

⁴⁶⁹ C2 — § 27.

⁴⁷⁰ C2 — § 30; C-3, Addenda 2.

⁴⁷¹ C2 — § 34; C-5, Settlement Agreement 1 between the ASDN and Lajun dated February 10, 2014, (Clause 11).

⁴⁷² C2 — § 37.

from 15 years to 27 years (through 2034), while also admitting the following: “[t]he ASDN has previously examined and accepts the fragile economic situation under which the Duquesa Landfill operates, this being a situation that the ASDN has acknowledged in several legal documents as inappropriate, due to the fact that the amounts of money it receives in solid waste tipping fees are much lower than the cost its correct treatment requires...”⁴⁷³ [Tribunal’s Translation]

379. Claimant asserts that he exercised the kind of due diligence that any reasonable investor would undertake to ensure the feasibility of the investment, and that such diligence also laid the foundation for Claimant’s legitimate expectations.⁴⁷⁴ Claimant emphasizes that these expectations were induced by Respondent before making the investment as follows:

- Respondent adopted various policies geared towards promoting foreign investment and opening up further avenues for international trade;
- Respondent promulgated Law 57-07, which provided various incentives for companies to adopt clean energy processes and endeavor to generate alternative sources of renewable energy. In particular, Law 57-07 was designed to “incentivize and regulate” investments in projects geared towards the production of efficient and alternative sources of energy;
- The (then) mayor of the ASDN issued a sworn affidavit that confirmed that the State’s municipalities were not appropriately compensating Lajun for its waste disposal services;
- The (then) mayor of the ASDN issued various certifications that confirmed that the ASDN was satisfied with Lajun’s services, which were being performed in compliance with Dominican law and the Concession Agreement; and
- Respondent executed the Second Amendment to the Concession Agreement, in which Respondent acknowledged that it was vital for the tipping fee to be revised periodically in order to sustain waste

⁴⁷³ C2 — § 38; C-6, Addenda 3, p. 2 (Fourth Recital of the Preamble).

⁴⁷⁴ C2 — § 293.

management operations and ensure the receipt of adequate compensation for the management and operation of the Duquesa Landfill.⁴⁷⁵

380. Claimant argues that Respondent's actions closely resemble those of the Province of Tucumán in *Vivendi II v. Argentina*, where the tribunal held that a Province had breached its duty of fair and equitable treatment. As argued by the claimants, the Province, among other wrongful actions, forced the claimants to provide services for Tucumán in violation of the parties' Concession Agreement, and further incited the population of Tucumán to refuse to pay the claimants' bills. The tribunal ultimately determined that the State had undermined claimants' legitimate expectations of their investment and breached its commitments under the Treaty:

*“Under the fair and equitable standard, **there is no doubt about a government’s obligation not to disparage and undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation. And that is exactly what happened in Tucumán.**”*⁴⁷⁶

381. As in *Vivendi II v. Argentina*, Claimant asserts, Respondent's actions throughout the duration of the Concession Agreement had the direct effect of undermining, undercutting, and disparaging Lajun's concession. Lajun was often forced to administer and manage the Duquesa Landfill without the benefit of any tipping fee and was routinely denied the ability to peacefully operate its concession. Further, similar to the actions in *Vivendi II v. Argentina*, the ASDN, on many occasions, launched public campaigns aimed at inciting the local population to oppose Lajun's operation of the Landfill and Claimant's possession of the Land.⁴⁷⁷

⁴⁷⁵ C2 — § 296.

⁴⁷⁶ C1 — § 290; CL-11, *Vivendi II v. Argentina*, § 5.2.16 (emphasis added by Claimant).

⁴⁷⁷ C1 — §291; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 51-53; C-87, Various press releases informing the public that the ASDN's Mayor, René Polanco, will be rescinding the Concession Agreement with Lajun as a result of Lajun's breaches concerning the Duquesa Landfill (May 5, 2017 and July 24, 2017); CL-11, *Vivendi II v. Argentina*, § 5.2.16.

382. Secondly, Claimant argues that Respondent behaved inconsistently. In addition to protecting an investor's legitimate expectations, fair and equitable treatment requires States to treat foreign investors consistently.⁴⁷⁸ Instead of acting in this way, Claimant points out that, on numerous occasions, Respondent represented and certified that Lajun was in compliance with the Concession Agreement, only to later falsely claim that Lajun had defaulted on its obligations.
383. Claimant underscores that just eight days before the ASDN's Concession Agreement Termination Notice, Respondent issued an inspection report that expressly certified that Lajun was in compliance with all of its concession obligations, and certified that Lajun was providing "quality" services to the Dominican community.⁴⁷⁹
384. According to Claimant, the State's inconsistent and arbitrary behavior continued throughout the duration of the Concession Agreement. For example, the ASDN conducted further inspections of the Duquesa Landfill in late 2016 to determine whether Lajun was operating the Landfill in accordance with the terms of the Concession Agreement. All of these inspections confirmed and certified that Lajun had already complied, or was complying, with all its obligations. Notwithstanding the State's affirmations that it was satisfied with Lajun's performance, the ASDN, around the same time it released its inspection reports, forcibly entered the Landfill while carrying firearms and staged a protest opposing Claimant's and Lajun's possession of the Land. In a shocking display of inconsistent and arbitrary behavior by the State, the ASDN held a press conference in which it falsely accused Claimant of being a "land thief," and misrepresented that Lajun was in breach of its obligations and responsibilities.⁴⁸⁰

⁴⁷⁸ C1 — § 293; CL-8, *Tecmed v. Mexico*, § 154: "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations"; CL-34, *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated May 25, 2004 ("*MTD v. Chile*"), § 165; CL-25, *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award dated March 17, 2006, ("*Saluka v. Czech Republic*"), § 309; CL-35, *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated July 24, 2008 ("*Bivater v. Tanzania*"), § 602.

⁴⁷⁹ C2 — § 321.

⁴⁸⁰ C1 — § 295; C-47 and C-48, Inspection reports issued by the ASDN titled "Verification of Compliance with Obligations" [Tribunal's Translation], dated October 16, 2016 and November 16, 2016, respectively; C-65, Internal report dated December 14, 2016 regarding the unannounced visit of the "Board of Councilors of Santo Domingo Norte" to Duquesa Landfill, with accompanying links to videos and photographs.

385. Respondent was also inconsistent in its position concerning the validity of the Concession Agreement, Claimant asserts. On August 11, 2017, the ASDN filed an administrative action against Lajun seeking the nullification of the Concession Agreement, in which it argued that the agreement had been executed in contravention of Dominican public bidding procedures. The State initiated its nullification action less than three months after the ASDN signed the Second Settlement Agreement, under which it reconfirmed the validity of the Concession Agreement and irrevocably released all claims and actions it had, or could have, against Lajun. Moreover, the ASDN had, on two separate occasions, previously defended the validity of the Concession Agreement when responding to administrative actions brought by third parties. In those actions, the ASDN argued the exact opposite of what it claimed in its 2017 nullification petition and confirmed that the Concession Agreement had been executed in conformity with all relevant laws.⁴⁸¹
386. After more than thirty years of acknowledging in official and public documents issued by the Dominican judicial, legislative, and executive branch that the sale of the Land was legal and binding, Respondent, during the “cooling-off” period under the Treaty (three months), initiated legal proceedings in order to wrongfully expropriate Claimant’s Land. Respondent did this more than five years after Claimant acquired the Land. Respondent relied on facts that occurred more than thirty years ago (1986), and that relate to several independent third parties that are not affiliated with Claimant. These proceedings were initiated again in December 2020.
387. Thirdly, Claimant holds that Respondent failed to act in a transparent manner and that the requirement of transparency is also a core component of FET. Specifically, relying on several authors, Claimant asserts there is broad agreement among States that transparency is an important element in creating a predictable, stable, and secure climate for foreign investment. Indeed, this is expressly acknowledged by the Treaty. In fact, Article IX of

⁴⁸¹ C1 — § 296; C-8, Settlement Agreement 2 between the ASDN and Lajun dated May 24, 2017; C-10 Response to the Complaint for Breach of the Agreement, Act No. 610/2017, dated August 11, 2017. Claimant responded to the ASDN’s allegations asserting that the ASDN had failed to comply with the Concession Agreement when refusing to increase the tipping fee according to the terms contractually agreed upon. See also C-12, Statement of Defense and Referral of ASDN Administrative Record dated March 18, 2014; C-16, Certification of Compliance and Conformity dated July 9, 2014; C-120, ASDN’s Statement of Defense dated February 4, 2016.

Annex III (titled “Transparency”) requires the State, independently of its duty to provide fair and equitable treatment, to also treat foreign investors in a transparent manner.⁴⁸²

388. Article IX of Annex III of the Treaty, invoked by Claimant, provides:

ARTICLE IX
TRANSPARENCY

Each Party shall publish all laws, judgments, administrative practices and procedures regarding investments, or which may affect the same.

389. Claimant insists that Respondent’s references to *Cargill v. Mexico* and *Mercer v. Canada* to argue that the standard of customary international law does not include a component of transparency are inappropriate since those cases are based on the *Neer v. Mexico* standard, which is very antiquated and highly criticized.⁴⁸³

390. Transparency is not limited to publication of laws, judgments, practices and administrative proceedings regarding the investment.⁴⁸⁴ The series of actions undertaken by Respondent show – in Claimant’s opinion – a pattern and practice of arbitrary reversals of promises, representations, and administrative processes that Claimant reasonably relied upon in connection with his investment in the Dominican Republic. According to

⁴⁸² C1 — § 303; CL-8, *Tecmed v. México*, § 154: “The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations;” CL-10, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) p. 290; CL-26, R. Dolzer, “Fair and Equitable Treatment: Today’s Contours”, 12 Santa Clara Journal of International Law, 7 (2014), p. 30.

⁴⁸³ C2 — § 330; CL-99, *Murphy Exploration and Production Company International v. The Republic of Ecuador II*, PCA Case No. 2012-16 (previously AA 434), Partial Final Award dated May 6, 2016, §§ 206, 208: “The international minimum standard and the treaty standard continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned;” CL-51, *Anglo American plc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award dated January 18, 2019, §§ 441-442: “The Tribunal fully shares and endorses the words of the tribunal in *Vivendi v. Argentina*, when it emphasizes that: ‘fair and equitable treatment conform to the principles of international law, but this requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard.’...[T]he Tribunal shares the Claimant’s position that today such a debate is somewhat sterile since it is equally true that the minimum standard of treatment under customary international law has evolved since the definition of the standard in the 1926 *Neer* case;” See also, CL-100 (RL-355), *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10 (UNCITRAL), Interim Award dated December 13, 2017, § 336.

⁴⁸⁴ C2 — § 331.

Claimant, the State's overall pattern of conduct led to the impairment of Claimant's management, maintenance, use and enjoyment of his investment.⁴⁸⁵

391. Claimant highlights the following conclusion reached by the tribunal in *Frontier Petroleum v. Czech Republic*:

*"Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment. While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making."*⁴⁸⁶

392. The utter lack of transparency is exemplified, according to Claimant, by the municipalities' consistent refusal to engage with Lajun and its representatives in their efforts to increase the company's tipping fees, as well as by the State's failure to disclose its reasoning for never raising the tipping fee.⁴⁸⁷ Claimant highlights that, as documented in the declaration of Adrian Christopher Lee-Chin, upon being appointed General Manager of Lajun in September 2016, Adrian assessed the status of each of Lajun's contracts with the municipalities. This assessment revealed that all of the State's municipalities were paying Lajun below-market tipping fees for waste deposited at the Landfill. Notwithstanding, Lajun, in good faith, was continuing to service the State even though its contracts with the Municipalities were all expired or about to expire.⁴⁸⁸ Given these circumstances, Mr. Adrian Christopher Lee-Chin, as Lajun's General Manager, wrote to each of the municipalities on September 20, 2016, and explained that the current tipping fee received

⁴⁸⁵ C2 — § 333.

⁴⁸⁶ C2 — § 332, CL-101, *Frontier Petroleum Services Ltd. v. Czech Republic* (UNCITRAL), Final Award dated November 12, 2010, § 285.

⁴⁸⁷ C1 — § 306.

⁴⁸⁸ C1 — § 306; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 51-56; C-122, First Declaration of Mr. Adrian Christopher Lee-Chin, §§ 41-42, 55-65.

by Lajun (averaging USD 2.50 per ton of waste) was inadequate and insufficient to support the proper maintenance and operation of the Landfill. In these letters, Lajun provided the municipalities with statistics confirming that Lajun's tipping fees were much lower than the fees then being charged for similar services in other comparable Latin American countries. In light of this situation, Mr. Adrian Christopher Lee-Chin requested that the Municipalities cooperate with Lajun to find "a solution" to the tipping fee "problem."⁴⁸⁹ Claimant asserts that, rather than address Lajun's concerns in a transparent manner, the municipalities neglected to respond to Lajun's correspondence.⁴⁹⁰ However, Lajun (through Mr. Adrian Lee-Chin) continued in its efforts to bring the State to the negotiation table, and remained hopeful that a good-faith resolution could be reached with the municipalities. Once again, all of the municipalities failed to respond. At this point, it became obvious to Lajun that the State had no intention of engaging with Lajun in a transparent and reasonable manner.⁴⁹¹ The State's failure to engage with Lajun (and therefore with Claimant) in a transparent manner was all the more glaring given that the State had repeatedly acknowledged the need to increase the tipping fees received by Lajun.⁴⁹² The Ministry of Environment likewise previously confirmed the inadequacy of the tipping fees being received by Lajun⁴⁹³.

⁴⁸⁹ C1— § 307; C-38, Various correspondence from Lajun to the Dominican municipalities concerning the tipping fee adjustment, dated September 20, 2016.

⁴⁹⁰ C1— § 308; C-39, Various correspondence from Lajun to the Dominican municipalities concerning the tipping fee adjustment, dated October 13, 2016; C-40, Various correspondence from Lajun to the Dominican municipalities concerning the tipping fee adjustment, dated October 17, 2016: "We hereby respectfully request a meeting with you ... in order to follow up on the above-mentioned subject [revision of the tipping fee] ..., we have already tried to schedule this meeting to no avail ... via several emails and phone calls." [Tribunal's Translation]

⁴⁹¹ C1— § 309; C-41, Various correspondence from Lajun to the Dominican municipalities concerning the tipping fee adjustment, dated November 1, 2016. "[W]e request an appointment as soon as possible in order to discuss the terms of the contract and reach mutually beneficial agreements." [Tribunal's Translation]

⁴⁹² C1— §310; C-46, Sworn Affidavit from the Mayor of the ASDN, dated September 6, 2012, admitting that "this institution [ASDN] has acknowledged through various documents the impossibility of building the perimeter fence and the performance of other commitments established in the [Concession] Agreement and in the signed Addendas ... because the Municipalities that make up the users of said landfill do not pay the real cost of the adequate treatment of the solid waste dumped there ... to the detriment of Lajun Corporation ... we are in the best position to support the contents of this declaration in the judicial proceedings that may be necessary" [Tribunal's Translation] ; C-32, ASDN Board of Councilors' Resolution No. 06/2014, dated February 19, 2014, Approving the Extension of the Concession Agreement for the Administration of the 205 Duquesa Landfill; C-12, Statement of Defense and Referral of ASDN Administrative Record dated March 18, 2014; C-16, Certification of Compliance and Conformity dated July 9, 2014.

⁴⁹³ C1— § 311; C-7, Correspondence from the Ministry of Environment to Lajun, dated October 30, 2015: "We wish to inform you that in February 2014, the Ministry of Environment and Natural Resources established in their Solid Waste Policies that the tipping fee per ton of waste deposited would start at USD 5.00 in order to promote

393. Claimant points out to Respondent's belated argument that the concept of "Tipping Fee" (*Tarifa de Volcado*) is different from what it now calls "Reference Fee" (*Tarifa de Referencia*). Respondent also argues now that the word "revision" (or "*revisión*") contained in Article 4.9 of the Concession Agreement refers to a simple examination of a fee amount but does not entail an increase (or even a potential increase) of the relevant fee. Claimant submits that the Concession Agreement provides for no distinction between the two types of fees, and the word "revision," by definition, implies a modification.⁴⁹⁴
394. Claimant alleges that in mid-March 2017, the Ministry of Environment interjected itself as a "mediator" in Lajun's impasse with the State regarding the tipping fee issue after more than six months of the State ignoring Lajun's pleas for an adjustment to the tipping fee rate. During the said period, the Ministry of Environment wrote to Lajun and suggested that it participate in a meeting with representatives from the Municipalities to supposedly seek an amicable solution to the Parties' dispute. As a result of the meeting, the Ministry of Environment agreed to hire an independent expert (JICA) to conduct a study to determine the appropriate tipping fee to be paid to Lajun for each ton of waste deposited at the Landfill. Further, the State promised to reach a consensus on a revised tipping fee once the JICA study and report were concluded and released.⁴⁹⁵ However, Claimant asserts that Respondent concealed the results of the JICA study, which was completed in May 2017. Despite repeated requests by Claimant and his son, the Ministry of Environment failed to provide Lajun with a copy of the 2017 JICA report. Given the State's failure to share the results of the JICA report, Claimant's son independently searched for and eventually obtained a copy of the JICA report. The JICA report

new payment cultures and begin to reorganize a budget structure in the management of the final disposal of municipal solid waste, decrease health indicators and develop environmental protection." [Tribunal's Translation]

⁴⁹⁴ C3 — Footnote 8. Respondent now defines the former as the fee applicable to all Dominican municipalities and other users (not including the ASDN) and defines the latter as the fee contemplated in the Concession Agreement between Lajun and the ASDN.

⁴⁹⁵ C1 — § 312; C-80, Correspondence from the Ministry of Environment (Vice Minister of Environmental Management, Zoila González de Gutiérrez) to Lajun (Adrian Lee-Chin), dated March 15, 2017: "[W]e wish to inform you ... that we are taking the necessary steps to find a solution to the Duquesa Landfill issue ... we intend to hold a meeting between the parties involved to reach an agreement ... we appeal to your good sense and ask that you maintain the set schedule from 6:00 a.m. to 8:00 p.m. and the operations on Saturdays and Sundays at the usual times ..."; C-81, Correspondence from Lajun (Adrian Lee-Chin) to the Ministry of Environment (Vice Minister of Environmental Management, Zoila González de Gutiérrez), dated March 16, 2017: "[W]e are unable to comply with your request to extend the hours since we have not received the payment necessary to operate for several months due to the impasse with the Gran Santo Domingo municipalities ... Thousands of tons of trash are shipped to us daily without a contract ... There has been no price increase in 10 years. We continue to operate despite not receiving the necessary payments." [Tribunal's Translation]

confirmed what Lajun had maintained all along: the tipping fees being paid to Lajun were substantially inadequate to cover Lajun's operating costs. Further, the JICA report concluded that the average tipping fee cost paid in Latin America and the Caribbean for waste disposal was USD 20.43 per ton, over 600% greater than the average fees being charged by Lajun at that time.⁴⁹⁶

395. Lastly, Claimant submits that Respondent engaged in arbitrary and discriminatory conduct *vis-à-vis* Claimant. Fair and equitable treatment also requires that host states refrain from arbitrary and unreasonable conduct.⁴⁹⁷ In particular, Claimant highlights the following summary provided by Professor Dolzer:

*"Tribunals have properly recognized that the fair and equitable treatment does not allow arbitrary conduct in the relations between the host state and the investor... In an investment-friendly climate, fair and equitable treatment requires that the host state does not affect the foreign investor's rights without cause. Thus, an official may not act vis-à-vis an investor because of reasons of a personal nature. On a different level, the host state government must not act out of xenophobic motives. More important in practice, fair and equitable treatment will stand in the way of conduct of the host state that is driven by domestic politics instead of arising out of considerations related to the investment. Governmental action will also be suspect in case it is not based on a proper review of facts relevant to a decision."*⁴⁹⁸

396. Claimant argues that, according to various legal scholars, a measure is likely to be found arbitrary if it is "motivated by inappropriate considerations" or "not based on reason." Arbitrary conduct is driven by domestic politics instead of arising out of considerations related to the investment; governmental action will also be suspect in the event it is not based on a proper review of facts relevant to a decision.⁴⁹⁹

⁴⁹⁶ C1 — §§ 313-314; C-83 Electronic Correspondence from Mr. Michael Anthony Lee-Chin to various representatives of the Dominican Republic's Ministry of Environment dated March 30, 2017, asking for a copy of the JICA report; C-84, "Manual for Final Disposal of Municipal Solid Waste" (JICA Manual), May 2017.

⁴⁹⁷ C1 — § 298; CL-8, *Tecmed v. Mexico*, § 114; CL-17, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated January 17, 2007 ("*Siemens v. Argentina*"), § 319; CL-10, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) p. 274.

⁴⁹⁸ C1 — § 300; CL-26, R. Dolzer, "Fair and Equitable Treatment: Today's Contours," 12 *Santa Clara Journal of International Law*, 7 (2014), p. 31.

⁴⁹⁹ C1 — § 316; CL-10, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) pp. 249-250, 302; CL-26, R. Dolzer, "Fair and Equitable Treatment: Today's Contours," 12 *Santa Clara Journal of International Law*, 7 (2014), p. 31.

397. Claimant refers to the above-mentioned evidence and provides additional examples of what he considers arbitrary and unreasonable conduct by the State:

- At the request of the Ministry of Environment, Lajun prepared a detailed environmental plan that explained the framework for Lajun's operations in the Duquesa Landfill and included studies of the volume of waste received by the Landfill on a yearly basis. Notwithstanding, the Ministry imposed baseless fines on Lajun in early 2017 and arbitrarily decided to withhold Lajun's previously approved environmental license. The Ministry of Environment's actions took place after Lajun insisted that it receive increased tipping fees for its services.
- On November 9, 2016, Claimant met with the President of the Dominican Republic to discuss the status of the Landfill, Lajun's proposal to construct a Waste-to-Energy Plant, and the need to increase the tipping fees being paid by the Municipalities. At this meeting, the President assured Claimant that the State would not wrongfully interfere with Claimant's investment and expressly guaranteed that Lajun's rights under the Concession Agreement would be respected. On this same day, the ASDN – contrary to the President's representations and guarantees – deposited biohazardous and prohibited waste at the Landfill in camouflaged bags, all in an effort to wrongfully interfere with Lajun's operation of the Landfill. Thereafter, as described in the declarations of Michael Anthony and Adrian Christopher Lee-Chin, the State initiated a targeted and abusive campaign of discriminatory actions against Lajun, Claimant, and the investment.
- As part of this retaliatory campaign, the Ministry of Environment filed a criminal complaint against Adrian Christopher Lee-Chin in August 2017, claiming that he had committed a crime by attempting to reduce the Landfill's operating schedule. In initiating this criminal action, the State was well aware that Lajun had temporarily reduced its operating hours only because its operational costs could not be covered by the tipping fees then being received by the State's Municipalities, many of which had ceased paying Lajun altogether. Moreover, Lajun's reduced operating schedule was short-lived, as the ASDN ordered a military intervention of the Landfill and

forced Lajun to keep open the Landfill during extended operating hours. In short, as described previously, the criminal action against Adrian Christopher Lee-Chin was not motivated by any legitimate State motives and was filed solely to harass and intimidate Claimant and his son.

- Less than two months after the execution of the Second Settlement Agreement – wherein the State reconfirmed the validity of the Concession Agreement – the ASDN abruptly notified Lajun that it would be terminating its concession. Again, the State’s purported reasons for terminating the Concession Agreement were unsubstantiated and contrary to the State’s prior affirmations that Lajun was complying with its contractual obligations and with Dominican law.

