INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ADDITIONAL FACILITY

SARGEANT PETROLEUM, LLC

Claimant

-against-

THE DOMINICAN REPUBLIC

Respondent

(ICSID Case No. ARB(AF)/22/1)

CLAIMANT'S MEMORIAL

Dated: 20 April 2023

O'MELVENY & MYERS LLP

Times Square Tower
7 Times Square
New York, New York 10036-6537
Telephone: +1 212 326 2000
Facsimile: +1 212 326 2061

19th Floor
100 Bishopsgate
London EC2N 4AG, United Kingdom
Telephone: +44 20 7088 0000
Facsimile: +44 20 7088 0001

400 South Hope Street
18th Floor
Los Angeles, California 90071-2899
Telephone: +1 213 430 6000
Facsimile: +1 213 430 6407

TABLE OF CONTENTS

INITIAL MEMORIAL OF CLAIMANT SARGEANT PETROLEUM, LLC

I. PRELIMINARY STATEMENT

1. The DR-CAFTA exists to ensure that companies can freely invest in other party states without the risk that the host government will one day decide to push them out in favor of local competitors. Yet that is exactly what has happened here.

2. For nearly 30 years, Sargeant's founders—and, for over 20 years, Sargeant itself—invested and operated in the Dominican Republic. For most of that time, the relationship has been extremely beneficial for both Sargeant and the Dominican people. Sargeant and its founders helped introduce AC-30 (a specialized type of asphalt cement used as a component in hot mix asphalt for paving roads) to the Dominican Republic, modernized the country's AC-30 supply and distribution processes, and ensured that Dominican contractors had reliable access to AC-30 at a fair price. Sargeant's operations and pricing were so exemplary that after a public tender the Dominican Republic's Ministry of Public Works and Communications ("MOPC")[1] signed contracts with Sargeant under which it would store and handle hundreds of millions of gallons of AC-30, and also sell AC-30 directly to the MOPC at the MOPC's option.

3. In order to provide its high level of service to the MOPC and the Dominican people, Sargeant, a U.S. company, invested heavily in its Dominican operations. Not only did Sargeant invest by signing contracts with the MOPC, but it also leased dock space, purchased land, rented sophisticated asphalt barges, and retrofitted defunct industrial space—all at considerable cost.

4. Despite Sargeant's exemplary record of service and its considerable domestic investments, however, the MOPC has recently engaged in a concerted effort to starve Sargeant of capital and squeeze it out of the Dominican asphalt market. Those illegal efforts began the moment that the administration of President Luis Abinader, the Dominican Republic's current president, came to power. Not only has the MOPC refused to pay Sargeant what it (under prior administrations) already recognized was owed under the parties' contracts, but it has also exercised its option to order AC-30 directly from Sargeant (which Sargeant then had to import), only to never pick up the product or pay for it.

[1] However, at some point before 2013, the MOPC was previously known as the Secretariat of State of Public Works and Communications ("SEOPC") and the title given to the person in charge of it was "Secretary" instead of "Minister." Because the facts discussed in this Memorial cover some time periods when the agency was known as the SEOPC, and other time periods where it was known as the MOPC, for clarity this Memorial uniformly refers to the agency as the "MOPC," and the individual in charge of it as a "Minister," even if the actual terminology at the time in question would have been "SEOPC" or "Secretary."

5. Meanwhile, the MOPC has made payments to Dominican asphalt suppliers while claiming that it has no money to pay Sargeant and has held Sargeant's AC-30 in limbo. MOPC has also abandoned transparent, public tenders—a process in which Sargeant excels due to its efficient operations—in favor of simply awarding AC-30 contracts to inexperienced, politically-connected, Dominican companies instead.

6. Sargeant has repeatedly tried to reconcile these issues with the MOPC, asking the MOPC to honor its contracts, pay what it owes, and open the AC-30 market beyond politically-connected companies. Those efforts have failed. Accordingly, Sargeant has been left with no option but to bring this action—seeking to enforce the DR-CAFTA's protections to right the very wrongs it was enacted to prevent.

II. FACTUAL BACKGROUND AND EVENTS GIVING RISE TO SARGEANT'S CLAIMS

7. Since at least 2020, the Dominican Republic, through its MOPC, has engaged in a series of orchestrated actions to deprive Sargeant of the cashflow necessary to operate its business and drive it out of the Dominican asphalt market in favor of Dominican-owned companies. The Dominican Republic has taken these deliberate illegal steps even though Sargeant has operated there for over 25 years with an exemplary record, and even though the Dominican-owned companies that are now being treated more favorably—some of which are state-owned—charge the Dominican government higher prices for the same product. Sargeant has made repeated attempts, contacting multiple government offices, in an effort to amicably resolve this issue. Those efforts have been met with deflections, stalling, and silence. Accordingly, Sargeant has commenced this arbitration to defend its rights and obtain compensation for its damages.

A. Sargeant and Its Founders Enter the Dominican Republic's Asphalt Industry

8. Sargeant's founders and co-owners/co-managers, Mustafa Abu Naba'a ("Mr. Abu Naba'a") and Harry Sargeant III ("Mr. Sargeant"), have been working in the Dominican asphalt industry since 1995. At that time, Mr. Sargeant's father's company, a Florida company named Sargeant Marine Ltd. ("Sargeant Marine Florida"), had won a public tender from the MOPC for the supply and storage of AC-30 for the Duarte Highway project in the Dominican Republic.[2]

9. Mr. Abu Naba'a and Mr. Sargeant led Sargeant Marine Florida's efforts on the Duarte Highway project, which was completed in 1997.[3]

[2] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 8.
[3] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 9.

10. In February 1998, the MOPC's new Minister, Diandino Peña, contacted Mr. Abu Naba'a and informed him that because Sargeant Marine Florida had done such an exemplary job on the Duarte Highway project, he wanted it to continue providing AC-30 services in the Dominican Republic.[4]

11. Mr. Sargeant's father was not interested in continuing to provide AC-30 services in the Dominican Republic, so in 1998 Mr. Sargeant and Mr. Abu Naba'a created a Bahamian company called Sargeant Marine Ltd. ("Sargeant Marine Bahamas") to continue providing AC-30 services to the Dominican market. Mr. Sargeant and Mr. Abu Naba'a own Sargeant Marine Bahamas equally. Mr. Sargeant and his family members oversee Sargeant Marine Bahamas's logistics operations remotely from their offices in Florida and Texas, while Mr. Abu Naba'a has always managed Sargeant Marine Bahamas's on-the-ground activities from the Dominican Republic.[5]

12. On July 3, 2002, the MOPC issued a new public tender, requesting bids to store, transport, and handle AC-30 being imported from Venezuela and Mexico. Wanting to participate in the bidding process through an American company—which they felt would be better able to invoke the assistance of the American government if needed—Mr. Sargeant and Mr. Abu Naba'a formed Sargeant Petroleum, LLC ("Sargeant") on July 31, 2002. Sargeant was formed in the State of Florida, United States, and later converted into a Texas company. On July 31, 2022, Sargeant also registered as a foreign company with the Dominican Republic's Chamber of Commerce and Production.[6]

13. Like with Sargeant Marine Bahamas, Mr. Sargeant and Mr. Abu Naba'a co-own Sargeant equally. Mr. Sargeant and his family members oversee Sargeant's logistics operations remotely from their offices in Florida and Texas, while Mr. Abu Naba'a has always managed Sargeant's on-the-ground activities from the Dominican Republic.[7]

14. Later in 2002, the "Sargeant Petroleum Consortium," which included Sargeant, won the MOPC's public tender to store, transport, and handle AC-30 being imported from Venezuela and Mexico. That victory was later formalized in a contract between the MOPC and Sargeant on February 26, 2003 (the "2003 Contract"), which is discussed in more detail in Section II.D.i below.[8]

[4] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 11.
[5] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 12.
[6] *See* Witness Statement of Mustafa Abu Naba'a, at ¶¶ 14-15.
[7] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 16.
[8] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 18.

B. Sargeant and Its Founders Modernize the Dominican Republic's Asphalt Industry

15. Before Mr. Sargeant and Mr. Abu Naba'a began working in the Dominican asphalt industry in 1995, Dominican contractors used AC-20, a soft asphalt cement that was not well suited to the country's climate and roads. Mr. Sargeant's and Mr. Abu Naba'a's work, through Sargeant Marine Florida, helped Dominican contractors working on government road projects transition from AC-20 to AC-30, which was better suited to the Dominican climate and allowed the government to pave roads with less material. AC-30 was soon adopted for use across the Dominican Republic.[9]

16. Mr. Sargeant's and Mr. Abu Naba'a's work also helped improve truck tanker dispatch and asphalt supply. Before 1995, the Dominican Republic was only capable of storing and handling enough asphalt for nine trucks per day, and asphalt supplies were often cut off for weeks at a time. But once Mr. Sargeant and Mr. Abu Naba'a became involved, both issues greatly improved: the Dominican Republic received a consistent supply of AC-30, and the MOPC's Duarte Highway project alone received more than 33 trucks per day. By April 2016, Sargeant's Dominican operations alone were capable of dispatching up to 62 trucks per day and supplying more than 7 million gallons of AC-30 per month.[10]

17. Through Sargeant Marine Florida, Mr. Sargeant and Mr. Abu Naba'a also introduced new recycling and mixing practices that improved the quality, strength, and long-term performance of Dominican asphalt. In mid-2015, Sargeant imported the first PG 76-10 (a performance-grade bitumen) into the Dominican Republic, where it was used on three separate projects.[11]

18. Not only did Mr. Sargeant and Mr. Abu Naba'a—through Sargeant Marine Florida, Sargeant Marine Bahamas, and Sargeant—contribute knowledge of the asphalt industry, superior product, and state-of-the-art equipment to the Dominican Republic, but contractors specifically requested to work with their companies because of their reliability, efficiency, optimal location in the Port of Haina, and ability to provide excellent customer service by staying open late and occasionally opening on weekends to accommodate last-minute AC-30 pick-ups.[12]

19. Through Sargeant Marine Florida, Sargeant Marine Bahamas, and Sargeant, Mr. Sargeant and Mr. Abu Naba'a helped develop the Dominican asphalt industry in other ways too. In 1999, the Dominican government underwrote a $25 million loan with the Venezuelan Investment Fund to acquire AC-30, and asked Sargeant

[9] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 19.
[10] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 20.
[11] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 21.
[12] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 22.

Marine Bahamas—which, along with Sargeant Marine Florida, handled worldwide transportation for 85% of all of Venezuela's asphalt cement—to transport and store that product.[13]

20. Additionally, in 2002, Mr. Sargeant and Mr. Abu Naba'a—aware of the Dominican Republic's shortage of funds—worked with the Export-Import Bank of the United States to finance $50 million in US-origin asphalt cement for the Dominican Republic, under terms very favorable to the Dominican Republic. Because such U.S.-financed agreements require the use of Jones Act-compliant (American) vessels, other transporters would normally upcharge foreign countries for use of their ships. But Mr. Sargeant and Mr. Abu Naba'a did not take advantage, and continued to provide transport to the Dominican Republic, using American ships, without price increases.[14]

21. Finally, Sargeant Marine Florida, Sargeant Marine Bahamas, and Sargeant have provided the majority of the transport and storage services to the Dominican Republic under the Petrocaribe bilateral agreement, bringing these benefits to the Dominican Republic.[15]

22. As of present day, Sargeant Marine Florida, Sargeant Marine Bahamas, Sargeant, and their affiliates have imported and distributed more than 240 million gallons of AC-30 in the Dominican Republic.[16]

C. Sargeant's Investments in the Dominican Republic

23. To bring these and other benefits to the Dominican Republic, Sargeant has made considerable, long-term investments in its capacity and physical infrastructure there.[17]

24. Between 1995 and 2010, Sargeant Marine Florida, Sargeant Marine Bahamas, and Sargeant stored and handled AC-30 on Dock No. 3 in the Port of Haina (one of the main ports of entry to the Dominican Republic), with the permission of the Dominican Port Authority. On February 19, 2010, Sargeant entered into a long-term lease with the Dominican Port Authority for exclusive use of Dock No. 3 (the "Dock Lease"). Under the Dock Lease, Sargeant pays the Dominican Port Authority approximately $18,000 dollars per year. On December 17, 2019, Sargeant and the Dominican Port Authority renewed the Dock Lease for an

[13] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 23.
[14] *Id.*
[15] *Id*.
[16] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 24.
[17] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 25.

additional 10-year period and increased the lease payment to approximately $37,000 per year, subject to annual increases.[18]

25. Sargeant also took over tanks in the Port area that had been previously used by the Sugar Council's sugar mill, which had fallen into disrepair. To transform those defunct sugar tanks into part of a functioning AC-30 storage and transport operation, Sargeant revamped three of the existing terminals to include the following:

    a. Terminal One: facilities for administrative offices, warehouses, crew's quarters, truck loading racks, a muster area, and an emulsion plant with two tanks, each with a 30,000 gallon capacity; a 10,000 gallon solution tank; a 35,000 gallon Kerosene tank; and a 27,000-gallon AC-30 tank.
    b. Terminal Two: two AC-30 tanks with storage capacities of 1,890,000 gallons and 1,974,000 gallons, respectively; a pump and boiler generation room; diesel tanks; and heat expansion oil tanks, each with an 800-gallon storage capacity.
    c. Terminal Three: two AC-30 tanks, with storage capacities of 995,400 and 1,092,000 gallons, respectively.
    d. The cost of Sargeant's revamped infrastructure in the three terminals is approximately $3,000,000.[19]

26. For the past 10 years, Sargeant has paid $205,000 a year to lease the storage tanks in Terminal 3, for an approximate total of $2,050,000 dollars.[20]

27. Sargeant sought and received permits and plans to build a fourth terminal for expanding its operation in the Dominican Republic. These permits and plans cost Sargeant approximately $500,000.[21]

28. To guarantee efficient dispatch of AC-30 in the event of any damage to its dock that might otherwise interrupt continuous and reliable service, on or around 2010 Sargeant also constructed a pipeline between its terminals and ran that pipeline to the public dock at Dock No. 4. Installing and constructing that pipeline cost approximately $200,000.[22]

29. Sargeant undertook all of the investments discussed above for the sole purpose of fulfilling its obligations under the 2003 and 2013 Contracts with the Dominican

[18] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 26.
[19] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 27(a)-(d).
[20] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 28.
[21] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 30.
[22] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 31.

