

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

In the arbitration proceeding between

MICHAEL ANTHONY LEE-CHIN

Claimant

and

THE DOMINICAN REPUBLIC

Respondent

ICSID Case No. UNCT/18/3

DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN

I. INTRODUCTION

1. In the Partial Award of July 15, 2020, the majority decided that Article XIII of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Agreement Establishing the Free Trade Area between the Caribbean Community (“CARICOM”) and the Dominican Republic (hereinafter, “the Treaty”) vested this Tribunal with jurisdiction and that the so-called “indirect investments” were covered by the protection accorded by such treaty. I issued a dissenting opinion because I considered that both decisions were wrong. My colleagues having thus decided on the continuity of the proceeding, I shall opine on other questions regarding jurisdiction and the merits decided in the Final Award. I regret to say that, once again, I must seriously depart from the majority’s decision, both in the analysis of the applicable law and the facts as well as in the assessment of evidence. The only common ground with the majority is that the municipalities breached their obligation to renegotiate the tipping fees with Lajun Corporation SRL (“Lajun”) and that Claimant cannot invoke an exclusive right and a guarantee to build a WTE Plant.
2. A key issue in the instant case is the determination of Claimant’s capacity as investor in Lajun, the Dominican company allegedly injured by the Dominican Republic’s actions. With regard to the so-called “indirect” investments, I understand that the decision in the Partial Award was accepting their protection by the Treaty, but the fact that Claimant had made said investments in the present case could not have been deemed proved at that procedural stage. Such a task required the assessment of evidence which was only incorporated to the record at a later time. The Final Award seems to be satisfied with the assertion made in the decision of July 15, 2020, and the only thing it does is a very light ratification to consider that such investments existed. As seen further below, instead of making sure of this, so as to reach its conclusion, the majority makes do with a number of inferences and makes considerations on the “plausible” nature of many of Claimant’s assertions.
3. I also deeply regret the majority’s departure from the rules of interpretation of treaties contained in the Vienna Convention of 1986, which leads to wrong decisions that distort the scope of the requirements laid down in the Treaty so as to invoke its protection. The Final Award thus minimizes the importance of the language of the Treaty -in fact, it puts it aside-, when literal interpretation, albeit not the only one, is at the heart of the applicable rule. The draft also ignores the teleological interpretation. Actually, we do not know with certainty the interpretation approach followed. As explained hereinafter, that leads the majority to temper the need to prove a particular link between the capital invested and the alleged investor.

4. I also disagree with the assessment by the majority of the invocation of national security triggered by Lajun's attitude of preventing treatment of waste in the region of Gran Santo Domingo, the capital of the Dominican Republic. Although I agree with the idea that an international tribunal may assess whether the invocation by a State of such circumstances is correct or not, judges or arbitrators cannot substitute for those who must react vis-à-vis those circumstances and become political decision-makers themselves. Any such assessment must pursue the purpose of preventing the abuse of an invocation that would allow the ruler to be automatically exempted from any obligation by using the argument of emergency or national security as an excuse. The Final Award also equates or compares in a misguided fashion the situations of national emergency set forth by law or a treaty with the state of necessity, a circumstance precluding wrongfulness, which is a different legal notion in International Law.
5. I will go on to examine the different points of my dissent hereinbelow.

II. WAS THERE A JAMAICAN INVESTMENT IN THE DOMINICAN REPUBLIC?

6. As asserted by the Final Award, even when Respondent has not formally raised a separate objection to jurisdiction grounded on nationality, the issue was mentioned thereby.¹
7. Claimant, Mr. Michael Lee-Chin, introduced himself to the Dominican authorities as Canadian and it is in Canada that he has the center of his business.² On the basis of the evidence adduced in the instant case, the first time that Claimant invoked his Jamaican nationality before Respondent was on December 19, 2017, when he sent Respondent a Notice of Controversy in preparation for this arbitration.³
8. What appears in the evidence relating to the critical period, that is, between the acquisition of Lajun and a portion of land additional to the Duquesa Landfill (the "**Land**") (June 26, 2013) and the date of the notice of controversy (December 19, 2017), is that has Claimant always invoked before Respondent his Canadian, not Jamaican, nationality. For instance, in the resolution authorizing the sale of Lajun shares to Nagelo Enterprises, S.A. ("**Nagelo**") and Wilkison Company S.R.L. ("**Wilkison**") of February 19, 2014, Nagelo appears as "represented by Mr. MICHAEL LEE-CHIN, Canadian, of age, holder of Passport No. BA704077,

¹ Final Award, footnote 125.

² Memorial on Jurisdictional Objections, para. 3 (i).