398. The State’s arbitrary actions continued after the ASDN forcibly removed and ejected Lajun from the Landfill in September 2017. On February 1, 2018, the State filed another action against Claimant’s Investment, this time seeking the nullification of the title of the sale of the Land. Notably, the Land Nullification Action is based on events that pre-date Claimant’s Investment by over thirty years. Notwithstanding the over three decades between the initial sale of the Land and its acquisition by Claimant, the State only chose to file the Land Nullification Action less than six weeks after Claimant filed his Notice of Controversy.⁵⁰⁰

⁵⁰⁰ C1 — § 301; C-50; Environmental Permit DEA No. 0511-06 issued in favor of Lajun, dated April 26, 2010; C-38, Various correspondence from Lajun to the Dominican municipalities concerning the tipping fee adjustment dated September 20, 2016; C-39, Various correspondence from Lajun to the Dominican municipalities concerning the tipping fee adjustment, dated October 13, 2016; C-47, Verification of Compliance with Obligations, dated October 16, 2016; C-48, Verification of Compliance with Obligations, dated November 16, 2016; C-36, Resolution RJ No. 17-2016 deciding on the appeal (“*recurso jerárquico*”) filed by the Duquesa Landfill project representatives against Resolution No. 114-2016-VGA (showing that the State ratified the Resolution and confirmed the administrative sanction of DOP 1 million that had been issued against Lajun) dated October 12, 2016; C-8, Settlement Agreement 2 between the ASDN and Lajun dated May 24, 2017; C-9, Complaint for Breach of the Agreement, Act No. 179/2017 dated July 19, 2017; C-11, Administrative Proceeding filed by the ASDN in order to nullify the Concession Agreement dated August 10, 2017; C-88, Criminal complaint and civil claim for damages brought by the Ministry of Environment before the Prosecution of the Province of Santo Domingo, dated August 3, 2017 (alleging, according to Claimant, that Adrian Christopher Lee-Chin committed crimes against the State because he violated the State’s environmental laws, and requested that both Claimant’s son and Lajun be held civilly liable to the State in the amount of DOP 100 million (approximately USD 2 million)); C-106, Action to Nullify the Sale, Demarcation and Cancellation of Certificate of Title filed by the Consejo Estatal del Azúcar against Felipe Antonio Díaz, José Antonio Díaz and Lajun, dated January 30, 2018 (according to Claimant, alleging that the sale of the Land was fraudulent, petitioning that the Land be returned to the State, and requesting that Defendants indemnify the State in the amount of DOP 1 billion (approximately USD 20 million)); C-112, Environmental Management and Compliance Plan (PMAA) for the Duquesa Landfill, prepared by Lajun, dated

399. As alleged by Claimant, there is also ample evidence of the suspect nature of Respondent’s so-called Environmental and Health Emergency Declaration, which in reality constitutes merely a “symbolic” declaration with no judicial or legal effects, issued simply with the goal of expropriating Claimant’s investment without due process in violation of the Treaty.⁵⁰¹ Respondent repeatedly alleges that it took over the Landfill because Claimant breached the Concession Agreements and the amendments thereto. However, as stated by Claimant, the real reason why Respondent initiated the Nullification Action of the Concession Agreement in the first place was because it wanted to “bypass” the termination procedure requirements in the Concession Agreement and its amendments as it would not have been able to meet them.⁵⁰² Claimant emphasizes that Respondent cannot simply allege in these proceedings that all of the certifications and documents that were issued by Dominican public officials and authorities are fake or forged.⁵⁰³
400. All in all, as in *Siemens v. Argentina*, Respondent’s actions were not “based on reason,” but rather intended to sabotage Lajun and remove control of the Duquesa Landfill and the Land from Claimant; Respondent consistently failed to respect its commitments and obligations throughout the duration of the Concession Agreement, such as granting Lajun the “peaceful” operation of the Landfill and working with Lajun to increase the tipping fee charged for its services.⁵⁰⁴

B) The Respondent’s position

401. Respondent alleges that it did not violate the applicable FET standard. First, Respondent notes that Claimant submits that the FET standard contained in the Treaty is broad and flexible, and that the dominant approach by investment tribunals has been to interpret fair and equitable treatment as an independent standard with an autonomous meaning.

December 1, 2015. According to Claimant, Lajun communicated to the State that part of its plans concerning the treatment of waste at the Duquesa Landfill included the installation of a waste-to-energy plant: “The design of the complex is focused on ... [e]xploring the advisability of developing the ability to generate profit from organic and non-organic matter, through the analysis of new technologies that minimize environmental impacts, such as a reclassification and recycling plant, a solid waste energy production plant and a hazardous waste treatment plant,” [Tribunal’s Translation] pp. 37-38; C-34, VGA Resolution No. 20-2016 of the Ministry of Environment and Natural Resources dated March 11, 2016, evidencing that the State issued an administrative sanction of DOP 2,026,530.00 against Lajun for alleged Dominican law environmental violations.

⁵⁰¹ C2 — § 325.

⁵⁰² C2 — § 326.

⁵⁰³ C2 — § 327.

⁵⁰⁴ C1 — § 302; CL-17, *Siemens v. Argentina*, § 319.

However, the broad and autonomous FET standards invoked by Claimant are not the standard contained in the Treaty, since – unlike other investment treaties – this Treaty specifically defines the scope and meaning of this standard.⁵⁰⁵

402. Respondent alleges that the FET obligation under Article IV of Annex III of the Treaty is circumscribed to the minimum standard of treatment under customary international law.⁵⁰⁶ Respondent underscores that this provision under the Treaty bears a number of similarities with other treaties (such as Article 1105 of NAFTA and Article 10.5 of the DR-CAFTA or other treaties executed by Respondent and CARICOM, where the FET obligation is also circumscribed to the minimum treatment under customary international law.⁵⁰⁷ To support its position, Respondent relies on a series of investment tribunals’

⁵⁰⁵ R1 — § 370.

⁵⁰⁶ R2 — § 316.

⁵⁰⁷ R1— §371; RL-404, NAFTA, Article 1105: “1. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;” RL-46, DR-CAFTA, Article 10.5: “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;” RL-552, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the Dominican Republic as a Non-Disputing Party dated October 5, 2012, §§ 3, 6-8, explaining that the Fair and Equitable Treatment standard of Article 10.5 of the DR-CAFTA “is limited to the ‘Minimum Standard of Treatment’ afforded to foreigners under customary international law, and not ‘fair and equitable’ as autonomous concept,” and, in order to constitute a violation of such Article, “a measure attributable to the State must be sufficiently egregious so as to fall below the internationally accepted standards” and “only manifestly arbitrary behavior, blatant unfairness and very egregious actions may be claimed under DR-CAFTA Article 10.5, and not just simply arbitrariness or a mere breach.” See also RL-226, Free Trade Agreement between Central America and the Dominican Republic, signed on April 16, 1998, with different effective dates for each State Party, Chapter IX (Investment), Article 9.03; RL-157, Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Dominican Republic and the Government of the Republic of France, signed on January 14, 1999, effective since October 30, 2000, Article 3. The other treaties entered into by the Republic do not contain an explicit reference to international law or to the minimum treatment standard in their fair and equitable treatment provision. Thus, according to Respondent, evidently it is an important distinction to be taken into consideration by the interpreter when unraveling the meaning and scope of this standard in the Treaty; RL-47, Free Trade Agreement between the Government of Costa Rica and the Caribbean Community (CARICOM) (representing the Governments of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago), signed on March 9, 2004 with different effective dates for each CARICOM State, Article X.04(1): “Investments of either Party shall at all times be accorded fair and equitable treatment, and shall enjoy full legal protection and security in accordance with international law.”

decisions that may confirm the meaning and scope of the provisions containing this language.⁵⁰⁸

403. According to Respondent, pursuant to the language of Article IV of the Treaty, interpreted in its context, there are no doubts that the FET obligation is limited to the minimum treatment under customary international law. Therefore, in Respondent's opinion, the object and general purposes of the Dominican Republic-CARICOM FTA (which, on the other hand, is silent about the specific FET obligation under the Treaty) cannot be used to alter the ordinary meaning of the words used in a specific Treaty provision interpreted in its context, let alone to rewrite the FET obligation, as purported by Claimant.⁵⁰⁹

404. Respondent argues that because Claimant plead its case in reliance on an erroneous analysis, Claimant's entire analysis of the FET obligation is flawed. According to Respondent, Claimant cites cases in which the FET obligation was construed as an independent standard with an autonomous meaning, and none of those cases is applicable here, for the language of the FET clauses that was being construed in such decisions was very different to the language of Article IV of the Treaty.⁵¹⁰

405. Consequently, in Respondent's view, Claimant must prove the State's conduct was egregious, scandalous, manifestly arbitrary, a behavior of denial of justice, manifestly discriminatory and without justification.⁵¹¹ Claimant's argument about the evolution of

⁵⁰⁸ R1 — § 371; RL-409, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award dated July 31, 2007, § 369: "The Tribunal notes that fair and equitable treatment conventionally obliges States parties to the BIT to respect the standards of treatment required by international law. The international law mentioned in Article II of the BIT refers to customary international law, *i.e.*, the repeated, general, and constant practice of States, which they observe because they are aware that it is obligatory. Fair and equitable treatment, then, is an expression of a legal rule. Inequitable or unfair treatment, like arbitrary treatment, can be reasonably recognized by the Tribunal as an act contrary to law;" see also, RL-410, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award dated March 10, 2015, § 4.82; RL-411, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award dated November 18, 2014, § 573; RL-412, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award dated October 30, 2017, §§ 8.42, 8.44.

⁵⁰⁹ R1 — § 372.

⁵¹⁰ R1 — § 373.

⁵¹¹ R2 — § 318; R1 — § 374. That standard was expressed in *Neer v. Mexico* and has been ratified by several investment tribunals that had to interpret clauses that were similar to Article IV of the Treaty. RL-417, L.F.H. *Neer and Pauline E. Neer v. Mexico*, Mexico–U.S. General Claims Commission, Docket No. 136, Opinion dated October 15, 1926, p. 556: the treatment of an alien, 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;" RL-418, *Glamis Gold*,

the content of the FET standard does not have enough consensus to constitute a rule of customary international law,⁵¹² except when it refers to the obligation to refrain from acting arbitrarily.⁵¹³

406. Respondent asserts that, in the instant case, none of the measures put in place by the Republic referred to by Claimant could have violated the minimum treatment under customary international law. The decisions adopted by the Republic were reasonable and justified considering the repeated and severe breaches of Lajun's obligations and taking into consideration the health and environmental crisis caused as a result of such breaches.⁵¹⁴

407. Respondent alleges that, in any event, even if the Tribunal accepted the standard invoked by Claimant, there would be no violation of the FET in the case at hand.⁵¹⁵ This is because, even where it is considered that the FET standard has an autonomous meaning, the threshold to determine the violation of such standard is high.⁵¹⁶

408. First, there has been no violation of legitimate expectations.⁵¹⁷ For legitimate expectations to exist, the expectations must be objective, reasonable, rely on specific promises aimed

Ltd. v. United States of America, Case under NAFTA Chapter 11 (UNCITRAL), Award dated June 8, 2009, § 824; RL-419, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)05/02 under NAFTA Chapter 11, Award dated September 18, 2009 ("*Cargill v. Mexico*"), §§ 284, 286. See also RL-420, Patrick G. Foy and Robert J.V. Deane, "Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement," 16(2) *ICSID Review* (2001), pp. 313-314; RL-421, *Alex Genin, Eastern Credit Limited, Inv. and A. S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award dated June 25, 2001, § 367.

⁵¹² R2 — § 321.

⁵¹³ R2 — § 324.

⁵¹⁴ R1 — § 375.

⁵¹⁵ R1 — § 376.

⁵¹⁶ R1 — § 376, footnote 791; CL-35, *Bivater v. Tanzania*, §§ 596-597: "Whilst the Tribunal in *Mondev v. United States* concluded that: 'a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case' This is not to say that the general threshold for finding a violation of the standard cannot be articulated. This threshold is a high one;" RL-422, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award dated June 7, 2012 ("*Toto v. Lebanon*"), § 155. On the other hand, according to Respondent, even if the fair and equitable treatment standard were an independent one with an autonomous meaning, it does not mean it has the broad and unlimited scope propounded by Claimant. See, RL-140, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award dated September 11, 2007, ("*Parkerings v. Lithuania*") § 280: "The principle of fair and equitable treatment is violated where a host State's conduct is grossly unfair or discriminatory;" RL-423, Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press 2011), p. 60; RL-424, Graham Mayeda, "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties," 41(2) *Journal of World Trade* (2007), pp. 274-275; RL-425, Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007), p. 89.

⁵¹⁷ R2 — § 337.

at the investor, must be reasonably relied upon by the investor, and decisive to make the investment.⁵¹⁸ Mere desire or subjective perception cannot give rise to legitimate expectations.⁵¹⁹ Nor can general references in laws, other than specific promises or commitments, be the basis of legitimate expectations.⁵²⁰ Furthermore, legitimate expectations cannot replace the rights and obligations set forth under a contract.⁵²¹

409. In Claimant's view, when making his investment, Claimant knew (or at least should have known) the following relevant factors:

- Lajun did not perform the obligations provided for under the Concession Agreement in a strict manner, operating the Duquesa Landfill as an open-air rather than as a sanitary landfill.⁵²²
- The ASDN had already announced it wished to terminate the Concession Agreement because of Lajun's breaches.⁵²³
- The tipping fee offered by Lajun was not sufficient to cover the operating costs of the Duquesa Landfill and make the investments required under the Concession Agreement.⁵²⁴

⁵¹⁸ R1 — § 378; RL-376, *Philip Morris v. Uruguay*, § 426: "It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment;" RL-378, Andrew Newcombe and Lluís Paradell, *Law and practice of investment treaties: Standards of treatment* (Kluwer International Law, 2009), pp. 281-282.

⁵¹⁹ R1 — § 378; RL-140, *Parkerings v. Lithuania*, § 344: "It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law;" RL-422, *Toto v. Lebanon*, § 166; RL-430, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, dated November 30, 2012, § 7.76; RL-429, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012), p. 148.

⁵²⁰ R1 — § 378; RL-376, *Philip Morris v. Uruguay*, § 426: "Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law;" RL-259, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, dated December 27, 2010 ("*Total v. Argentina*"), § 117; RL-431, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated October 8, 2009, § 217.

⁵²¹ R1 — § 378; RL-432, James Crawford, "Treaty and Contract in Investment Arbitration," 24(3) *Arbitration International* (2008), p. 373.

⁵²² R1 — §§ 55-57, 97, 380.

⁵²³ R1 — §§ 62, 97, 380.

⁵²⁴ R1 — §§ 57, 78-79, 97, 380.

- Lajun's attempts to negotiate an increase in the payable fees with the Municipalities had failed; thus, the tipping fee had not been updated in six years.⁵²⁵
- There was no provision of the Concession Agreement that would allow Lajun to force an increase in fees absent the Municipalities' prior agreement.⁵²⁶
- The ASDN was only required under the contract to endeavor to mediate with the Municipalities in connection with any fee increase, which it did.⁵²⁷
- Lajun did not have a contractual right to develop and build a WTE Plant in the Duquesa Landfill.⁵²⁸
- Lajun did not comply with the applicable environmental standards in terms of solid waste management, nor with its obligations under the Amended Environmental Permit.⁵²⁹
- With a view to the strengthening of the institutional and technical capacities and the improvement of solid waste management, the regulatory framework in that aspect was constantly evolving, with technical, operating and environmental liability regulations progressively becoming more stringent.⁵³⁰

410. Respondent contends that a legally stable and unchanged environment cannot be expected, particularly for health/environmental obligations.⁵³¹ The investor's alleged expectations must be weighed against the State's right to regulate and exercise its police power in the interests of general welfare.⁵³² Respondent did not unreasonably interfere with Claimant's use and enjoyment of the alleged investment.⁵³³ Claimant cannot legitimately expect the State not to react in such case: Respondent has a margin of

⁵²⁵ R1 — §§ 6, 97, 157, 158, 380.

⁵²⁶ R1 — §§ 6, 29-33, 58, 79, 88, 97, 380.

⁵²⁷ R1 — §§ 32-33, 58, 97, 174, 380.

⁵²⁸ R1 — §§ 3, 6, 10-11, 37-39, 53-54, 90-94, 97, 153-154, 380.

⁵²⁹ R1 — §§ 35, 50-57, 61, 97, 380.

⁵³⁰ R1 — §§ 16-19, 89, 380.

⁵³¹ R2 — § 331.

⁵³² R2 — § 333.

⁵³³ R2 — § 339.

appreciation in order to exercise its police power in the sphere of public health or environmental matters.⁵³⁴

411. In addition, there can be no expectations regarding contractual obligations that Respondent never undertook.⁵³⁵ The Concession Agreement granted Claimant no “exclusive” right to build and develop a WTE Plant, which means that Claimant never had acquired rights thereto.⁵³⁶

412. Respondent alleges that the documents submitted by Claimant may not support legitimate expectations, as they were issued a year either before or after the investment was made; in any event, Respondent maintains that the ASDN fulfilled its obligations at all times and respected Lajun’s rights under the Concession Agreement and amendments thereto.⁵³⁷

413. According to Respondent, Claimant failed to perform proper and complete due diligence and must be deemed liable for his own negligence and the risk taken when making his alleged investment.⁵³⁸ In fact, according to Respondent, the so-called due diligence to which Claimant refers consisted mainly in the following:

- The alleged technical due diligence performed by A2Z Group did not exist as described. In reality, A2Z was a prospective partner that was to participate in a different project, which eventually was never carried out, and the technical conditions of the Duquesa Landfill were not truly assessed. Anyways, the fact that A2Z (which would have been the project partner having the technical experience necessary for the operation of the Duquesa Landfill) decided not to participate does not exactly support Claimant’s position.⁵³⁹

⁵³⁴ R2 — § 345.

⁵³⁵ R2 — § 338.

⁵³⁶ R2 — § 342.

⁵³⁷ R2 — § 338.

⁵³⁸ R2 — § 336.

⁵³⁹ C1 — §§ 42-45; see C-121, First Declaration of Mr. Michael Anthony Lee-Chin, §§ 27-29; C-117, *Integrated Resource Recovery Facility for Municipal Solid Waste at Santo Domingo, Dominican Republic*, dated November 11, 2012; R1 — §§ 72-75, 382.

- There was no environmental due diligence. Claimant makes reference to an Environmental Impact Statement issued in 2006, even prior to the execution of the Concession Agreement, as well as a study performed by JICA in 2007, but cannot even mention any document that is remotely contemporaneous to the date of acquisition of his Shares in Lajun. Notably, Claimant performed no environmental audit, which would have revealed the serious breaches of Dominican environmental regulations found by the 2013 Technical Report.⁵⁴⁰
- What Claimant calls financial due diligence is actually a table showing Lajun's alleged income from January 2011 through July 2012.⁵⁴¹ Apart from the fact that these values lack documentary support, it is also not explained why only the revenues from January 2011 were considered when the Concession Agreement was signed in 2007, or until July 2012, when Claimant's alleged investment was made a year later. Hence, there was no real assessment of the financial situation of Lajun.⁵⁴² What that succinct analysis does seem to have revealed is that the tipping fees payable by the Municipalities to Lajun on account of waste disposal in the Duquesa Landfill were very low.⁵⁴³
- The purported legal due diligence, as per Claimant's own narrative, consisted mainly in an alleged study of the certificate of title of the Portion of Land pertaining to the Duquesa Landfill.⁵⁴⁴ Even though Claimant mentions that the same law firm revised the Concession Agreement and several of Lajun's contracts with other municipalities, he fails to indicate

⁵⁴⁰ C1 — §§ 48-54; see C-121, First Declaration of Mr. Michael Anthony Lee-Chin, § 31; C-115, Environmental Impact Statement dated June 19, 2006; C-116, Study on Integrated Solid Waste Management Plan in Santo Domingo de Guzman National District Dominican Republic, Volumes I – IV, performed by the Japan International Cooperation Agency (JICA) in response to a request from the Government of Dominican Republic (March 2007); R1— §§ 80-82, 382.

⁵⁴¹ C1 — §§46-47; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, § 32; C-122, First Declaration of Mr. Adrian Christopher Lee-Chin, § 23; C-111, Table showing the income received by Lajun from the Municipalities from January 2011 through July 2012, dated August 20, 2012; R1— §§ 76-79, 382.

⁵⁴² R1 — §§ 70, 382.

⁵⁴³ C1 — § 47; R1 — §§ 78-79, 382.

⁵⁴⁴ R1 — §§ 83-87, 382. According to Respondent, had a proper analysis of title over the Portion of Land been carried out, obvious irregularities of the documents supporting such title should have been identified at first sight.

the conclusions reached.⁵⁴⁵ Nor did Claimant carry out a necessary (environmental and/or energy) regulatory analysis which would have revealed that the operation of the Duquesa Landfill was a highly regulated activity, that its operation was also to comply with the provisions of environmental regulations, and that Claimant was not allegedly entitled to build and operate a WTE Plant (which, on the other hand, and as stated *supra*, would have required a concession granted by the President of the Republic and compliance with other legal requirements.)⁵⁴⁶

414. Consequently, Respondent could not have compromised Claimant's expected return on his capital, given that the situation was clear.⁵⁴⁷ The investor knew (or should have known) all these circumstances and, in spite of that, decided to take a risk when making his investment in Lajun. If Claimant made a risky investment or failed to properly assess his investment before making it, or if the investment did not turn out to be as profitable as he expected, it is the investor that is to face the consequences of the risks taken.⁵⁴⁸ Bilateral investment treaties are not insurance policies protecting investors against bad business judgments.⁵⁴⁹

415. Respondent submits that Claimant failed to demonstrate specific commitments during the negotiation phase in support of his legitimate expectations.⁵⁵⁰ Respondent was under no obligation to work with Lajun in order to increase tipping fees or assure Lajun a profitable operation.⁵⁵¹

⁵⁴⁵ C1 — § 55; C-121, First Declaration of Mr. Michael Anthony Lee-Chin, § 33; R1 — §§ 88, 382. It is worth pointing out that, although Claimant asserts that Langa & Abinader firm confirmed that the seller had a valid title to the Portion of Land, and that it also analyzed whether the Portion of Land was subject to any existing claims and revised the terms of the Concession Agreement and several contracts with municipalities, he incorporated none of those reports into the record.

⁵⁴⁶ R1 — §§ 89-94, 382.

⁵⁴⁷ R2 — § 340.

⁵⁴⁸ R1 — § 381.

⁵⁴⁹ R1 — § 381; RL-433, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award dated November 13, 2000, § 64: "In this connection, the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments;" CL-34, *MTD v. Chile*, § 178; RL-434, *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award (Excerpts), dated August 14, 2015, § 186; RL-435, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award dated December 21, 2016, § 21.

⁵⁵⁰ R2 — § 344.

⁵⁵¹ R2 — § 341.

416. Respondent insists that the introduction to Article 4.9 and Article 4.9.1 of the Concession Agreement provide for a regular (not continuing) obligation to revise (not increase) the tipping fee understood as “Reference Fee” (*Tarifa de Referencia*), but not as “Tipping Fee” (*Tarifa de Volcado*);⁵⁵² that is to say, such provisions do not provide for an obligation to increase the fee actually paid by the Duquesa Landfill users. In relation to Tipping Fees, Article 4.9.2 merely imposes a “best efforts” obligation.⁵⁵³

4.9 Annual Adjustment of Consideration. The Parties agree that the consideration described in paragraph 4 of this Agreement shall be revised at least twice a year, so that it can reflect in a realistic fashion any change in the operation of the Duquesa Landfill, in view of the fluctuation of the Dominican Republic’s inflation rate, the variation of the exchange rate, labor costs, fuel costs, as well as any other relevant factors.

4.9.1 This revision shall be mandatory every time there is a variation of more than five per cent (5%) in operating costs at the Duquesa Landfill.