Republic (discussed below), and continuing to serve the Dominican Republic after those Contracts were completed.[23]

D. Sargeant's Current Contracts with the MOPC Come into Force

30. As different administrations in the Dominican government came and went, Sargeant's business continued to grow.[24]

i. The 2003 Contract Is Signed and Implemented

31. Sargeant won the MOPC's 2002 public tender during the administration of President Mejia. As discussed above in Section II.A, Sargeant's victory in that 2002 tender was finalized on February 26, 2003, through the 2003 Contract.[25]

32. Under the 2003 Contract, Sargeant was to provide transport, storage, and handling of 28,650,000 gallons AC-30 per year for eight years (*i.e.*, a total of 229,200,000 gallons) for the MOPC.[26]

33. Under the 2003 Contract, the MOPC was responsible for arranging AC-30 supply. Once supply had been arranged, Sargeant was responsible for picking up the AC-30, bringing it back to the Dominican Republic, and storing it until Dominican contractors picked it up. At the time the 2003 Contract was signed, the MOPC's main sources of AC-30 were Venezuela (from Petroleos de Venezuela S.A. or PDVSA) and Mexico (under the San Jose Agreement).[27]

34. The 2003 Contract also included a monthly minimum storage amount, and a corresponding monthly minimum payment. The MOPC had to use at least 1,260,000 gallons of Sargeant's stored AC-30 each month. If it used less than that, it had to pay Sargeant for the full minimum amount, including any shortfall.[28]

35. The 2003 Contract also contained an arbitration provision, under which all controversies with respect to the 2003 Contract were to be resolved "in accordance with the rules of the International Chamber of Commerce based in Paris, France, under the laws of the State of Texas."[29]

36. Throughout the Mejia Administration, Sargeant and the MOPC continued working closely together under the 2003 Contract. That cooperation continued during the administration of President Mejia's successor, President Leonel Fernandez.

[23] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 32.
[24] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 34.
[25] *See* Witness Statement of Mustafa Abu Naba'a, at ¶¶ 35.
[26] *See* Witness Statement of Mustafa Abu Naba'a, at ¶¶ 35-36.
[27] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 36.
[28] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 37.
[29] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 38.

During the Mejia and Fernandez Administrations (*i.e.*, from February 2003 through August 14, 2012), Sargeant and the MOPC signed thirteen Addenda updating, revising, and extending the 2003 Contract.[30]

ii. **The 2013 Contract Is Signed**

37. After President Medina succeeded President Fernandez in 2012, Sargeant continued to work closely with the Dominican government.[31]

38. On August 21, 2012, Mr. Abu Naba'a met with Minister Gonzalo Castillo, the new Minister of the MOPC. Minister Castillo explained to him that the new government would not have funds until February of 2013, but he would like Sargeant to continue performing under the 2003 Contract. Minister Castillo promised to pay Sargeant in February 2013, assuring Mr. Abu Naba'a that the MOPC "would not spend money it did not have." Reassured by this promise, Sargeant continued to comply with the 2003 Contract until the MOPC's debt reached approximately $15 million.[32]

39. In approximately February 2013, the MOPC's Legal Counsel, Selma Mendez, spoke with Mr. Abu Naba'a. She explained that the MOPC had never registered the 2003 Contract with the General Controller. She proposed signing a new agreement that would replace the 2003 Contract, combine and simplify the 2003 Contract's various addenda by restating the parties' current obligations, and give the MOPC a new contract to register with the General Controller. Ms. Mendez was also adamant about removing the 2003 Contract's arbitration clause, on the ground that one of the government's new policies purportedly was that it would not enter into arbitration agreements. Ms. Mendez told Mr. Abu Naba'a that if Sargeant did not agree to enter into this new contract, the MOPC would not pay Sargeant money that it owed to Sargeant at the time. Accordingly, Sargeant felt compelled to agree to the MOPC's request.[33]

40. Sargeant signed this new contract with the MOPC (the "2013 Contract") on May 10, 2013. After the 2013 Contract was signed, the MOPC started paying its remaining debt to Sargeant.[34]

41. The 2013 Contract confirms that out of the 229,200,000 gallons of AC-30 for storage and handling covered under the 2003 Contract, 74,536,312.52 gallons remained. Accordingly, the 2013 Contract governed Sargeant's storage and handling of those 74,536,312.52 remaining gallons. Under the 2013 Contract, the MOPC agreed to pay Sargeant $0.75/gallon for storage, with no additional charge

[30] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 39.
[31] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 40.
[32] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 41.
[33] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 43.
[34] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 44.

for handling. The 2013 Contract states that it remains in force until the MOPC has used all 74,536,312.52 gallons of Sargeant's stored AC-30. Like under the 2003 Contract, the MOPC had to use at least 1.26 million gallons of Sargeant's stored AC-30 per month. If it did not meet that minimum, it still had to pay Sargeant in full, at $0.75 per gallon, as if it had.[35]

42. In addition, the 2013 Contract gave the MOPC the option to have Sargeant directly supply additional AC-30 at a to-be-agreed-upon cost of no more than $3.75 per gallon. That price was later agreed to be $3.50 per gallon, which was then reduced to $2.90 per gallon. This supply provision was entirely separate from the storage and handling aspects of the 2013 Contract. Accordingly, any AC-30 that the MOPC received from Sargeant pursuant to this optional supply provision did not count toward the MOPC's obligation to use 74,536,312.52 gallons of AC-30 from Sargeant's storage, or toward the MOPC's related 1.26 million gallon monthly storage use minimum. Thus, if the Dominican government did not have any AC-30 from other suppliers for Sargeant to store and handle, and decided to exercise its option to buy AC-30 from Sargeant instead, Sargeant was entitled to invoice the MOPC for the 1.26 million gallon monthly storage use minimum at $0.75 per gallon (*i.e.,* $945,000), *and also separately charge* the MOPC for whatever AC-30 it had ordered from Sargeant at $2.90 per gallon. However, as a courtesy, when the MOPC was purchasing a considerable amount of AC-30 from Sargeant, Sargeant would not charge the MOPC for its 1.26 million gallon monthly storage use minimum. Those 1.26 million gallons would simply remain part of the 2013 Contract's 74,536,312.52 gallon AC-30 storage use total, to be used by MOPC (or paid for as a storage use shortfall) at a later date.[36]

iii. The 2013 Contract is Implemented and the MOPC Incurs Debt Owed to Sargeant

43. For many years, Sargeant and the Dominican Republic had a mutually-beneficial working relationship under the 2013 Contract.[37]

44. In fact, on June 4, 2014, the MOPC sent a letter to Mr. Ibrahim Jahan Al-Kuwari, the Chief Enforcement Officer of WOQOD, in support of a bid by Sargeant's affiliates to store, transport, and supply of asphalt cement to Qatar. In that letter, the MOPC noted how the ideas and knowledge that Sargeant and its affiliates had provided to the Dominican Republic since winning the 2002 public tender "proved to be handy till today," explaining that their "logistical solutions . . . guarantee[d] continuous availability of products and daily dispatch" of AC-30. The MOPC also confirmed that, during peak demand, Sargeant was capable of dispatching "58 truckloads [of AC-30] in a single day" and "remain[ed] one of [the MOPC's] main

[35] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 45.
[36] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 46.
[37] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 48.

suppliers." Overall, the MOPC confirmed that it was "very satisfied with [Sargeant's] service and . . . believe[ed] that [Sargeant's] experience would be very beneficial" to Qatar.[38]

45. At some point in 2013, the Petrocaribe program, under which the Dominican Republic had been obtaining AC-30 from Venezuela, became defunct. As a result, the MOPC lost its main supplier providing AC-30 to Sargeant for the storage and handling aspects of the 2013 Contract. Also, as a result, the MOPC increased its orders for Sargeant to supply AC-30 through the 2013 Contract's optional supply provision.[39]

46. Beginning in 2014, the MOPC began running short of funds to pay Sargeant on time. To solve that problem, the MOPC opened lines of credit at Banco de Reservas. Through these lines of credit, Sargeant received payment from the bank, and then the MOPC could later repay the bank, plus the 9.5% interest that accrued, when it was able to.[40]

47. In early 2019, the MOPC stopped opening new lines of credit. As a result, it began to fall behind on its payments to Sargeant.[41]

48. In February 2019, Sargeant learned that the MOPC believed that it had completed the 2013 Contract's storage and handling component, and thus that the 2013 Contract had ended. To correct that misconception, Mr. Abu Naba'a met with the Director of Supervision and Financing of Public Works, a subgroup within the MOPC. Mr. Abu Naba'a explained that the 2013 Contract was not complete because the 74,536,312.52 gallons of AC-30 designated for storage and handling had not been fully consumed, and that 40,104,533.10 gallons of AC-30 designated for storage and handling remained under the 2013 Contract.[42]

49. On September 11, 2019, Mr. Abu Naba'a met with Minister Ramon Pepin, the head of the MOPC at the time, in his office. Minister Pepin told Mr. Abu Naba'a that the MOPC intended to open the market for the sale of AC-30 and wanted to find a way to amicably end the 2013 Contract. Mr. Abu Naba'a explained that, to do so, the MOPC would have to pay for the outstanding storage under the 2013 Contract, stop submitting purchase orders under the 2013 Contract's optional supply provision, and pay for the invoices related to the AC-30 Sargeant imported in response to the MOPC's prior purchase orders. As an alternative, Mr. Abu Naba'a offered to sell the remaining storage under the 2013 Contract to the MOPC under the optional supply provision at the discounted price of $2.40 per gallon. However,

[38] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 49.
[39] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 50.
[40] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 51-52.
[41] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 53.
[42] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 54.

Mr. Abu Naba'a told Minister Pepin that this offer was contingent on the MOPC opening the AC-30 market and purchasing all AC-30 through transparent, public tenders in the future.[43]

50. On or about November 2019, Mr. Abu Naba'a met again with Ms. Mendez, the MOPC's legal counsel. She asked that he sign an addendum to the 2013 Contract (the "Draft Addendum"). That Draft Addendum affirmed that 40,104,533.10 gallons of AC-30 storage and handling remained under 2013 Contract. It also affirmed that those 40,104,533.10 gallons were for storage and handling only, and were separate from any AC-30 that Sargeant provided under the 2013 Contract's optional supply provision. Through this Draft Addendum, the MOPC effectively conceded that the analysis in Sargeant's memorandum was correct.[44]

51. The Draft Addendum, however, also sought to combine the 2013 Contract's storage and handling provisions with its optional supply provision, such that Sargeant would conclude the 2013 Contract by directly supplying the remaining 40,104,533.10 gallons of AC-30. This would have been a significant modification to the existing arrangements under the 2013 Contract. Further, the Draft Addendum contained no guarantee that the MOPC would open the AC-30 market, which was a requirement of the deal that Mr. Abu Naba'a offered Minister Pepin. Mr. Abu Naba'a, therefore, told Ms. Mendez that Sargeant had no interest in signing a new contract with the MOPC because (1) its offer was contingent on the MOPC opening the AC-30 market and (2) the Dominican government had not honored the terms of the 2013 Contract (*i.e.,* the 2013 Contract).[45]

52. By the middle of November 2019, the MOPC's debt to Sargeant under the 2013 Contract had climbed to $82,627,963.22, reflecting both outstanding storage charges and additional charges for optionally-purchased AC-30.[46]

53. In December 2019, the MOPC opened two lines of credit in Sargeant's favor to pay its debts. In doing so, the MOPC certified that it owed Sargeant $45,035,067.82 and $16,643.903.19 in two letters dated November 11, 2019 and November 12, 2019, respectively. But even after those payments were made, the MOPC still remained in debt to Sargeant.[47]

54. In June and July of 2020, all of the Dominican Republic's other AC-30 companies stopped supplying AC-30 to the MOPC in anticipation of the new government coming to power in the next months and potentially refusing to pay any outstanding invoices. Sargeant, however, continued to import AC-30 into the Dominican

[43] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 55.
[44] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 56.
[45] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 57.
[46] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 58.
[47] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 59.