³ C-15, Notice of Controversy dated December 19, 2017.

domiciled and residing in this city of Santo Domingo, National District.”⁴ [Prof. Kohen’s Translation]

9. Identical information appears in the first settlement agreement between the Municipality of Santo Domingo Norte (“**ASDN**”) and Lajun of February 10, 2014.⁵ In the Certificate pertaining to Nagelo of the Commercial Registry of Foreign Companies, Mr. Lee-Chin also appears as Canadian.⁶ The only piece of evidence in which Mr. Lee-Chin is mentioned as related to Jamaica is a letter signed by the General Manager of Metro Country Club, a company different from Lajun or its purchasers, requesting an appointment with the President of the Dominican Republic in which Claimant is introduced as “The Honorable Mr. Michael Lee-Chin, Minister of the Government of Jamaica Economic Growth Council.”⁷ [Prof. Kohen’s Translation]
10. That is to say, regardless of the veracity or not of this assertion, Claimant is introduced as a senior governmental official, not an investor. Good faith “governs the relations between States but also the legal rights and duties of those seeking to assert an international claim under a treaty.”⁸ Good faith requires the parties “to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage.”⁹
11. It is true that the Treaty defines the investor simply as “any natural person possessing the citizenship of a Party in accordance with its laws”¹⁰ and that Mr. Lee-Chin has the nationality of Jamaica, one of CARICOM member States. It is also true that Respondent did not raise a *ratione personae* objection to the jurisdiction of the Tribunal, although it alleged before the latter that Claimant had the burden of proving the *ratione personae* jurisdiction.¹¹
12. Not only did Claimant fail to inform his Jamaican nationality to Respondent, but he and his son Adrian, who, at a given time was the General Manager of Lajun, also misinformed the Dominican Republic about those who had made the investment. Claimant invoked an email

⁴ C-147.

⁵ C-5.

⁶ C-181.

⁷ C-161.

⁸ *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009), para. 107.

⁹ *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award (May 15, 2019), para. 255; *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, Award (May 15, 2019), para. 266; *David R Aven, Samuel D Aven, Carolyn J Park, Eric A Park, Jeffrey S Shiolen, Giacomo A Buscemi, David A Janney and Roger Raguso v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (September 18, 2018), para. 224; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009) (n. 59), para. 107.

¹⁰ Article I(2) (a) of the Treaty.

¹¹ Respondent’s Memorial on Jurisdiction, footnote 173; Transcript, January 24, 2022, p. 155, 6:9.

sent to the Vice President of the Dominican Republic on November 13, 2013, in which he informed this high State authority that “I am investing on behalf of sovereign states and important pension funds”.¹² In a television interview of November 3, 2013, the journalist introduced Mr. Adrian Lee-Chin in the following terms: “*canadiense de nacimiento de ascendencia china*” (“he comes from Canada related to an Asian family,” in the English translation.) In response, Claimant’s son informs that Lajun is jointly owned by local and foreign investors and that he represents the latter, a private equity fund (in his words in English: “Lajun is jointly owned by local investors and foreign investors. The foreign investors which I represent are, is a private equity fund.”)¹³

13. There is here a two-fold obstacle with respect to the investment. Firstly, the State must have knowledge of the foreign investor’s nationality in order to know what international rules apply. Until the time of the Notice of Controversy, Respondent never knew that the Treaty applied to the dispute arisen with the Dominican company Lajun. Secondly, Claimant does not introduce himself as an investor, but as an agent of the alleged true investors. The only time he is mentioned (and not by himself) as Jamaican is to identify him as a purported minister of Jamaica. The Final Award fails to examine the first obstacle and seeks to set the second one aside, under the pretext that such assertions were “informal” and that “the Tribunal has no basis to rule” thereon. It is satisfied with the explanations provided during the hearing by both persons in their capacity as witnesses at the oral stage of the proceeding: the first, who asserted that he referred to “other investments,” and the second, “that he had made a mistake.”¹⁴ Nevertheless, the first case is a message sent by Claimant to one of the highest authorities of the Dominican Republic clearly referring to Lajun and the other is public information widely circulated when the problem of the Duquesa Landfill had hit the national headlines.

14. In accordance with the Final Award, a purported meeting among Mr. Michael Lee-Chin, his son Adrian and Dominican investor Asilis Elmudesi¹⁵ with the President of the Dominican Republic of November 9, 2016, is evidence that Claimant was the owner of the investment.¹⁶ Respondent has called into question the existence of such meeting. The evidence submitted by Claimant is the above-mentioned letter from *Metro Country Club* of October 31, 2016, signed by

¹² C-126.