4.9.2 THE MUNICIPALITY OF SANTO DOMINGO NORTE undertakes to make its best efforts to liaise with the Duquesa Landfill users, every time that pursuant to the preceding articles there is a need to increase the tipping fee, so that they will accept the variation in the tipping cost, for the purpose of proper performance of the Duquesa Landfill.⁵⁵⁴ [Tribunal’s Translation]

417. Thus, the first part of the introduction to Article 4.9 refers to “the consideration described in paragraph 4 of this Agreement,” i.e., the Reference Fee, and provides for a biannual revision, whereas the second part of the introduction to Article 4.9 lays down criteria aimed at guiding such biannual revision, and Article 4.9.1 introduces an exception to the regularity of the revision: when operating costs vary by more than five per cent.⁵⁵⁵ Respondent emphasizes that “revision” is not a synonym for “increase”.⁵⁵⁶ A revision entails an assessment of the Reference Fee on the basis of specific criteria with a view to

⁵⁵² R2 — Footnote 48.

⁵⁵³ R2 — § 28.

⁵⁵⁴ R-6 (C-1), Concession Agreement, Article 4.9, modified by C-3, Addenda 2, Articles 3.3 and 3.4.

⁵⁵⁵ R2 — § 29.

⁵⁵⁶ R2 — § 30.

an update, but not a specific and automatic increase. What is revised and, where applicable, updated, is the Reference Fee, i.e., the fee that “the MUNICIPALITY OF SANTO DOMINGO NORTE authorizes THE COMPANY to charge Duquesa Landfill users.” [Tribunal’s Translation] Even if the ASDN and Lajun had reached an agreement on the new Reference Fee, such fee would not have automatically applied. The fees that continue to apply are the Tipping Fees agreed-upon with users under service contracts.⁵⁵⁷ That is why Article 4.9.2 of the Concession Agreement then goes on to establish the ASDN’s obligation to “make its best efforts to liaise with the [...] users” when “there is a need to increase the tipping fee” so that users “will accept the variation in the [...] cost.” Respondent insists that it is evident that an obligation to make “best efforts to liaise” is not a “continuing obligation to increase the Tipping Fee” [Tribunal’s Translation].⁵⁵⁸ Respondent does not deny that the ASDN had obligations – specifically, to revise the Reference Fee and make its best efforts to liaise with the Duquesa Landfill users in order to agree to new Tipping Fees – but the consequences hailing from such obligations are not those mentioned by Claimant – namely, increasing the fee payable to the level he wishes.⁵⁵⁹

418. Secondly, Respondent asserts that its actions were not inconsistent. To begin with, it is worth highlighting that not only is the alleged obligation to act consistently argued by Claimant not part of the minimum standard of treatment under customary international law, but it is also not an element of the FET obligation as an independent standard with an autonomous meaning.⁵⁶⁰

419. The ASDN repeatedly notified Lajun that, were the breaches to continue, the Concession Agreement would be terminated.⁵⁶¹ Respondent contends in this regard that the

⁵⁵⁷ *Ibid.*

⁵⁵⁸ R2 — § 31.

⁵⁵⁹ R2 — § 32.

⁵⁶⁰ R1 — § 398; RL-459, Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010), p. 198; RL-416, UNCTAD, Fair and Equitable Treatment, *UNCTAD Series on Issues in International Investment Agreements II* (United Nations), p. 63: “A number of possible elements, such as transparency or consistency, have generated concern and criticism. So far, they may not be said to have materialized into the content of fair and equitable treatment with a sufficient degree of support.”

⁵⁶¹ R2 — § 348.

certifications of compliance to which Claimant makes reference do not have the weight attributed thereby.⁵⁶²

420. For Respondent, the nullification of the Concession Agreement was declared by a competent court, after clear and specific evidence that such Agreement had been entered into in violation of Law No. 340-06 on Public Procurement was found.⁵⁶³ According to Respondent, there is no inconsistency in the fact that Respondent recognized the validity of the sale of the Portion of Land in several documents issued by the Legislative, Executive and Judicial Branches, but later filed a request to nullify title over the Portion of Land. It maintains that many of those documents have been forged. Respondent alleges that it discovered the fraud only in 2016.⁵⁶⁴

421. Thirdly, Respondent argues that it acted in a transparent manner.⁵⁶⁵ According to Respondent, the general obligation of transparency is not part of the minimum standard of treatment under customary international law and, therefore, is not an element of the fair and equitable treatment standard under the Treaty as confirmed by the tribunals of *Cargill v. Mexico* and *Merver v. Canada*.⁵⁶⁶ The only obligation of transparency contained in the Treaty is Article IX of Annex III, which requires that the Republic publish all laws, judgments, administrative practices and procedures regarding investments, or which may affect the same. Claimant mentions this provision, but the content of this obligation is different from what it contends – which is much broader; an alleged general obligation of transparency that does not exist in the Treaty. In fact, Claimant makes no claim

⁵⁶² R1 — § 400; R2 — § 348; C1 — §§ 294-295; C-52, Verification of Compliance with Obligations, dated July 1, 2013; C-47, Verification of Compliance with Obligations, dated October 16, 2016; C-48, Verification of Compliance with Obligations, dated November 16, 2016; Statement of Mr. Pérez Lorenzo, § 9. Respondent recalls that Claimant makes reference to three certifications that were allegedly made by the ASDN on compliance with contractual obligations. Respondent argues that those suspicious certifications were made by an official exercising a non-professional position who had neither the competence nor the abilities to execute such documents. Moreover, such certifications have no relevance in order to determine compliance with environmental obligations, as the ASDN is not the competent body in environmental matters.

⁵⁶³ R2 — § 348.

⁵⁶⁴ R2 — § 348.

⁵⁶⁵ R2 — § 353.

⁵⁶⁶ R1 — § 409; RL-419, *Cargill v. Mexico*, § 294; RL-464, *Merver International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award dated March 6, 2018, § 7.77.

whatsoever in this case on the grounds of an alleged failure to publish all laws, judgments, administrative practices and procedures regarding investments⁵⁶⁷.

422. The fact that the Municipalities did not agree to the increase of their fees has nothing to do with an alleged general obligation of transparency.⁵⁶⁸ According to Respondent, Lajun never made the investments that it had promised to make so as to turn the Duquesa Landfill into a sanitary landfill, which could have been a determining factor for the Municipalities to refuse to increase fees.⁵⁶⁹

423. Contrary to Claimant's allegation, Respondent submits that it did not conceal from Claimant the JICA Report entitled "Manual for Final Disposal of Municipal Solid Waste," prepared by the Ministry of Environment with the support and collaboration of the Japanese cooperation agency.⁵⁷⁰

424. Lastly, Respondent contends that its conduct was neither arbitrary nor unreasonable.⁵⁷¹ In fact, for a measure to be arbitrary, it must have been made with no justification or reasoning.⁵⁷²

⁵⁶⁷ C1 — § 303; R1 — § 236.

⁵⁶⁸ R1 — § 410.

⁵⁶⁹ R1 — § 410.

⁵⁷⁰ R2 — § 355. See R1 — § 411. According to Respondent, the "Manual for Final Disposal of Municipal Solid Waste" was prepared by the Ministry of Environment with the support and collaboration of the Japanese cooperation agency JICA. It is not true that the Republic concealed the Manual for Final Disposal from Claimant or that JICA was hired by the Republic at the request of Lajun. JICA's collaboration with the Republic is long dated, and the preparation of the Manual for Final Disposal bears no relation to the situation of Lajun. Even though Claimant alleges that Mr. Adrian Lee-Chin wrote to the Ministry of Environment in March 2017 requesting a copy of such report, the report had not been completed by then, as a result of which it would have been impossible to deliver a copy. It is no minor detail that the average cost of USD 20.43 per ton mentioned in the Manual for Final Disposal and to which Claimant refers is barely that: an average cost that not only includes an entire region, but also concerns all kinds of final disposal, from non-controlled open dump landfills such as Duquesa (which have very low operating costs) to the more modern landfills existing in some Latin countries (which have high operating costs.) Respondent had no interest in "concealing" the result of the Manual for Final Disposal, since the Manual purported to be a "tool to support [Dominican] municipalities for the planning, design, construction and operation of controlled final disposal sites." See C-84, "Manual for Final Disposal of Municipal Solid Waste" (JICA Manual), p. 1, May 2017.

⁵⁷¹ R1 — § 402.

⁵⁷² R1 — § 403. The ICJ defined the arbitrariness standard in *ELSI* as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety." RL-460, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment dated July 20, 1989, *ICJ Reports* 15 (1989), § 108. See also RL-446, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, dated November 3, 2008, § 197; RL-461 (CL-86), *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated May 22, 2007, § 281; RL-344, *Plama v. Bulgaria*, § 184.

425. In this respect, Respondent argues that Claimant fails to explain how the Environmental and Health Emergency Declaration was arbitrary or unreasonable.⁵⁷³ Here also, Respondent submits that the fact that the breaches (warranting nullification) had not been discovered before by the authorities does not mean by itself that Respondent's conduct was arbitrary or unreasonable.⁵⁷⁴

426. Additionally, neither can it be alleged that Respondent's conduct was unreasonable. When analyzing whether certain conduct was reasonable, one should assess whether the action taken is reasonable in relation to a rational policy.⁵⁷⁵ What is more, the Republic's conduct was amply justified after Lajun had been provided countless opportunities to cure its breaches and irregularities. Specifically, the measures adopted were justified in the face of specific circumstances resulting from Claimant's conduct, such as:

- the improper management of the Duquesa Landfill, the poor condition of the perimeter area of the landfill, and the diseases and conditions that affected not only the neighboring municipalities but Gran Santo Domingo as well;
- the considerable daily-hour cut in the operation hours to Mondays through Fridays and the complete suspension of operations during Saturdays and Sundays in 2017, which caused a serious health and environmental crisis, and
- starting in early April 2017, unilaterally preventing solid waste from several municipalities from entering the Landfill in breach of the Concession Agreement and the duty of continued provision of essential public services.⁵⁷⁶

⁵⁷³ R2 — § 351.

⁵⁷⁴ R2 — § 352.

⁵⁷⁵ R1 — § 404; RL-462, *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated September 23, 2010, §§ 10.3.7-10.3.8: "There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter."; RL-376, *Philip Morris v. Uruguay*, § 409; CL-25, *Saluka v. Czech Republic*, § 460; RL-463, *Stadtwerke München and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award dated December 2, 2019, §§ 317-318.

⁵⁷⁶ R1 — §§ 192-194, 198, 201, 217-218, 226-230, 405.

C) The Tribunal's analysis

427. Certain preliminary observations are necessary in order to properly analyze the arguments raised by the Parties regarding the Treaty obligation to ensure FET for investments and returns. It should be noted, in particular, that the Parties have stated radically opposite positions on the FET standard applicable in this case.
428. The first question to be decided by the Tribunal is whether it endorses any of the FET standard interpretations made by the Parties. The Tribunal recalls its prior finding in the Partial Award – which again it fully ratifies – that it should take into account the customary rules on treaty interpretation as reflected in the Vienna Convention of 1986.⁵⁷⁷
429. Secondly, the Parties have also stated radically opposite positions with respect to the factual elements in this case. The Tribunal has carefully examined the Parties' positions in this regard and will insist on the decisive factual elements that ultimately support its finding.
430. Thirdly, the Tribunal wishes to make a specific observation concerning the precedents invoked by the Parties to support their respective positions with respect to the applicable FET standard.⁵⁷⁸ It is noted here that these precedents are certainly helpful in general for understanding the development of the various existing FET standards, and, consequently, for better outlining the scope of the standard applicable in this case as well. The Tribunal considers that, *prima facie*, the precedents relied upon by the Parties often appear to be similar to the factual matrix in this case given that they are very briefly presented. However, it is important for the Tribunal to highlight that it cannot be satisfied only with such general degree of factual similarity in considering the reasoning of a particular tribunal. When the Tribunal only has access to certain information from the record of a particular case, it should approach the precedents invoked with caution. Certainly, reliance on such precedents at least assists the Tribunal insofar as it outlines certain boundaries and limits of the scope of protection. In this regard, the Tribunal finds it perhaps more helpful to examine why, in a particular case, a tribunal concluded that certain action did not amount to a FET violation.

⁵⁷⁷ *Supra*, § 114.

⁵⁷⁸ *Supra*, §§ 112-113.

431. Having said this, the Tribunal considers it relevant to discuss the applicable standard and the specific requirements for “fair and equitable” treatment Respondent was obliged to afford Claimant and its investment. Undoubtedly, Respondent’s understanding of the FET standard would make it more difficult for Claimant to establish a violation of said standard, as it would actually require proof of atrocious conduct on the part of the State, which shocked, was manifestly arbitrary, denied justice, was evidently discriminatory and without any justification whatsoever.⁵⁷⁹
432. In the Tribunal’s opinion, Respondent rightly insists on the fact that, in the present case, the applicable FET standard is limited to what is commonly known as minimum treatment under customary international law.⁵⁸⁰ Yet, in the eyes of the Tribunal, the description of this standard made by Respondent is obsolete. This Tribunal cannot be satisfied, as Respondent is, with merely reproducing a paragraph of the well-known opinion rendered in *Neer v. Mexico* almost a century ago, in 1926,⁵⁸¹ when investor-State disputes bore very little resemblance to those arising these days. Put differently, Respondent’s description of the standard is no longer adequate, as it has evolved over time and is not “frozen” at a particular time in the past.⁵⁸² At the same time, the Tribunal cannot “view” in the Treaty, as suggested by Claimant,⁵⁸³ new requirements simply on the basis of a teleological interpretation in light of the purpose of Annex III of the Treaty to promote investments.
433. While the Tribunal cannot fully endorse Claimant’s reading of the applicable standard, it also cannot endorse the reading proposed by Respondent. The Tribunal is persuaded that, in the present case, the applicable FET standard is limited by the contemporary requirements of the minimum treatment standard.⁵⁸⁴ In this regard, the Tribunal agrees that a showing of bad faith is no longer required under customary international law.

⁵⁷⁹ *Supra*, § 405.

⁵⁸⁰ *Supra*, § 402.

⁵⁸¹ RL-417, *Neer v. Mexico*, p. 556 (*supra*, footnote 511).

⁵⁸² In this regard, Respondent has only alleged, but not demonstrated, that the development of the standard described by Claimant lacked consent to be regarded as customary international law.

⁵⁸³ C1 — § 273.

⁵⁸⁴ *Supra*, § 367.

434. In view of the *supra* considerations, the Tribunal finds that the following elements constitute the applicable standard:

- (i) the obligation to honor legitimate expectations;
- (ii) the obligation to act in a non-discriminatory fashion;
- (iii) the obligation to act transparently; and
- (iv) the obligation to act consistently.

435. Put this way, such elements do not take the Tribunal very far since the fundamental question to adjudicate still is, evidently, what threshold applies to each of them. Furthermore, each of the elements mentioned may be subject to more or less subjective interpretations that may collide with what constitutes the legitimate exercise of sovereign rights. The Arbitral Tribunal should thus analyze them separately.

436. As a starting point, the Tribunal accepts that the applicable standard protects Claimant's legitimate expectations. Claimant has provided ample evidence of clear recognition of this element by arbitral tribunals as part of the FET standard.⁵⁸⁵

437. Also, and most importantly, it is clear that not all expectations will be legitimate to the extent that they qualify for protection under the Treaty. In this respect, the Tribunal considers that, for legitimate expectations to exist, there must be objective expectations that are reasonable, based on specific promises made to the investor, which the investor reasonably relied upon, and that were decisive in making their investment.⁵⁸⁶

438. The Tribunal shall address each of the expectations invoked by Claimant *infra*:

- (i) The expectation that Claimant would be afforded the exclusive right to operate, manage, maintain, and administer the Duquesa Landfill, as well as the exclusive right to receive a tipping fee for all waste deposited at the Landfill: the Tribunal agrees that the contractual relationship unequivocally provides for such rights, as reflected in the Concession

⁵⁸⁵ *Supra*, § 371.

⁵⁸⁶ *Supra*, § 408.

Agreement.⁵⁸⁷ The Tribunal also notes that such rights are not disputed by Respondent, although it insists, as discussed *supra*, that the Concession Agreement was validly nullified. According to Respondent, Claimant could not have any legitimate expectation that, if he breached the terms of the Concession Agreement and environmental and health regulations, thereby jeopardizing the health of millions of people and the Dominican environment, the Republic would not take any measures to prevent or attempt to remedy that situation.⁵⁸⁸ The Tribunal generally accepts Respondent's argument, but confirms, for the sake of clarity, that it cannot align with Respondent as to the characterization of the level of emergency it observed and the health situation that had occurred.

- (ii) The expectation of the ASDN's agreement to review and revise the tipping fee on a yearly basis (later amended to twice a year) and to liaise with the Landfill's users and municipalities so they would accept adjustments to the tipping fee: Respondent argues that the ASDN was not required to increase the fees, but merely to use its best efforts to assist in Lajun's negotiations with the other Municipalities and users in the event they should be changed.⁵⁸⁹ The Tribunal finds that the contractual relationship certainly included the obligation to periodically revise the fees. The key question is whether this included an obligation to actually increase them. In the Tribunal's opinion, Claimant convincingly established that, through the various amendments, and more specifically, by repeatedly acknowledging that the fees were insufficient, Respondent actually agreed to be fully committed to taking part in the revision

⁵⁸⁷ C-1 (R-6), Concession Agreement, Clause 8.7: "It is understood between the Parties that LAJUN CORPORATION, S.A. shall install a solid waste treatment or recycling plant, as well as a leachate treatment plant for both those now existing and those to be generated in any future deposits. Additionally, it shall install a biomedical or hazardous waste incinerator. All such facilities shall be built according to the Implementation Project to be carried by LAJUN CORPORATION S.A. within the timelines specified therein. THE MUNICIPALITY OF SANTO DOMINGO NORTE acknowledges that these obligations involve significant investments and a technical and environmental planning process that cannot be immediately executed, and thus LAJUN CORPORATION, S.A. undertakes to fulfill these obligations in the shortest possible time, in accordance with the Comprehensive Execution Plan to be submitted by LAJUN CORPORATION, S.A. to the MUNICIPALITY OF SANTO DOMINGO NORTE" [Tribunal's Translation]; Clause 16.5, see *supra* footnote 329.

⁵⁸⁸ R1 — § 394.

⁵⁸⁹ *Supra*, §§ 416-417.

process, but, in fact, failed to do so. The Tribunal accepts Claimant's allegation that the Concession Agreement does not provide for a distinction between the two types of fees – as argued by Respondent – and that the word “revision,” in this context, implies a modification.⁵⁹⁰ It is true that, theoretically, as claimed by Respondent, a tariff revision should not always necessarily result in an increase. Nevertheless, in this particular context and taking into account the specific variables, the revision should inevitably lead to an increase. It is not by coincidence that Respondent itself acknowledged on several occasions and in different ways that the fees were low.⁵⁹¹ Insofar as the fees had to be mandatorily revised “at least twice (2) a year,”⁵⁹² any breach of such obligation could only be ascertained at the end of each year. Therefore, the Tribunal finds that the breach of this obligation took place on December 31, 2013.

- (iii) The expectation that Claimant had the right to develop a recycling facility and a WTE Plant: the Tribunal has already concluded that it finds no evidence of any contractual assurance regarding the construction of a recycling facility and a WTE Plant that would have generated a legitimate expectation by Claimant.⁵⁹³
- (iv) The expectation based on Respondent's representations that the Concession Agreement had been executed following all proper Dominican public bidding procedures, and that the ASDN was pleased and satisfied with Lajun's management and operation of the Duquesa Landfill: the Tribunal finds in this regard that the factual elements presented by Claimant evince, at least, inconsistent behavior by Respondent. In the Tribunal's view, it is precisely due to the existence of these contradictory elements in the factual matrix that Claimant could not reasonably have formed legitimate expectations that the ASDN's expressed satisfaction with Lajun's actions was complete and unconditional. Claimant himself, in his characterization of constructive

⁵⁹⁰ *Supra*, §§ 392, 415.

⁵⁹¹ C1 — § 310.

⁵⁹² *Supra*, § 376.

⁵⁹³ *Supra*, §§ 350-353.

expropriation, recounts a series of actions by Respondent throughout the life of the investment that could hardly have given rise to a positive expectation. This is so because, regardless of the various statements made by Respondent regarding its satisfaction with the investment, the other referenced actions were also varied and constant. No certain expectation could be generated from such contradictions in any way. Inconsistent behavior will be considered separately by the Tribunal insofar as it is a distinct element constituting the applicable standard.

439. Respondent has argued that, in any event, Claimant could not have formed any legitimate expectation since it failed to conduct the required due diligence procedure.⁵⁹⁴ The Tribunal has no difficulty in accepting that the lack of the required due diligence of an investor – irrespective of its approach, namely, financial, technical, environmental or legal – before its investment decision, may affect the legitimacy of its expectations. In other words, an investor can hardly rely on legitimate expectations if it failed to conduct adequate due diligence that could have enabled it to identify certain risks for its investment. The Tribunal should assess credibility – not veracity – of the due diligence conducted. In this case, while Respondent has emphasized certain weaknesses in Claimant’s account regarding “extensive” due diligence, Claimant’s decision to invest actually followed proper exercise of due diligence as it can demonstrate that his investment decision was based on an analysis of technical, financial, environmental, and legal framework elements. The Tribunal also finds that Claimant rightly insists that the key provisions in the Concession Agreement and its amendments were considered as part of such due diligence.⁵⁹⁵

440. Now, turning to whether Respondent has been able to provide some justification in order to explain the frustration of legitimate expectations(i) and (ii) identified *supra*, the Tribunal again should note that it is not in a position to conduct a comprehensive *de novo* revision of the legal actions filed in the State. In other words, these proceedings cannot be an opportunity to act as a sort of appellate court. Despite the foregoing conclusion, in the case at hand, the Tribunal must verify whether the measures that eventually frustrated the

⁵⁹⁴ *Supra*, § 413.

⁵⁹⁵ C1 — § 57.

legitimate expectations identified *supra* were justified by Respondent. In this regard, the Tribunal may not accept the justification provided by Respondent, that is, in essence, the need to respond to the environmental emergency. Regardless of the legitimate concerns that might have existed at the different levels of the State affecting both the health and environmental situation, said concerns cannot, for instance, justify (indeed, quite the opposite) that, with only a small difference in time, on the one hand, the parties agreed to continue performing the Concession Agreement and, on the other hand, the validity of the Agreement was challenged.

441. That said, the Tribunal will now discuss whether Respondent violated the FET standard by failing to act consistently. Claimant argued that Respondent acted inconsistently throughout the life of the investment and, in particular, regarding the validity of the Concession Agreement and the quality of the concessionaire's performance.⁵⁹⁶ Respondent asserts that its actions were not inconsistent and insists that the alleged obligation to act consistently advanced by Claimant neither is part of the minimum treatment under customary international law, nor is an element of the FET obligation as an independent standard with an autonomous meaning.⁵⁹⁷
442. The Tribunal is not satisfied that the authorities cited by Respondent show the current status of contemporaneous customary international law;⁵⁹⁸ they rather suggest a legitimate concern that the FET standard should not be interpreted as an imposition of a frozen legal environment or as a violation of both the State's general right to issue rules and regulations and its exceptional rights to act in emergency situations. In the Tribunal's view, a State may change its position on a specific policy and thus legislate or adopt decisions as the executive branch in a manner that may not be in line with its preceding behavior; however, those deviations in a State's conduct should not violate the other constituent elements of the standard applicable.
443. In this respect, it is noteworthy that, in the instant case, Respondent has engaged in a series of contradictory actions which, on the one hand, sought to reassure Claimant regarding the successful operation of his investment, and, on the other hand – what is

⁵⁹⁶ *Supra*, § 385.

⁵⁹⁷ *Supra*, § 418.

