School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Michael Anthony Lee Chin v. Dominican Republic (ICSID Case No. UNCT/18/3) – Partial Award on Jurisdiction – 9 July 2020

Case Report by: Carla Martini**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against the Dominican Republic pursuant to the Agreement Establishing the Free Trade Area between the Caribbean Community ('CARICOM') and the Dominican Republic (the 'Agreement' or the 'Treaty'). Claimant alleged that the Dominican Republic had breached, *inter alia*, expropriation, fair and equitable treatment, full protection and security, non-discrimination, and most-favoured nation ('MFN') obligations under the aforementioned Agreement. The Tribunal decided to have a phase of the proceedings to address Respondent's jurisdictional objections. The Tribunal decided to have jurisdiction over the dispute, and deferred the adoption of the decision on costs.

Main Issues: consent to international arbitration under the Agreement Establishing the Free Trade Area between the Caribbean Community and the Dominican Republic, as well as the protection of indirect investments and investors under the Agreement.

Tribunal: Professor Diego P. Fernández Arroyo (President), Mr. Christian Leathly (Arbitrator) and Professor Marcelo Kohen (Arbitrator)

Claimant's Counsel: Mr. Richard C. Lorenzo, Ms. Maria Eugenia Ramirez, Mr. Mark Cheskin, Ms. Juliana De Valdenebro (Hogan Lovells US LLP, Miami)

Respondent's Counsel: Ms. Yahaira Sosa, Viceministra de Comercio Exterior (Viceministerio de Comercio Exterior Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales), Ms. Patricia Abreu, Viceministra de Cooperación Internacional, Ms. Rosa Otero, Directora de Relaciones Internacionales del Viceministerio de Cooperación Internacional, Ms. Johanna Montero, Encargada Departamento Comercio y Ambiente, Dirección de Relaciones Internacionales del Viceministerio de Cooperación Internacional Ministerio de Medio Ambiente y Recursos Naturales, Mr. Flavio Darío Espinal, Consultor Jurídico del Poder Ejecutivo, Ms. Jimena Conde, Sub-consultora Jurídica del Poder Ejecutivo, Ms. Nathalie Hernández, Encargada del Dpto. de Política Comercial, Arbitraje, Inversión y Negociaciones, Consultoría Jurídica del Poder Ejecutivo, Ms. Sara Patnella, Abogado II del Dpto. de Política Comercial, Arbitraje, Inversión y Negociaciones, Consultoría Jurídica del Poder Ejecutivo, Ms. Lourdes Pérez, Asesora Legal del Despacho del Alcalde del Ayuntamiento de Santo Domingo Norte, Ms. Ramona Lara, Abogada del Ayuntamiento de Santo Domingo Norte, Mr. George Kahale III, Ms. Claudia Frutos-Peterson, Ms. Gabriela

Álvarez Ávila, Mr. Fernando Tupa, Ms. Elisa Botero, Ms. Natalia Linares, Curtis Mallet-Prevost, Colt & Mosle LLP, Washington DC)

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** Carla Martini is an Argentine-trained lawyer and a candidate for the New York Bar (2020). She holds an LLB degree from the University of Buenos Aires, and a Master's degree (LL.M.) from Columbia Law School. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Martini can be contacted at cm3914@columbia.edu

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Digest:

1. Relevant Facts

Mr. Michael Anthony Lee-Chin ('Lee-Chin' or 'Claimant') is a national of Jamaica. Respondent is the Dominican Republic ('Domincan Republic' or 'Respondent') (¶¶ 2-3). The underlying dispute arose out of a Concession Agreement undertaken on 1 March 2007, between Lajun Corporation S.R.L. ('Lajun'), a Dominican company, and the Municipality of Santo Domingo Norte ('ASDN'). The agreement granted Lajun the administration and operation of a waste disposal landfill ('Duquesa Landfill'), and the right to build a waste to energy ('WTE') plant (¶ 6). In addition, the Municipalities of the Gran Santo Domingo area would be charged a fee of at least USD 2 per ton of waste (the 'Tipping Fee') as consideration for Lajun's performance of services (¶ 10).

On 26 June 2103, the owners of Lajun aggregate share capital sold their shares and part of the Duquesa Landfill (the 'Land') to the Panamanian entity Nagelo Enterprises, S.A. (50% of the shares), and to the Dominican entity Wilkison Company, S.R.L (remaining 50% of the shares). Claimant became the indirect owner of 90% of Lajun and the Land through two Panamanian companies, namely Lution Investments, S.A. (owner of 100% of Nagelo share capital), Kigman Del Sur, S.A. (owner of 80% of Wilkinson share capital) (¶ 7).

Claimant made substantial investments in the Land, even though he claimed that the Tipping Fee was insufficient to cover the operating costs of the Duquesa Landfill or to make the required investments under the Concession Agreement (¶ 9).

Claimant further alleged that his investment deteriorated over the years due to lack of adequate compensation by the Dominican authorities for Lajun's provision of services (¶ 10).