¹³ R-12.

¹⁴ Final Award, para. 151.

¹⁵ Mr. Asilis Elmudesi, a national of the Dominican Republic, appears as shareholder of Wilkison, one of the companies that acquired Lajun and the Land. He was also the recipient of the funds obtained for acquisition thereof.

¹⁶ Final Award, footnote 118.

Mr. Luis Gulano, General Manager of such company, requesting the Dominican President an appointment for Mr. Michael Lee-Chin and Mr. Asilis where “[t]he topics to be addressed are foreign investment and the [D]uquesa Landfill.” [Prof. Kohen’s Translation] As stated above, Mr. Lee-Chin was then introduced as “Minister of the Government of Jamaica Economic Growth Council.”¹⁷ [Prof. Kohen’s Translation] A package of Lajun documents dated “November 9, 2016” (same date as the alleged meeting) the first page of which reads “Information for the President” was also submitted as purported evidence of the meeting with the President.¹⁸ [Prof. Kohen’s Translation]

15. The majority asserts that “[t]he Tribunal fails to see any element that could lead to the conclusion that said meeting did not take place, as Respondent seems to suggest.”¹⁹ In other words, by reversing the burden of proof, my colleagues expected Respondent to submit negative evidence, *i.e.*, to prove something that it states did not exist. That is not all. Even assuming that said meeting existed, the mere presence of Mr. Lee-Chin, introduced as a Jamaican minister and accompanying his son and Lajun’s Dominican investor, is not evidence of any ownership. That is compounded by the information transmitted to the Vice President of the Dominican Republic that introduced Claimant as an agent, not an investor.
16. It is worth pointing out that there is no evidence on record that Claimant, in his capacity as “indirect investor”, has taken any step before the companies Lution and Kigman del Sur, so that they, in turn, take steps before Nagelo and Wilkison, in their capacity as owners of Lajun and the Land, in connection with his alleged investment.
17. It is also worth highlighting the sales of the shares and the land on June 27, 2013. That day, Mr. José Antonio López Díaz and Ms. Darleny Indhira López Polanco, owners of Lajun aggregate share capital, sold 50% of that share capital to the Panamanian entity Nagelo and the remaining 50% to the Dominican entity Wilkison. Lajun’s Meeting Minutes are signed “By New Shareholders in sign of Acceptance” by Mr. Luis José Asilis Elmudesi, for both Wilkison and Nagelo.²⁰ [Prof. Kohen’s Translation] On that same date, Mr. López Díaz sold the Land to Nagelo and Wilkison. Claimant alleges that, on that same date, he became the indirect owner of 90% of Lajun and the Land through two Panamanian companies: Lution Investments, S.A. (“Lution”), owner of 100% of the share capital of Nagelo, and Kigman Del Sur, S.A.

¹⁷ C-161.

¹⁸ C-43.

¹⁹ *Idem.*

²⁰ C-152.

(“Kigman”), owner of 80% of the share capital of Wilkison.²¹ Notably, the evidence of payment for the Land is a “receipt of payment” signed by Mr. José Antonio López Díaz dated November 11, 2016, *i.e.*, more than three years after the sale was made. It is a payment of USD 2,500,000.²² Registration of the sale of the land was formalized only on December 6, 2016, *i.e.*, more than three years after the contract for sale of the land was entered into.²³

18. In order to prove that the investment in Lajun and the Land, which are the subject-matter of the dispute, was made by Claimant, the majority errs in three main issues: the scope of the Partial Award, the interpretation of the Treaty, and the assessment of evidence.
19. To conclude that Claimant showed that he made an investment in the Dominican Republic, the Final Award avers that nothing discussed in this case alter[s] the conclusion “reached by the Tribunal in the Partial Award that there is a clear link between Claimant and the investment.”²⁴ However, the Partial Award neither conducted, nor could have conducted at such preliminary stage, a study of that substantive issue. Of course, the *dispositif* of the Partial Award failed to resolve the substantive issue. Had it done so, a prejudgment would have arisen. It merely decided that indirect investments fitted within the definition of investment under the Treaty and that, accordingly, the Tribunal had jurisdiction to examine them. That was exactly what had to be done at this stage of proceedings and what the Final Award failed to do, or did superficially or improperly.
20. The majority settled as proven that it was Claimant who made the investment since Nagelo appeared as “represented by Mr. Michael Lee-Chin” in one of the above-mentioned documents.²⁵ But *representation* is not a synonym for *ownership or control*. If this were the case, the owner of Wilkison, Nagelo or Lution, or the one who controls them, could be deemed to be a Dominican citizen, not Mr. Lee-Chin. Indeed, in the same documents cited, Wilkison SRL appears as represented by Mr. Luis José Asilis Elmudesi, a national of the Dominican Republic. Actually, Mr. Asilis Elmudesi appears in the contracts for the purchase of Nagelo and the Land as a representative not only of Wilkison, but also of Nagelo and Lution Investments.²⁶

²¹ *Statement of Claim*, §§ 27, 82. Claimant explains that the remaining 10% minority interest is owned by Dominican entrepreneur, Dr. José Luis Asilis. See also *Memorial on Jurisdiction*, §§ 16-17.