⁵⁹⁸ *Supra*, § 418.

more, contemporaneously – actually intended to terminate this operation on the basis that it was anything but successful. This inconsistency, in the Tribunal’s view, amounts to a violation of the applicable FET requirement, not because it represents a change of the State’s position *per se*, but because it is a change of position against the constituent elements of the FET standard as a whole. It should be recalled, for the sake of clarity, that the Tribunal understands that a State is entitled to change its position on a foreign investment-related matter, to the extent that such change does not violate the applicable FET standard overall. Otherwise, the change of State position does bear consequences. What the State cannot do – or rather what it cannot do without violating its duty to provide FET – is to certify that the investment meets all applicable requirements and, at the same time, terminate the concession while arguing otherwise.

444. Now, as to whether Respondent violated the FET standard in failing to act in a transparent manner, the Tribunal makes the following findings. Claimant argues that Article IX of Annex III of the Treaty requires the State, independently of its duty to act fairly and equitably in relation to foreign investors, to also treat them in a transparent manner.⁵⁹⁹ Respondent, on the contrary, insists that a general obligation of transparency is not part of the minimum treatment owed under customary international law, so it is not an element of the FET standard of the Treaty; Respondent submits that the only obligation of transparency contained in the Treaty is the one in Article IX, which merely requires the Republic to publish its laws, judgments, administrative practices and procedures relating to or affecting investment.⁶⁰⁰

445. The Tribunal accepts that the applicable standard in this case – that is, Article IV of Annex III of the Treaty – also includes a certain obligation for the State to act transparently, which further requires not to prevent the exchange of relevant and available information. Respondent’s insistence that the applicable standard does not include components of transparency is based, in the Tribunal’s view, on a static reading of customary international law by the State, which does not account for the evolution of the law in the past decades.⁶⁰¹ The Tribunal highlights that it is certainly not taking into account a high threshold regarding the obligation to act in a transparent manner, as

⁵⁹⁹ *Supra*, § 387.

⁶⁰⁰ *Supra*, § 421.

⁶⁰¹ *Supra*, §§ 387, 421.

routinely included in the new generations of treaties; however, the Tribunal determines that a requirement of a certain degree of transparency has reached the level of customary international law.

446. On the one hand, the Tribunal certainly agrees with the general conclusion of the tribunal in *Frontier Petroleum v. The Czech Republic* – referred to by Claimant – that the requirement of transparency means that the legal framework for the investor’s operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework.⁶⁰² On the other hand, the Tribunal notes that the later discussion of the same tribunal on the stability of the legal framework – stressed by Claimant – is not directly related to a matter of transparency.⁶⁰³ In other words, the State must act in a transparent manner and respect a certain level of transparency in the decision-making process; verifying whether this is or is not the case must be distinguished from the separate issue of the stability of the legal framework.
447. The Tribunal notes that, in the instant case, Claimant fails to argue an alleged violation as regards publication of laws, judgments, administrative practices and procedures relating to investment, except for the JICA Report of March 2017.⁶⁰⁴ In any event, this disputed aspect does not seem relevant enough to find that there has been a violation of the obligation to act transparently.
448. The Tribunal will now discuss whether Respondent’s actions were arbitrary and discriminatory – as argued by Claimant – and, if so, whether they amount to a violation of the duty to provide FET to Claimant and his investment.
449. The Tribunal highlights Respondent’s recognition that, in any event, (i.e. also based on its reading of the current contents of customary international law), it is required not to act in an arbitrary manner.⁶⁰⁵ Respondent submits that its conduct was neither arbitrary

⁶⁰² *Supra*, § 391.

⁶⁰³ *Supra*, § 391.

⁶⁰⁴ *Supra*, § 421. The Tribunal notes that Claimant’s claim is only based on the breach of the FET standard.

⁶⁰⁵ *Supra*, § 405.

nor unreasonable; in fact, for a measure to be arbitrary, it must have had no justification or reason for being.⁶⁰⁶

450. Respondent argues that its conduct is reasonably related to a rational policy, that the Environmental and Health Emergency Declaration was not arbitrary or unreasonable, and that Respondent's conduct was justified after Lajun was afforded countless opportunities to remedy its breaches and cure its irregularities.⁶⁰⁷

451. The Tribunal cannot fully subscribe to Respondent's position. Indeed, while on the one hand, the Tribunal has no doubt that Respondent has rightfully raised serious environmental concerns, on the other hand, the Tribunal is not satisfied that these concerns were the only ones that motivated Respondent's conduct which Claimant complains of before this Tribunal. Moreover, said concerns did not prevent the Second Settlement Agreement from being approved on May 24, 2017. In this context, the series of inconsistent declarations which Claimant eventually had to face are sufficient proof of some arbitrariness in Respondent's conduct. In other words, no pattern of reasonableness or plausible justifications may be discerned in Respondent's changing attitudes throughout the investment.

452. Lastly, the Tribunal notes that Claimant has specifically argued that Respondent's actions were discriminatory. In this regard, the Tribunal considers that the factual scenario described by Claimant does not establish the existence of a discriminatory intent. The Tribunal notes that it has already discussed this question in regard to analysis of the existence of expropriation.⁶⁰⁸

453. Based on the foregoing arguments, the Tribunal concludes that Respondent has failed to comply with its obligation under Article IV of Annex III of the Treaty to provide FET to Claimant's investment by frustrating Claimant's legitimate expectations that he would be granted an exclusive right to operate, administer and maintain the Duquesa Landfill, as well as an exclusive right to collect a fee for dumping all the waste deposited at the Landfill, and that such fee would be revised from time to time with the aid of Respondent,

⁶⁰⁶ *Supra*, § 424.

⁶⁰⁷ *Supra*, §§ 425-426.

⁶⁰⁸ *Supra*, § 364.

and by having acted inconsistently and arbitrarily as regards the investment. The Tribunal notes that the facts related to this conclusion overlap with the facts considered for the Tribunal's former conclusion about a violation of Article XI of Annex III of the Treaty. The Tribunal shall take into account this aspect in the quantum phase.

3. The issue of the arbitrary and discriminatory behavior

454. Article V of Annex III of the Treaty, relied upon by Claimant, provides:

ARTICLE V
COMPLIANCE WITH OBLIGATIONS

Each Party shall comply with its commitments regarding investment and shall, in no way, impair, through the adoption of arbitrary and discriminatory measures, the management, development, maintenance, utilisation, usufruct, acquisition, expansion or transfer of said investments.

455. The Tribunal takes note that the second part of the article is recognized by the Parties as the grounds for invoking this issue: “*Each Party [...] shall, in no way, impair, through the adoption of arbitrary and discriminatory measures, the management, development, maintenance, utilisation, usufruct, acquisition, expansion or transfer of said investments.*”

A) The Claimant's position

456. Claimant argues that Respondent impaired his investment through arbitrary and discriminatory measures in violation of Article V of Annex III of the Treaty. The Treaty includes a general blanket prohibition against arbitrary and discriminatory conduct by the State.⁶⁰⁹

457. Claimant submits that he does not need to demonstrate the existence of “bad faith” in order to persuade the Tribunal that the measures taken by the State were arbitrary.⁶¹⁰

⁶⁰⁹ C1 — § 315.

⁶¹⁰ C2 — § 335.

Claimant argues that deference to the primary decision-makers cannot certainly be unlimited.⁶¹¹

458. Claimant insists that a measure is likely to be found arbitrary if it is motivated by inappropriate considerations or not based on reason; arbitrary conduct is also driven by domestic politics instead of arising out of considerations related to the investment. Governmental action will also be suspiciously arbitrary the event that it is not based on a proper review of facts relevant to a decision.⁶¹²

459. Claimant highlights that in *Azurix v. Argentina*, the tribunal concluded that, among other arbitrary behavior, the State had called for non-payment of bills, restrained Claimant from collecting payment from its customers for services rendered and denied Claimant access to certain documentation.⁶¹³

460. In addition to arbitrary conduct, Article V of Annex III of the Treaty also prohibits discriminatory measures. According to Claimant, the principle of non-discrimination mandates that foreigners are entitled to the non-discriminatory application of host State law. Notably, in analyzing claims of discrimination, tribunals focus on the effect of the disputed state conduct, and not on the state's intent.⁶¹⁴

⁶¹¹ C2 — § 337.

⁶¹² C1 — § 316; *supra* § 396.

⁶¹³ C1 — § 317; CL-24 (RL-471), *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, § 393: “The Tribunal finds that the actions of the provincial authorities calling for non-payment of bills even before the regulatory authority had made a decision, threatening the members of the ORAB because it had allowed ABA to resume billing, requiring ABA not to apply the new tariff resulting from the review of the construction variations and affirming that zone coefficients apply in contradiction with the information provided to the bidders at the time of bidding for the Concession, restraining ABA from collecting payment from its customers for services rendered before March 15, 2002, and denying to ABA access to the documentation on the basis of which ABA was sanctioned are arbitrary actions without base on the Law or the Concession Agreement and impaired the operation of Azurix’s investment.”

⁶¹⁴ C1 — § 318; CL-10, A. Newcombe y L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) pp. 250, 288; CL-17, *Siemens*, § 321: “The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in nondiscriminatory treatment”; CL-32, *Occidental*, § 177: “The Tribunal is convinced that this has not been done with the intent of discriminating against foreign-owned companies... However, the result of the policy enacted and the interpretation followed by the SRI in fact has been a less favorable treatment of OEPC;” CL-25, *Saluka v. The Czech Republic*, § 307: “In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.”

461. Claimant submits that Respondent's arbitrary and discriminatory actions include, at a minimum, the following:

- The State's abrupt rescission of the Concession Agreement a mere thirteen days after Claimant acquired Lajun and the Land.
- The State's forcible and wrongful takeover of the Landfill and its operations in July 2013.
- The State's imposition of environmental fines on Lajun, which were contrary to the ASDN's representations that Lajun had complied with all relevant Dominican laws.
- The State's disposal of hazardous waste at the Landfill on the same day Claimant met with the Dominican President and was assured Lajun's rights under the Concession Agreement would be respected.
- The State's violent entry into the Landfill on 14 December 2016, during which it staged a protest and held a press conference to slander Claimant and Lajun.
- The State's failure to make any adjustments to the tipping fees charged by Lajun, notwithstanding the State's numerous affirmations that Lajun was not being properly compensated for managing and operating the Landfill.
- The State's wrongful blockage of the Landfill in April 2017, which interfered with Lajun's operations.
- The State's failure to disclose the results of the 2017 JICA report that conclusively established Lajun was receiving substantially inadequate tipping fees.
- The State's specious criminal prosecution of Claimant's son for alleged environmental violations.
- The State's initiation of the nullification action, despite its numerous prior representations confirming the validity of the Concession Agreement.
- The State's initiation of the Land Nullification Action more than thirty years after the initial sale of the Land, which was filed in retaliation against Claimant's recently submitted Notice of Controversy.⁶¹⁵

⁶¹⁵ C1 — §319; C-37, Act No. 817-2013, Notice of Termination of the Agreement of the Municipality of Santo Domingo Norte dated July 9, 2013 (the ASDN notified Lajun of the rescission of the Concession Agreement and

462. In Claimant's view, Respondent failed to timely raise such concerns in the numerous exchanges between the Parties over the course of several years, and actually affirmed Lajun's compliance with environmental laws on numerous occasions.⁶¹⁶
463. Claimant further submits that Respondent's discriminatory measures towards Claimant are particularly evident when comparing Respondent's conduct towards the Duquesa Landfill and its obligations under the Concession Agreement prior to Claimant's investment, versus Respondent's conduct towards the Landfill and its failure to abide by its obligations under the Concession Agreement after Claimant's Investment.⁶¹⁷
464. Lastly, Claimant asserts that Respondent retaliated against Claimant via attacks against Claimant's son and Claimant's local business partner.⁶¹⁸

B) The Respondent's position

465. To begin with, Respondent insists that the protection standard contained in Article V of Annex III of the Treaty, on the basis of its own wording, requires that the measures adopted not be arbitrary or discriminatory. Accordingly, both requirements must be met for a violation of the standard to be deemed to exist; in other words, if the State's conduct were just arbitrary, or just discriminatory, this standard could not be said to have been violated.⁶¹⁹

all its amendments for, among other reasons, according to Claimant, alleged environmental contamination and breaches of the Concession Agreement); C-29, Notice of Taking of Possession of the Landfill Site of the Duquesa Landfill and Verbal Process of Asset Inventory No. 470/2013, dated July 17, 2013 (the ASDN rescinded the Concession Agreement, took possession of the Land, and took over the administration of the Landfill and Lajun's equipment and machinery located on the Land); C-47, Verification of Compliance with Obligations from September 16 to October 15, 2016; C-48, Verification of Compliance with Obligations dated November 16, 2016; C-7, Correspondence from the Ministry of Environment to Lajun, dated October 30, 2015; C-12, Statement of Defense and Referral of ASDN Administrative Record dated March 18, 2014; C-16, Certification of Compliance and Conformity dated July 9, 2014; C-106, Action to Nullify the Sale, Demarcation and Cancellation of Certificate of Title filed by the *Consejo Estatal del Azúcar* against Felipe Antonio Díaz, José Antonio Díaz and Lajun, dated January 30, 2018; C-65, Internal report dated December 14, 2016 regarding the unannounced visit of the "Board of Councilors of Santo Domingo Norte" to Duquesa Landfill, with accompanying links to videos and photographs.

⁶¹⁶ C2 — § 338.

⁶¹⁷ C2 — § 340.

⁶¹⁸ C2 — § 341.

⁶¹⁹ R1 — § 413.

466. First, Respondent argues that the applicable standard to determine whether a measure is arbitrary requires proving that it was capricious and egregious with no justification.⁶²⁰
467. In this regard, Respondent contends that its conduct was not arbitrary. Lajun received several notifications for breach of contract and of Respondent's environmental rules and did nothing to cure such breaches. On the other hand, Respondent insists that Claimant does not specify which certifications it is referring to. If Claimant were referring to the "suspicious" ASDN's certifications, Respondent argues that Claimant cannot use such certifications to support the alleged compliance of Lajun with the environmental obligations, as ASDN is not the competent authority in this matter and the content of such certifications is not consistent with reality.⁶²¹
468. Lastly, with regard to the purported discrimination, Respondent contends that Claimant does not identify any other investor receiving the same treatment as Claimant and to which Respondent has accorded different or more favorable treatment.⁶²² Respondent argues that Claimant cannot allege that there was discrimination based on Claimant's Jamaican nationality, and Claimant always introduced himself as Canadian before the Dominican authorities.⁶²³

C) The Tribunal's analysis

469. The Tribunal begins its analysis by noting that the Parties' position regarding the existence of a violation of Article V of Annex III of the Treaty, as might be expected, partially reflects the positions of the Parties expressed in their discussion of the FET standard and the Treaty requirements as to the existence of an expropriation. In this regard, the Tribunal recalls it has not been able to find any discriminatory conduct but has found that a certain degree of arbitrariness was present in Respondent's conduct.⁶²⁴

⁶²⁰ R2 — § 359.

⁶²¹ R2 — § 362.

⁶²² R1 — § 415.

⁶²³ R2 — § 363.

⁶²⁴ *Supra*, §§451-453.

470. The issue that should first be assessed by the Tribunal in this regard is whether the standard established in Article V of Annex III of the Treaty is different than the considerations made by the Tribunal *supra*.
471. First, the Tribunal notes an identical reference to the obligation to refrain from acting in a “discriminatory” manner in Article XI of Annex III of the Treaty (Expropriation).⁶²⁵ On the other hand, the Tribunal underscores that the wording of Article VI of Annex III of the Treaty (FET) does not include an obligation to refrain from acting in a discriminatory or arbitrary manner; nonetheless, the Tribunal revisits its earlier conclusion that, in light of contemporary customary international law, FET also includes the obligation to refrain from acting in an arbitrary or discriminatory manner.⁶²⁶ In the Tribunal’s view, no distinction should be made to this effect as to the definition of what ultimately constitutes arbitrary or discriminatory content.
472. For the purposes of this analysis, however, there is an important difference in connection with the Tribunal’s prior enquiry. In the case at hand, the Parties appear to agree that a violation of Article V of Annex III of the Treaty requires that the measures be arbitrary and also discriminatory.⁶²⁷ The Tribunal accepts that, in view of the specific drafting of Article V of Annex III of the Treaty – that is, particularly the use of the conjunction “and” – Claimant must show that Respondent acted in both a discriminatory and arbitrary fashion.
473. The Tribunal considers that its prior conclusion as to the existence of certain degree of arbitrariness also applies to the particular context of Claimant’s claim by virtue of Article V of Annex III of the Treaty.⁶²⁸
474. However, the Tribunal has not found any distinguishing element in Claimant’s arguments, already dismissed in the preceding sections, about the existence of discrimination on Respondent’s part, and Claimant’s allegations to that effect now made in connection with Article V of Annex III of the Treaty. In other words, the Tribunal understands that none

⁶²⁵ *Supra*, § 300.

⁶²⁶ *Supra*, §§ 367, 434

⁶²⁷ C2 — §334; R2 — § 364.

⁶²⁸ *Supra*, § **Error! Reference source not found.**

of the elements furnished by Claimant is sufficiently persuasive to prove that Respondent has treated him in a discriminatory manner.

475. In light of the consideration *supra*, the Tribunal does not need to verify whether the actions invoked impaired even more “the management, development, maintenance, utilisation, usufruct, acquisition, expansion or transfer” of Claimant’s investment, as it is additionally required to establish that there has been a violation of Article V of Annex III of the Treaty.

476. Therefore, the Tribunal finds that there has been no violation of Article V of Annex III of the Treaty in regard to the adoption of arbitrary and discriminatory measures by Respondent.

4. The issue of the umbrella clause

477. Article V of Annex III of the Treaty, once again invoked by Claimant, sets forth:

ARTICLE V

COMPLIANCE WITH OBLIGATIONS

Each Party shall comply with its commitments regarding investment and shall, in no way, impair, through the adoption of arbitrary and discriminatory measures, the management, development, maintenance, utilisation, usufruct, acquisition, expansion or transfer of said investments.

478. The Tribunal notes that the first part of the article is recognized by the Parties as the umbrella clause: “*Each Party shall comply with its commitments regarding investment.*”

A) The Claimant’s position

479. Claimant submits that Respondent violated the umbrella clause of Article V of Annex III of the Treaty.

480. According to Claimant, an umbrella clause elevates breaches of contracts or other commitments under domestic law to breaches of a treaty. In this respect, numerous tribunals have held that umbrella clauses in BITs provide foreign investors with an

international forum to address breach of contract claims against a State.⁶²⁹ Claimant insists on the fact that concession agreements, such as the one in the instant case, fall within the scope of an umbrella clause, as confirmed by the tribunal in *EDF International v. Argentina*.⁶³⁰

481. Claimant first alleges that a contract with a State organ—like the ASDN and municipalities at issue here—is tantamount to a contract with the State itself.⁶³¹ The Constitution of the Dominican Republic itself establishes that municipalities in question (such as the ASDN) are State organs.⁶³²

482. Claimant submits that the cases that Respondent relies upon in support of its lack of privity argument are distinguishable and should be given no weight because the language of the umbrella clauses at issue in those cases contain limitations that do not exist here.⁶³³ Unlike the cases relied upon by Respondent, the umbrella clause set forth in Article V of Annex III of the Treaty contains no such limiting language. There is nothing in the text

⁶²⁹ C1 — § 322; CL-20, *Eureko B.V. v. Republic of Poland, Ad Hoc*, Partial Award dated August 19, 2005, § 250: “The immediate, operative effects of Article 3.5 are two. The first is that Eureko’s contractual arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal, a conclusion that reinforces the jurisdictional conclusions earlier reached in this Award. The second is that breaches by Poland of its obligations under the SPA and its First Addendum, as read together, that are not breaches of Articles 3.1 and 5 of the Treaty nevertheless may be breaches of Article 3.5 of the Treaty [i.e., the umbrella clause], since they transgress Poland’s Treaty commitment to ‘observe any obligations it may have entered into’ with regard to Eureko’s investments;” CL-36, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award dated October 12, 2005, §§ 51, 61-62; CL-37, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated January 29, 2004 (“*SGS v. Philippines*”), §§ 117, 127; CL-38, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award dated February 10, 2012, § 72.

⁶³⁰ C1 — § 323; CL-39, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated June 11, 2012, §§ 939, 970.

⁶³¹ R2 — § 346.

⁶³² C1 — § 347.

⁶³³ C2 — § 344; RL-470, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated December 14, 2012 (“*Burlington v. Ecuador*”), §§ 131, 201, Article II(3)(c) of the applicable Treaty: “Each Party shall observe any obligation it may have entered into with regard to investments;” CL-24 (RL-471), *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006 (“*Azurix v. Argentina*”), §§ 379, 384, Article II(2)(c) of the applicable Treaty: “Each Party shall observe any obligation it may have entered into with regard to investments;” see, in this regard, CL-17, *Siemens v. Argentina*, § 196; RL-305, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated June 18, 2010, (“*Hamester v. Ghana*”) § 342; RL-472, *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award dated February 22, 2017 (“*WNC Factoring v. Czech Republic*”), § 71; RL-447, *Consutel Group S.p.A. in liquidazione v. People’s Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award dated February 3, 2020 (“*Consutel v. Algeria*”), § 360; RL-473, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated April 22, 2005 (“*Impregilo v. Pakistan*”), §§ 109, 216.

of the umbrella clause of the Treaty to suggest that it applies only to contracts specifically entered into between Claimant and the Dominican Republic.⁶³⁴

483. According to Claimant, Respondent fails to address the wealth of case law and legal commentary that have held that a contract with a State organ—like the ASDN and municipalities at issue here—is tantamount to a contract with the State itself. Thus, in *Bosh International v. Ukraine*, the tribunal found that the term “Party” in the umbrella clause refers to any situation where the Party is acting *qua* State. Moreover, Claimant adds that, in *Strabag v. Libya*, this very same “lack of privity” argument advanced by Libya was rejected, leading the tribunal to conclude that the umbrella clause *did* apply to the contracts at issue, despite the fact that Libya itself was not a party to them, because those contracts were entered into by State agencies vested with governmental authority and they concerned significant public projects.⁶³⁵

484. Further, Claimant points out that the Political Constitution of the Dominican Republic itself establishes that the municipalities in question (such as the ASDN) are State organs. The mere fact that a State organ may have a separate legal personality under municipal law does not abrogate the fact that its conduct is legally considered an act of the State. Claimant understands that this is confirmed by commentary 6 to Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (“ILC”) which states that “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...” Pursuant to Article 4(1) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, “[t]he conduct of any State organ shall be considered an act of that State under international law...” Claimant continues by alleging that Article 4(2) provides that “an organ” includes any “entity which has that status in accordance with the internal law of the State.” In Claimant’s view, Respondent has failed to put forth any facts or evidence demonstrating that its municipalities are distinct from the Dominican Republic as a matter of national law. Thus, the conduct of the ASDN and other municipalities towards

⁶³⁴ C2 — § 345.

⁶³⁵ C2 — § 346, CL-107, *Bosh International, Inc and B&P LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award dated October 25, 2012 (“*Bosh v. Ukraine*”), § 246; CL-91, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award dated June 29, 2020 (“*Strabag v. Libya*”), §§ 167-187; CL-92, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated May 29, 2009, § 141.