On 9 July 2013, the ADSN rescinded the Concession Agreement, took possession of the Land and ejected Lajun and their employees from the property (¶ 11).

A settlement agreement was concluded in February 2014 between ASDN and Lajun (the 'First Settlement Agreement'), whereby the ASDN returned possession of the Land to Lajun and allowed the company to continue with its operations (¶ 12). Claimant made further investments based on the commitments made by Respondent in the First Settlement Agreement and in the amendments to the Concession Agreement (¶ 12).

A second settlement agreement between ASDN and Lajun was later executed on May 2017 due to Respondent's later interference in the operation of Duquesa Landfill (¶ 15).

On 19 July 2017, the ASDN unilaterally terminated the Concession Agreement and notified Lajun of alleged breaches of its obligations under the Concession Agreement (¶ 16).

On 10 August 2017 the ADSN sought the nullification of the Concession Agreement by filing an action before the Dominican Republic Administrative Court, which included a request for interim measures for judicial administration of the Duquesa Landfill until the conclusion of the proceedings (¶ 17).

Following the interim measure issued by the court on 27 September 2017, a governmental commission took control of the Duquesa Landfill which Claimant alleged constituted an expropriation without compensation (¶ 18).

On 25 October 2018, the Superior Administrative Court declared the Concession Agreement null on the basis of Lajun's violations of Law No. No. 340-06 of Public Procurement (¶ 21).

Claimant brought an action for relief against the Dominican Republic pursuant to the Agreement, alleging that the Dominican Republic had breached, *inter alia*, expropriation, fair and equitable treatment, full protection and security, non-discrimination, and most-favoured nation protections contained in the aforementioned Agreement (¶ 22). Claimant sought damages for up to USD 596.1 million, moral damages in the amount of USD 5 million, plus costs (¶ 22).

2. Procedural History

Claimant sent Respondent a Notice of Arbitration on 6 April 2018 pursuant to Article 3 of the UNCITRAL Rules (¶ 20). The parties notified the Secretary-General of ICSID on 19 July 2018 of their agreement to appoint ICSID as Administering Authority of the arbitral proceedings (¶ 25). The arbitral tribunal (the 'Tribunal') was constituted on 7 August 2018 (¶ 28). On September 25, 2018, the Tribunal and the Parties held the preliminary procedural consultation by telephone conference (¶ 29) whereby they agreed, *inter alia*, that the proceedings were to be conducted pursuant to the 1976 UNCITRAL Rules. Claimant submitted his statement of claim on 18 January 2019 (¶ 33). On 4 February 2019, Respondent submitted a request for bifurcation jointly with, *inter alia*, two jurisdictional objections, to which Claimant opposed on 19 February 2019 (¶¶ 34-35). The Tribunal granted Respondent's request for bifurcation on 6 March 2019. The Hearing on Jurisdiction was held in Washington D.C. on 27 and 29 February 2020 (¶ 52). Claimant and Respondent submitted their costs submissions on 20 April 2020 and 15 May 2020, respectively (¶¶ 58;60).

3. Positions of the Parties

3.1 Respondent's Position

Respondent challenged the Tribunal's jurisdiction on the grounds that, *inter alia*, paragraph 1 of Article XIII of the Agreement did not contain an open offer of consent to UNCITRAL arbitration, that Article XIII required the State's *ex post* consent to the existence of a dispute, and that the MFN clause could not be invoked to determine Respondent's consent ('First

Jurisdictional Objection') (¶63). Respondent further contended that the Agreement did not protect neither indirect investments nor indirect investors (¶ 64).

3.1.1 First Jurisdictional Objection: parties' consent to international arbitration

3.1.1.1 The obligation undertaken by the contracting parties to the Treaty and the requirement for a specific choice of forum

According to Respondent, paragraph 1 of Article XIII of the Agreement does not contain an open offer of consent to UNCITRAL arbitration. Respondent contended that the purpose of paragraph 1 is to identify different alternatives for dispute resolution, and set the preconditions for submitting a dispute under those alternatives (¶ 82). The word "shall" is used to denote an eventuality rather than an obligation, and that interpreting this word as providing an obligation would lead to conclude that a dispute should be submitted simultaneously to three dispute resolution methods (¶ 83). In Respondent's view, paragraph 1 also failed to identify a specific arbitration forum, and international law does not allow for a consent to international arbitration *in abstracto* (¶ 136).

3.1.1.2 The submission of a dispute to international arbitration: paragraph 2 of Article XIII, the scope of the Parties' potential agreement and the application of the UNCITRAL Rules

Respondent submitted that, according to a good faith interpretation of paragraph 2, consent to UNCITRAL arbitration is perfectioned upon conclusion of a *de novo* agreement between the investor and the State (¶ 145). In fact, the phrase "where the dispute is referred to international arbitration" only introduces the conditions to be met for a dispute to be submitted to international arbitration (¶ 146). Respondent further argued that the expression "may agree" indicated the requirement of an agreement between the investor and the host State after the dispute has arisen in order to resort to an UNCITRAL arbitration (¶ 157). According to Respondent, this agreement is the unavoidable pathway for the State to consent to arbitration (¶160).