Republic in response to the MOPC's purchase orders, consistent with the terms of the 2013 Contract, so that it could keep a constant inventory of product ready to fulfill the MOPC's purchase orders. This included importing 5,729.296 metric tons of AC-30 in June 2020. Unlike the other AC-30 companies, Sargeant did not fear not being paid by the new government because it had experienced multiple changes in government over the course of its long commercial history in the Dominican Republic and was always paid by the MOPC following a new administration coming to power.[48]

55. On July 14, 2020, Mr. Abu Naba'a met with MOPC Minister Pepin at his MOPC office. Mr. Abu Naba'a explained his concerns about the MOPC's current debt under the 2013 Contract. Minister Pepin assured Mr. Abu Naba'a that the MOPC was "not going to leave anyone hooked," and requested that Sargeant continue providing services to the MOPC under the 2013 Contract despite the MOPC's current debts. Taking Minister Pepin at his word, and assured that the MOPC would eventually pay its debts to Sargeant, Sargeant continued providing the MOPC with normal services under the 2013 Contract.[49]

56. But despite Minister Pepin's assurances, the MOPC did not pay Sargeant as promised. In fact, at the same time that the MOPC was asking Sargeant to continue supplying AC-30 despite the MOPC's considerable debt, the MOPC was making large payments to other, Dominican, AC-30 suppliers that had abruptly stopped supplying AC-30 to the MOPC. Specifically, between July 10, 2020 and July 14, 2020—the same day that Mr. Abu Naba'a met with Minister Pepin—the MOPC made substantial payments to three Dominican AC-30 suppliers: Bluport Asphalt, Inversiones Titanio, and General Asphalt.[50]

57. On August 5, 2020, Sargeant sent a strongly worded letter to the MOPC stating that Sargeant had learned of the MOPC's "selective" payments to these Dominican suppliers, reciting the MOPC's breaches of the 2013 Contract, and explaining that the MOPC presently owed Sargeant $40,091,523.41.[51]

58. Following its August 5, 2020, letter, Sargeant received a $16 million payment toward its outstanding debt under the 2013 Contract.[52]

59. On August 11, 2020, the MOPC also approved additional payment orders, called "libramientos," to cover part of its remaining debt to Sargeant under the 2013 Contract. In total, the libramientos added up to $22,484,104.62, with the first libramiento (#7856-1) for $9,408,034.50, and the second libramiento (#7652) for

[48] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 60.
[49] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 61.
[50] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 62.
[51] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 63.
[52] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 64.

$13,076,070.12. Things seemed to be moving in the right direction. However, this situation deteriorated immediately when the new Abinader government came to power.[53]

E. The MOPC's Unlawful and Discriminatory Treatment Under the New Abinader Regime

60. President Luis Abinader is the current President of the Dominican Republic. He took office, succeeding former President Medina, on August 16, 2020, just five days after the libramientos were approved.[54]

61. Even though, under Dominican law, a libramiento is only supposed to be issued after all checks and audits have been conducted—meaning that, once issued, the libramiento is supposed to be paid in full without further review—neither of the libramientos has been paid. Payment has been stopped by the Abinader administration.[55]

62. In response to the non-payment of the libramientos, on August 28, 2020, Sargeant sent a letter to the new Minister of the MOPC, Deligne Ascencion. Sargeant's letter explained that the MOPC was failing to adhere to its financial obligations under the 2013 Contract, and had made payments to Dominican contractors instead of paying Sargeant what it was owed. Sargeant also noted that it had outstanding purchase orders from the MOPC for 4,530,678.88 gallons of AC-30.[56]

63. On September 9, 2020, Mr. Abu Naba'a met with Minister Ascencion in his office at the MOPC. During the meeting, Mr. Abu Naba'a and Minister Ascension discussed Sargeant's continued commercial relationship with the Dominican Republic. At the end of the meeting, Minister Ascension stated that Sargeant and the Dominican Republic were not just in a commercial relationship, but a "strategic partnership."[57]

64. Shortly afterwards, however, the MOPC stopped all optional purchases of AC-30 from Sargeant. Yet soon after stopping its AC-30 purchases, the MOPC reached out to Sargeant's financial assistant, Rosa Alfonseca, to ask how much inventory Sargeant still held. She explained that Sargeant had over 2.3 million gallons in inventory, and the MOPC told her to expect additional purchase orders.[58]

---

[53] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 65.
[54] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 67.
[55] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 66; *See* Expert Report of Laura Castellanos, at ¶ 47-49.
[56] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 69.
[57] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 70.
[58] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 71.

i. The MOPC's Contract with Dominican-Owned Inversiones Titanio

65. Even though Minister Ascencion had recently confirmed the MOPC's "strategic partnership" with Sargeant, and the MOPC knew Sargeant had millions of gallons of AC-30 for sale, on September 8, 2020 and September 28, 2020, the MOPC sent AC-30 purchase orders to Sargeant's competitor, the Dominican company Inversiones Titanio, for 381,816.96 gallons of AC-30 at $2.90 a gallon (the same price at which it could have purchased AC-30 from Sargeant under the 2013 Contract). Indeed, buying AC-30 from Inversiones Titanio instead of from cheaper, international sources effectively cost the MOPC $3.65/gallon—$2.90/gallon to Inversiones Titanio, and $0.75/gallon to Sargeant under the 2013 Contract for storage and handling capacity that was going unused. The MOPC was apparently prepared to pay more to other AC-30 suppliers in order to freeze Sargeant out of any further deals.[59]

ii. The MOPC's Contract with Dominican Government-Owned Refidomsa

66. On October 5, 2020 the MOPC signed another contract for the supply of AC-30—this time with Refidomsa, a private petroleum supplier in whom the Dominican Republic owns a majority stake, without a public tender. Under the contract, Refidomsa agreed to supply asphalt to the MOPC for $2.65/gallon. Considering the $0.75/gallon that the MOPC would then need to pay Sargeant under the 2013 Contract for storage and handling capacity that was going unused, the effective cost was actually $3.40/gallon.[60]

67. Because Refidomsa lacked product or infrastructure to support the contract it had just signed, it held its own tender by invitation to subcontract its obligations under the October 5 contract.[61]

68. On September 23, 2020, Refidomsa invited the Dominican Republic's three major asphalt suppliers—(1) Sargeant, (2) Bluport Asphalt, and (3) Inversiones Titanio—plus (4) P.A.C. de las Americas[62] and (5) Ichor Oil (two entities unknown in the asphalt business) to participate in a tender for supplying 6,300,000 gallons of AC-30 and storing the product for four months.[63]

---

[59] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 72.
[60] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 73.
[61] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 74.
[62] P.A.C de las Americas was started by a close friend of the Director of Refidomsa only four months before Refidomsa's September 23, 2020 tender by invitation. *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 74 n. 4.
[63] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 74.

69. Sargeant's bid in Refidomsa's tender was due on Monday, September 28, 2020. Because Thursday, September 24, 2020 was a holiday, Sargeant had only one business day, Friday September 25, 2020, to prepare its bid. Sargeant requested a one-day continuance to submit its bid, but Refidomsa rejected Sargeant's request.[64]

70. Sargeant continued diligently preparing its bid. As part of those preparations, Sargeant asked Refidomsa to provide routine industry information necessary for preparing the bid, such as how many trucks and gallons per day Refidomsa would need each month, when the contract would begin, and what Refidomsa's criteria were for evaluating bids. Refidomsa responded that it was unable to give Sargeant any more details. Refidomsa apparently did not want to give Sargeant a fair chance in the tender process.[65]

71. Because it appeared to Sargeant that Refidomsa had invited it to participate in the tender on a pretextual basis, Sargeant had one of its affiliates, Grupo Kyrat, purposely submit an offer on its behalf that was so low that it could not make any money—to supply AC-30 for $1.50/gallon by rounding down from the international market price, which was $1.58/gallon at the time. Yet despite this unbeatable bid, Refidomsa failed to even notify Grupo Kyrat about whether it won the tender.[66]

72. On approximately October 1, 2020, Sargeant learned that Ichor Oil, a Dominican company with no industry presence or experience, had won Refidomsa's tender. Ichor Oil (like Refidomsa) had never supplied AC-30 before, and had no AC-30 or any storage facilities in the Dominican Republic. Ichor Oil's bid had front-loaded profits, charging Refidomsa $2.09/gallon for the first 1,300,000 gallons of AC-30 (well above the market price), and then promising to charge Refidomsa $0.98/gallon (well below the market price) for the remaining 5,000,000 gallons. Given the front-loaded profits of Ichor Oil's bid, and the fact it was offering to sell most of the AC-30 for approximately 33% below market value, it was clear that Ichor Oil never intended to actually follow through on its offer.[67]

73. On October 5, 2020, Sargeant sent an email to Refidomsa, asking about the status of its own bid. Refidomsa did not respond, so Sargeant contacted it again—explaining that Sargeant knew that the winner of Refidomsa's tender was charging Refidomsa over $2.00 a gallon, which would cost Dominican taxpayers an additional $3.15 million compared to Grupo Kyrat's bid.[68]

---

[64] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 75.
[65] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 76.
[66] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 77.
[67] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 78.
[68] In actuality, this overage ended up costing more than $4.3 million beyond what Sargeant's affiliate, Grupo Kyrat, had bid; *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 79, n.5.

74. The story of what happened next with the Ichor Oil contract illustrates the depths to which the MOPC was willing to go in order to avoid using Sargeant's services. For the first three weeks of its subcontract with Refidomsa, Ichor Oil could not perform. That was because it was completely new to the asphalt industry, and had no way of obtaining AC-30.[69]

75. To solve the problem, Refidomsa itself had to help Ichor Oil obtain AC-30 in a very unconventional manner. In October 2020, there were over 3,000 metric tons (*i.e.,* over 800,000 gallons) of AC-30 sitting at Puerto de Boca Chica that had never been cleared by Customs and were deemed abandoned.[70]

76. On October 21, 2020, Minister Ascension sent a letter to the Director General of Customs, Eduardo Sanz. In that letter, he directed Sanz not to auction the 800,000 gallons of abandoned AC-30 sitting at Puerto de Boca Chica, and instead consign the AC-30 to the MOPC, so that it could purchase it from Refidomsa. The Bill of Lading attached to the MOPC's letter, which was executed just five days before, endorses the release of the AC-30 to Ichor Oil. Through this scheme, the MOPC gave the AC-30 directly to Ichor Oil, who then sold it to Refidomsa, who then sold it back to the MOPC. All that time, of course, the AC-30 was already the Dominican government's property because it had been abandoned, as recognized by Minister Pepin in his letter to Customs. This scheme resulted in the MOPC paying for AC-30 that was, legally, already owned by the Dominican government.[71]

77. Once this AC-30 had been used up, Ichor Oil was no longer able to perform under its subcontract with Refidomsa. At that point, Ichor Oil reached out to Mr. Abu Naba'a to ask if it could buy AC-30 from Sargeant to fulfill its remaining obligations under the contract with Refidomsa. Mr. Abu Naba'a quoted Ichor Oil the same price that Ichor Oil gave to Refidomsa. Even though that offer would have let Ichor Oil fulfill its obligations under the contract with Refidomsa, Ichor Oil rejected that offer because it would not have turned a profit.[72]

78. When Ichor Oil could not fulfill its remaining obligations under its contract with Refidomsa, Refidomsa issued another tender. That tender was won by P.A.C. de las Americas, the company started by a close friend of the Director of Refidomsa only a few months earlier, which charged $2.21/gallon (*i.e.,* $0.12/gallon more than

[69] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 80.
[70] Any imported AC-30 must be cleared by Customs. Under Dominican law, once a product has been abandoned at a port for more than six months, it automatically becomes the property of the Dominican government and may be sent to auction for sale, the proceeds of which belong to the Dominican people; *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 81.
[71] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 82.
[72] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 83.

the highest price point in Ichor Oil's bid in the original tender, and $0.71 more than Grupo Kyrat offered in the original tender).[73]

79. A little over a year later, Ichor Oil and its affiliate, General Asphalt, were indicted for administrative corruption.[74]

iii. The MOPC's Continued Non-Payment to Sargeant Under the 2013 Contract

80. On October 23, 2020, Sargeant sent another letter to the MOPC, noting that the MOPC owed $27,872,530.22 under the 2013 Contract. And, although the MOPC had stopped ordering additional AC-30 from Sargeant in August 2020, Sargeant informed the MOPC that 5,824,305.90 gallons from its previous purchase orders had not yet been collected. Those 5,824,305.90 gallons included the 5,728.296 metric tons Sargeant imported in June 2020 and part of an additional 1,784,028,54 gallons imported in March 2020 that the MOPC allowed Sargeant to import. None of those uncollected 5,824,305.90 gallons had been paid for, either.[75]

81. Nonetheless, the MOPC continued to issue payments to Dominican-owned AC-30 suppliers even though it was not paying Sargeant. For example, on November 5, 2020, the MOPC issued a payment for over $600,000 to Bluport Asphalt for AC-30 to settle debt incurred under the prior administration.[76]

82. Mr. Abu Naba'a continued to try and resolve the outstanding payment issues with the MOPC. On November 16, 2020, Vice Minister Roberto Herrera of the MOPC contacted Mr. Abu Naba'a and advised him that he had investigated the August 2020 libramientos, and was recommending that they be paid to Sargeant.[77]

83. On November 25, 2020, Vice Minister Herrera informed Mr. Abu Naba'a that the libramiento payments were "on their way." Vice Minister Herrera told Mr. Abu Naba'a that he had discussed the libramientos with the MOPC's legal advisor and finance director, both of whom said that the outcome "looked good." According to Vice Minister Herrera, the libramiento payments were being processed and would be made within the next month or so.[78]

84. Vice Minister Herrera later sent a memorandum to Minister Ascencion regarding the MOPC's 2013 Contract with Sargeant. In that memorandum, Vice Minister Herrera confirmed that the 2013 Contract was for the storage of AC-30, and that

[73] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 84.
[74] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 85.
[75] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 86.
[76] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 87.
[77] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 88.
[78] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 89.