²² C-153.

²³ C-66, Certificate of Title to the Portion of Land, January 3, 2017.

²⁴ Final Award, para. 149.

²⁵ This Dissenting Opinion, para. 8.

²⁶ C-22.

21. Another key issue discussed by the Parties was how the funds for the acquisition of the portions of Lajun and the Land were obtained. It is indisputable that none of the transfers to such effect was made on Claimant's name or by the companies that Claimant says to control and that appear as purchasers of Lajun and the Land. It has also been proved that such funds were not contributed by Lution Investment SA or Kigman del Sur SRL, the Panamanian and Dominican companies which purportedly belong to Claimant and which, in turn, acquired Nagelo and, in part, Wilkison, respectively. In other words, neither Claimant nor anyone else in the long chain of "indirect investments" appears as provider of the funds.
22. Claimant asserts that the transfers, from Barbados and Canada, were made by other companies (AIC and Portland), which, in turn, are owned thereby. The evidence adduced is two documents signed by two Canadian individuals, one of whom claims to be a member of AIC and the other one of whom claims to be a lawyer, dated August 19, 2021, and September 8, 2021, respectively.²⁷ This means that these documents were clearly prepared for purposes of this case and submitted at the final stage thereof. There is no official certification of such documents, or no public document establishing such ownership, that is contemporaneous to the transfers. I do not think that such documents meet the necessary standard of proof. The Final Award does not even examine them.
23. Evidence of the alleged transfers for payment for shares or the Land is also largely insufficient to show both the fact of the transfers themselves and the recipients thereof. Even though some of those transfers contain the word "Lajun", only a purported internal e-mail to Claimant's son indicates that the transfers are directed to Nagelo for the Lajun purchase. One could expect relevant bank documents as able support such evidence, with a clear indication of the sender and the recipient of the transfer.²⁸
24. The Final Award avers: "the Tribunal, absent an express requirement in the Treaty — or otherwise applicable general principle or other international law rule or in the specific context of arbitrations operating under UNCITRAL Rules — it is not necessary for Claimant to specifically establish the origin of the funds used. Instead, the Tribunal's task is to exercise its discretion and assess whether Claimant has been able to demonstrate a link between himself

²⁷ C-202 and C-203.

²⁸ C-179 and C-196.

and the capital invested. This link may be direct or indirect and, absent specific requirements, must be assessed by the Tribunal.”²⁹

25. Firstly, in my opinion, the Tribunal does not have discretion. Its members must be persuaded by sufficient evidence that Claimant proved that it made the investment. Secondly, I do not think that the Treaty must contain an express requirement for the Tribunal to consider the origin of the funds. Thirdly, I disagree with how the Final Award applies the rule of interpretation of treaties as reflected in the Vienna Convention of 1986.
26. In its preamble and different articles, the Treaty requires that the investment be made “by investors.”³⁰ The majority downplays the value of the text, when literal interpretation, albeit not the only one, is at the heart of the matter. In reality, the draft also ignores the object and purpose of the treaty, which is promoting amongst the contracting parties foreign investments in the territory of the others and ensuring protection thereof. A good-faith interpretation of the text, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, leads to conclude that the investment must be made *by investors*. Specifically, a basic requirement of transparency enabling a good-faith application of the Treaty demanded that the investment be made by Claimant or, at least, by some of the intermediary companies that the majority accepted as “indirect investments.” Even upholding the interpretation made by the majority, which includes as investments the so-called indirect investments and the broad interpretation thereof in the particular case (they are triply “indirect” investments), specific evidence of the investment, either under the investor/Claimant’s name or by at least some of the companies he says to control, was to be expected. None of such evidence was submitted. Not even the amounts transferred make it possible to determine their correspondence with the alleged purchases.
27. It should also be borne in mind that the investments, whomever has made them, have irregularities, both in the transfer of Lajun shares as well as in the acquisition of the Land. One of them is the difference in the purchase price stated in the Contract for the purchase of shares and in the Framework Agreement, which would lead to a tax fraud. The Final Award regards them as “minor” in nature and judges Claimant’s explanation “plausible,” with no further details. It considers the fact that the tax authority failed to act expeditiously and that the evidence submitted by Respondent in connection with the non-payment of taxes “does not

²⁹ Final Award, para. 147.