Claimant's investment is attributable to the Dominican Republic under the Treaty's umbrella clause.⁶³⁶

485. Claimant also rebuts Respondent's allegation that the umbrella clause of the Treaty does not allow Claimant to raise simple contractual claims as tantamount to a Treaty violation. For that purpose, Claimant recalls that the tribunal in *Strabag v. Libya* rejected this very same argument made by the very same counsel representing the State in this case (*i.e.*, Curtis Mallet-Prevost). In *Strabag v. Libya*, the tribunal held that the specific words of the treaty govern, and the umbrella clause in the treaty in *Strabag v. Libya* was set forth as follows: "Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party." The *Strabag* tribunal refused to limit this provision so it would not apply "to ordinary commercial acts," or so it could only apply to an exercise of sovereign authority or conduct involving breaches of international law. The tribunal reasoned that no such limits or conditions appear in the language of the treaty, and the respondent's argument would "deprive the provision of effectiveness in all but rare situations."⁶³⁷

486. Here, and as stated above, Article V of the Treaty is entitled "COMPLIANCE WITH OBLIGATIONS" and states, in similar fashion as the umbrella clause in *Strabag v. Lydia*, that "Each party shall comply with its commitments regarding investment..." According to Claimant, his allegations of the State's breaches under the umbrella clause are to be treated in the same way as his claims under other standards of protection contained in the Treaty. It would be entirely inconsistent with the object and purpose of protecting such rights and claims if Respondent's breaches of the corresponding obligations were excluded from the Tribunal's jurisdiction.⁶³⁸

487. In Claimant's view, assuming, *arguendo*, that Respondent's limited reading of the umbrella clause includes only claims that involve an exercise of public power, Respondent's acts

⁶³⁶ C2 — § 347; CL-80, 2002 Political Constitution of the Dominican Republic, Title VIII; CL-41, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 4, Commentary, Section (6)) (2001).

⁶³⁷ C2 — § 348, R1 — § 421; CL-91, *Strabag v. Libya*, §§ 137, 164; CL-86 (RL-461), *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated May 22, 2007, §§ 273, 274; CL-92, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated June 29, 2009 ("*Bureau Veritas v. Paraguay*"), § 141.

⁶³⁸ C2 — § 349, CL-91, *Strabag v. Libya*, §§ 160, 164.

are, indeed, an exercise of public power. The continued opposition by the Dominican municipalities to increasing the tipping fee in breach of their contractual obligations was based on the lack of an appropriate budget assigned to these Dominican organs by the State. As explained by the municipalities themselves in a JICA Report issued in 2017, the central government consistently failed to provide the local governments with the mandatory and necessary budgets for waste management. Moreover, this limited budget was the municipalities' "excuse" to avoid increasing and adjusting the tipping fee as mandated by the applicable contracts. Thus, according to Claimant, the breach of the municipalities' commitment to increase the tipping fees and make tipping fee payments was not a simple contractual breach, but rather the consequence of a public policy decision taken by the central government with respect to budgetary allocations.⁶³⁹

488. Claimant contends that Respondent's failure to abide by its obligations and commitments under the Concession Agreement (as amended) and the various settlement agreements, violated Claimant's rights under the Treaty, as well as under international law.⁶⁴⁰

489. Claimant further alleges that, in breach of the Concession Agreement and its amendments, Respondent failed to make adjustments to the tipping fees charged by Lajun for its waste disposal services. The Concession Agreement (as well as its amendments) required the ASDN to review and update Lajun's tipping fees from time to time. Pursuant to the Second Amendment to the Concession Agreement, the ASDN agreed to increase the frequency with which it would review and modify the tipping fees received by Lajun from once a year to twice a year. Furthermore, the Concession Agreement and its amendments required that the ASDN employ its best efforts to assist Lajun in negotiating the tipping fees to be paid by the other municipalities of the State.⁶⁴¹

490. According to Claimant, Respondent never made a genuine effort to address or revise the tipping fees collected by Lajun. To make matters worse, on several occasions throughout the concession, the State and its Municipalities failed to pay Lajun any tipping fee at all for waste disposal at the Landfill.⁶⁴²

⁶³⁹ CPHB — pp. 35-36.

⁶⁴⁰ C2 — § 350.

⁶⁴¹ C1 — § 324.

⁶⁴² C1 — § 325.

491. Claimant also posits that Respondent denied Lajun the opportunity to start building the WTE Plant.⁶⁴³

492. The Concession Agreement granted Lajun the exclusive right to manage, administer, maintain and operate the Duquesa Landfill, which included the right to operate and administer the recycling facility. However, as Claimant alleges, Respondent consistently obstructed Lajun's operation and management of the Landfill (including the recycling facility). Respondent's wrongful conduct ranged from depositing hazardous (camouflaged) waste at the Landfill to unlawfully stationing its military at the Project site.⁶⁴⁴

B) The Respondent's position

493. First, Respondent asserts that the umbrella clause of Article V of Annex III is not applicable in this case because there was no contractual relationship between Claimant and Respondent. In doing so, it relies on the decisions of several investment tribunals, pursuant to which the absence of a contractual relationship (privity) with Claimant renders the umbrella clause inapplicable.⁶⁴⁵

494. In this case, the Concession Agreement was entered into with a municipality, the ASDN, not with Respondent, and it contains obligations undertaken exclusively by the ASDN and governed by Dominican law.⁶⁴⁶ Respondent insists that numerous investment tribunals have ratified this basic principle whereby contractual obligations with a public

⁶⁴³ C1 — § 327.

⁶⁴⁴ C1 — § 326.

⁶⁴⁵ R1 — § 418; RL-470, *Burlington v. Ecuador*, §§ 212, 218, 220: "The question at hand is exclusively whether the umbrella clause protection applies to obligations entered into not between the State and the investor and Claimant, but between the State and an affiliate of the investor. (...) The umbrella clause is only one of the various substantive protections that the Treaty bestows upon investors, with the scope of protection depending on the terms of each specific provision. (...) As a result, the Tribunal holds that, Burlington may not rely on the Treaty's umbrella clause to enforce against Ecuador its subsidiary's contract rights under the PSCs for Blocks 7 and 21;" RL-471 (CL-24), *Azurix v. Argentina*, § 384; CL-17, *Siemens v. Argentina*, § 204; RL-472, *WNC Factoring Limited v. The Czech Republic*, §§ 323, 325, 334; RL-447, *Consutel v. Algeria*, §§ 370-371.

⁶⁴⁶ R1 — §§ 418-419.

entity other than the State cannot be automatically attributed to the State.⁶⁴⁷ At no point was there any intervention by governmental authority in said contractual relationship.⁶⁴⁸

495. Consequently, in Respondent's view, the clause does not allow Claimant to transform mere contractual claims into claims protected under the Treaty. Even where applicable, only those contractual claims which involved an exercise of governmental authority could potentially give rise to violations of the Treaty, but not mere contractual claims such as those alleged here by Claimant.⁶⁴⁹

496. Moreover, Respondent submits, it should be borne in mind that the Concession Agreement itself contains a dispute settlement clause, which cannot be set aside by means of the application of the Treaty's umbrella clause.⁶⁵⁰ Respondent argues that, in support of his position, Claimant cites cases in which tribunals held that any claim relating to the umbrella clause had to be preceded by the use of the forum of exclusive jurisdiction provided in the relevant contract in order to establish the breaches of contract.⁶⁵¹

497. In any event, Respondent submits that none of the contractual breaches complained of occurred. Respondent specifically argues that the ASDN had no obligation to increase the tipping fee but rather simply had an obligation to make its "best efforts" to mediate in the negotiations between Lajun and the other Municipalities and users should the need to modify the fees arise.⁶⁵²

498. Furthermore, there was no "unlawful interference" with the Concession Agreement by Respondent in violation of the contractual commitments undertaken; in fact, there was

⁶⁴⁷ R1 — § 419; RL-447, *Consutel v. Algeria* § 364: "The Tribunal admitted, for the purposes of the debate on jurisdiction, the attribution of the alleged contractual violations against Algeria Telecom to the State. However, this does not mean that the State is considered to be the obligor of these contractual obligations. The rules of attribution do not modify contract ownership, nor do they transfer to the State the ownership over the rights or obligations undertaken by a public entity. The liability incurred by a public entity for the violation of its contractual obligations can certainly be attributed to the State on the basis of the rules of attribution, but the contractual obligations thus violated still belong to the public entity that has undertaken them. The State does not become, as a result of the rules of attribution, the obligor of the obligations assumed by the public company." [Tribunal's Translation]; RL-305, *Hamester v. Czech Republic*, §§ 346-349; RL-473, *Impregilo v. Pakistan*, §§ 216, 223; RL-381, *CMS v. Argentina (Annulment)*, § 95.

⁶⁴⁸ RPHB — § 94.

⁶⁴⁹ R1 — § 421.

⁶⁵⁰ RPHB — § 94.

⁶⁵¹ R2 — § 370. C-1 (R-6), Concession Agreement, Article 16.13; CL-107, *Bosh v. Ukraine*, § 251; CL-92, *Bureau Veritas v. Paraguay*, § 159.

⁶⁵² R1 — § 424.

an attempt to terminate the agreement but it was ultimately annulled once it became apparent that it had been entered into in violation of the law.⁶⁵³ Lastly, Respondent asserts that there was no breach of an alleged right to build and operate a WTE Plant, since said alleged contractual right did not exist under the Concession Agreement and could not even have been granted by a municipality.⁶⁵⁴

C) The Tribunal's analysis

499. The Tribunal notes from the outset that, in order to decide on Claimant's request, it must decide on three different issues: first, whether the absence of a contractual relationship (privity) with Claimant renders the umbrella clause inapplicable; second, whether the existence of a dispute settlement clause in the Concession Agreement precludes the application of the umbrella clause; and, lastly, whether the contractual obligations raised by Claimant have indeed been breached. It is understood that the Tribunal can only arrive at the final question if it concludes that the arguments raised by Respondent in relation to the other two issues should be rejected.

500. Regarding the first issue, the Tribunal recalls that Respondent argues that, in this case, there is, in fact, no contractual relationship between Claimant and Respondent, but rather one exists between Claimant and the ASDN and other municipalities.⁶⁵⁵ This is not disputed by Claimant⁶⁵⁶ and is accepted by the Tribunal. The issue here concerns the attribution of conduct and the scope of the obligations protected under the umbrella clause provided in Article V of Annex III of the Treaty.

501. The Tribunal takes note of and accepts Claimant's argument that the conduct of organs other than the State (like the ASDN and municipalities in this case) can very well be attributable to the State in certain circumstances, as recognized by the ILC Draft Articles generally relied on.⁶⁵⁷ However, beyond this general acceptance, the most significant

⁶⁵³ R1 — § 425.

⁶⁵⁴ R1 — § 426.

⁶⁵⁵ *Supra*, § 493.

⁶⁵⁶ C2, § 346.

⁶⁵⁷ *Supra*, § 484.

aspect of the analysis of the Parties' arguments is whether the applicable umbrella clause in fact covers contractual commitments such as those present in this case.

502. The Tribunal recalls Respondent's precise answer to the question posed by the Tribunal – for the Post-Final Hearing Briefs – as to what extent (and if so, why) it should limit itself to consider only contractual claims involving an exercise of governmental authority:

“The answer is to the full extent. That is the only scenario in which the Tribunal can consider contractual claims since not every contractual claim can be transformed into a violation under the Treaty. Indeed, investment tribunals have explained that ordinary commercial breaches of a contract do not amount to breaches under an investment treaty, drawing a distinction between cases where the State's conduct arises from a sovereign function or power of the State, and not from an ordinary contract party. Such a distinction ‘is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause.’”⁶⁵⁸
[Tribunal's Translation]

503. The Parties have referred to a series of precedents to discuss the possibility – *vel non* – that the applicable umbrella clause extends in our case to the existing contractual obligations between the ASDN and Claimant. The Tribunal is naturally aware of the fact that the interpretation and application of umbrella clauses is a heavily discussed and controversial issue and that arbitral tribunals have adopted different positions on the matter. In this regard, the Tribunal reiterates its previous remark regarding the need to approach the relevance of these precedents with utmost caution and not to forget that it has to apply the specific umbrella clause enshrined in Article V of Annex III of the Treaty.⁶⁵⁹ As the tribunal in *Strabag v. Libya* correctly noted:

“In the Tribunal's view, this issue cannot be resolved by comparing the number of awards expressing one view or another.”⁶⁶⁰

⁶⁵⁸ RPHB – § 93; RL-370, *Sempra v. Argentina*, § 310; RL-476, *El Paso v. Argentina*, §§ 82-83.

⁶⁵⁹ *Supra*, §§ 112-113.

⁶⁶⁰ CL-91, *Strabag v. Libya*, § 159.

504. The factual matrix and, more importantly, the legal matrix of *Strabag v. Libya* is, in the Tribunal's view, very similar to that of the present case. But it is rather the interpretative approach of the tribunal in *Strabag v. Libya* that this Tribunal finds appropriate: it is not up to this Tribunal to introduce limits or conditions to the applicable text when these do not appear in its language or necessarily follow from its ordinary meaning.
505. The Tribunal finds that through the precedents relied on, and particularly *Strabag v. Libya*, Claimant has advanced two decisive arguments to support the conclusion that the lack of privity in the present case is not an obstacle to the application of the umbrella clause.
506. First, the language of the applicable umbrella clause does not evidence any limits that may indeed appear in other treaties. This Tribunal is certainly aware that it must pay due attention to all the interpretative elements to be taken into account in accordance with the general rule of Article 31 of the 1986 Vienna Convention, without limiting itself to the text. However, in the case at hand, none of the arguments raised by Respondent warrant reading additional limitations into the Treaty.
507. Second, in any event, the contractual commitments in question constitute important public projects in Respondent's interest, an interest that Respondent itself has emphasized throughout this arbitration. The Tribunal takes note of Respondent's position that at no point was there intervention by governmental authority in said contractual relationship.⁶⁶¹ However, the rationale invoked in this respect by the tribunal in *Strabag v. Libya* can, in this case, also be supported by the factual and legal matrix before this Tribunal:

*“Contracting for such public works contracts is in fact a typical State function, not a commercial activity carried out Jure privatorum. Further, their performance involved actions by a range of State organs exercising their governmental Powers”.*⁶⁶²

508. The Tribunal also finds support for its conclusion given the fact that, as proven by Claimant, the municipalities' breach of their commitment was, at least partially, the

⁶⁶¹ *Supra*, § 494.

⁶⁶² CL-91, *Strabag v. Libya*, § 165.

consequence of a public policy decision made by the central government with respect to budgetary allocations.⁶⁶³

509. Consequently, the Tribunal rejects Respondent's first objection related to the non-application of the umbrella clause due to lack of privity.

510. The Tribunal turns to the second argument advanced by Respondent to justify that the umbrella clause cannot be applied in this case. In this regard, Respondent submits that it should not be overlooked that the Concession Agreement itself contains a dispute settlement clause, which cannot be set aside by application of the Treaty's umbrella clause.⁶⁶⁴

511. The cases relied upon by Respondent on this point even suggest that a treaty-based tribunal such as this one should declare an investor's claim inadmissible when the underlying contract includes an exclusive dispute settlement clause.⁶⁶⁵

512. The Tribunal has sought guidance on the matter in the two relevant texts. First, it is noted that, indeed, the dispute settlement clause of the Concession Agreement is clear in stating that "[a]ny litigation, dispute or claim arising from or relating to the [Concession] Agreement, its breach, its termination or nullity, shall be submitted to the Superior Administrative Court."⁶⁶⁶ [Tribunal's Translation] While taking into account the clarity of this text, however, it cannot be disregarded that the applicable Treaty, which has been negotiated and ratified by Respondent, contains the umbrella clause under analysis. Expecting that the former must always prevail over the latter could lead to the absurdity of having to accept that a State or its instrumentalities can avoid their international obligations simply by imposing exclusive jurisdiction clauses in the contracts they enter into with foreign investors. The treaty itself could regulate the issue of the potential jurisdictional conflict in relation to the contractual commitments undertaken by the States party to the treaty, but that is not the case here.

⁶⁶³ *Supra*, § 487.

⁶⁶⁴ R2 — § 370.

⁶⁶⁵ *Supra*, § 496.

⁶⁶⁶ R-6 (C-1), Concession Agreement, Article 16.13.

513. In the Tribunal's view, once the umbrella clause is deemed applicable,⁶⁶⁷ the contractual dispute settlement clauses are irrelevant to the claims covered by the umbrella clause, as these are Treaty-based claims and therefore fall within the Tribunal's jurisdiction.⁶⁶⁸ But, even if this were not the understanding (as seems to be the case in the argument advanced by Respondent), the exclusivity of the contractual clause — which is very commonly found in this type of contract — would, in the Tribunal's opinion, be only one of the factors to be taken into account, in conjunction with others, of no lesser relevance. These include, in general, the availability of the exclusive forum designated in the agreement, the potential for parallel proceedings, the use of available resources by the State, its general attitude towards the investment and the investor, as well as the nature of the contractual obligations in question.⁶⁶⁹

514. In the case at hand, in the Tribunal's opinion, the last two factors mentioned would be particularly relevant. Indeed, it is clear to the Tribunal that the obligations undertaken by Respondent through the Concession Agreement and its amendments refer to matters closely connected with essential public policies, as Respondent itself has acknowledged on several occasions during this arbitration. In particular, instead of complying with the obligation to review and update the tipping fees that it itself acknowledged through various means to be inadequate, Respondent sent contradictory messages throughout the duration of the investment. In light of this, the Tribunal considers it established that Claimant properly raised, on multiple occasions, the pressing need to adjust the tipping fees in order to provide the essential service retained, only to be met with the well-known negative result. A similar point should be noted with respect to Respondent's obligation to guarantee the normal operation and administration of the Duquesa Landfill, an issue closely related to the aforementioned matter. In this material and factual context, the contractual obligations at play should be covered by the umbrella clause of the Treaty. Consequently, even if the Tribunal were to adopt Respondent's point of view, it should reject Respondent's second objection relating to the application of the umbrella clause.

⁶⁶⁷ *Supra*, §§ 507-509.

⁶⁶⁸ See, among others, CL-20, *Eureko v. Poland*, §§ 92-114, 250, 256; CL-37, *SGS v. Philippines*, § 116; *SGS v. Paraguay*, Decision on Jurisdiction, June 10, 2010, §§ 138, 142, 172, 185.

⁶⁶⁹ See, e.g., CL-91, *Strabag v. Libya*, § 208 (concluding that the claimant had a right to pursue its claims before said international tribunal given that it could not pursue its claims in Libyan courts in safety or with any reasonable expectation of a considered and expeditious outcome).

515. Lastly, the Tribunal turns to the question of whether, in this case, the contractual commitments alleged by Claimant have indeed been breached. The Tribunal has reviewed the different contractual breaches alleged regarding:

- (i) the lack of revision and modification of the tipping fees;⁶⁷⁰
- (ii) the lost opportunity to start construction of a WTE Plant;⁶⁷¹ and
- (iii) the constant obstruction of the operation and management of the Landfill in violation of the exclusive right to manage, administer, maintain and operate the Duquesa Landfill, which included the right to operate and administer the recycling facility.⁶⁷²

516. The Tribunal has already assessed the factual and legal framework in relation to these issues when it determined the existence of a violation of Articles IV and XI of Annex III of the Treaty. In the Tribunal's view, there is no element before it that would justify a different conclusion in this regard. With respect to the first point, the Tribunal reiterates its previous conclusion that Claimant had a legitimate expectation of such a tipping fee revision.⁶⁷³ Regarding the second point, the Tribunal also reiterates its previous conclusion that there is no assurance in the contractual relationship regarding the construction of the WTE Plant, and that, accordingly, Claimant cannot rely on a legitimate expectation in this respect.⁶⁷⁴ As for the third point, the Tribunal also reiterates its previous conclusion that, pursuant to the Concession Agreement, Claimant did indeed have an exclusive right to operate and maintain the Duquesa Landfill.⁶⁷⁵

517. In light of the foregoing considerations, the Tribunal finds that the contractual breaches that the Tribunal has previously found in relation to violations of Articles IV and XI of Annex III of the Treaty also constitute violations of the umbrella clause. The Tribunal emphasizes that the violation of the umbrella clause of Article V of Annex III of the Treaty is supported by the same facts assessed in relation to the existence of a violation

⁶⁷⁰ *Supra*, §§ 489-490.

⁶⁷¹ *Supra*, § 491.

⁶⁷² *Supra*, § 492.

⁶⁷³ *Supra*, § 438.

⁶⁷⁴ *Supra*, §§ **Error! Reference source not found.**-439.

⁶⁷⁵ *Supra*, § 356.

of Articles IV and XI mentioned *supra*, and this overlap will be taken into account for the calculation of potential damages.

IX. THE DAMAGES

1. *On the calculation of damages*

518. The Tribunal has found that Respondent has engaged in several violations of the Treaty. Specifically, Respondent has executed an indirect creeping expropriation of Claimant's investment and has violated both the FET and the umbrella clauses. The Tribunal has concluded that there has been certain arbitrariness on the part of Respondent in the treatment afforded to Claimant, but that there has been no discrimination. The finding of such Treaty violations by Respondent entails – in principle – that it has to redress any harm caused. The Tribunal should consider the way in which each breach has occurred and their scope in order to quantify such damages. This is what the Tribunal will do in the following paragraphs.

519. Under international law, the principle of full compensation for the damage caused is well-established and is an undisputed issue for arbitral tribunals in investor-State cases. Compensation will be available whenever restitution in kind is not possible. As is well known, such principle was stated by the Permanent Court of International Justice in the famous *Chorzów Factory* case, as follows:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.”⁶⁷⁶

⁶⁷⁶ CL-40, *Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ (Ser. A) No. 17, dated September 13, 1978. C1 — § 330.

520. In the present case, making the required calculations is not a simple task as the results reached by the Parties' respective experts are widely different. This could even be logical taking into account that the Parties adopted conflicting positions, not only with respect to the very jurisdiction of this Tribunal, but also on whether violations of the Treaty have occurred. While, according to Claimant, violations have occurred, according to Respondent, there has been no violation at all and there is thus no damage to redress. However, Respondent goes further: in its opinion, even if it were true that any violation existed, no compensation should be awarded to Claimant. These widely opposing views are accounted for in the reports of the experts called and instructed by the Parties. In fact, for each of the damages invoked and calculated by Claimant's expert, Respondent's expert finds any criterion or circumstance that would lead to a fatal reduction to the amounts calculated by the former to zero or, in some cases, to negative results.⁶⁷⁷
521. Taking into account the foregoing, the Tribunal will be guided whenever possible by the proposals made by the Parties – thoroughly discussed by them and with the Tribunal, before, during and after the Hearing – which are summarized *infra*.

2. The Parties' positions

A) The Claimant's position

522. To begin with, Claimant asserts that, as the material damages that he sustained were caused by Respondent in breach of the Treaty and international law, Respondent must make full reparation for such harm.⁶⁷⁸ Claimant further seeks reparation for the moral damage caused by Respondent.
523. Specifically, Claimant understands that the losses caused by the State comprise three categories: a) Claimant's share of Lajun's historical lost cash flows over the period from 9 July 2013 to 27 September 2017 (the date the administrative courts of the Dominican Republic granted the request for interim measures and ordered the suspension of the Concession Agreement); b) Claimant's loss of his shares of Lajun, calculated according to the fair market value ("FMV") on 27 September 2017; and c) Claimant's loss related

⁶⁷⁷ R2 — § 459.

⁶⁷⁸ C1 — §§ 330-332.

to the value of the Land under its highest and best use, which Claimant believes would consist in the development of a solar facility.⁶⁷⁹

524. As initially quantified by Claimant's expert, the total damages owed by Respondent for such losses range from USD 583.6 to 596.1 million, including interest up to September 27, 2017 (valuation date).⁶⁸⁰ Subsequently, such amounts were updated to USD 632.5 and 676.2 million, through introducing some changes and adding interest up to the date of submission of the Reply Memorial, that is, April 13, 2021.⁶⁸¹ Regarding the moral damages further sought, Claimant requests payment of an additional amount of not less than USD 5 million.⁶⁸²

525. It is important to bear in mind that the estimates provided by Mr. Kaczmarek (IAV), Claimant's expert, on the value of Claimant's shares in Lajun are made as if the Treaty breaches ascertained by the Tribunal had never occurred.⁶⁸³ More specifically, such calculations are based on the assumption that, if Respondent had not engaged in the Treaty breaches mentioned *supra*, Claimant would have maintained possession of the Land, acquired the adjoining piece of land, continued to operate the Duquesa Landfill, developed a WTE Plant and sold the energy produced thereby, and installed a series of solar panels on areas of the Land that would have been built for such purpose and also sold any energy resulting therefrom.⁶⁸⁴ Each of these hypothetical assumptions⁶⁸⁵ will be considered by the Tribunal.