40,104,533.10 gallons of AC-30 storage and handling remained to be used. He also advised Minister Ascencion that the MOPC should: (1) Buy the 2,336,275.62 gallons of AC-30 in Sargeant's inventory at the discounted price of $2.40 that I had previously offered; (2) honor the MOPC's obligation to use the 40,104,533.10 gallons of AC-30 storage remaining under the 2013 Contract; and (3) have a public tender for AC-30 on the international market, using Sargeant to store the imported AC-30 until the 2013 Contract had been exhausted. Vice Minister Herrera later told Mr. Abu Naba'a that he had submitted this memo to Minister Ascencion so Minister Ascencion "could not later allege that he did not know."[79]

85. On December 8, 2020, Ms. Jacqueline Almonte, who was in charge of the MOPC's Department of the Importation and Supply of Asphalt Products, sent a memorandum to Vice Minister Herrera. Her memorandum similarly acknowledged that there were still 40,104,533.10 gallons of AC-30 storage and handling remaining under the 2013 Contract, that the supply of AC-30 is optional under the 2013 Contract, and advised buying the 2,336,275.62 gallons of AC-30 that Sargeant currently had in storage and signing a new contract with Sargeant.[80]

86. On December 12, 2020, Vice Minister Herrera told Mr. Abu Naba'a that it would be best if he wrote a letter to the MOPC correcting two erroneous beliefs that certain individuals at the MOPC who worked under Abinader held: (1) that the gallons for storage and handling under the 2013 Contract were exhausted by the MOPC's prior purchased on AC-30 under the optional supply provision; and (2) that the MOPC did not need to pay Sargeant for any AC-30 obtained through the outstanding dispatch orders at issue because the 2013 Contract ended. Vice Minister Herrera also suggested that Mr. Abu Naba'a explain that there was "no ceiling" on the supply of AC-30 in the 2013 Contract, and therefore that the MOPC had to pay for the AC-30 that it had ordered from Sargeant under the 2013 Contract's optional supply provision. Vice Minister Herrera also reiterated that he agreed with Sargeant's interpretation of the 2013 Contract as separating gallons of AC-30 for storage and handling from those gallons of optionally-supplied AC-30.[81]

87. In early January 2021, Mr. Abu Naba'a called Minister Ascencion to wish him a Happy New Year. Vice Minister Herrera was in the room with Minister Ascencion when Mr. Abu Naba'a called. Minister Ascencion invited Mr. Abu Naba'a to come visit him in the Dominican Republic. Mr. Abu Naba'a told Minister Ascencion that

[79] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 90.
[80] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 91.
[81] In Sargeant's March 23, 2022 Request for Arbitration, it was noted that this comment by Minister Herrera was made at an in-person meeting on December 8, 2020 (Sargeant's Request for Arbitration at 10). As shown in the concurrently-filed Witness Statement of Mr. Abu Naba'a, this comment by Minister Herrera was actually made on or about December 2020 through a WhatsApp voice message; *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 92.

he was in Dubai, but would fly back to the Dominican Republic to meet him. Minister Ascencion told Mr. Abu Naba'a to call him when he arrived, so they could meet.[82]

88. Mr. Abu Naba'a arrived in the Dominican Republic on January 12, 2021, but Minister Ascencion would not answer his calls. Mr. Abu Naba'a contacted Vice Minister Herrera to find out what was going on, noting that he had come all the way to the Dominican Republic to meet with Minister Ascencion. Vice Minister Herrera told Mr. Abu Naba'a to come meet Minister Ascencion in the afternoon on January 13, 2021. However, Minister Ascencion never arrived for the meeting. Vice Minister Herrera told Mr. Abu Naba'a that he was insisting that Minister Ascencion meet him, and that he would contact Minister Ascencion and follow up. When Mr. Abu Naba'a did not hear from Vice Minister Herrera, he messaged Vice Minister Herrera on January 17, 2021, asking if the Minister would meet him the following day. It was agreed that Mr. Abu Naba'a would meet Minister Ascencion at 11:30 am on January 18, 2021. Mr. Abu Naba'a arrived on time, but Minister Ascencion never came to the meeting.[83]

89. On March 8, 2021, Sargeant sent a letter to Minister Ascencion. In that letter, Sargeant explained that the Dominican Republic's current debt under the 2013 Contract had climbed to $32,597,530.22. It also explained that Sargeant had sent the MOPC numerous letters, none of which had been answered, and that Minister Ascencion had personally asked Mr. Abu Naba'a to come back to Dominican Republic to meet but left him waiting more than a week for a meeting that never happened.[84]

90. On May 17, 2021, Mr. Abu Naba'a asked Vice Minister Herrera about the status of the libramientos because they were not paid as promised. Vice Minister Herrera told Mr. Abu Naba'a that the issue was sent to "the powers above" (*i.e.*, the Presidential palace) and was, therefore, out of his hands.[85]

91. As discussed above, at the end of June 2020, Sargeant was forced to import 5,728.296 metric tons of AC-30 to fulfill its obligations under one the MOPC's last purchase orders. But the MOPC never paid for the AC-30, did not collect it, and even instructed Customs not to clear the AC-30 so that Sargeant could not finalize the import process. After 14 months of the AC-30 being stored in Sargeant's Port of Haina tanks without being cleared for sale by Customs, Sargeant sent two letters to the MOPC asking if it would allow Sargeant to re-export the asphalt. The MOPC never responded.[86]

[82] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 93.
[83] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 94.
[84] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 95.
[85] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 96.
[86] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 97.

92. On August 9, 2021, Mr. Abu Naba'a sent a letter to the Director General of Customs, Eduardo Sanz Lovaton, and asked if he could help Sargeant re-export the 5,728.296 metric tons of AC-30 that Customs (at the MOPC's behest) would not clear through customs for distribution in the Dominican Republic. As later confirmed by from Mr. Lovaton, Customs initially approved the re-export, but the MOPC stopped it.[87]

93. On or around August 27, 2021, the Dominican government acquired the remaining ownership interest in Refidomsa, making it a wholly state-owned company. As noted in a contemporaneous press release, the Dominican government's plan to purchase the remaining shares was decided just a few days after President Abinader assumed power, as one of his administration's main measures to be adopted in the sector. It is clear that the Abinader administration came to power with a plan to restructure the Dominican oil and asphalt industry, and its behavior towards Sargeant should be viewed in this context.

94. On September 1, 2021, Mr. Sargeant sent a final letter to Dr. Antoliano Peralta, legal counsel to the President. In this letter, Mr. Sargeant explained that the MOPC was continuing to purchase AC-30 from Refidomsa at a higher price than it would cost if the MOPC imported AC-30 through an international tender and stored it using Sargeant's facilities as contemplated under the 2013 Contract. He also mentioned that, as of that date, the Dominican Republic's debt to Sargeant totaled $71,866,521.80, reflecting (1) $38,267,530.22 currently owed to Sargeant under the 2013 Contract, (2) $16,890,487.10 for the Dominican Republic's outstanding pending purchase orders for AC-30 that was imported but never dispatched or paid for, and (3) $16,708,504.50 for the 22,278,006 gallons remaining to be stored under the 2013 Contract.[88]

95. On September 3, 2023, Sargeant came to an agreement with Customs that allowed Sargeant to re-export its 5,728.296 metric tons of AC-30. But the MOPC would not allow Customs to move forward with the arrangement.[89]

96. Instead, on November 14, 2022, Sargeant sold 2,157,581.20 gallons of AC-30 in its inventory to Bluport Asphalt for $1.75 per gallon. This sale resulted in a loss of $2,481,218.38 to Sargeant, compared to the $2.90/gallon that the MOPC was supposed to pay. Once Bluport Asphalt bought the AC-30, it was able to sell the product within the Dominican Republic straight from Sargeant's tanks at the Port of Haina.[90]

[87] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 98.
[88] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 99.
[89] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 100.
[90] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 101.

97. Despite the MOPC's repeated non-payment, Sargeant continued to provide the MOPC with invoices for monthly storage minimums in accordance with the 2013 Contract. And the MOPC never challenged any of these invoices based on the fact that the 2013 Contract was over. In fact, the only time the MOPC challenged an invoice by Sargeant was on May 28, 2020, during the COVID-19 pandemic. On that occasion, the Director General of Supervision and Financing of Works, Martina Cabrera Serrano, sent Mr. Abu Naba'a a letter explaining that the MOPC could not fulfill its obligation to pay the monthly storage minimum for the month of April because the Dominican Republic was in a State of Emergency due to the pandemic.[91]

iv. **The MOPC's Treaty Violations Continue Through Present Day**

98. Sargeant sent its final invoice under the 2013 Contract, for the 74,536,312.52 gallons of AC-30 storage and handling remaining under the 2013 Contract (*i.e.*, $643,504.95), to the MOPC on February 17, 2023. That invoice reflected the end of the 2013 Contract because it charged the MOPC for use of the final gallons out of the agreed-upon 74,536,312.52 gallons of AC-30 storage and handling stated in the 2013 Contract.[92]

99. As of today, Sargeant's invoices remain unpaid and the Dominican Republic has not resolved its outstanding debt. Including Sargeant's final invoice, as of March 2023, the MOPC owed Sargeant $54,976,035.20 under the 2013 Contract.[93]

100. On December 10, 2021, Sargeant filed its Notice of Intent to Submit a Claim to Arbitration with ICSID, beginning these proceedings. On March 23, 2022, Sargeant filed its Application for Access & Request for Arbitration. ICSID approved Sargeant's Application for Access on May 17, 2022.[94]

101. On July 15, 2022, Sargeant sent a letter to Victor Bizono Haza, the Minister of Industry and Commerce, explaining that it wished to resolve this dispute through meditation but that its requests to do so went unanswered by the MOPC In this letter, Sargeant noted that, although it was pursuing arbitration, it remained open to resolving this dispute amicably and stated that its representative were willing to meet with the MOPC in the Dominican Republic on July 21, 2022, to do so.[95]

102. On July 25, 2022—approximately two months after ICSID approved Sargeant's Application for Access and four days after the MOPC acknowledged in a July 21, 2022 letter that it would like to resolve this dispute amicably—the Dominican

[91] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 102.
[92] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 103.
[93] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 104.
[94] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 105.
[95] *See* Sargeant's July 15, 2022, Letter (attached as **C-0001-ENG**)

Republic filed suit against Sargeant, and Mr. Abu Naba'a personally, in its administrative courts.[96] Apparently seeking to punish Sargeant, and Mr. Abu Naba'a, for pursuing this case with ICSID, the Dominican Republic's suit seeks to undo the 2003 and 2013 Contracts and force Sargeant and Mr. Abu Naba'a, jointly and severally, to pay the Dominican Republic over $177 million. That groundless lawsuit's only apparent purpose is to intimidate Sargeant and Mr. Abu Naba'a into no longer pursuing this action.[97]

III. APPLICABLE LAW

103. The terms of the DR-CAFTA govern Sargeant's claims in this arbitration.

104. By virtue of the relevant provisions of the DR-CAFTA, the Parties have agreed that the law to be applied in this arbitration is a combination of international law and the law of the Dominican Republic, together with such other laws as are made applicable by the 'more favorable treatment' provisions in the DR-CAFTA.

105. The key treaty provisions and other rules relevant to the selection of the applicable law are set out below.

A. Applicable Law under the DR-CAFTA

106. This arbitration takes place pursuant to the provisions of the DR-CAFTA. The DR-CAFTA is therefore the basic text governing the arbitration. Accordingly, any particular rules set out in the DR-CAFTA (such as the prohibition against expropriation, or the requirement to afford a minimum standard of treatment) are applicable to the dispute which has been submitted to arbitration.

107. Moreover, those particular rules, being contained in a treaty, have to be applied within the framework of international law as a whole. This includes the rules of international law concerning the interpretation of treaties (which are of particular importance since they determine the meaning to be given to those provisions of the DR-CAFTA which are directly relevant to the circumstances which have arisen).

108. These rules of interpretation are set out in the Vienna Convention on the Law of Treaties, and in particular Article 31 of that Convention.[98] The crucial provision of Article 31 is paragraph 1, which reads:

[96] *See* **MAN-0027-SPA.**
[97] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 107.
[98] Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31 (attached as **CL-0001-ENG**),

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

109. The basic element in paragraph 1 of the rule laid down in Article 31 is that of the "*ordinary meaning*" of the terms used. The context in which the terms are used, and the object and purpose of the treaty, are important secondary elements which may qualify the ordinary meaning, which remains the primary test.

110. The DR-CAFTA also contains provisions which are relevant to the question of the applicable law. These are Articles 1.2,[99] 10.22,[100] 10.3 and 10.4.

111. The objectives of the DR-CAFTA are set out in Article 1.2, and include:

"1(c) promote conditions of fair competition in the free trade area"

112. Article 1.2(2) of the DR-CAFTA then reiterates:

"*The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*"

113. Article 10.22 of the DR-CAFTA addresses the issue of the governing law to be applied in any arbitration brought pursuant to its terms, and states that the Tribunal shall decide the issues in dispute "*in accordance with this Agreement* [*i.e.*, DR-CAFTA] *and applicable rules of international law*".

114. Article 10.22(2) provides that the Tribunal shall apply:

"(a) the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree; or
(b) if the rules of law have not been specified or otherwise agreed:
(i) the law of the respondent, including its rules on the conflict of laws; and
(ii) such rules of international law as may be applicable."