³⁰ R-1, Articles II(1), III(1) and XVI.

demonstrate the existence of unlawful activity.”³¹ . The fact is that the Framework Agreement and the contract for the sale of the Land, on the one hand, and the contract for the sale of shares, on the other, were executed on the same date, but indicating different prices and before two different notaries.³² The price difference amounts to more than seven million US dollars.³³

28. Considering that Claimant failed to prove his capacity as investor or that the investment was made by him, I will not opine on other theoretical issues that the Final Award develops, such as whether the “Salini test,” which requires existence of an economic risk as a condition for an investment to exist, applies to the instant case. Instead, I find it convenient to refer to other aspects of the Final Award regarding the existence of violations of the substantial provisions of the Treaty.

III. WOULD THERE HAVE BEEN A VIOLATION OF TREATY OBLIGATIONS?

29. The facts giving rise to the present case are related to the existence of different disputes between the ASDN and Lajun from July 2013 to September 2017. The relationship between the ASDN and Lajun is based on six contractual agreements: the Concession Agreement of March 1, 2007, and three addenda, a First Settlement Agreement of February 10, 2014, and a Second Settlement Agreement of May 24, 2017. It was agreed that the contractual relationship is governed by Dominican law and that any dispute or controversy between the Parties would be submitted to the Superior Administrative Court or, in the event of collection actions by Lajun, to the Dominican ordinary courts.

30. The problems related to Lajun’s management of the Duquesa Landfill did not begin with the acquisition of shares of the concessionaire company by Nagelo and Wilkison. The first settlement agreement of February 10, 2014, was the result of a complaint for breach of the agreement from the ASDN against Lajun on July 1, 2013, and the subsequent rescission of the concession agreement of July 9, 2013, the ASDN’s intervention in the Duquesa Landfill and a subsequent administrative-judicial proceeding between the parties. Such agreement referred to a number of measures that Lajun had to implement and explained that, with the incorporation of Nagelo and Wilkison as shareholders, the company now proved to have the financial

³¹ Final Award, paras. 187-188.

³² C-22.

³³ Dominican Republic’s Memorial on Jurisdictional/Admissibility Objections and Counter-Memorial on the Merits and Quantum, para. 105.

solvency necessary to implement them.³⁴ It is worth recalling that the acquisition of Lajun shares by said companies took place by means of a private contract of June 26, 2013. The ASDN could not have knowledge of such transaction before its registration, and there are no elements to show that its actions on July 1 were the result of such transaction.

31. A key issue in the instant case is the amount of the tipping fees paid by the municipalities. For the purpose of succeeding in the tender bid, it was Lajun which proposed a reference tipping fee of two US dollars per ton.³⁵ The Concession Agreement set said reference tipping fee it considered its potential revision by agreement of the parties. Neither in any of the addenda nor in the settlement agreements that followed was such tipping fee adjusted. That is to say, Lajun continued accepting said fee despite the fact that it requested its revision. Except for the ASDN, which could use the Duquesa Landfill free of charge, the tipping fee revision was to be negotiated with the other municipalities of Gran Santo Domingo. When Nagelo and Wilkison acquired Lajun shares, said fees were already considered insufficient. It is noteworthy that, while the agreements with the different municipalities acknowledged that the tipping fees were below the operating cost, Lajun accepted them.³⁶
32. According to the concession agreement, in the event of non-payment of the fees, Lajun could resort to ordinary courts. It did not use them. Lajun could also unilaterally rescind the agreements.³⁷ It did not do that either. Although the agreements with the municipalities had expired, both parties continued acting as if an automatic renewal had been triggered. Instead, Lajun adopted a series of measures that were clearly contrary to the contractual agreements.

³⁴ C-5.

³⁵ Transcript, January 24, 2022, p. 143: 20-22, and p. 171: 6-7. Assertion uncontested by Claimant.