B) The Respondent's position

526. The denial of the existence of any violation of the Treaty leads Respondent to also deny, in general, that Claimant should receive any sum at all on account of damages.

⁶⁷⁹ C1 — § 334; C2 — § 359.

⁶⁸⁰ *Ibid.*

⁶⁸¹ C2 — § 413.

⁶⁸² C1 — §§ 351-352; C2 — §§ 416-419.

⁶⁸³ Second Report of Mr. Kaczmarek, § 33.

⁶⁸⁴ Second Report of Mr. Kaczmarek, § 6.

⁶⁸⁵ Referring to the fair market value approach, Claimant's own expert emphasizes that it is a "hypothetical transaction analysis," based on the statements of specialist Chris Mercer, according to whom, "The world of fair market value is not the real world. It is a special world in which the participants are expected (defined) to act in specific and predictable ways. It is a world of hypothetical willing buyers and sellers and of hypothetical transactions." See Second Report of Mr. Kaczmarek, § 145, and quotation from Chris Mercer's article, entitled "Fair Market Value vs. The Real World," p. 1. (IAV-226).

Respondent also contends that none of the rights on the basis of which Claimant makes his calculations (right to charge an increased tipping fee, to build and operate a WTE Plant, to sell the electricity generated thereby, etc.) exist and thus nothing can be claimed for their value.⁶⁸⁶

527. Respondent also asserts that there is no causal link between the damages alleged by Claimant (which, according to Respondent, are non-existent) and the measures adopted by Respondent; without that causal link – for which, additionally, the applicable standard should be determined – Respondent cannot be held liable.⁶⁸⁷ In particular, with respect to the tipping fees, Respondent claims that “the possibility of renegotiating fees, or assisting in the renegotiation of the tipping fees, is not tantamount to a right to increase tipping fees to the desired level.”⁶⁸⁸ [Tribunal’s Translation] According to Respondent, the damages purportedly sustained by Lajun result directly from the terms of the Concession Agreement and the agreements with the Duquesa Landfill’s users, terms that were freely negotiated and agreed-upon by Lajun.⁶⁸⁹

528. Referring to the discounted cash flow approach (“DCF”) adopted by Claimant’s expert in calculating the alleged damages, Respondent considers that it “leads to a very speculative result” and is not appropriate for a business like that of Lajun, which was never profitable.⁶⁹⁰ [Tribunal’s Translation] In turn, the valuation method based on comparable transactions and companies is not only closely related to the discounted cash flow approach, but cannot function in this case since there are no elements that can be compared.⁶⁹¹

529. With regard to Claimant’s attempt to estimate the value of the Land based on the notion of “highest and best use,” Respondent invokes a passage from the decision of the tribunal in *Unglaube v. Costa Rica*, where it is held that “to identify the *highest and best use* of this particular property, it seems plain to the Tribunal that that can only be the *highest and best*

⁶⁸⁶ R1 — §§ 459-460.

⁶⁸⁷ R1 — §§ 478-480.

⁶⁸⁸ R1 — § 482.

⁶⁸⁹ R1 — § 484.

⁶⁹⁰ R1 — §§ 492 *et seq.*

⁶⁹¹ R1 — §§ 521-522.

use subject to all pertinent legal, physical, and economic constraints.”⁶⁹² Without engaging in any further elaboration, according to Respondent, the value of the Land is nil.⁶⁹³

3. The Tribunal’s analysis

A) Overview

530. As per its previous findings, the Tribunal will calculate the damages Respondent must pay Claimant based on the finding that an indirect creeping expropriation and a violation of both the FET and the umbrella clauses exist, to the extent stated in each section.

531. Specifically, the Tribunal will thus address:

- the damages regarding Respondent’s obligation to adjust the tipping fees;
- the damage sustained as a result of the expropriation, which is equal to the value of 90% of Lajun shares held by Claimant;
- the calculation of interest;
- the moral damage.

532. As to the methods used for the quantification of damages, the Parties disagree on a series of criteria, even where they apply the same method.

533. Nonetheless, the Parties’ experts generally agree on three aspects:

- the valuation date (27 September 2017);
- consideration of lost cash flows from 9 July 2013 to the valuation date; and
- use of the fair market value standard.⁶⁹⁴

534. However, as already mentioned, the respective general quantification levels of the Parties differ significantly. The main reason for this difference lies in the fact that the expert reports are based on highly different data, making them virtually incomparable. The essential difference is that the expert evidence submitted by Claimant assesses the value

⁶⁹² R1 — § 476, citing RL-509, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Cases Nos. ARB/08/1 and ARB/09/20, Award, dated May 16, 2012, § 309 (emphasis by the Tribunal).

⁶⁹³ R1 — § 526.

⁶⁹⁴ Second Report of Mr. Kaczmarek, § 16.

of Lajun shares assuming that, absent the violations of the Treaty by Respondent, the company would have deployed its activity regarding the WTE Plant through 2034,⁶⁹⁵ while the expert evidence submitted by Respondent is based on the assumption of continuous operation of the current landfill activity, that is, waste collection and recycling.

535. The Tribunal already explained that the “potentiality” of an investment is not necessarily an investment and – particularly, the one concerning the construction and operation of the WTE Plant – is certainly not an investment in this case. While Claimant commissioned certain studies, the truth is that he failed to engage in any activity (not even a semblance of it) specifically aimed at transforming the potentiality of his desire into a tangible reality. Most importantly, the commissioning of studies is not by itself sufficient to demonstrate that Claimant had the right to erect a WTE Plant and economically operate it. There is not a single element in the record that allows the Tribunal to infer that the same investor who had so many difficulties in managing a landfill could become an electricity generator and operator on that same landfill. It should be recalled once again that Claimant did not even show interest in acquiring the adjoining land that would have initially been intended for such development, and that the deadline to opt for it had long expired by the time the Concession Agreement was terminated.⁶⁹⁶ Thus, any valuation based on the future operation of a WTE Plant must be discarded.

B) The damages regarding the failure to adjust the tipping fees

536. Upon the Tribunal’s finding that Respondent violated the FET by failing to revise the tipping fees – as provided for in the Concession Agreement⁶⁹⁷ – the consistency of the damage suffered in this regard is reflected in the maintenance of the tipping fees during the landfill operation period, which, necessarily, has an impact on the calculation of the cash flows considered for the valuation of the expropriation, calculated using the DCF method.

⁶⁹⁵ In actual fact, Claimant’s expert considers that the operation of the WTE Plant will extend many years beyond 2034, and thus its calculation of Lajun’s cash flows is projected through 2049. See First Report of Mr. Kaczmarek, §§ 163-167 (based on the First Report of Deltaway).

⁶⁹⁶ See *supra*, § 351.

⁶⁹⁷ See *supra*, subsection VIII.2.e.

537. A first element for quantifying the damage is thus based on the determination of the tipping fee that should have been applied during the operation of the investment, which itself has an impact on the quantification of other damages.
538. The determination of the correct tipping fee has been an issue regarding which the Parties had strong disagreements. Insofar as the expert reports submitted by Respondent which, in assessing the damages, are based on the assumption that the tipping fees paid were the negotiated ones and that there was no obligation to increase them – contradict the Tribunal’s decision – the Tribunal cannot rely on such reports as a reference for calculating damages in this regard.
539. The basis for assessing the damage regarding the failure to adjust the tipping fees contained in the reports prepared at Claimant’s request, however, is consistent with the Tribunal’s finding. Indeed, the calculations proposed are based on different evidentiary elements of the dispute: a letter from the Minister of Environment confirming a minimum tipping fee of USD 5.00 (always calculated per ton of waste); the recognition by the municipalities that the operating costs should range between USD 6.30 and 6.55; the tipping fee paid by private clients of USD 8.14; the average tipping fees paid in other countries of Latin America and the Caribbean range from USD 6.00 to 8.00; and a 2012 World Bank report noting that the cost of waste treatment for middle-income countries was between USD 3 and 10.⁶⁹⁸
540. Accordingly, in the Tribunal’s opinion, the tipping fees estimated for the 2013 to 2017 period contained in Table 13 of the First Report of Mr. Kaczmarek and in Table 6 of the Second Report of Mr. Kaczmarek⁶⁹⁹ represent a reasonable starting point for quantifying the tipping fee applicable to a ton of solid waste, taking into account both the reality of contemporaneous statements and comparable data. However, instead of reproducing the annual variation of such tipping fee used by Claimant’s expert – a variation for which no satisfactory explanation is provided and which ranges from 14% between 2013 and 2014 to 6% between 2016 and 2017 – the Tribunal finds it more appropriate to update it based on a 3% annual rate, which corresponds to the average rate of inflation in the Dominican

⁶⁹⁸ Elements mentioned in the Second Report of Mr. Kaczmarek, §§ 85 *et seq.*

⁶⁹⁹ C2 — § 361.

Republic.⁷⁰⁰ Thus, the Tribunal assumes a fee of USD 6.69 per ton in 2013 to a fee of USD 7.53 per ton in 2017, rather than the USD 8.46 per ton fee indicated by Claimant's expert.⁷⁰¹

541. With these remarks, the Tribunal therefore finds that the damage caused by the decision not to increase the tipping fees should be calculated based on the fees that should have been applied by Respondent. The income generated by Lajun's operation using such tipping fees, however, would not be exempt from certain deductions the Tribunal will analyze, particularly the amounts actually received by Lajun during such period, the investments necessary for improving the conditions of the Landfill, and the tax burdens.
542. Inasmuch as the Arbitral Tribunal has already explained that the notion that the investor would have actually invested in a WTE Plant if the State had not violated its obligations is, based on the evidentiary record, purely speculative,⁷⁰² the Tribunal will not consider this hypothetical investment (the amount of which would also be heavily disputed by the Parties' experts). Consequently, no amount related thereto will be subtracted from the cash flow calculation.⁷⁰³
543. Thus, the but-for cash flows would not amount to USD 26,920,141 (Table 16 of the First Report of Mr. Kaczmarek), but rather to **USD 17,133,000**.
544. The sum calculated accounts for the losses caused by Respondent's unjustified refusal to readjust the tipping fees. Said amount, however, does not account for any eventual investments which would undoubtedly have had to be made to maintain the landfill in proper operating condition, discarding any necessary investments to turn it into an energy production facility.
545. The Parties' experts have discussed what Lajun would have done if the tipping fees had been updated. According to Deltaway and IAV, Lajun would have invested USD 31.6 million, in particular, in the WTE Plant.⁷⁰⁴ In turn, Quadrant Economics, based on

⁷⁰⁰ See <https://fr.statista.com/statistiques/1038624/taux-d-inflation-dans-la-republique-dominicaine/>

⁷⁰¹ C2 — § 363. Second Report of Mr. Kaczmarek, Table 6.

⁷⁰² *Supra*, §§ 351 *et seq.*

⁷⁰³ It should be noted that in the Second Report of Mr. Kaczmarek, § 21, Table 1, the historical cash flow calculation in the First Report of Mr. Kaczmarek, § 157, Table 16, is corrected.

⁷⁰⁴ Second Report of Mr. Kaczmarek, § 107.

estimates by Deltaway, refers to some necessary investments in 2017 worth USD 12.2 million in order to cure the environmental deficiencies at the landfill, and USD 9.6 million to cover waste.⁷⁰⁵

546. The Tribunal must rule out any type of investment in the WTE Plant. Instead, it is undeniable that Claimant needed to invest at least part of his income in maintaining and revamping Duquesa. The figures in the expert reports are both inaccurate and controversial and, therefore, do not provide true guidance to the Tribunal. Yet, considering all the elements mentioned in the reports, the Tribunal finds that Lajun could have reinvested at least USD 8 million in the entire effective operation period (2013-2017). This is also consistent with the assumed increase of the tipping fees.
547. Respondent's expert further underlines that Claimant's expert has failed to subtract from the figure indicated the amount payable as income tax, since income would be higher. Respondent's expert points out that the applicable rate would have been 27%.⁷⁰⁶ Although the annexes to the expert reports do not identify the source of such percentage or the specific calculations that would lead to application thereof, Claimant's expert accepts it in the review of the table relating to the "*Existing Business DCF*" prepared by Respondent's expert.⁷⁰⁷ No other estimate has been submitted and no correction has been made in this regard in the other expert reports.
548. Based on the foregoing, in addition to the other applicable discounts on the amounts actually collected by Lajun, the percentage attributable to taxes as stated by Respondent's expert should be added, which this Tribunal deems plausible and reasonable. Hence, the net amount of damages attributable to Respondent for failing to adjust the tipping fees in the period 2013-2017 is **USD 5,422,898** (that is, 17,133,000 (but-for cash flows) minus the following amounts: 8,000,000 (sanitary investment), 2,005,730 (taxes), and 1,044,277 (actual cash flows)). However, only 90% of this amount should be considered, which is Claimant's ownership interest, that is, **USD 4,880,609**.

⁷⁰⁵ Second Report of Quadrant Economics, § 96.

⁷⁰⁶ First Report of Quadrant Economics, § 71.

⁷⁰⁷ Ap. QE-0002; Second Report of Mr. Kaczmarek, Appendix L.1 and L.2.

C) Damages related to Claimant's shares in Lajun

549. The Tribunal considers that, in view of Respondent's breaches of the Treaty, the value of Claimant's shares in Lajun has been materially impaired. As a consequence, Claimant is entitled to full reparation for the loss of his ownership interest, which is 90% of Lajun's capital.
550. For the purpose of the calculation of damages, the Report of Mr. Kaczmarek uses three valuation approaches, and then calculates a weighted average of the three results obtained. The quantification of the damage is based on the fact that the landfill would have been transformed into a power plant as from 2019/2020. This means that the first approach used by Claimant's expert – the discounted cash flow approach – accounts for the income that would have resulted from this new activity, with the required updates. The expert evidence produced by Claimant is not based on historical data – as such transformation has not occurred – but rather on a prospective study requested by Claimant to Deltaway, which was updated for the purposes of this arbitration.⁷⁰⁸
551. Likewise, the second method used by Mr. Kaczmarek, based on the comparable publicly traded company approach, takes a wide range of companies in order to compare two types of activities: renewable energy and waste management. Now, Lajun has only been engaged in the later. Thus, the – envisaged but never performed – activity of turning the landfill into a power plant may not be used to assess the income that Lajun would have earned. All but two of the 14 companies used by Mr. Kaczmarek are engaged in some WTE activity, which, once again, should be recalled is not the case of Lajun.⁷⁰⁹ Moreover, it is apparent that Lajun is not a publicly traded company. Therefore, the Tribunal believes that the data considered for this valuation are inapposite and that the ensuing result cannot be upheld by the Tribunal.
552. Lastly, it is noteworthy that the Tribunal does not find the third approach proposed – the comparable transaction approach – acceptable, as the companies analyzed⁷¹⁰ do business outside Latin America, except for one of them which operates in Brazil. In other words,

⁷⁰⁸ First Report of Mr. Kaczmarek, §§ 159 *et seq.*

⁷⁰⁹ See Table 26 of the First Report of Mr. Kaczmarek.

⁷¹⁰ See Table 30 of the First Report of Mr. Kaczmarek.

the geographic factor and the characteristics of the country are not accounted for by the Expert report. Furthermore, several of the companies taken into account operate in the WTE sector, which, once again, is not the case of Lajun. Hence, the Tribunal finds this approach inapposite as well.⁷¹¹

553. Against this background, the more convincing method for this Tribunal to value the damage caused by Respondent consists in establishing the FMV of Lajun's shares on the basis of the income that Lajun would have earned if the State had not committed the expropriation and the other violations of the Treaty as determined by the Tribunal.

554. To that end, the Tribunal may not rely on the calculations made by Claimant's expert, to the extent that they, as explained *supra*, are based on projections that this Tribunal deems unsupported, namely, that Lajun's business would have been that of a WTE Plant.

555. The proposals made by Claimant's expert are strongly challenged by Respondent's expert. Respondent's expert states, *inter alia*, that:

- regarding the infrastructure, the WTE Plant and the photovoltaic park were little more than an idea, as “no contractor had been hired, no agreement had been executed, and no procedure to obtain permits had been initiated;”
- no steps had been taken to obtain the concessions to produce power, no negotiations had been initiated to reach an agreement to purchase energy, both crucial to the feasibility of the WTE Plant and the solar plant;
- the fees projected by Claimant's expert could only refer to a landfill operation, rather than the landfill operated by Lajun;
- regarding recycling, operations had ceased more than one year prior to the valuation date, and the historical operations were much more limited than the project proposed;
- Mr. Kaczmarek assumes that the Concession Agreement, which was planned to expire in 2034, would be renewed indefinitely.⁷¹²

⁷¹¹ In this regard, the Tribunal deems the First Report of Quadrant Economics, § 63, convincing.

⁷¹² First Report of Quadrant Economics, § 20.

556. In the Tribunal's view, the criticism by Respondent's expert is generally well-founded, except as regards the fees taken into account to make the calculations, which should be, according to the Tribunal, clearly higher than those charged historically, as explained in the calculation of the *historical cash flow*.⁷¹³ There is an apparent contradiction between the failure to adjust fees as stipulated,⁷¹⁴ on the one hand, and requiring investments and services that cannot be undertaken without such income, on the other hand.

557. Thus, the Tribunal cannot follow either Party's expert reports, as they are both incompatible and based on premises inconsistent with this Tribunal's findings.

558. Hence, it is for this Tribunal, in order to calculate the fair market value of Lajun's shares, to perform an estimate of the profits that Lajun could have earned between 2017 (when the constructive expropriation took place) and 2034, by which period the company had ensured the operation of Duquesa. For that purpose, the Tribunal will take into account the fees that should have been applied to Lajun's operation (starting with a fee of USD 7.76 per ton in 2018—that is, continuing the 3% annual increase sequence) and other factors that have not been persuasively disputed (or that have not been disputed at all), based on the following facts:

- a fixed amount of treated waste, estimated in 1,250,000 tons per year for the aforementioned period, on the basis of an average of the three years of almost uninterrupted operation (2014, 2015, 2016);⁷¹⁵
- an amount of waste deposited by the ASDN worth 100,000 tons per year for the relevant period, without billing;⁷¹⁶
- an annual price variation of around 3%, based on the average inflation in the Dominican Republic;⁷¹⁷

⁷¹³ *Supra*, § 540.

⁷¹⁴ It should further be noted that, from early 2017, the municipalities ceased paying the agreed-on tipping fees. C2 — § 355.

⁷¹⁵ See Table 5 of the Second Report of Mr. Kaczmarek.

⁷¹⁶ See First Report of Mr. Kaczmarek, § 68, and Second Report of Mr. Kaczmarek, Table 5.

⁷¹⁷ *Supra*, § 540. While there were two years of exceptionally high inflation (like in many other countries), there is a trend towards recovery of normal values.

- expenses estimated, for 2018, on the basis of an average of the three years of almost uninterrupted operation,⁷¹⁸ thereafter reassessed on an annual basis, at an identical rate of 3%;
- an annual amount of sanitary investments at Duquesa, estimated in USD 2,000,000 in 2018, gradually increasing to USD 3,209,413 in 2034;
- an invariable tax rate of 27%;⁷¹⁹ and
- a country risk premium of 6.71%.⁷²⁰

559. With these parameters, Lajun's total income between the date of expropriation and the intended date of termination of the Agreement would be USD 194,088,883. This figure, minus USD 87,409,378 as expenses, USD 43,523,175 as health investments, USD 17,052,209 as taxes, and USD 3,093,586 as country risk premium, amounts to **USD 43,010,534.**

560. The shares not owned by Claimant (10%) should be subtracted from such figure. Accordingly, the damages for the loss of value of the investor's shares amount to **USD 38,709,481.**

D) Damage related to the Land and its use

561. Claimant also requests an amount for damage to the value of the Land which, as already stated, should be quantified, in his opinion, based on the highest and best use approach. It is on the basis of this approach that Claimant submits that the best use of the Land would have been to perform a sanitation of the Land and then install a photovoltaic park. Therefore, he claims compensation in the amount of approximately USD 55,000,000.⁷²¹

562. Against Claimant's claim, Respondent alleges that the value of the Land as of the valuation date, is zero, as use thereof, with all cumulative non-buried waste and other equally valueless items, is plainly impossible. Moreover, in Respondent's view, the sale of

⁷¹⁸ See Table 7 of the Second Report of Mr. Kaczmarek.

⁷¹⁹ *Supra*, § 547

⁷²⁰ The experts also disagree in this regard on the percentage that should be taken into account. See comparative chart in Table 10 of the Second Report of Mr. Kaczmarek. The Tribunal estimates that the rate proposed by Respondent's expert (6.71%) is more appropriate in this case.

⁷²¹ Second Report of Mr. Kaczmarek, § 52.

the Land would entail costs for Claimant who would have to sanitize it before executing the sale.

563. In the Tribunal's opinion, the valuation of the Land's use as a waste deposit and collection site, which was the intended use by the time this dispute arose – that is, when the State violated its obligations under the Treaty – has already been estimated when calculating the FMV of Lajun's capital. If the Land had to be valued, such operation should be done considering its actual use and taking into account the condition of the land at the time of a hypothetical sale.
564. Based on such acknowledgment, the Tribunal is persuaded by Respondent's arguments that the sale of a land that emits polluting gases and is full of garbage has no market value. The Claimant himself recognizes that, since September 2017, "*over 1 million tons of waste have been brought to the very unsanitary Duquesa Landfill for disposal every year for the past four years. Extending the life of the Landfill until 2034 would simply prolong the environmental damage being caused by the State.*"⁷²² This assertion is otherwise completely contradictory with the purported comparison made by Claimant's expert to the sale price of land that is clean and potentially suitable for housing or recreation. In this regard, Respondent's expert rightfully points to the fact that any person interested in acquiring portions of land in this area of the Dominican Republic, regardless of intended use, would have found much more appealing options than the Land (and at a lower price than the price attached by Claimant's expert on the Land.)⁷²³
565. Even without denying the likely technical relevance of the highest and best use approach invoked by Claimant, the Tribunal cannot but agree with the findings of the tribunal in *Unglaube v. Costa Rica*, to the effect that such approach may not be applied in a vacuum but taking into account the actual context and constraints.⁷²⁴ It should not be ignored that, by the valuation date, Duquesa was not a sanitary landfill – which is expressly

⁷²² C2 — § 412.

⁷²³ Second Report of Quadrant Economics, §§ 101-105.

⁷²⁴ *Supra*, § 529.

accepted by Claimant's expert –⁷²⁵ even if it is accepted that Claimant could not transform the landfill due to the non-adjustment of the tipping fees.

566. For the reasons set out above, the Tribunal finds that Claimant has no right to any relief whatsoever in relation to the value of the Land.

E) The calculation of interest

567. The Tribunal has established that the compensation due by Respondent for its violations of the Treaty amounts to USD **4,880,609 + 38,709,481 = USD 43,590,090**, plus interest, to be added to this sum on the basis of the principle of full reparation.

568. Claimant proposes three possible rates to calculate the interest to be added to the sum due by Respondent:

- the yield on Dominican Republic sovereign bonds issued in US dollars;
- the U.S. Prime Rate of interest plus 2%;
- the 12-month LIBOR plus 4%.⁷²⁶

569. In Respondent's view, none of these interest rates is appropriate since their application would compensate Claimant for risks to which the compensation due will not be subject. With this argument, Respondent – which, in spite of denying that any sum should be awarded to Claimant, accepts that, if anything were owed, the sum due would bear interest – proposes that interest should be calculated by applying a risk-free rate, namely, the yield of the United States Treasury Bonds at 6 or 12 months. In this way, Claimant would be compensated for the loss of value of the money over time without adding risks, as would be the case with commercial loans.⁷²⁷

570. The Tribunal has assessed the grounds for the Parties' positions and has found that the Claimant's expert's characterization of Claimant's situation as that of a forced lender to the State is convincing.⁷²⁸ It is, therefore, correct to say that, if that is his situation, he

⁷²⁵ Second Report of Mr. Kaczmarek, § 85. "Given the fact that the Landfill was effectively an open dump, we only considered tipping fees and final disposal costs for non-sanitary, open dump landfills."