115. Footnote 7 to Article 10.22 clarifies that the "*law of the respondent*" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

[99] Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), Ch. 1, Mar. 1, 2006 (attached as **CL-0002-ENG**)
[100] Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), Ch. 10, Mar. 1, 2006 (attached as **CL-0003-ENG**)

116. Articles 10.3 (National Treatment) and 10.4 (Most-Favoured-Nation Treatment) of the DR-CAFTA import into the treatment to be accorded to covered investments made by U.S. investors any additional protections made available to investors of the Dominican Republic or of any third State. In particular, protections available under bilateral investment treaties, to which the Dominican Republic is a party, also apply to the extent they are more favorable to protected investors than the treatment afforded under the DR-CAFTA.

B. Applicable law under the ICSID Additional Facility Rules

117. The Parties have also agreed that the Tribunal must look to what the ICSID Additional Facility Arbitration Rules[101] say about the applicable law. The relevant Rule is Article 54(1), which states:

> *"(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable."*

118. By virtue of the first sentence of Article 54(1) and for the reasons set out above, the Parties have expressly or by necessary implication designated certain rules of international law as applicable to the substance of the dispute.

119. Moreover, at the heart of the present dispute is the 2013 Contract. Clause 1.5 of the 2013 Contract provides that all aspects related to the validity, interpretation and/or development of the contract "*shall be governed by the laws of the Dominican Republic.*"

120. The Parties have thus required the Tribunal, under Article 54(1) of the ICSID Additional Facility Rules, to apply the rules of law designated as applicable to the substance of the dispute, which includes clause 1.5 of the 2013 Contract identifying the law of the Dominican Republic as the law to be applied to the 2013 Contract.

C. Conclusion

121. It is accordingly clear that by virtue of the terms of the DR-CAFTA, read where appropriate with the terms of the ICSID Additional Facility Rules, the principal laws to be applied by the Tribunal in this arbitration are international law and the law of the Dominican Republic.

---

[101] International Centre for Settle of Investment Disputes (ICSID) Additional Facility Arbitration Rules, ICSID/11/Rev. 1, Art. 54 (Jan. 2003) (hereinafter "Additional Facility Rules") (attached as **CL-0004-ENG**)

IV. THE TRIBUNAL'S JURISDICTION UNDER THE DR-CAFTA

122. The Tribunal has jurisdiction under the DR-CAFTA to adjudicate each of Sargeant's claims against the Dominican Republic.

123. Article 10.1 of the DR-CAFTA sets forth the jurisdictional requirements for asserting violations of the substantive protections afforded by Section A of Chapter 10 of the DR-CAFTA. All of these jurisdictional requirements are satisfied in this case.

124. First, the treaty has at all relevant times been in force and, by its terms, applies to investments made both before and after its coming into force. Second, the conduct of the MOPC and other emanations of, or agents for, the Dominican Republic about which Sargeant complains constitute 'measures adopted or maintained by' the Dominican Republic. Third, Sargeant qualifies as an 'investor of another Party' within the meaning of Article 10.1(a) of the DR-CAFTA. Fourth, the dispute involves 'covered investments' within the meaning of Article 10.1(b) of the DR CAFTA. Finally, Article 10.17 of the DR-CAFTA contains the written consent of the Dominican Republic to submit investment disputes arising under Chapter 10 of the DR-CAFTA to arbitration.

125. In addition, Article 10.16(1)(a)(i)(C) of the DR-CAFTA permits Sargeant to commence arbitration proceedings where the Dominican Republic has breached an obligation under 'an investment agreement'. The 2013 Contract is an investment agreement, as defined by Article 28 of the DR-CAFTA. The MOPC, whose actions are attributable to the Dominican Republic under international law, has breached various terms of the 2013 Contract. Sargeant is consequently entitled to commence arbitration proceedings pursuant to Articles 10.16 and 10.17 of the DR CAFTA seeking a financial remedy for breaches of the 2013 Contract.

126. Sargeant has sought in vain, for many months, to negotiate an amicable resolution of this dispute through consultation and negotiation, as required by Article 10.15. But its efforts have been ignored by the Dominican Republic. Sargeant has also fulfilled all of the conditions stipulated by Article 10.16 of the DR CAFTA prior to the commencement of this arbitration.

A. The Treaty has at all relevant times been in force

127. The DR-CAFTA came into force between the United Sates and the Dominican Republic on 1 March 2007, and remains in full force and effect. Article 2.1[102] (Definitions of General Application) includes a definition of 'covered investment'

[102] Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), Ch. 2, Mar. 1, 2006 (attached as **CL-0005-ENG**)

that applies to investments in existence as of the date of entry into force of the treaty, or established, acquired, or expanded thereafter.

128. By signing the DR-CAFTA in August 2004, the Dominican Republic consented to be bound by the terms of the treaty and the arbitration provisions in Section B of Chapter 10.

129. The Parties' dispute concerns the injury to Sargeant's covered investment in the 2013 Contract arising from breaches by the Dominican Republic of its obligations under Articles 10.3, 10.4, 10.5 and 10.7 of the DR-CAFTA, as well as breaches of the 2013 Contract itself, which is an investment agreement. These breaches are the result of expropriatory, arbitrary and unlawful actions by the government of the Dominican Republic and by its agency MOPC, which commenced in 2019 and continue to the present day. As such, the dispute falls squarely within the temporal ambit of the treaty.

B. Unlawful conduct constitutes 'measures adopted or maintained by' the Dominican Republic

130. Article 10.1 of the DR-CAFTA defines the scope and coverage of the treaty protections afforded by Chapter 10, which relates to 'Investment'. It first stipulates that the chapter applies to 'measures adopted or maintained' by a Party to the treaty.[103]

131. As set out in paragraphs 1-102 above, Sargeant invokes a series of actions and omissions by the Dominican Republic itself, or by the MOPC, as measures that breached the substantive protections afforded by Chapter 10 of the DR-CAFTA. These measures include:

- Refusing to pay Sargeant amounts owed under the 2013 Contract;
- Refusing to take and pay for volumes of AC-30 which had been ordered from Sargeant; and
- Excluding Sargeant from the Dominican AC-30 market in favor of local competition.

132. To the extent these were measures adopted or maintained by the MOPC, these may be attributed to the Dominican Republic by applying well recognized principles of attribution under international law. These principles of attribution are addressed in more detail in Chapter V herein.

[103] Chapter 2 of the DR-CAFTA (General Definitions) provides that 'measures' includes any law, regulation, procedure, requirement, or practice.

133. Accordingly, all of the actions and omissions giving rise to Sargeant's claims based upon violations of the substantive protections afforded by Chapter 10 of the DR-CAFTA are all measures adopted or maintained by the Dominican Republic, a Party to the treaty.

C. Sargeant Is an 'Investor of Another Party'

134. Article 10.1(a) of the DR-CAFTA provides that Chapter 10 applies to disputes between a Party and 'investors of another Party'. The Dominican Republic and the United States are both Parties to the DR-CAFTA.

135. An 'investor' of a Party is defined in Article 10.28 to include an enterprise of a Party that attempts to make, is making, or has made, an investment in the territory of another Party.

136. Sargeant was at all relevant times, and continues to be, an enterprise of the State of Texas within the United States. It has made significant and numerous investments in the territory of the Dominican Republic (as to which see paragraphs 137-139 below), and is therefore an investor of another Party to the DR-CAFTA within the meaning of Article 10.1(a).

D. Sargeant's investments qualify as 'covered investments'

137. Article 10.1(b) of the DR-CAFTA provides that Chapter 10 applies to 'covered investments', which is defined in Article 2.1 of the treaty (Definitions of general application). Article 2.1 states:

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

138. Article 10.28 states:

> "***investment*** *means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*
>
> *(a) an enterprise;*
>
> *(b) shares, stock, and other forms of equity participation in an enterprise;*
>
> *(c) bonds, debentures, other debt instruments, and loans;*

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, pro duction, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges"

139. As set out in paragraphs 23-29 above, Sargeant has made the following investments in the Dominican Republic which were in existence as of the date of entry into force of the DR-CAFTA or established, acquired, or expanded thereafter:

- The 2013 Contract itself;
- The Dock Lease;
- The investments in Terminals 1, 2 and 3 referred to at paragraph 25 above;
- The lease of storage tanks referred to at paragraph 26 above;
- Investments in the permits and plans referred to at paragraph 27 above;
- The pipeline referred to at paragraph 28 above; and
- The purchase orders issued under the 2013 Contract which have not yet been paid for, together with product inventory acquired by Sargeant under the 2013 Contract.

E. The Dominican Republic has consented to arbitrate disputes with U.S. investors relating to their investments in the Dominican Republic

140. The Dominican Republic has consented to arbitration proceedings under the ICSID Additional Facility Rules. Article 10.17 of the DR-CAFTA (entitled 'Consent of each Party to Arbitration') provides:

> "*1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.*"

141. Article 10.17(2) of the DR-CAFTA states that such consent, together with the submission of a claim to arbitration, shall satisfy the requirements of Chapter II of

the ICSID Additional Facility Rules for written consent of the parties to the dispute, and Article II of the New York Convention[104] for an 'agreement in writing'.

142. Article 10.18 of the DR-CAFTA (entitled 'Conditions and Limitations on Consent of Each Party') then sets out certain limits on the consent and agreement to arbitrate provided for in the previous Article 10.17. None of the specified limitations apply in this case, and all conditions have been satisfied.

143. In particular, all of the wrongful acts allegedly committed by the Dominican Republic took place within the three-year period prior to the arbitration proceedings being commenced, and there is therefore no question of the limitation period specified in Article 10.18(1) applying to any of the claims.

144. Sargeant has also complied with the requirements of Article 10.18(2), since it has, in its Application for Access and Request for Arbitration dated March 23, 2022, consented in writing to arbitration in accordance with the procedures set out in the DR-CAFTA, and submitted a written waiver as required by Article 10.18(2)(b).

F. The Parties have been unable to resolve their dispute amicably through negotiations

145. Article 10.15 of the DR-CAFTA requires the parties initially to seek to resolve any dispute through consultation and negotiation. Sargeant has tried, for many months, to settle this dispute by negotiation with the Dominican Republic, but has been either ignored or its efforts rebutted.

146. In particular, Sargeant refers to and relies upon the correspondence sent to the MOPC regarding unpaid amounts due under the 2013 Contract, the meetings with representatives of the MOPC and the government of the Dominican Republic, and its July 15, 2022 letter as evidence of its attempts to seek an amicable resolution of this dispute.

147. Sargeant has made genuine and good faith efforts to resolve this dispute, and has more than satisfied the requirements of Article 10.15 of the DR-CAFTA.

G. The Tribunal has jurisdiction to determine a claim that the Dominican Republic has breached the 2013 Contract

148. In addition to the claims advanced against the Dominican Republic based upon violations of the substantive protections afforded by the treaty, Sargeant is also bringing a claim in these arbitration proceedings based upon breaches of the 2013 Contract. The jurisdictional basis for these contractual claims is provided by Article

[104] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Comm'n on Int'l Trade Law, Art. II (1958) (attached as **CL-0006-ENG**)

10.16(1)(a)(i)(C) of the DR-CAFTA, which permits a claimant to commence arbitration proceedings under the DR-CAFTA for a claim that the respondent has breached 'an investment agreement.'

149. The term 'investment agreement' is defined in Article 10.28, which provides:

> "***investment agreement*** *means a written agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights:*
>
> *(a) with respect to natural resources or other assets that a national authority controls;*
>
> *and*
>
> *(b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.*"

150. The 2013 Contract is a written agreement that took effect after the date of entry into force of the DR-CAFTA. It is a contract made between MOPC, a national authority of the Dominican Republic, and Sargeant, a United States company and therefore an investor of another Party.

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

152. Sargeant has relied upon the 2013 Contract in establishing or acquiring covered investments other than the 2013 Contract itself, consisting of all of those investments described at paragraphs 23-29 above which were made after the 2013 Contract came into force.

153. Consequently, the 2013 Contract is an 'investment agreement' as defined by Article 10.28 of the DR-CAFTA, and Sargeant is entitled to commence arbitration proceedings pursuant to Article 10.16(1)(a)(i)(C) for a claim that the Dominican Republic (or a national authority of the Dominican Republic) has breached the 2013 Contract.

154. The same Tribunal constituted to determine Sargeant's claims that the Dominican Republic has violated the investment protection provisions in Chapter 10 of the DR-CAFTA also has jurisdiction to determine Sargeant's contractual claims against the Dominican Republic (specifically, its MOPC) under the 2013 Contract.

V. THE DOMINICAN REPUBLIC'S RESPONSIBILITY FOR THE CONDUCT OF OTHER ORGANS AND ENTITIES

155. It goes without saying that the Dominican Republic is responsible for its own actions in violation of the DR-CAFTA. In addition, actions taken by the MOPC are legally attributable to the Dominican Republic under applicable international law.

156. Under international law, the actions and omissions of government instrumentalities are actions and omissions of the State. The principle of attribution has been affirmed by the International Law Commission, the International Court of Justice, and both early and recent arbitral tribunals. Indeed, this principle has been so widely accepted that it is now considered beyond dispute.