³⁶ For instance, the contract with the Municipality of Pantoja: “11. Cost of services and adjustment thereof. The MUNICIPALITY acknowledges that the operating costs of DUQUESA range between USD 6.5 and USD 13.55 per ton of solid waste and, currently, the MUNICIPALITY is not paying for the services. 11.1. In view of the previous acknowledgment and in order to contribute to the proper technical, financial and environmental operation of Duquesa, the MUNICIPALITY accepts to pay LAJUN a monthly amount of FIFTY-FIVE THOUSAND PESOS AND 00/100 (DOP 55,000.00) for the service of reception of the MUNICIPALITY’s waste in Duquesa. Moreover, the MUNICIPALITY agrees that the aforementioned amount shall be paid as from February 1, 2009. 11.2 The Parties agree that, on an annual basis, the Urban Sanitation Division jointly with LAJUN shall assess the operating costs of Duquesa, and that the parties shall proceed to make the necessary adjustments to the fee payable for the service rendered by LAJUN to the MUNICIPALITY, so as to guarantee the sustainability of Duquesa’s operations. Additionally, the MUNICIPALITY acknowledges that LAJUN may request the assessment of the operating costs of Duquesa and the subsequent adjustment thereof provided that there has been an increase; if the operating costs of Duquesa exceed the amount of USD 8.00 per ton, the cost of the monthly service shall be increased prior agreement on the rate of increase between the parties.” (C-18). [Prof. Kohen’s Translation]

³⁷ For example, Art. 30 of the agreement with the National District acknowledged Lajun’s right to unilaterally rescind the agreement, “nevertheless, given the Public Order nature of the Recollection and Final Disposal of Solid Waste Service, this decision shall be reported to the ADN in writing at least six months in advance, for the purpose of finding alternative solutions, notwithstanding the fact that, upon expiration of that term, and in the event that the ADN has no alternative place, any such term may be extended” (C-17). [Prof. Kohen’s Translation]

On January 18, 2017, Lajun unilaterally decided to increase the tipping fee to USD 8.14 per ton.³⁸ As the municipalities concerned had not made the payment requested, on February 13, 2017, Lajun wrote to them again proposing discussion of a payment schedule “and, thus, preventing a health catastrophe from affecting their municipality.”³⁹ A note of March 2, 2017, from Lajun to the Municipality of Santo Domingo Oeste is explicit in terms of the threat of what would happen next: “There is no need for the population to bear the brunt of the carelessness or neglect of those of us who are called upon to protect it from undesirable waste accumulation on the streets giving rise to plagues and diseases, or from lines of dump trucks due to slowness or inability to discharge the waste in our landfill.”⁴⁰ [Prof. Kohen’s Translation]

33. Indeed, Lajun first proceeded to unilaterally limit the landfill’s access hours and close it on weekends between March 16 and April 20, 2017, and then, to close it completely for trucks coming from the Municipalities of Santo Domingo Oeste, Alcarrizos and Pantoja. In July 2017, Lajun proceeded to restrict access hours even more.⁴¹ These are clearly unilateral measures that Lajun could not adopt and are, thus, violations of its contractual obligations. As a result of such decisions, there was considerable accumulation of waste on the streets and of parked trucks full of waste that could not be discharged. It was against this background that the complaint for breach seeking termination of the concession agreement by the ASDN (July 19, 2017) and the environmental and health emergency declaration by the Ministries of Environment and Health (July 21, 2017) took place.⁴²

34. The key question in the instant matter is whether the termination of the concession agreement and the subsequent judicial declaration of nullification of the concession were conducted lawfully. The ASDN’s complaint for breach of the agreement of July 19, 2017, and the Report on the status of environmental compliance of the Duquesa Landfill by the Ministry of Environment of April 12, 2017, are conclusive as regards contractual and environmental breaches by Lajun.⁴³ There is no evidence on record that any such assertions are false; rather, the opposite is true. The aforementioned “factual pattern” or “scenario,” Lajun’s contractual breaches announced even before they occurred, places liability for the situation on the

³⁸ Notes from Lajun of January 18, 2017, to the municipalities of the National District, Santo Domingo Oeste, Pantoja and Los Alcarrizos (C-68).

³⁹ Notes from Lajun of February 13, 2017, to the same municipalities (C-71).

⁴⁰ Note from Lajun of March 2, 2017, to the Municipality of Santo Domingo Oeste (C-72).

⁴¹ Counter-Memorial on the Merits (Respondent), paras. 217-219; Rejoinder on the Merits (Respondent), paras. 171-188; Statement of Sócrates Pérez, para. 27.

⁴² Environmental and Health Emergency Declaration of the Province of Santo Domingo and the National District of July 21, 2017 (R-37).

⁴³ C-9 and R-133, respectively.