⁷²⁶ C2 — § 413.

⁷²⁷ First report of Quadrant Economics, §§ 111-119; R1 — §§ 528-529.

⁷²⁸ Second Report of Mr. Kaczmarek, § 428.

cannot be treated any worse than a voluntary lender. As was well-noted in the said expert report, Respondent should not be penalized, but neither should States be incentivized to expropriate and maintain unpaid debts, which is what could happen if a risk-free rate were used, a rate that would never be available in the market.⁷²⁹

571. Out of the three options proposed by Claimant's expert (which are actually two, since the Libor rate is not currently relevant), the Tribunal considers that the most appropriate rate for the present case is the rate based on the yield on Dominican Republic sovereign bonds issued in US dollars. In effect, it is a predictable and fair rate for both Parties.

572. Consequently, the amount due by Respondent should be adjusted according to that rate, computed from two different dates, depending on the damage suffered:⁷³⁰ the interest on damages relating to the failure to adjust the tipping fees (historical cash flow) should be calculated from December 31, 2013, which is the day on which Respondent should be deemed to have breached its obligation to adjust the tipping fees;⁷³¹ meanwhile, the interest on damages relating to Lajun's shares should be calculated from September 27, 2017, the valuation date. In both cases, interest shall be compounded annually and shall accrue until the date of actual payment.

F) On moral damages

573. Claimant also requests compensation for moral damages estimated at USD 5,000,000. The basis that this claim is grounded on the one hand, on what Claimant considers to be a real defamation campaign against him, carried out by the State through the media, and, on the other hand, on the "discriminatory intimidation tactics" that the State allegedly employed against Mr. Adrian Christopher Lee-Chin, by seeking his criminal prosecution. According to Claimant, these actions caused not only severe damage to his reputation but also significant "emotional trauma" to both him and his family members.⁷³²

574. Claimant's claim is vehemently rejected by Respondent. According to the latter, Claimant's son was not accused of any crimes but was instead the subject of an

⁷²⁹ *Ibid.*

⁷³⁰ First Report of Mr. Kaczmarek, Table No. 36.

⁷³¹ *Supra*, § 438 (ii).

⁷³² C1 — §§ 351-352. Claimant also stresses the anxiety caused to his son by having to verify the INTERPOL database on a daily basis to find out if his name had been included in it, which also affected Claimant.

environmental criminal complaint initiated by the Ministry of Environment, in his capacity as Lajun's legal representative (and not as a result of the fact that he was Claimant's son). Respondent adds that, in any event, Claimant lacks any standing to seek compensation for the damage suffered by his son, which, additionally, was not proven.⁷³³ Respondent further alleges that there is no evidence of the existence of a link between itself and the cited news articles in which insulting remarks against Claimant were published.⁷³⁴ Lastly, Respondent argues that should the Tribunal consider that it has jurisdiction to decide a claim for moral damages under the Treaty (which is silent on the matter), no compensation would be due since neither the facts asserted by Claimant nor their alleged effects reach the necessary threshold of seriousness required under international law.⁷³⁵

575. The Tribunal finds that Claimant's arguments on this issue are not convincing. The threshold for awarding compensation for moral damages is particularly high. It is not enough to claim alleged suffering or harm to a person's reputation for moral damages to arise. On the contrary, such damages must be convincingly proven, including proof of the causal link between the party causing the damage and the victim. It should be noted that, as has been pointed out, the most important aspect of the alleged facts do not even refer directly to Claimant but to his son. The evidence submitted by Claimant to support his request has been anything but persuasive.

576. In contrast, Respondent has submitted several precedents in which other arbitral tribunals refer to the "exceptional circumstances" that must be present for moral damages to arise, providing some examples of such circumstances.⁷³⁶ Claimant has fallen far short of this threshold, which the Tribunal considers to be appropriate. Moreover, Claimant did not even make a proper case regarding the Tribunal's jurisdiction to award moral damages under the specific applicable regulatory framework.

577. For the reasons set out above, the Tribunal considers that Claimant's request regarding moral damages must be dismissed.

⁷³³ R1 — § 531.

⁷³⁴ R1 — § 532.

⁷³⁵ R1 — §§ 533-535.

⁷³⁶ *Ibid.*

G) Summary

578. On the basis of the arguments raised in the foregoing chapters, the Tribunal finds that Respondent must compensate Claimant for the damages it actually caused as a result of violating its obligations under the terms of the Treaty. This compensation must fully cover both the income that Claimant should have received if reasonable tipping fees had been applied and the loss of 90% of the value of Lajun's capital stock. The requirement to provide full reparation entails the application of interest on the aforementioned sum under the terms determined *supra*.

579. The compensation due, however, does not cover other damages alleged by Claimant and which the Tribunal has either deemed inapplicable or to not have been adequately proven. Specifically, Claimant is not entitled to any reparation for the construction and operation of a WTE Plant, nor for the value of the Land and its potential use, nor for moral damages.

X. COSTS

1. *The Parties' positions*

580. Both Parties requested a decision on costs, asking that the other Party be ordered to pay all costs of the arbitration, including its own fees and expenses, with interest. The Parties submitted their respective statements, as requested by the Tribunal in consultation with the Parties, on April 18, 2022. Claimant submitted the Statement of Costs as per the breakdown *infra*:

Name of Providers	Invoiced Fees and Costs ⁷³⁷
Hogan Lovells US LLP	USD 5,213,993.29 (Fees) + USD 362,275.81 (Costs)
International Centre for Settlement of Investment Disputes (ICSID) ⁷³⁸	USD 550,110.00

⁷³⁷ The amounts submitted by Claimant follow the American punctuation rules in the original document.

⁷³⁸ Additional payments in the amounts of USD 100,000 and USD 74,980 were received from the Claimant after the submission of the Claimant's Statement of Costs.

Legal Expert (Joost Pauwelyn)	USD	71,769.00
Legal Expert (Andrea Bianchi)	USD	40,010.00
Technical Expert (Deltaway)	USD	588,677.27
Damages Expert (IAV Advisors LLC)	USD	703,928.75
Additional Expenses Concerning Final Merits Hearing	USD	18,454.81
Total:	USD	7,574,676.09

581. Respondent submitted the Statement of Costs as per the breakdown *infra*:

Description	Amount (USD)
Costs of the Arbitration for ICSID Services and Tribunal Fees ⁷³⁹	USD 550,000.00
Curtis, Mallet-Prevost, Colt & Mosle LLP (Professional Fees) (Jurisdiction and Merits Phases)	USD 4,238,984.44
Hearing Expenses (Jurisdiction and Merits Phases)	USD 61,718.48
Fees and Expenses of Respondent's Experts	USD 500,000.00 USD 500,000.00
(1) J.S. Held's Fees and Expenses	
(2) Quadrant Economics LLC's Fees and Expenses	
Other Costs and Expenses	USD 32,230.39
Total:	USD 5,882,933.31

582. The Tribunal's decision on costs is governed by Articles 38 to 40 of the UNCITRAL Rules.

583. In accordance with Article 38 of the UNCITRAL Rules, the Tribunal's fees and expenses and the ICSID's administrative fees and direct expenses (the "arbitration costs") amount to the following sum (in USD):

⁷³⁹ Additional payments in the amounts of USD 100,083 and USD 75,000 were received from the Respondent following the submission of the Respondent's Statement of Costs.

Arbitrators' fees and expenses	
Prof. Diego P. Fernández Arroyo	USD 432,615.92
Mr. Christian Leathley	USD 228,049.60
Prof. Marcelo Kohen	USD 276,243.74
ICSID's administrative fees	USD 262,000.00
Direct expenses	USD 214,385.12
Total	USD 1,413,294.38

584. The above arbitration costs have been paid out of the advances made by the Parties in equal parts.

585. Article 40 of the UNCITRAL Rules provides:

1. Except as provided in paragraph 2, the costs of arbitration shall, in principle, be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

[...]

2. The Tribunal's analysis

586. Article 40(1) does not impose on the Tribunal the obligation to apply the principle by which arbitration costs are “borne by the unsuccessful party,” but instead states that the Tribunal may deviate from this rule at its discretion if it determines that a different apportionment is reasonable “taking into account the circumstances of the case.” As for the costs of legal representation and assistance, Article 40(2) grants the Tribunal broad discretion to apportion such costs in a reasonable manner taking into account the circumstances of the case.

587. The Tribunal considers that, broadly speaking, the Parties' respective behavior throughout the proceedings is an important factor for the purpose of calculating the allocation of the costs of an arbitration. In other words, in the absence of a provision to such effect in the applicable rules or a specific agreement between the Parties, the Tribunal sees no convincing reasons to automatically order that all expenses should be borne by the losing party. Moreover, in this case, while all of Respondent's objections have been rejected and the Tribunal found that Respondent has committed several violations of the Treaty, Claimant has failed to persuade the Tribunal of the merits of an essential part of its claims. Many resources were employed to argue issues that the Tribunal ultimately found to be unsubstantiated.
588. During the arbitral proceedings, the Parties have not been as cooperative as could be expected of them in the production of certain documents. Further, both have introduced questionable issues that ultimately turned out to be burdensome, requiring many written pages and many hours of work. Even during the Hearing, the Parties argued about the submission of new documents, a debate that also continued afterward.⁷⁴⁰ In this regard, Claimant requests the Tribunal to draw negative inferences from several of Respondent's attitudes during the arbitration against him.⁷⁴¹ With similar emphasis, Respondent also criticizes Claimant's actions on several points.⁷⁴²
589. The Tribunal has difficulty seeing any real difference in the behavior of the Parties. Both have staunchly advocated for their points of view, at times toying with the limits of what is permissible in a proceeding of this nature and attempting to maximize all the possibilities within their reach. However, in essence, neither Party has proven that the other has advanced legally inadmissible attitudes. Although each has vehemently criticized the actions of the other during the term of the Concession Agreement and the positions on the merits of this arbitration, their attorneys have generally conducted themselves within the bounds of professional decorum, respecting the colleagues of the opposing party and the Tribunal.

⁷⁴⁰ See this matter reflected in Claimant's request in CPHB, p. 38, item h).

⁷⁴¹ C-2, § 431; R-2, § 489. Also, CPHB, p. 38, item g).

⁷⁴² R-2, §§ 473-479.

590. On the basis of the foregoing considerations, the Tribunal finds that the approach that leads each Party to bear its own costs and 50% of the arbitration costs is the most appropriate in this particular case.

XI. DECISION

591. For the foregoing reasons, the Tribunal decides:

- i. To declare that this dispute is within the jurisdiction of the Tribunal;
- ii. To reject the jurisdictional objections filed by Respondent;
- iii. To find that Respondent has violated its obligations under the Treaty regarding expropriation, fair and equitable treatment and the umbrella clause;
- iv. To order Respondent, as reparation for the violations referred to *supra*, to pay compensation for the damage caused to Claimant, which amounts to USD **43,590,090**.
- v. To order Respondent to pay interest, at the rate based on the yield on Dominican Republic sovereign bonds issued in U.S. dollars; such interest shall accrue, as regards the amount relating to damages for the failure to update the tipping fees (USD **4,880,609**), from December 31, 2013, and, as regards the amount relating to damages on Lajun's shares (USD **38,709,481**), from September 27, 2017; in both cases, interest shall be compounded annually and shall accrue until the date of actual payment;
- vi. To reject all other claims of the Parties;
- vii. To order that each Party bear its own costs and 50% of the arbitration costs.

[signed]

Mr. Christian Leathley
Arbitrator

Date: September 27, 2023

[signed]

Prof. Marcelo Kohen
Arbitrator
Subject to the attached Dissenting Opinion

Date: September 9, 2023

[signed]

Prof. Diego P. Fernández Arroyo
President of the Tribunal

Date: September 9, 2023

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE AGREEMENT ON
RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE CARIBBEAN
COMMUNITY AND THE DOMINICAN REPUBLIC AND THE UNCITRAL ARBITRATION RULES
(1976)**

In the arbitration proceeding between

MICHAEL ANTHONY LEE-CHIN

Claimant

and

THE DOMINICAN REPUBLIC

Respondent

ICSID Case No. UNCT/18/3

DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN

I. INTRODUCTION

1. In the Partial Award of July 15, 2020, the majority decided that Article XIII of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Agreement Establishing the Free Trade Area between the Caribbean Community (“CARICOM”) and the Dominican Republic (hereinafter, “the Treaty”) vested this Tribunal with jurisdiction and that the so-called “indirect investments” were covered by the protection accorded by such treaty. I issued a dissenting opinion because I considered that both decisions were wrong. My colleagues having thus decided on the continuity of the proceeding, I shall opine on other questions regarding jurisdiction and the merits decided in the Final Award. I regret to say that, once again, I must seriously depart from the majority’s decision, both in the analysis of the applicable law and the facts as well as in the assessment of evidence. The only common ground with the majority is that the municipalities breached their obligation to renegotiate the tipping fees with Lajun Corporation SRL (“Lajun”) and that Claimant cannot invoke an exclusive right and a guarantee to build a WTE Plant.
2. A key issue in the instant case is the determination of Claimant’s capacity as investor in Lajun, the Dominican company allegedly injured by the Dominican Republic’s actions. With regard to the so-called “indirect” investments, I understand that the decision in the Partial Award was accepting their protection by the Treaty, but the fact that Claimant had made said investments in the present case could not have been deemed proved at that procedural stage. Such a task required the assessment of evidence which was only incorporated to the record at a later time. The Final Award seems to be satisfied with the assertion made in the decision of July 15, 2020, and the only thing it does is a very light ratification to consider that such investments existed. As seen further below, instead of making sure of this, so as to reach its conclusion, the majority makes do with a number of inferences and makes considerations on the “plausible” nature of many of Claimant’s assertions.
3. I also deeply regret the majority’s departure from the rules of interpretation of treaties contained in the Vienna Convention of 1986, which leads to wrong decisions that distort the scope of the requirements laid down in the Treaty so as to invoke its protection. The Final Award thus minimizes the importance of the language of the Treaty -in fact, it puts it aside-, when literal interpretation, albeit not the only one, is at the heart of the applicable rule. The draft also ignores the teleological interpretation. Actually, we do not know with certainty the interpretation approach followed. As explained hereinafter, that leads the majority to temper the need to prove a particular link between the capital invested and the alleged investor.

4. I also disagree with the assessment by the majority of the invocation of national security triggered by Lajun's attitude of preventing treatment of waste in the region of Gran Santo Domingo, the capital of the Dominican Republic. Although I agree with the idea that an international tribunal may assess whether the invocation by a State of such circumstances is correct or not, judges or arbitrators cannot substitute for those who must react vis-à-vis those circumstances and become political decision-makers themselves. Any such assessment must pursue the purpose of preventing the abuse of an invocation that would allow the ruler to be automatically exempted from any obligation by using the argument of emergency or national security as an excuse. The Final Award also equates or compares in a misguided fashion the situations of national emergency set forth by law or a treaty with the state of necessity, a circumstance precluding wrongfulness, which is a different legal notion in International Law.
5. I will go on to examine the different points of my dissent hereinbelow.

II. WAS THERE A JAMAICAN INVESTMENT IN THE DOMINICAN REPUBLIC?

6. As asserted by the Final Award, even when Respondent has not formally raised a separate objection to jurisdiction grounded on nationality, the issue was mentioned thereby.¹
7. Claimant, Mr. Michael Lee-Chin, introduced himself to the Dominican authorities as Canadian and it is in Canada that he has the center of his business.² On the basis of the evidence adduced in the instant case, the first time that Claimant invoked his Jamaican nationality before Respondent was on December 19, 2017, when he sent Respondent a Notice of Controversy in preparation for this arbitration.³
8. What appears in the evidence relating to the critical period, that is, between the acquisition of Lajun and a portion of land additional to the Duquesa Landfill (the "**Land**") (June 26, 2013) and the date of the notice of controversy (December 19, 2017), is that has Claimant always invoked before Respondent his Canadian, not Jamaican, nationality. For instance, in the resolution authorizing the sale of Lajun shares to Nagelo Enterprises, S.A. ("**Nagelo**") and Wilkison Company S.R.L. ("**Wilkison**") of February 19, 2014, Nagelo appears as "represented by Mr. MICHAEL LEE-CHIN, Canadian, of age, holder of Passport No. BA704077,

¹ Final Award, footnote 125.

² Memorial on Jurisdictional Objections, para. 3 (i).

³ C-15, Notice of Controversy dated December 19, 2017.

domiciled and residing in this city of Santo Domingo, National District.”⁴ [Prof. Kohen’s Translation]

9. Identical information appears in the first settlement agreement between the Municipality of Santo Domingo Norte (“**ASDN**”) and Lajun of February 10, 2014.⁵ In the Certificate pertaining to Nagelo of the Commercial Registry of Foreign Companies, Mr. Lee-Chin also appears as Canadian.⁶ The only piece of evidence in which Mr. Lee-Chin is mentioned as related to Jamaica is a letter signed by the General Manager of Metro Country Club, a company different from Lajun or its purchasers, requesting an appointment with the President of the Dominican Republic in which Claimant is introduced as “The Honorable Mr. Michael Lee-Chin, Minister of the Government of Jamaica Economic Growth Council.”⁷ [Prof. Kohen’s Translation]
10. That is to say, regardless of the veracity or not of this assertion, Claimant is introduced as a senior governmental official, not an investor. Good faith “governs the relations between States but also the legal rights and duties of those seeking to assert an international claim under a treaty.”⁸ Good faith requires the parties “to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage.”⁹
11. It is true that the Treaty defines the investor simply as “any natural person possessing the citizenship of a Party in accordance with its laws”¹⁰ and that Mr. Lee-Chin has the nationality of Jamaica, one of CARICOM member States. It is also true that Respondent did not raise a *ratione personae* objection to the jurisdiction of the Tribunal, although it alleged before the latter that Claimant had the burden of proving the *ratione personae* jurisdiction.¹¹
12. Not only did Claimant fail to inform his Jamaican nationality to Respondent, but he and his son Adrian, who, at a given time was the General Manager of Lajun, also misinformed the Dominican Republic about those who had made the investment. Claimant invoked an email

⁴ C-147.

⁵ C-5.

⁶ C-181.

⁷ C-161.

⁸ *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009), para. 107.

⁹ *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award (May 15, 2019), para. 255; *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, Award (May 15, 2019), para. 266; *David R Aven, Samuel D Aven, Carolyn J Park, Eric A Park, Jeffrey S Shioleno, Giacomo A Buscemi, David A Janney and Roger Raguso v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (September 18, 2018), para. 224; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009) (n. 59), para. 107.

¹⁰ Article I(2) (a) of the Treaty.

¹¹ Respondent’s Memorial on Jurisdiction, footnote 173; Transcript, January 24, 2022, p. 155, 6:9.

sent to the Vice President of the Dominican Republic on November 13, 2013, in which he informed this high State authority that “I am investing on behalf of sovereign states and important pension funds”.¹² In a television interview of November 3, 2013, the journalist introduced Mr. Adrian Lee-Chin in the following terms: “*canadiense de nacimiento de ascendencia china*” (“he comes from Canada related to an Asian family,” in the English translation.) In response, Claimant’s son informs that Lajun is jointly owned by local and foreign investors and that he represents the latter, a private equity fund (in his words in English: “Lajun is jointly owned by local investors and foreign investors. The foreign investors which I represent are, is a private equity fund.”)¹³

13. There is here a two-fold obstacle with respect to the investment. Firstly, the State must have knowledge of the foreign investor’s nationality in order to know what international rules apply. Until the time of the Notice of Controversy, Respondent never knew that the Treaty applied to the dispute arisen with the Dominican company Lajun. Secondly, Claimant does not introduce himself as an investor, but as an agent of the alleged true investors. The only time he is mentioned (and not by himself) as Jamaican is to identify him as a purported minister of Jamaica. The Final Award fails to examine the first obstacle and seeks to set the second one aside, under the pretext that such assertions were “informal” and that “the Tribunal has no basis to rule” thereon. It is satisfied with the explanations provided during the hearing by both persons in their capacity as witnesses at the oral stage of the proceeding: the first, who asserted that he referred to “other investments,” and the second, “that he had made a mistake.”¹⁴. Nevertheless, the first case is a message sent by Claimant to one of the highest authorities of the Dominican Republic clearly referring to Lajun and the other is public information widely circulated when the problem of the Duquesa Landfill had hit the national headlines.
14. In accordance with the Final Award, a purported meeting among Mr. Michael Lee-Chin, his son Adrian and Dominican investor Asilis Elmudesi¹⁵ with the President of the Dominican Republic of November 9, 2016, is evidence that Claimant was the owner of the investment.¹⁶ Respondent has called into question the existence of such meeting. The evidence submitted by Claimant is the above-mentioned letter from *Metro Country Club* of October 31, 2016, signed by

¹² C-126.

¹³ R-12.

¹⁴ Final Award, para. 151.

¹⁵ Mr. Asilis Elmudesi, a national of the Dominican Republic, appears as shareholder of Wilkison, one of the companies that acquired Lajun and the Land. He was also the recipient of the funds obtained for acquisition thereof.

¹⁶ Final Award, footnote 118.

Mr. Luis Gulano, General Manager of such company, requesting the Dominican President an appointment for Mr. Michael Lee-Chin and Mr. Asilis where “[t]he topics to be addressed are foreign investment and the [D]uquesa Landfill.” [Prof. Kohen’s Translation] As stated above, Mr. Lee-Chin was then introduced as “Minister of the Government of Jamaica Economic Growth Council.”¹⁷ [Prof. Kohen’s Translation] A package of Lajun documents dated “November 9, 2016” (same date as the alleged meeting) the first page of which reads “Information for the President” was also submitted as purported evidence of the meeting with the President.¹⁸ [Prof. Kohen’s Translation]

15. The majority asserts that “[t]he Tribunal fails to see any element that could lead to the conclusion that said meeting did not take place, as Respondent seems to suggest.”¹⁹ In other words, by reversing the burden of proof, my colleagues expected Respondent to submit negative evidence, *i.e.*, to prove something that it states did not exist. That is not all. Even assuming that said meeting existed, the mere presence of Mr. Lee-Chin, introduced as a Jamaican minister and accompanying his son and Lajun’s Dominican investor, is not evidence of any ownership. That is compounded by the information transmitted to the Vice President of the Dominican Republic that introduced Claimant as an agent, not an investor.
16. It is worth pointing out that there is no evidence on record that Claimant, in his capacity as “indirect investor”, has taken any step before the companies Lution and Kigman del Sur, so that they, in turn, take steps before Nagelo and Wilkison, in their capacity as owners of Lajun and the Land, in connection with his alleged investment.
17. It is also worth highlighting the sales of the shares and the land on June 27, 2013. That day, Mr. José Antonio López Díaz and Ms. Darleny Indhira López Polanco, owners of Lajun aggregate share capital, sold 50% of that share capital to the Panamanian entity Nagelo and the remaining 50% to the Dominican entity Wilkison. Lajun’s Meeting Minutes are signed “By New Shareholders in sign of Acceptance” by Mr. Luis José Asilis Elmudesi, for both Wilkison and Nagelo.²⁰ [Prof. Kohen’s Translation] On that same date, Mr. López Díaz sold the Land to Nagelo and Wilkison. Claimant alleges that, on that same date, he became the indirect owner of 90% of Lajun and the Land through two Panamanian companies: Lution Investments, S.A. (“Lution”), owner of 100% of the share capital of Nagelo, and Kigman Del Sur, S.A.

¹⁷ C-161.

¹⁸ C-43.

¹⁹ *Idem.*

²⁰ C-152.