157. Article 4(1) of the Articles on Responsibility of States for Internationally Wrongful Acts (2001) ("Articles on State Responsibility") provide:

> "*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*" [105]

158. The Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Commentaries") explain that the "*reference to a State organ…is intended in the most general sense*" and "*covers all the individual or collective entities which make up the organization of the State and act on its behalf*". [106] The Commentaries also state that:

> "*In internal law, it is common for the 'State' to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal sub-division. The State as a subject of international law is held responsible for the conduct of all the organs,*

[105] Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "Articles on State Responsibility"), Y.B. Int'l L. Comm'n, vol. II, Art. 4(1) (2001) (attached as **CL-0007-ENG**)

[106] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Y.B. Int'l L. Comm'n, vol. II, at 39-40 (2001) (hereinafter "Commentaries") (attached as **CL-0008-ENG**)

instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under internal law." (emphasis added)[107]

159. It is similarly well-established that a breach by a State instrumentality of a contract between the instrumentality and a foreign investor is attributable to the State. The Commentaries provide in that regard that "*the entry into or breach of a contract by a State organ is … an act of the State for the purposes of Article 4.*"[108] The Commentaries further elaborate that contractual breaches by an organ of the State, under certain circumstances, also "*amount to an internationally wrongful act*", and note that "[i]*t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as 'acta iure gestionis.'*" [109]

160. Finally, there is no doubt that the principle of state responsibility extends to the actions and omissions of State-owned and State-controlled entities. Article 8 of the Articles on State Responsibility states that:

> "*The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying on the conduct.*"

161. The Commentaries expressly note that the actions and omissions of State-owned and State-controlled entities have been imputed to the State when "*the State was using its ownership interest in, or control of, a corporation specifically in order to achieve a particular result...*"[110] This is true no matter what label the State uses to describe that entity. Article 5 of the Articles on State Responsibility provides:

> "*The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of State under international law, provided the person or entity is acting in that capacity in the particular instance.*"

162. Applying these principles here, it is clear that the Dominican Republic is responsible for the actions of MOPC. The MOPC is a national authority of the Dominican Republic, and under the Constitution of the Dominican Republic is an organ whose acts are imputed to the State as a legal person.[111] The acts and

[107] Id. at 39.
[108] Id. at 41.
[109] *Id*.
[110] *Id*. at 48
[111] *See* Expert Report of Laura Castellanos, at ¶ 51-53.

omissions of the MOPC are therefore to be attributed to the Dominican Republic under both customary international law and the laws of the Dominican Republic.

VI. THE DOMINICAN REPUBLIC HAS VIOLATED THE DR-CAFTA BY INDIRECTLY EXPROPRIATING SARGEANT'S RIGHTS UNDER THE 2013 CONTRACT IN BREACH OF ARTICLE 10.7

163. Article 10.7 of the DR-CAFTA prohibits a Party from expropriating or nationalizing covered investments except under certain defined circumstances. Specifically, Article 10.7 provides that:

> "*No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and*
>
> *(d) in accordance with due process of law and Article 10.5.*"

164. Thus, a Party that takes measures equivalent to expropriation or nationalization of a covered investment violates Article 10.7 unless the expropriation satisfies all of the four conditions listed in Article 10.7 (a), (b), (c) and (d). The Dominican Republic has satisfied none of these conditions, and has consequently violated Article 10.7.

A. The Dominican Republic's Actions Constitute Measures Equivalent to Expropriation Under the DR-CAFTA

165. "Expropriation" has been defined in international texts and jurisprudence to include any unjustified interference with an investor's property that deprives the investor of the use or value of that property.

166. Article 10 of the Draft Convention on the International Responsibility of States for Injuries to Aliens, for example, defines expropriation as "*any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the*

property within a reasonable period of time after the inception of such interference."[112]

167. In *Metalclad Corp. v. United Mexican States* ("Metalclad"), an ICSID tribunal defined expropriation to include any "*covert or 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*." (emphasis added) [113]

168. More recently, in *Quiborex S.A. v. Bolivia* ("Quiborex"), the Tribunal stated as follows:

> "*It is undisputed that expropriation does not need refer solely to the overt taking of a physical asset or formal transfer of title (direct expropriation). Measures other than actual takings or formal transfers of title may amount to indirect expropriation or measures tantamount to expropriation. This is expressly recognized in Article VI of the BIT and has been accepted by numerous tribunals.*
>
> *For an indirect expropriation to exist, it is generally accepted that the State measure must have the effect of substantially depriving the investor of the economic value of its investment. … Similarly, according to the first Occidental tribunal, the question is whether there has been a "substantial deprivation" of "the use of reasonably expected economic benefit of the investment."* (emphasis added) [114]

[112] *See* Louis Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens*, 55 AM. J. INT'L L. 545, 553-554 (1961) (citing the Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 10(3)) (attached as **CL-0009-ENG**).

[113] *See Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶103 (Aug. 30, 2000) (attached as **CL-0010-ENG**). The NAFTA expropriation provision in issue was similar to the expropriation provision in the DR-CAFTA. Art. 1110 of NAFTA provides: "No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment." *See also Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award ¶ 78 (Feb. 17, 2000) (attached as **CL-0011-ENG**) (holding that expropriation occurs when "governmental interference has deprived the owner of his rights or has made those rights *practically useless*." (emphasis added); *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran*, Case No. 24, Award No. ITL 32-24-1, Interlocutory Award, (Dec. 19, 1983) 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (attached as **CL-0012-ENG**) ("[M]easures taken by a state can interfere with property rights to such an extent that these rights are *rendered so useless* that they must be deemed to have been expropriated." (emphasis added).

[114] *Quiborex S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, ¶¶ 237-38 (Sept. 16, 2015) (hereinafter "*Quiborex*") (attached as **CL-0013-ENG**)

169. It is therefore clear that a deprivation or taking of property may occur through interference by a State in the use of that property, or with the enjoyment of its economic benefits, even where legal title to the property is not affected.[115]

170. The Dominican Republic's actions present a clear case of indirect expropriation by measures equivalent to expropriation. Through a series of actions, the Dominican Republic has stripped Sargeant of the reasonably expected economic benefits of the 2013 Contract, which is a covered investment under the DR-CAFTA.

171. The Dominican Republic's expropriatory actions include:
    a. The MOPC's failure to pay Sargeant amounts owed under the 2013 Contract;
    b. The MOPC's failure to the delivery of and pay for volumes of AC-30 which it had ordered from Sargeant; and
    c. The deliberate exclusion of Sargeant from the Dominican AC-30 market in favour of local competition.

172. The Dominican Republic's acts and omissions set out above must be considered both individually and collectively. In *Vivendi II* the Tribunal stated that "[i*t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can.*" [116] Thus, a measure or series of measures can amount to a taking, even where the individual steps in the process do not.

173. In the present case, the Dominican Republic has targeted Sargeant and Sargeant's contractual rights, treating them unfavorably and in a discriminatory manner, over a prolonged period of time. Even if the Tribunal should find that some of these acts or omissions were not, when taken in isolation, unlawful, it should also apply a collective analysis to determine whether the course of conduct as a whole has resulted in a violation of Article 10.7 of the DR-CAFTA.

[115] *See Tippets v. TAMS-AFFA Consulting Engineers of Iran*, Case No. 7, Award No. 141-7-2, at 11 (June 29, 1984), 6 Iran-U.S. Cl. Trib. Rep. 219, 225-26 (attached as **CL-0014-ENG**) ("While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.")

[116] *Compania de Aquas del Aconquija S.A. and Vivendi Universal S.A. V. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.31 (Aug. 20, 2017) (attached as **CL-0015-ENG**).

B. The Dominican Republic has failed to compensate Sargeant for its Expropriated Investments

174. Article 10.7(c) of the DR-CAFTA prohibits a Party from expropriating covered investments unless such expropriation is accompanied by payment of prompt, adequate, and effective compensation.

175. In violation of the DR-CAFTA, the Dominican Republic's expropriatory actions have resulted in a very significant loss of the value of Sargeant's business in the Dominican Republic, for which absolutely no compensation has been paid, provided or offered.

176. Since it is unarguable that the Dominican Republic has failed to comply with Article 10.7(c), compliance with Articles 10.7(a), (b), and (d) becomes academic. Should Sargeant establish that the Dominican Republic's conduct amounts to an indirect expropriation, it follows that Article 10.7 of the DR-CAFTA has been breached.

VII. THE DOMINICAN REPUBLIC HAS VIOLATED THE DR-CAFTA BY FAILING TO ACCORD SARGEANT TREATMENT NO LESS FAVORABLE THAN IT ACCORDS ITS OWN INVESTORS, IN BREACH OF ARTICLE 10.3

177. Article 10.3 of the DR-CAFTA requires a Party to treat investors and covered investments made by nationals of another Party in the same manner as it treats local investors and their investments in the host Party's territory.

178. Article 10.3 provides as follows:

> "1. *Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*"

A. The Dominican Republic has treated Sargeant and its covered investments less favorably than the Dominican Republic's own investors and their investments

179. Numerous tribunals have confirmed that the applicable standard for a claim of violation of a national treatment provision in a treaty is an objective standard.[117] The test focuses on a measure's practical effect rather than on the Dominican Republic's intent to discriminate.

180. The same authorities confirm that it is sufficient to show discrimination against an investor who happens to be a foreigner, and there is no requirement that the differential treatment be motivated by its foreign nationality. The sole facts of (1) discrimination, and (2) foreign nationality, are sufficient to establish less favorable treatment for the purposes of most rational treatment treaty obligations. This was also the approach adopted by the ICSID Tribunal in *Bayindir v. Pakistan*.[118]

181. State conduct is discriminatory if similar cases are treated differently without reasonable justification.[119] The Dominican Republic has discriminated against Sargeant and Sargeant's covered investments in the following ways:

    a. Refusing to pay Sargeant amounts owed under the 2013 Contract;
    b. Refusing to take delivery and pay for volumes of AC-30 which had been ordered from Sargeant; and
    c. Excluding Sargeant from the Dominican AC-30 market in favour of local competition.

182. Comparable companies to Sargeant in the Dominican Republic include Refidomsa, Blupart Asphalt, Inversiones Titario and General Asphalt. These are all competitors of Sargeant and provide the Dominican Republic with AC-30 and related services, but have not been the victims of any of the measures that have been applied to Sargeant. Sargeant alone has been targeted for discriminatory and unfair treatment, and accordingly Respondent has violated Article 10.3 of the DR-CAFTA.

---

[117] *See SD Myers, Inc v. Government of Canada*, UNCITRAL Arbitration, Partial Award, ¶ 238-57 (Nov. 13, 2000) (attached as **CL-0016-ENG**); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF)/99/1, Award, ¶ 154-188 (Dec. 16, 2002) (attached as **CL-0017-ENG**); *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, ¶ 185 (July 1, 2004) (attached as **CL-0018-ENG**); *Ronald Lauder v. Czech Republic*, Ad Hoc Arbitration (UNCITRAL Rules), Final Award, ¶ 292 (Sept. 3, 2001) (attached as **CL-0019-ENG**).

[118] *Bayindir Instant Turizm Ticaret v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 390 (Aug. 27, 2009) (attached as **CL-0020-ENG**)

[119] *See Saluka Investments B.V. v. Czech Republic*, Ad Hoc Arbitration (UNCITRAL Rules), Partial Award, ¶ 313 (Mar. 17, 2006) (attached as **CL-0021-ENG**). This three-pronged test was later approved and applied by the ICSID tribunal in *Quiborax S.A. supra* note 114, at ¶ 247.

VIII. THE DOMINICAN REPUBLIC HAS VIOLATED THE DR-CAFTA BY FAILING TO ACCORD SARGEANT'S COVERED INVESTMENTS TREATMENT IN ACCORDANCE WITH CUSTOMARY INTERNATIONAL LAW, IN BREACH OF ARTICLE 10.5

183. Article 10.5 of the DR-CAFTA requires a Party to accord to covered investments treatment in accordance with customary international law.

184. Article 10.5 provides as follows:

> "*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.*"

185. The Parties have, in Annex 10-B of the DR-CAFTA, confirmed their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5, results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

A. The Dominican Republic has behaved unfairly and inequitably towards Sargeant's Covered Investments

186. An analysis of the content of the customary international law minimum standard of treatment frequently starts with a reference to the US-Mexico Claims Commission's decision in *Neer*. There, the Claims Commission defined the standard in the following terms:

> "[T]*he 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*."[120]

187. A number of treaty tribunals have since set out the content of the customary international law minimum standard of treatment. Some of those decisions have questioned the relevance and applicability of the *Neer* standard, whilst other decisions have applied it but with a number of important qualifications. Whichever approach has been adopted, there is a clear consensus that the minimum standard

[120] *L.F.H. Neer and Pauline E. Neer (United States) v. Mexico,* UNRIAA Award, Vol. 4, 60, 61-62 (Oct. 15, 1926) (attached as **CL-0022-ENG**)

of treatment is an evolutionary notion, which now affords much greater protection to investors than that contemplated in the *Neer* decision.[121]

188. In more recent times the content of the obligation has been set out by the Tribunal in *Waste Management v. Mexico*, as follows:

> "[T]*he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*
>
> *Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case*." [122]

189. The statement by the Tribunal in *Waste Management* set out above has been adopted and applied by a number of subsequent tribunals and may be regarded as uncontroversial. There is therefore no longer a requirement for the investor to demonstrate "shocking" or "outrageous" behavior, and it is sufficient to prove that conduct by the host state is "arbitrary", "grossly unfair", "unjust", or "idiosyncratic". The *Waste Management* formulation recognizes the requirement for tribunals to be sensitive to the facts of each case, and to recognize that injustice in either procedures or outcomes can constitute a breach.[123]

190. Whilst a failure to respect an investor's legitimate expectations in and of itself does not amount to a breach of the standard, it is an element that a tribunal should consider when assessing whether other components of the standard have been breached.[124]

---

[121] *See* Gabrielle Kaufmann-Kohler, *Interpretive Powers of the Free Trade Commission – Necessary Safety Valve or Infringement of the Rule of Law,* Fifteen Years of NAFTA Chapter 11 Arbitration 175, 184 (2011) (attached as **CL-0023-ENG**) ("Essentially, most tribunals have considered that the minimum standard of treatment is an evolutionary notion, which applies as it stands today and not at the time of the Neer decision in 1926 – requiring outrageous conduct.").