Dominican company in which Claimant says to have his investment through four different companies. Lajun's agreements with the municipalities choose Dominican law as applicable law, as well as the jurisdiction of Dominican courts. The administrative decisions were subjected to judicial assessment. Nothing on the record evidences a kind of collusion among Respondent's administrative and judicial bodies. On the contrary, they prove the independence of the judicial branch, which, on several occasions, did not follow executive bodies' propositions. It can be asserted that Respondent, through the relevant body, the ASDN, showed a great deal of patience and willingness to try to cure Lajun's difficulties. Instead of this, the Tribunal sees this attitude as inconsistent, because Respondent subsequently proceeded to rescind the agreement vis-à-vis Lajun's breaches.

35. The truth is that the alleged investor agreed to make his alleged investment although he knew, or should have known, that the fees applied to the municipalities were not sufficient to guarantee a return on his investment and that the Duquesa Landfill was far from being in its best operational conditions. Respondent's own claim about its expectation of construction of a WTE plant shows great ignorance of existing legal requirements and the factual possibility of implementing such a project.
36. There is no dispute that Respondent abode by Dominican law and that its actions were in accordance with such law, which is the law applicable to the contractual relationship. Purporting, as the majority does, that, through such "factual matrix," there was indirect expropriation or unfair and inequitable treatment is an abuse, both from a linguistic and a legal standpoint.
37. The Final Award fails to examine Lajun's behavior after the execution of the second settlement agreement of May 24, 2017. The situation of the landfill once again under Lajun's control did not change, but actually worsened in the face of a new cut in its operation hours in the month of July.
38. The Final Award fails to examine the real content of the thirty-day period that the ASDN's Notice of Breach gave Lajun on July 19, 2017. Lajun was to pay its debts and, during such period, cure the list of breaches under penalty of institution of contract termination proceedings. That itself constitutes an acknowledgement of breaches on the part of Lajun. All that pursuant to the Concession Agreement and its 2014 Addenda, as well as Dominican laws. The fact that, eight days before expiration of the thirty-day period, the State filed an action before the Superior Administrative Court in order to seek *nullification* of the agreement is not at

all contradictory. *Rescission* and *nullification* of a contract are two completely different issues. The Final Award seems to confuse them and finds in that action eight days before expiration of the thirty-day period a purported breach that is particularly “revealing.”⁴⁴

39. Then, it is important to examine the issue of the nullification action regarding the concession agreement. Two NGOs, not the State, initiated the nullification action. On February 19, 2014, Fundación Justicia y Transparencia and Alianza Dominicana Contra la Corrupción each filed a complaint before the General Directorate of Public Contracts, a decentralized body of the Central Administration of the State, regarding the legality of the contract between the ASDN and Lajun. Both the ASDN and Lajun raised their defenses and requested that such complaints be dismissed. This actually shows that the ASDN had no animosity against Lajun and no intention to dispossess such company. The General Directorate of Public Contracts partially admitted the complaints (as regards the respect of Dominican Public Bidding procedures) and referred them to the competent courts.⁴⁵ The majority also gets lost in the issue of determining whether the ASDN “confirmed” the validity of the concession agreement every time it relied thereupon.⁴⁶ It is obvious that the parties to the agreement acted as if it were in force and effect before any other body attempted to declare it null and void.
40. The same may be said about the Land and the irregularities existing as to the acquisition and registration thereof, as well as the subsequent nullification of the transaction, which was recognized by the purchaser that sold it to Nagelo and Wilkison.⁴⁷
41. The majority’s decision that there was an “indirect creeping expropriation” is, thus, widely unsatisfactory.⁴⁸ Just as the majority rapidly finds that there was an expropriation, it also easily concludes that the conditions required by the Treaty for the expropriation to be lawful have not been met, since there was obviously no compensation.
42. The foregoing analysis of the legal and “factual matrix” also leads me to dissent from my colleagues as to what they regard as a breach of the obligation to accord fair and equitable treatment and of the “umbrella” clause.

⁴⁴ Final Award, para. 359.

⁴⁵ R-17.

⁴⁶ Final Award, para. 385.

⁴⁷ R-153.

⁴⁸ Final Award, para. 360.