(“Kigman”), owner of 80% of the share capital of Wilkison.²¹ Notably, the evidence of payment for the Land is a “receipt of payment” signed by Mr. José Antonio López Díaz dated November 11, 2016, *i.e.*, more than three years after the sale was made. It is a payment of USD 2,500,000.²² Registration of the sale of the land was formalized only on December 6, 2016, *i.e.*, more than three years after the contract for sale of the land was entered into.²³

18. In order to prove that the investment in Lajun and the Land, which are the subject-matter of the dispute, was made by Claimant, the majority errs in three main issues: the scope of the Partial Award, the interpretation of the Treaty, and the assessment of evidence.
19. To conclude that Claimant showed that he made an investment in the Dominican Republic, the Final Award avers that nothing discussed in this case alter[s] the conclusion “reached by the Tribunal in the Partial Award that there is a clear link between Claimant and the investment.”²⁴ However, the Partial Award neither conducted, nor could have conducted at such preliminary stage, a study of that substantive issue. Of course, the *dispositif* of the Partial Award failed to resolve the substantive issue. Had it done so, a prejudgment would have arisen. It merely decided that indirect investments fitted within the definition of investment under the Treaty and that, accordingly, the Tribunal had jurisdiction to examine them. That was exactly what had to be done at this stage of proceedings and what the Final Award failed to do, or did superficially or improperly.
20. The majority settled as proven that it was Claimant who made the investment since Nagelo appeared as “represented by Mr. Michael Lee-Chin” in one of the above-mentioned documents.²⁵ But *representation* is not a synonym for *ownership or control*. If this were the case, the owner of Wilkison, Nagelo or Lution, or the one who controls them, could be deemed to be a Dominican citizen, not Mr. Lee-Chin. Indeed, in the same documents cited, Wilkison SRL appears as represented by Mr. Luis José Asilis Elmudesi, a national of the Dominican Republic. Actually, Mr. Asilis Elmudesi appears in the contracts for the purchase of Nagelo and the Land as a representative not only of Wilkison, but also of Nagelo and Lution Investments.²⁶

²¹ *Statement of Claim*, §§ 27, 82. Claimant explains that the remaining 10% minority interest is owned by Dominican entrepreneur, Dr. José Luis Asilis. See also *Memorial on Jurisdiction*, §§ 16-17.

²² C-153.

²³ C-66, Certificate of Title to the Portion of Land, January 3, 2017.

²⁴ Final Award, para. 149.

²⁵ This Dissenting Opinion, para. 8.

²⁶ C-22.

21. Another key issue discussed by the Parties was how the funds for the acquisition of the portions of Lajun and the Land were obtained. It is indisputable that none of the transfers to such effect was made on Claimant's name or by the companies that Claimant says to control and that appear as purchasers of Lajun and the Land. It has also been proved that such funds were not contributed by Lution Investment SA or Kigman del Sur SRL, the Panamanian and Dominican companies which purportedly belong to Claimant and which, in turn, acquired Nagelo and, in part, Wilkison, respectively. In other words, neither Claimant nor anyone else in the long chain of "indirect investments" appears as provider of the funds.
22. Claimant asserts that the transfers, from Barbados and Canada, were made by other companies (AIC and Portland), which, in turn, are owned thereby. The evidence adduced is two documents signed by two Canadian individuals, one of whom claims to be a member of AIC and the other one of whom claims to be a lawyer, dated August 19, 2021, and September 8, 2021, respectively.²⁷ This means that these documents were clearly prepared for purposes of this case and submitted at the final stage thereof. There is no official certification of such documents, or no public document establishing such ownership, that is contemporaneous to the transfers. I do not think that such documents meet the necessary standard of proof. The Final Award does not even examine them.
23. Evidence of the alleged transfers for payment for shares or the Land is also largely insufficient to show both the fact of the transfers themselves and the recipients thereof. Even though some of those transfers contain the word "Lajun", only a purported internal e-mail to Claimant's son indicates that the transfers are directed to Nagelo for the Lajun purchase. One could expect relevant bank documents as able support such evidence, with a clear indication of the sender and the recipient of the transfer.²⁸
24. The Final Award avers: "the Tribunal, absent an express requirement in the Treaty — or otherwise applicable general principle or other international law rule or in the specific context of arbitrations operating under UNCITRAL Rules — it is not necessary for Claimant to specifically establish the origin of the funds used. Instead, the Tribunal's task is to exercise its discretion and assess whether Claimant has been able to demonstrate a link between himself

²⁷ C-202 and C-203.

²⁸ C-179 and C-196.

and the capital invested. This link may be direct or indirect and, absent specific requirements, must be assessed by the Tribunal.”²⁹

25. Firstly, in my opinion, the Tribunal does not have discretion. Its members must be persuaded by sufficient evidence that Claimant proved that it made the investment. Secondly, I do not think that the Treaty must contain an express requirement for the Tribunal to consider the origin of the funds. Thirdly, I disagree with how the Final Award applies the rule of interpretation of treaties as reflected in the Vienna Convention of 1986.
26. In its preamble and different articles, the Treaty requires that the investment be made “by investors.”³⁰ The majority downplays the value of the text, when literal interpretation, albeit not the only one, is at the heart of the matter. In reality, the draft also ignores the object and purpose of the treaty, which is promoting amongst the contracting parties foreign investments in the territory of the others and ensuring protection thereof. A good-faith interpretation of the text, 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, leads to conclude that the investment must be made *by investors*. Specifically, a basic requirement of transparency enabling a good-faith application of the Treaty demanded that the investment be made by Claimant or, at least, by some of the intermediary companies that the majority accepted as “indirect investments.” Even upholding the interpretation made by the majority, which includes as investments the so-called indirect investments and the broad interpretation thereof in the particular case (they are triply “indirect” investments), specific evidence of the investment, either under the investor/Claimant’s name or by at least some of the companies he says to control, was to be expected. None of such evidence was submitted. Not even the amounts transferred make it possible to determine their correspondence with the alleged purchases.
27. It should also be borne in mind that the investments, whomever has made them, have irregularities, both in the transfer of Lajun shares as well as in the acquisition of the Land. One of them is the difference in the purchase price stated in the Contract for the purchase of shares and in the Framework Agreement, which would lead to a tax fraud. The Final Award regards them as “minor” in nature and judges Claimant’s explanation “plausible,” with no further details. It considers the fact that the tax authority failed to act expeditiously and that the evidence submitted by Respondent in connection with the non-payment of taxes “does not

²⁹ Final Award, para. 147.

³⁰ R-1, Articles II(1), III(1) and XVI.

demonstrate the existence of unlawful activity.”³¹ . The fact is that the Framework Agreement and the contract for the sale of the Land, on the one hand, and the contract for the sale of shares, on the other, were executed on the same date, but indicating different prices and before two different notaries.³² The price difference amounts to more than seven million US dollars.³³

28. Considering that Claimant failed to prove his capacity as investor or that the investment was made by him, I will not opine on other theoretical issues that the Final Award develops, such as whether the “Salini test,” which requires existence of an economic risk as a condition for an investment to exist, applies to the instant case. Instead, I find it convenient to refer to other aspects of the Final Award regarding the existence of violations of the substantial provisions of the Treaty.

III. WOULD THERE HAVE BEEN A VIOLATION OF TREATY OBLIGATIONS?

29. The facts giving rise to the present case are related to the existence of different disputes between the ASDN and Lajun from July 2013 to September 2017. The relationship between the ASDN and Lajun is based on six contractual agreements: the Concession Agreement of March 1, 2007, and three addenda, a First Settlement Agreement of February 10, 2014, and a Second Settlement Agreement of May 24, 2017. It was agreed that the contractual relationship is governed by Dominican law and that any dispute or controversy between the Parties would be submitted to the Superior Administrative Court or, in the event of collection actions by Lajun, to the Dominican ordinary courts.
30. The problems related to Lajun’s management of the Duquesa Landfill did not begin with the acquisition of shares of the concessionaire company by Nagelo and Wilkison. The first settlement agreement of February 10, 2014, was the result of a complaint for breach of the agreement from the ASDN against Lajun on July 1, 2013, and the subsequent rescission of the concession agreement of July 9, 2013, the ASDN’s intervention in the Duquesa Landfill and a subsequent administrative-judicial proceeding between the parties. Such agreement referred to a number of measures that Lajun had to implement and explained that, with the incorporation of Nagelo and Wilkison as shareholders, the company now proved to have the financial

³¹ Final Award, paras. 187-188.

³² C-22.

³³ Dominican Republic’s Memorial on Jurisdictional/Admissibility Objections and Counter-Memorial on the Merits and Quantum, para. 105.

solvency necessary to implement them.³⁴ It is worth recalling that the acquisition of Lajun shares by said companies took place by means of a private contract of June 26, 2013. The ASDN could not have knowledge of such transaction before its registration, and there are no elements to show that its actions on July 1 were the result of such transaction.

31. A key issue in the instant case is the amount of the tipping fees paid by the municipalities. For the purpose of succeeding in the tender bid, it was Lajun which proposed a reference tipping fee of two US dollars per ton.³⁵ The Concession Agreement set said reference tipping fee it considered its potential revision by agreement of the parties. Neither in any of the addenda nor in the settlement agreements that followed was such tipping fee adjusted. That is to say, Lajun continued accepting said fee despite the fact that it requested its revision. Except for the ASDN, which could use the Duquesa Landfill free of charge, the tipping fee revision was to be negotiated with the other municipalities of Gran Santo Domingo. When Nagelo and Wilkison acquired Lajun shares, said fees were already considered insufficient. It is noteworthy that, while the agreements with the different municipalities acknowledged that the tipping fees were below the operating cost, Lajun accepted them.³⁶
32. According to the concession agreement, in the event of non-payment of the fees, Lajun could resort to ordinary courts. It did not use them. Lajun could also unilaterally rescind the agreements.³⁷ It did not do that either. Although the agreements with the municipalities had expired, both parties continued acting as if an automatic renewal had been triggered. Instead, Lajun adopted a series of measures that were clearly contrary to the contractual agreements.

³⁴ C-5.

³⁵ Transcript, January 24, 2022, p. 143: 20-22, and p. 171: 6-7. Assertion uncontested by Claimant.

³⁶ For instance, the contract with the Municipality of Pantoja: “11. Cost of services and adjustment thereof. The MUNICIPALITY acknowledges that the operating costs of DUQUESA range between USD 6.5 and USD 13.55 per ton of solid waste and, currently, the MUNICIPALITY is not paying for the services. 11.1. In view of the previous acknowledgment and in order to contribute to the proper technical, financial and environmental operation of Duquesa, the MUNICIPALITY accepts to pay LAJUN a monthly amount of FIFTY-FIVE THOUSAND PESOS AND 00/100 (DOP 55,000.00) for the service of reception of the MUNICIPALITY’s waste in Duquesa. Moreover, the MUNICIPALITY agrees that the aforementioned amount shall be paid as from February 1, 2009. 11.2 The Parties agree that, on an annual basis, the Urban Sanitation Division jointly with LAJUN shall assess the operating costs of Duquesa, and that the parties shall proceed to make the necessary adjustments to the fee payable for the service rendered by LAJUN to the MUNICIPALITY, so as to guarantee the sustainability of Duquesa’s operations. Additionally, the MUNICIPALITY acknowledges that LAJUN may request the assessment of the operating costs of Duquesa and the subsequent adjustment thereof provided that there has been an increase; if the operating costs of Duquesa exceed the amount of USD 8.00 per ton, the cost of the monthly service shall be increased prior agreement on the rate of increase between the parties.” (C-18). [Prof. Kohen’s Translation]

³⁷ For example, Art. 30 of the agreement with the National District acknowledged Lajun’s right to unilaterally rescind the agreement, “nevertheless, given the Public Order nature of the Recollection and Final Disposal of Solid Waste Service, this decision shall be reported to the ADN in writing at least six months in advance, for the purpose of finding alternative solutions, notwithstanding the fact that, upon expiration of that term, and in the event that the ADN has no alternative place, any such term may be extended” (C-17). [Prof. Kohen’s Translation]

On January 18, 2017, Lajun unilaterally decided to increase the tipping fee to USD 8.14 per ton.³⁸ As the municipalities concerned had not made the payment requested, on February 13, 2017, Lajun wrote to them again proposing discussion of a payment schedule “and, thus, preventing a health catastrophe from affecting their municipality.”³⁹ A note of March 2, 2017, from Lajun to the Municipality of Santo Domingo Oeste is explicit in terms of the threat of what would happen next: “There is no need for the population to bear the brunt of the carelessness or neglect of those of us who are called upon to protect it from undesirable waste accumulation on the streets giving rise to plagues and diseases, or from lines of dump trucks due to slowness or inability to discharge the waste in our landfill.”⁴⁰ [Prof. Kohen’s Translation]

33. Indeed, Lajun first proceeded to unilaterally limit the landfill’s access hours and close it on weekends between March 16 and April 20, 2017, and then, to close it completely for trucks coming from the Municipalities of Santo Domingo Oeste, Alcarrizos and Pantoja. In July 2017, Lajun proceeded to restrict access hours even more.⁴¹ These are clearly unilateral measures that Lajun could not adopt and are, thus, violations of its contractual obligations. As a result of such decisions, there was considerable accumulation of waste on the streets and of parked trucks full of waste that could not be discharged. It was against this background that the complaint for breach seeking termination of the concession agreement by the ASDN (July 19, 2017) and the environmental and health emergency declaration by the Ministries of Environment and Health (July 21, 2017) took place.⁴²

34. The key question in the instant matter is whether the termination of the concession agreement and the subsequent judicial declaration of nullification of the concession were conducted lawfully. The ASDN’s complaint for breach of the agreement of July 19, 2017, and the Report on the status of environmental compliance of the Duquesa Landfill by the Ministry of Environment of April 12, 2017, are conclusive as regards contractual and environmental breaches by Lajun.⁴³ There is no evidence on record that any such assertions are false; rather, the opposite is true. The aforementioned “factual pattern” or “scenario,” Lajun’s contractual breaches announced even before they occurred, places liability for the situation on the

³⁸ Notes from Lajun of January 18, 2017, to the municipalities of the National District, Santo Domingo Oeste, Pantoja and Los Alcarrizos (C-68).

³⁹ Notes from Lajun of February 13, 2017, to the same municipalities (C-71).

⁴⁰ Note from Lajun of March 2, 2017, to the Municipality of Santo Domingo Oeste (C-72).

⁴¹ Counter-Memorial on the Merits (Respondent), paras. 217-219; Rejoinder on the Merits (Respondent), paras. 171-188; Statement of Sócrates Pérez, para. 27.

⁴² Environmental and Health Emergency Declaration of the Province of Santo Domingo and the National District of July 21, 2017 (R-37).

⁴³ C-9 and R-133, respectively.

Dominican company in which Claimant says to have his investment through four different companies. Lajun's agreements with the municipalities choose Dominican law as applicable law, as well as the jurisdiction of Dominican courts. The administrative decisions were subjected to judicial assessment. Nothing on the record evidences a kind of collusion among Respondent's administrative and judicial bodies. On the contrary, they prove the independence of the judicial branch, which, on several occasions, did not follow executive bodies' propositions. It can be asserted that Respondent, through the relevant body, the ASDN, showed a great deal of patience and willingness to try to cure Lajun's difficulties. Instead of this, the Tribunal sees this attitude as inconsistent, because Respondent subsequently proceeded to rescind the agreement vis-à-vis Lajun's breaches.

35. The truth is that the alleged investor agreed to make his alleged investment although he knew, or should have known, that the fees applied to the municipalities were not sufficient to guarantee a return on his investment and that the Duquesa Landfill was far from being in its best operational conditions. Respondent's own claim about its expectation of construction of a WTE plant shows great ignorance of existing legal requirements and the factual possibility of implementing such a project.
36. There is no dispute that Respondent abode by Dominican law and that its actions were in accordance with such law, which is the law applicable to the contractual relationship. Purporting, as the majority does, that, through such "factual matrix," there was indirect expropriation or unfair and inequitable treatment is an abuse, both from a linguistic and a legal standpoint.
37. The Final Award fails to examine Lajun's behavior after the execution of the second settlement agreement of May 24, 2017. The situation of the landfill once again under Lajun's control did not change, but actually worsened in the face of a new cut in its operation hours in the month of July.
38. The Final Award fails to examine the real content of the thirty-day period that the ASDN's Notice of Breach gave Lajun on July 19, 2017. Lajun was to pay its debts and, during such period, cure the list of breaches under penalty of institution of contract termination proceedings. That itself constitutes an acknowledgement of breaches on the part of Lajun. All that pursuant to the Concession Agreement and its 2014 Addenda, as well as Dominican laws. The fact that, eight days before expiration of the thirty-day period, the State filed an action before the Superior Administrative Court in order to seek *nullification* of the agreement is not at

all contradictory. *Rescission* and *nullification* of a contract are two completely different issues. The Final Award seems to confuse them and finds in that action eight days before expiration of the thirty-day period a purported breach that is particularly “revealing.”⁴⁴

39. Then, it is important to examine the issue of the nullification action regarding the concession agreement. Two NGOs, not the State, initiated the nullification action. On February 19, 2014, Fundación Justicia y Transparencia and Alianza Dominicana Contra la Corrupción each filed a complaint before the General Directorate of Public Contracts, a decentralized body of the Central Administration of the State, regarding the legality of the contract between the ASDN and Lajun. Both the ASDN and Lajun raised their defenses and requested that such complaints be dismissed. This actually shows that the ASDN had no animosity against Lajun and no intention to dispossess such company. The General Directorate of Public Contracts partially admitted the complaints (as regards the respect of Dominican Public Bidding procedures) and referred them to the competent courts.⁴⁵ The majority also gets lost in the issue of determining whether the ASDN “confirmed” the validity of the concession agreement every time it relied thereupon.⁴⁶ It is obvious that the parties to the agreement acted as if it were in force and effect before any other body attempted to declare it null and void.
40. The same may be said about the Land and the irregularities existing as to the acquisition and registration thereof, as well as the subsequent nullification of the transaction, which was recognized by the purchaser that sold it to Nagelo and Wilkison.⁴⁷
41. The majority’s decision that there was an “indirect creeping expropriation” is, thus, widely unsatisfactory.⁴⁸ Just as the majority rapidly finds that there was an expropriation, it also easily concludes that the conditions required by the Treaty for the expropriation to be lawful have not been met, since there was obviously no compensation.
42. The foregoing analysis of the legal and “factual matrix” also leads me to dissent from my colleagues as to what they regard as a breach of the obligation to accord fair and equitable treatment and of the “umbrella” clause.

⁴⁴ Final Award, para. 359.

⁴⁵ R-17.

⁴⁶ Final Award, para. 385.

⁴⁷ R-153.

⁴⁸ Final Award, para. 360.

IV. THE MAJORITY DECIDES THAT THERE WAS NO SITUATION AFFECTING NATIONAL SECURITY

43. On July 21, 2017, the Ministry of Environment and the Ministry of Public Health declared the environmental and health emergency at the Duquesa Landfill “due to the health problems caused and the imminent risk as a result of the improper management of solid waste.”⁴⁹ [Tribunal’s Translation] Respondent deems applicable Article XVII(2) of the Treaty, which provides that “[t]his Agreement shall not preclude the application by either Party of measures necessary for the protection of its own national security interests.”⁵⁰
44. I strongly disagree with how the majority interprets and applies (or, rather, fails to apply) such provision, as regards both “security” and the “national” scope thereof. As I stated in the introduction to this dissenting opinion, the Final Award confuses the protection of national security interests and the state of necessity.⁵¹ Today, that national security includes the health of the population and the environment is out of discussion. It suffices to recall the measures recently adopted by all States concerning the entry, movement, confinement and exit of people in their territories during the Covid-19 pandemic.
45. Claimant asserted that the Dominican Republic failed to declare a state of emergency, as the Constitution mandates. The majority accepts this consideration as a key element to its reasoning that Respondent failed to use the remedy of declaration of a state of exception allowed by its Constitution.⁵² However, the declaration of a state of emergency (or whatever it may be called under the different constitutions) is not the only way in which States can face situations concerning their national security. The majority “finds that Respondent has failed to prove that the situation in question, despite posing a very serious health and environmental situation that called for urgent measures, actually constituted a state of emergency associated with the impairment of national security.”⁵³
46. The Tribunal believes, nevertheless, that, in the instant case, there is a “serious health and environmental crisis,” but that “it has not been proven that such a crisis had a national scope

⁴⁹ R-37 or C-149, Environmental and Health Emergency Declaration of the Province of Santo Domingo and the National District, dated July 21, 2017.

⁵⁰ R-1.

⁵¹ *Infra*, para. 4.

⁵² Final Award, para. 260.

⁵³ Final Award, para. 248.

or impact.”⁵⁴ The Final Award does not consider that the situation in Santo Domingo had a national scope, as a consequence of which “national” security could not be invoked. According to my colleagues: “the situation invoked as a reason for the declaration was confined to a limited portion of the national territory and to a populated area, which, although relatively large, was also limited. A national emergency has to affect the general population to such an extent that it takes on such importance that the entire nation must respond, allocate resources, take impact measures, or be prepared to absorb the consequences of such an emergency.”⁵⁵ This assertion, which is unusual *per se* as its authors bestow upon themselves the right to generally decide the scope of a situation affecting national security,⁵⁶ ignores the fact that the situation concerns the capital of the Republic, where more than forty per cent of the total population of the country lives, and that Duquesa was the only landfill in such area.

47. The majority awards Claimant compensation in the amount of USD 43.590.090.

V. CONCLUSIONS

48. For the foregoing reasons, I consider that the Final Award has serious defects and, therefore, I feel compelled to issue a negative vote. In addition, there are other elements that warrant this dissenting opinion. The totally unbalanced way of assessing the Parties’ good or bad faith, which follows from a comparison between the limited analysis of how Claimant purportedly made the investment and the assertion whereby Respondent, after creating expectations in Lajun, took “a series of actions on all fronts” in order to deprive it of its investment, is regrettable.⁵⁷

49. The majority carries out a sort of psychological analysis of the State’s actions. Even though the majority opines that Respondent did not act in a discriminatory fashion, it considers that Respondent’s real objective was just to deprive Claimant of his investment, dismissing the reasons invoked, such as the concession being awarded in violation of the Law, Lajun’s breach of its contractual obligations, or the environmental and health crisis, which Respondent relies upon. According to the Final Award, “[t]he Tribunal notes that it is not persuaded that the current circumstances in the landfill could be used to show that the State’s actions served a

⁵⁴ Final Award, para. 251.

⁵⁵ Final Award, para. 254.

⁵⁶ Were the authors to be believed, a State could not invoke “national” security reasons if another State occupies only a part of its territory without any intention of going any further...

⁵⁷ Final Award, para. 359.

public purpose. What is apparent from the factual scenario, is that the State took a series of actions aimed at actually excluding Claimant from the operation of the investment. .”⁵⁸

50. If the Final Award were to be described in one word, it could be said to be an “indirect” Final Award: the investor is “indirect,” the method of financing the investment is “indirect,” and the expropriation is “indirect.” And I might add that the way in which the majority is persuaded by Claimants’ allegations is also very “indirect.”

51. Aside from the particular situation of this case, I would like to make one last comment. In times when States and international organizations make arduous efforts to guarantee the transparency of flows of money and, thus, of both national and foreign investments -especially the latter-, and when efforts to prevent money laundering and tax fraud lead public and private bodies to increasingly demand clear and transparent transactions, the reading of the Final Award will puzzle more than one. The same can be said about the efforts of States and both governmental and non-governmental international organizations to foster a stricter environmental protection. This Final Award will certainly not contribute to favoring a positive reading of the practice of investment tribunals, in times when the system is subject to widespread criticism, as well as revision attempts and efforts.

[signed]

Professor Marcelo G. Kohen
Date: 09.08.2023

⁵⁸ Final Award, para. 363.