[122] *Waste Management, Inc. v. United Mexican States*, ICSID No. ARB (AF)00/3, Award, ¶ 98 (Apr.30 2004) (attached as **CL-0024-ENG**) (hereinafter "*Waste Management*").

[123] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada,* PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 430 (Mar. 17, 2015) (hereinafter "*Bilcon*") (attached as **CL-0025-ENG**).

[124] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, ¶ 502 (Mar. 24, 2016) (attached as **CL-0026-ENG**).

191. The Dominican Republic's conduct towards Sargeant, as summarized in paragraphs 163-176 is grossly unfair and unjust. It can also be characterized as arbitrary and idiosyncratic. It has deprived Sargeant of the cashflow it is legitimately entitled to expect for payment for services rendered under a legally binding agreement, and has effectively pushed Sargeant out of the Dominican Republic market for the supply of AC-30 asphalt and the provision of services relating to AC-30 asphalt. There is no good reason to justify such conduct, and on occasion it has manifestly been to the detriment of the Dominican Republic's own tax-payers.

192. Such conduct is a clear breach of the minimum standard of treatment required by customary international law, and consequently a breach of Article 10.5 of the DR-CAFTA.

IX. THE DOMINICAN REPUBLIC HAS VIOLATED THE DR-CAFTA BY FAILING TO ACCORD SARGEANT TREATMENT NO LESS FAVORABLE THAN IT ACCORDS INVESTORS OF ANY OTHER PARTY OR ANY NON-PARTY, IN BREACH OF ARTICLE 10.4

193. Article 10.4 of the DR-CAFTA requires a Party to treat investors and covered investments made by nationals of another Party in the same manner as it treats investors from any other Party, or investors from any non-Party state.

194. Article 10.4 provides as follows:

> "*1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*"

A. By Virtue of Article 10.4 of the DR-CAFTA, Sargeant is entitled to any substantive protections available to investors from other countries that are more favorable than those contained in the DR-CAFTA

195. Article 10.4 of the DR-CAFTA is what is commonly known as a "most-favoured nation" or MFN clause. Numerous international tribunals have held that MFN

clauses in similar terms to Article 10.4 enable an investor to rely upon more favourable provisions contained in other treaties entered into by the host state that relate to the observance of obligations towards a foreign investor or a covered investment.

196. In *EDF v Argentina*[125] the claimants argued that by virtue of the MFN clause in Article 4 of the Argentina-France BIT, they were entitled to any substantive protections in third-party investment treaties which might be considered more favourable than those contained in the Argentina-France BIT. In particular, the claimants sought the protection of their specific commitments under the so-called "umbrella clauses" in other investment treaties entered into by Argentina. The Tribunal held that the MFN clause did in fact permit recourse to the "umbrella clauses" of third-country treaties, and that the claimants were able to rely upon the protections afforded by the "umbrella clauses" in the Argentina-Luxembourg or the Argentina-Germany BITs.

197. In the annulment decision in the same case, the Committee found that the original tribunal's employment of the MFN clause involved no annullable error, and that the language of the MFN clause was sufficiently broad to embrace the use of the "umbrella clause" in another BIT, commenting that:

> "*If German investors in Argentina have the benefit of a treaty provision requiring the Host State to honour commitments undertaken (or entered into) in relation to their investment, then they are being accorded a form of treatment which is not expressly granted to French investors by the Argentina-France BIT. That situation falls squarely within the terms of the MFN clause*." [126]

198. The same principle applies in this case. Sargeant is therefore entitled to rely upon and enforce the "umbrella clauses" in treaties entered into by the Dominican Republic with third countries.

B. The "umbrella clauses" contained in bilateral investment treaties entered into by the Dominican Republic with third countries enable Sargeant to assert claims for breaches of the 2013 Contract

199. Article 3(4) of the Dominican Republic-Netherlands BIT provides:

[125] *EDF International S.A. & Others v. Argentina*, ICSID Case No. ARB/03/23, Final Award, ¶¶ 890, 929. 937 (June 11, 2012) (attached as **CL-0027-ENG**).
[126] *EDF International S.A. & Others v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 237-238 (Feb. 5, 2016) (attached as **CL-0028-ENG**).

"*4. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party*." [127]

200. The "umbrella clause" in the Dominican Republic-Netherlands BIT cited above is broadly worded, referring to "any obligation". On its face, and bearing in mind Article 31(1) of the Vienna Convention, which requires interpretation to be "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty*", the conditions for a breach of this article are that (i) there exists an "*obligation*" of the State which is (ii) "*entered into with regard to investments*" and which (iii) has not been observed.[128]

201. The 2013 Contract contains numerous obligations entered into by the MOPC, which is an instrument of the government of the Dominican Republic and whose acts and omissions are attributable to the Dominican Republic. A breach of the 2013 Contract by the MOPC is therefore not merely a breach of a contractual obligation actionable under applicable municipal law, but a breach of an obligation entered into by the Dominican Republic with regard to investments. As such it also amounts to a breach of the Dominican Republic's international obligations under the DR-CAFTA.

202. There are a number of previous decisions by eminent international tribunals that have interpreted a similar or identical "umbrella clause" in a way which elevates a breach of contract by a State to the level of a breach of a treaty. These decisions include *Fedax N.V. v. Venezuela,*[129] *SGS v. Republic of the Philippines,*[130] *Eureko B.V. v. Poland,*[131] *Noble Ventures, Inc v. Romania,*[132] *BIVAC. v. The Republic of Paraguay,*[133] and *SGS v. Republic of Paraguay.*[134]

203. More recently, in *Nissan v. India,* the Tribunal noted that the ordinary meaning of the term "any" in the "umbrella clause" in question (in that case found in the Comprehensive Economic Partnership Agreement between Japan and India) was

---

[127] Dominican Republic-Netherlands Bilateral Investment Treaty (BIT), Art. 3(4) (2006) (attached as **CL-0029-ENG**)

[128] Vienna Convention on the Law of Treaties, *supra* note 98, at Art. 31(1) (attached as **CL-0001-ENG**)

[129] *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, ¶ 29 (Mar. 9, 1998) (attached as **CL-0030-ENG**)

[130] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 127-28 (Jan. 29, 2004) (attached as **CL-0031-ENG**).

[131] *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, ¶ 245-46 (Aug. 19, 1995) (attached as **CL-0032-ENG**).

[132] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶¶ 52, 60, 62 (Oct. 12, 2005) (attached as **CL-0033-ENG**).

[133] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, ¶ 141 (May, 29 2009) (attached as **CL-0034-ENG**).

[134] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision of Jurisdiction,¶ 170 (Feb. 12, 2010) (attached as **CL-0035-ENG**).

"all-encompassing". The Tribunal held that such wording "*draws no distinctions based on the mechanism through which the commitment is conveyed, and certainly does not suggest that State contracts were meant to be excluded or covered only in certain circumstances*". [135]

204. More recently still, in *ESPF v. Italy,*[136] the majority decision of the Tribunal adopted a broad interpretation of the "umbrella clause" in the Energy Charter Treaty, finding that contracts made between the State and an investor or its investment were protected obligations under the "umbrella clause" (Article 10(1)), which were elevated to obligations under international law.

205. Article 12(2) of the Dominican Republic-Finland BIT is a similarly broadly framed "umbrella clause":

> "*2. Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party*."[137]

206. There is no material difference between this and Article 3(4) of the Dominican Republic-Netherlands BIT, and it has the same effect for the same reasons.

207. Further or alternatively, Article 3(3) of the Dominican Republic-Taiwan BIT and Article 3(3) of the Chile-Dominican Republic BIT both contain similarly worded commitments by the Contracting Parties to provide effective measures to enforce claims and respect rights relating to investments and agreements.

208. Article 3(3) of the Dominican Republic-Taiwan BIT provides:

> "*3. Each Contracting Party shall establish effective means to enforce the claims and respect rights relating to investments, agreements and investment authorisations.*" [138]

209. Article 3(3) of the Chile-Dominican Republic BIT provides:

---

[135] *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, ¶ 277 (Apr. 29, 2019) (attached as **CL-0036-ENG**).
[136] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, ¶¶ 752, 793, 811 (Sept. 14, 2020) (attached as **CL-0037-ENG**).
[137] Dominican Republic-Finland Bilateral Investment Treaty (BIT), Art. 12(2) (2001) (attached as **CL-0038-ENG**).
[138] Dominican Republic-Taiwan Bilateral Investment Treaty (BIT), Art. 3(3) (1998) (attached as **CL-0039-ENG**).

"*3. Each Contracting Party will contribute with effective measures to enforce claims and respect the rights related to investments, agreements and investment authorisations.*" [139]

210. Whilst the text of these clauses is different from the classic "umbrella clause" wording, the obligation assumed by the host State to "respect rights" relating to investments and agreements has a similar effect, and enables a protected investor to assert a contractual claim against the host State at the treaty level.

C. The MOPC has breached the terms of the 2013 Contact, and consequently the Dominican Republic has breached its obligations under the DR-CAFTA

211. The MOPC is in flagrant breach of its contractual obligations under the 2013 Contract, as described in more detail in paragraphs [212-231] below.

212. These contractual breaches are also actionable as treaty violations under the DR-CAFTA, based upon the "umbrella clauses" cited above, which are all, to the extent necessary, imported into the protections afforded to investors by the DR-CAFTA through the mechanism of the MFN clause, Article 10.4.

X. THE DOMINICAN REPUBLIC HAS BREACHED THE 2013 CONTRACT, WHICH IS AN INVESTMENT AGREEMENT AS DEFINED IN THE DR-CAFTA

213. In addition to the treaty violations set out Chapters VI-IX above, Sargeant is also entitled to bring claims against the Dominican Republic for the MOPC's breaches of the 2013 Contract. As explained in paragraphs 148-154 above, the 2013 Contract is an investment agreement as defined in Article 10.28 of the DR-CAFTA.

A. The 2013 Contract is Valid, Effective and Binding on the Parties

214. The 2013 Contract is governed by the law of the Dominican Republic.[140] Consequently the Tribunal should apply the law of the Dominican Republic to the contractual claims set out in this chapter.

215. Article 1108 of the Civil Code of the Dominican Republic provides that the four requirements for a valid contract to be formed are (1) consent; (2) capacity; (3) a true object; and (4) a licit cause.[141]

---

[139] Chile-Dominican Republic Bilateral Investment Treaty (BIT), Art. 3(3) (2000) (attached as **CL-0040-ENG**).
[140] Clause 1.5 of the 2013 Contract.
[141] See Expert Report of Laura Castellanos, at ¶ 11.

216. The 2013 Contract is a written agreement signed by duly authorised representatives of both Sargeant and the MOPC, and therefore satisfies the requirement for consent under Article 1108.[142] The 2013 Contract clearly also has a true object and licit cause.[143]

217. Both Sargeant and the MOPC possess the requisite capacity to enter into the 2013 Contract. Even if the MOPC did not satisfy the technical requirement that a special power of attorney be issued, this is insufficient to prevent the 2013 Contract being binding and effective on the parties, because (a) at the date of signature the MOPC possessed the requisite legal capacity following approval of Law 247-12, which meant that a power of attorney from the President was no longer required;[144] and (b) the common intention of the parties when the 2013 Contract was signed was to make the contractual terms binding and effective.[145]

218. Furthermore, the fact that both parties have operated under the terms of the 2013 Contract for several years conclusively demonstrates that the contract is valid, and the parties themselves conducted their business relationship on that basis.[146]

219. Article 11 of the 2013 Contract provides that the contract shall remain valid until the 74,536,312.52 million gallons of AC-30 Asphalt Cement contracted and described in Article b2 for storage and handling have been used. The final invoice for the consumption of this volume of AC-30 was rendered by Sargeant on February 17, 2023, and consequently on that date the 2013 Contract came to an end. However, all of the MOPC's payment obligations incurred before then remain to be performed.

B. The MOPC has Breached its Contractual Obligations

220. As explained by Sargeant's witness, Mustafa Abu Naba'a, the MOPC has repeatedly failed to pay Sargeant for services rendered under the 2013 Contract. As of the date of this Memorial, the MOPC owes Sargeant a principle amount of US$54,976,035.20.[147] The MOPC has been invoiced for all of the above sums.[148] None of the invoices have been challenged or rejected. The MOPC has also breached the terms of the 2013 Contract by ordering AC-30 and then refusing to pay for it, causing Sargeant further loss and damage of at least US$2.48 million.[149]

[142] See Expert Report of Laura Castellanos, at ¶ 17.
[143] See Expert Report of Laura Castellanos, at ¶ 24-25.
[144] See Expert Report of Laura Castellanos, at ¶ 29-31.
[145] See Expert Report of Laura Castellanos, at ¶ 32.
[146] See Expert Report of Laura Castellanos, at ¶ 33-34.
[147] *See* Witness Statement of Mustafa Abu Naba'a, at ¶ 104, and Expert Report of Richard Indge, at ¶ 4.1.7.
[148] *See* **RI-0023-ENG.**
[149] See Expert Report of Richard Indge, at ¶ 4.2.10.