IV. THE MAJORITY DECIDES THAT THERE WAS NO SITUATION AFFECTING NATIONAL SECURITY

43. On July 21, 2017, the Ministry of Environment and the Ministry of Public Health declared the environmental and health emergency at the Duquesa Landfill “due to the health problems caused and the imminent risk as a result of the improper management of solid waste.”⁴⁹ [Tribunal’s Translation] Respondent deems applicable Article XVII(2) of the Treaty, which provides that “[t]his Agreement shall not preclude the application by either Party of measures necessary for the protection of its own national security interests.”⁵⁰
44. I strongly disagree with how the majority interprets and applies (or, rather, fails to apply) such provision, as regards both “security” and the “national” scope thereof. As I stated in the introduction to this dissenting opinion, the Final Award confuses the protection of national security interests and the state of necessity.⁵¹ Today, that national security includes the health of the population and the environment is out of discussion. It suffices to recall the measures recently adopted by all States concerning the entry, movement, confinement and exit of people in their territories during the Covid-19 pandemic.
45. Claimant asserted that the Dominican Republic failed to declare a state of emergency, as the Constitution mandates. The majority accepts this consideration as a key element to its reasoning that Respondent failed to use the remedy of declaration of a state of exception allowed by its Constitution.⁵² However, the declaration of a state of emergency (or whatever it may be called under the different constitutions) is not the only way in which States can face situations concerning their national security. The majority “finds that Respondent has failed to prove that the situation in question, despite posing a very serious health and environmental situation that called for urgent measures, actually constituted a state of emergency associated with the impairment of national security.”⁵³
46. The Tribunal believes, nevertheless, that, in the instant case, there is a “serious health and environmental crisis,” but that “it has not been proven that such a crisis had a national scope

⁴⁹ R-37 or C-149, Environmental and Health Emergency Declaration of the Province of Santo Domingo and the National District, dated July 21, 2017.

⁵⁰ R-1.

⁵¹ *Infra*, para. 4.

⁵² Final Award, para. 260.

⁵³ Final Award, para. 248.

or impact.”⁵⁴ The Final Award does not consider that the situation in Santo Domingo had a national scope, as a consequence of which “national” security could not be invoked. According to my colleagues: “the situation invoked as a reason for the declaration was confined to a limited portion of the national territory and to a populated area, which, although relatively large, was also limited. A national emergency has to affect the general population to such an extent that it takes on such importance that the entire nation must respond, allocate resources, take impact measures, or be prepared to absorb the consequences of such an emergency.”⁵⁵ This assertion, which is unusual *per se* as its authors bestow upon themselves the right to generally decide the scope of a situation affecting national security,⁵⁶ ignores the fact that the situation concerns the capital of the Republic, where more than forty per cent of the total population of the country lives, and that Duquesa was the only landfill in such area.

47. The majority awards Claimant compensation in the amount of USD 43.590.090.

V. CONCLUSIONS

48. For the foregoing reasons, I consider that the Final Award has serious defects and, therefore, I feel compelled to issue a negative vote. In addition, there are other elements that warrant this dissenting opinion. The totally unbalanced way of assessing the Parties’ good or bad faith, which follows from a comparison between the limited analysis of how Claimant purportedly made the investment and the assertion whereby Respondent, after creating expectations in Lajun, took “a series of actions on all fronts” in order to deprive it of its investment, is regrettable.⁵⁷

49. The majority carries out a sort of psychological analysis of the State’s actions. Even though the majority opines that Respondent did not act in a discriminatory fashion, it considers that Respondent’s real objective was just to deprive Claimant of his investment, dismissing the reasons invoked, such as the concession being awarded in violation of the Law, Lajun’s breach of its contractual obligations, or the environmental and health crisis, which Respondent relies upon. According to the Final Award, “[t]he Tribunal notes that it is not persuaded that the current circumstances in the landfill could be used to show that the State’s actions served a

⁵⁴ Final Award, para. 251.

⁵⁵ Final Award, para. 254.

⁵⁶ Were the authors to be believed, a State could not invoke “national” security reasons if another State occupies only a part of its territory without any intention of going any further...

⁵⁷ Final Award, para. 359.

public purpose. What is apparent from the factual scenario, is that the State took a series of actions aimed at actually excluding Claimant from the operation of the investment. .”⁵⁸

50. If the Final Award were to be described in one word, it could be said to be an “indirect” Final Award: the investor is “indirect,” the method of financing the investment is “indirect,” and the expropriation is “indirect.” And I might add that the way in which the majority is persuaded by Claimants’ allegations is also very “indirect.”

51. Aside from the particular situation of this case, I would like to make one last comment. In times when States and international organizations make arduous efforts to guarantee the transparency of flows of money and, thus, of both national and foreign investments -especially the latter-, and when efforts to prevent money laundering and tax fraud lead public and private bodies to increasingly demand clear and transparent transactions, the reading of the Final Award will puzzle more than one. The same can be said about the efforts of States and both governmental and non-governmental international organizations to foster a stricter environmental protection. This Final Award will certainly not contribute to favoring a positive reading of the practice of investment tribunals, in times when the system is subject to widespread criticism, as well as revision attempts and efforts.

[signed]

Professor Marcelo G. Kohen
Date: 09.08.2023

⁵⁸ Final Award, para. 363.