C. Sargeant Is Entitled to a Financial Remedy for the MOPC's Contractual Breaches

221. All of the unpaid invoices giving rise to this claim were tendered well within the applicable limitation period, which for most civil claims (including debt collection claims) is 20 years.[150] Consequently none of the claims is time-barred by application of the Dominican Republic's rules on limitation of action.

222. Dominican Republic law provides the following remedies which the innocent party may seek in this situation.

223. First, the creditor may claim forced execution of the obligations under the contract, which in this case are payment obligations. In the case of debts, a claim of forced execution takes the form of a collection procedure known as "*demanda en cobro de pesos*", which is a debt collection claim. The purpose of this procedure is to obtain an executable title (such as a definite court decision) for the unpaid debts.[151]

224. Additionally, the creditor may claim damages for breach of contract under the Dominican contractual liability regime. Under this regime, Sargeant may claim damages for non-compliance with the contract consisting of amounts similar to the losses he has suffered and the earnings he has not received, pursuant to article 1149 of the Civil Code.[152]

225. Furthermore, when the contractual breach consists of payment delays or failure to pay, article 1153 of the Civil Code provides for compensation in the form of interest upon the amounts due, to be calculated from the date of the lawsuit. A claim for interest under article 1153 is a legal presumption and does not require proof of prejudice.[153] This arbitration was commenced on March 23, 2022, when Sargeant filed its Request for Arbitration, and Sargeant is entitled to interest on its claims from that date until the date of any award in its favor in accordance with article 1153 of the Civil Code.

226. The rate of interest under article 1153 is determined by the court, but cannot exceed the average interest rate available at the time of the decision based on information published by the Central Bank of the Dominican Republic.[154]

227. Article 1149 of the Civil Code also allows the creditor to claim compensation for other material loss or damage, enabling a creditor to claim interest accruing before

[150] *See* Expert Report of Laura Castellanos, at ¶ 14-15.
[151] *See* Expert Report of Laura Castellanos, at ¶ 36.
[152] *See* Expert Report of Laura Castellanos, at ¶ 37, 39.
[153] *See* Expert Report of Laura Castellanos, at ¶ 40.
[154] See Expert Report of Laura Castellanos, at ¶ 42.

the date of the lawsuit. In that case the creditor must prove its entitlement to claim such a remedy.[155]

228. The MOPC has previously agreed to pay interest at the rate of 9.5% per annum on unpaid or late debts due under the 2013 Contract.[156] Accordingly, that is the rate of interest sought by Sargeant for the period from the date each payment fell due until March 23, 2022, the date of commencement of this arbitration.

229. The evidence and documentation filed with this Memorial would be sufficient to start a contentious administrative lawsuit before the secretary of the Contentious Administrative Court in the Dominican Republic seeking an appropriate remedy for the MOPC's breaches of contract. In particular, the amount of the debt is certain, liquid and callable, as required by the Dominican Republic's procedural rules.[157]

230. Sargeant is entitled to seek from this Tribunal, constituted under Chapter 10 of the DR-CAFTA, all of the same remedies it would be entitled to seek from the courts of the Dominican Republic, had it elected to pursue its contractual claims there. These remedies include an award of damages for breach of contract in an amount of at least US$57.46 million,[158] plus interest on that amount.

XI. REQUEST FOR RELIEF

A. Claimant is entitled to Damages for Respondent's Treaty Violations

231. Article 10.26 of the DR-CAFTA provides that the tribunal may award, separately or in combination, monetary damages and any applicable interest.

232. The appropriate objective of an award of monetary damages should be to restore Claimant to the position it would have been in had the Dominican Republic's unlawful acts not occurred. [159] International law requires damages to constitute "*reparation for a loss suffered: a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole*." [160]

233. Article 36(2) of the Articles on State Responsibility says that compensation "*shall cover any financially assessable damage including loss of profits insofar as it is established*."[161]

---

[155] See Expert Report of Laura Castellanos, at ¶ 43.
[156] See Witness Statement of Mustafa Abu Naba'a, at ¶ 51-52.
[157] See Expert Report of Laura Castellanos, at ¶ 44.
[158] See Expert Report of Richard Indge, at ¶ 4.4.1 and Table 5.
[159] Metalclad Corp., *supra* note 113, at ¶ 113 (attached as **CL-0010-ENG**).
[160] U.N. Rep. of Int'l Arbitral Awards, Opinion in the Lusitania Cases, vol. VII, 32, 39 (Nov. 1, 1923) (**CL-0041-ENG**)
[161] Articles on State Responsibility, *supra* note 105, at Art. 36(2) (attached as **CL-0007-ENG**).

234. The Commentaries to Article 36 of the Articles on State Responsibility confirm that "market value" is the standard according to which compensation is generally calculated under international law for the taking or destruction of property.[162] Claimant's expert evidence on quantum is based upon a valuation analysis under a fair market standard, and is therefore consistent with the authorities cited above and with general practice in investor-State arbitration.

235. The diminution in value of Sargeant's investment in the 2013 Contract using this approach is assessed to be US$54.98 million in relation to unpaid invoices together with US$2.48 million in relation to amounts of AC-30 ordered but not taken, and the total value of Sargeant's claim for monetary damages is therefore US$57.46 million.[163]

B. Claimant is entitled to Damages for MOPC's Breaches of the 2013 Contract

236. Further or alternatively, Sargeant is entitled to an award of damages for breaches of the 2013 Contract, in the same amounts as detailed above.

C. Claimant is entitled to an Award of Compound Interest at the Prevailing Dominican Republic Rate

237. The Tribunal may award interest on any monetary damages pursuant to Article 10.26 of the DR-CAFTA.

238. Article 38(1) of the Articles on State Responsibility provides that: "*Interest on any principal sum due…shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.*"

239. The rate of interest awarded, and the method of calculation adopted, must therefore effectively compensate Sargeant for its losses resulting from Respondent's treaty violations, considering the time value of money, including compound interest.

240. This principle was confirmed by the tribunal in *Wena Hotels Limited v. Arab Republic of Egypt*, which held that an award of interest should "*restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place*," and should, therefore, include compound interest.[164]

---

[162] See Commentaries, *supra* note 106, at 102-103 (attached as **CL-0008-ENG**).
[163] See Expert Report of Richard Indge, at ¶ 4.4.1 and Table 5.
[164] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case. No. ARB/98/4, Award, ¶¶ 128-29 (Dec. 8, 2000), 412 I.L.M. 896, aff'd, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case. No. ARB/98/4, Annulment Proceeding, ¶ 129 (Jan. 28, 2002), 41 I.L.M. 933 (2002) (adopting Professor John Gotanda's

241. Similarly, in *Middle East Cement v. Arab Republic of Egypt*, the tribunal held that "[r]*egarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation…and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases*."[165] Similarly, the tribunal in *Metalclad* determined that that "*to restore the claimant to a reasonable approximation of the position which it would have been if the wrongful act had not taken place*," it was necessary to grant compound interest at the applicable rate.[166]

242. On this basis, in order to restore Claimant to the position it would have been in absent Respondent's breaches of the DR-CAFTA, Claimant seeks compound interest at the prevailing Dominican Republic commercial rate over the relevant time period.[167]

243. Article 38(2) of the Articles on State Responsibility indicates that the date from which interest is to be calculated is "*the date when the principal sum should have been paid*."[168] The tribunal in Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka confirmed that "*interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged*."[169] The date from which interest on an award should be deemed to accrue, therefore, is the time at which the Dominican Republic violated its obligations under the DR-CAFTA.

---

observation that "almost all financing and investment vehicles involve compound interest…If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical not equitable to award the claimant only simple interest.") (attached as **CL-0042-ENG**); *see also In the Matter of an Arbitration between the State of Kuwait and American Independent Oil Company (Amoniol)*, 66 I.L.M. 976, 1042 (March 24, 1982) (attached as **CL-0043-ENG**); Collection of ICC Arbitral Awards 1991-1995, Award in ICC Case No. 5514, 459, 463 (1997) (**CL-0044-ENG**); John Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int'l. L. 40, 61 (1996) (**CL-0045-ENG**).

[165] *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 174 (Apr. 12, 2002) (attached as **CL-0046-ENG**).

[166] Metalclad Corp., *supra* note 113, ¶ 128 (attached as **CL-0010-ENG**).

[167] An award of interest at a rage pegged to the rate applicable in the State in which investments were made (and accorded wrongful treatment) is consistent with practice in bilateral investment treaty awards. For example, in *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Arbitration, Award, ¶¶ 637-41 (Mar. 14, 2003) (In an arbitration involving an investment in the Czech Republic, the tribunal awarded interest at a rate of 10 percent in accordance with rates set by the Czech National Bank) (attached as **CL-0047-ENG**); *See also Marvin Roy Feldman, supra* note 117, at ¶ 205 (awarding interest at the rate applicable to Mexican Federal Treasury Certificates on the principal sum awarded for the expropriation of an investment in Mexico) (attached as **CL-0017-ENG**).

[168] Articles on State Responsibility, *supra* note 105, Art. 38(2) (attached as **CL-0007-ENG**).

[169] *Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 114 (June 27, 1990) (attached as **CL-0048-ENG**).

244. Alternatively, if Sargeant succeeds on its breach of contract claims based upon the 2013 Contract, it is entitled to interest under applicable Dominican Republic law. Article 1149 of the Civil Code allows a creditor to claim compensation for other material damage as long as it was direct and foreseeable, and Sargeant seeks compound interest as appropriate compensation for the losses it has foreseeably incurred as a direct result of the MOPC's contractual breaches.

245. Sargeant's claim for interest has been calculated by Sargeant's quantum expert in two alternative ways: (a) using a rate of 9.5%; and (b) using the converted commercial lending rate in the Dominican Republic during the relevant period. He has calculated the value of interest using those two possible approaches as either US$9.94 million or US$9.83 million until March 31, 2023.[170]

D. Claimant is Entitled to an Award of Costs and Attorney's Fees

246. Article 10.26(1) of the DR-CAFTA specifically entitles the Tribunal to award costs and attorney's fees.

247. Article 58 of the ICSID (Additional Facility) Arbitration Rules[171] provides that the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceedings shall be borne.

248. Thus, in the event Claimant is successful in this arbitration, Claimant should be awarded arbitration costs including, without limitation, the Tribunal's fees and expenses, and attorney's fees and disbursements. Such an award of costs would be entirely consistent with decisions of previous arbitral tribunals that an award of costs is part of the fair and equitable compensation for losses related to the expropriated party's claims. Claimant therefore seeks an award of its arbitration costs to be assessed as of the date of the award.

E. Prayer for Relief

249. Sargeant respectfully requests an award:

    a. declaring that the Dominican Republic has violated its obligations under the DR-CAFTA, including obligations owed on the basis of national treatment under DR-CAFTA Article 10.3; most favored nation treatment under DR-CAFTA Article 10.4; the minimum standard of treatment under Article 10.5; and the prohibition against unlawful expropriation under Article 10.7;

[170] See Expert Report of Richard Indge, at ¶ 4.3.20 and Table 4.
[171] Additional Facility Rules, *supra* note 101, Art. 56 (attached as **CL-0004-ENG**)

b. declaring that the 2013 Contract is an investment agreement as defined by the DR-CAFTA and that the Dominican Republic has violated its obligations under the 2013 Contract;

c. awarding Sargeant damages for breaches of the DR-CAFTA and/or the 2013 Contract in an amount of US$57.46 million;

d. awarding Sargeant all of the costs incurred in this arbitration, including all legal and other professional fees and disbursements;

e. awarding Sargeant pre-award and post-award interest on all sums awarded;

f. ordering such further relief as may be just and appropriate in all the circumstances.

Dated: April 20, 2023

Counsel for Claimant Sargeant Petroleum LLC:

ALLEN W. BURTON
aburton@omm.com
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036-6537
Telephone: +1 212 326 2000
Facsimile: +1 212 326 2061

DAVID FOSTER
dfoster@omm.com
O'MELVENY & MYERS LLP
19th Floor
100 Bishopsgate
London EC2N 4AG, United Kingdom
Telephone: +44 20 7088 0000
Facsimile: +44 20 7088 0001

ANDREW J. WEISBERG
aweisberg@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street

18th Floor
Los Angeles, California 90071-2899
Telephone: +1 213 430 6000

Claimant's Index of Abbreviations

Abbrevation	Full Name or Authority
APAC	Asia, Pacific
BIT	Bilateral Investment Treaty
CEDR	The Centre for Effective Dispute Resolution
DOP	Dominican Peso
DR-CAFTA	Dominican Republic-Central America Free Trade Agreement
EMEA	Europe, Middle East, Africa
EV	Enterprise Value
ICSID	International Centre for Settlement of Investment Disputes
IVS	International Valuation Standards
MOPC	Ministry of Public Works and Communications of the Dominican Republic
NPV	Net Present Value
PDVSA	Petroleos de Venezuela S.A.
REFIDOMSA	La Refineria Dominicana de Petroleo or Dominican Petroleum Refinery
SEOPC	Secretariat of State of Public Works and Communications
WOQOD	Qatar Fuel