In addition, Respondent submitted that the application of the UNCITRAL Rules would be possible only if the parties conclude an agreement to such effect (¶175). Respondent further contended that Article XIII did not contain the written agreement to apply the UNCITRAL Rules required by Article 1(1) of such rules, which should be clear and unambiguous (¶176). Respondent disagreed with Claimant that the UNCITRAL Rules are applicable by default, as the Treaty does not favour one option over the other (¶177).

3.1.2 Second jurisdictional objection: the issue of indirect investments and indirect investors and the investments protected by the Treaty

According to Respondent, the Treaty does not protect indirect investments nor indirect investors absent any reference in the Treaty; instead, the broad definition of investment relates to the assets protected by the Treaty, and "not to the way in which they are held" (¶201). Respondent relied on the principle of international law whereby a company's shareholders may not seek to recover damages suffered by the company in which they hold shares (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Decision on Preliminary Objections dated May 24, 2007,) (¶203). Respondent also argued that the Parties did not seek to protect indirect investments and indirect investors as they

intended to avoid any risk of potential parallel proceedings should such protection exists (¶204).

3.2 Claimant's Position

Claimant asserted that the dispute was within the jurisdiction and competence of the tribunal, and requested to dismiss Respondent's jurisdictional challenges (¶68). Claimant argued that Respondent consented to the arbitration under paragraph 1's unilateral offer of consent, and that such consent is confirmed by the MFN clause provided in the Agreement (¶66)**.** Claimant further submitted that the Agreement protected both indirect investments and investors given their broad definitions in the Agreement (¶67)**.**

3.2.1 Article XIII contains Respondent's consent to international arbitration

Claimant argued that paragraph 1 of Article XIII contains Respondent's complete consent to international arbitration, and provides investors with an immediate right of access to arbitration without the need of a second State consent once the dispute arises (¶84)**.** Claimant contended that the binding nature of the State's consent is confirmed by the word "shall" in paragraph 1 (¶85)**.** According to Claimant, the Treaty provides for three forum options: international arbitration, domestic arbitration and domestic courts; where the Treaty refers to an arbitral forum, it provides for the default application of the UNCITRAL Arbitration Rules (¶137).

3.2.2 Paragraph 2 of Article XIII and the application of the UNCITRAL Rules

According to Claimant, paragraph 2 of Article XIII assumes that a dispute has been already submitted to international arbitration and only addresses the procedural question of how to appoint arbitrators (¶148). Claimant disagreed with Respondent's interpretation of paragraph 2 that the phrase "may agree" conditions its consent under paragraph 1 (¶149). According to Claimant, there is no requirement of an *ex post* agreement as the parties may always agree *ex post* to submit a dispute to arbitration even without express reference (¶161). Such agreement would not be an unavoidable condition to access arbitration, but rather an option for the parties to choose either a sole arbitrator or an arbitral tribunal (¶161; 164). Claimant further asserted that UNCITRAL Rules should be applied by default in the absence of a special agreement (¶180). Given that the Rules are expressly mentioned in the Treaty, and that they exist independently of any special agreement between the parties, parties can always "fallback" on the option of applying such pre-existing rules (¶181). Unlike Respondent, Claimant considered Article 1(1) of the UNCITRAL Rules agreement in writing requirement to be satisfied (¶182).

3.2.3 The treaty protects indirect investments and indirect investors

In Claimant's view, the clear and unambiguous text of the Treaty defining investment and investor in "extremely broad terms" protects Claimant's investments, even without an express reference to indirect investment (¶207). Claimant further clarified that the damages sought were not on behalf of Lajun, but those associated with the loss in value of his investment in the Dominican Republic (¶207); in any event, the Treaty expressly recognizes shareholders' right to initiate an arbitration by including shares of companies as protected investments (¶207).

4. Tribunal's position

4.1 Respondent consented to international arbitration under UNCITRAL Rules

The Tribunal agreed with Claimant that the expression "shall … be submitted" is unambiguous, and expresses the parties' obligation to submit their disputes either to the courts of a contracting party, domestic arbitration or international arbitration (¶ 95). After analysing several lexicographic entries, the Tribunal concluded that the only definition applicable to the wording and context of paragraph 1 is the one that understands "shall" as an obligation, and not to an event that might occur in the future as asserted by Respondent (¶ 103). The Tribunal further rejected Respondent's understanding that, if the expression is to be interpreted as an obligation, it would lead to the result of having to submit the dispute to all three options specified at the end of paragraph 1 (¶ 107). In fact, in *Garanti Koza*, the tribunal held that the availability of more options beyond international arbitration does not change the compulsory nature of the expression but rather how it is implemented (¶ 113). Given that the offer to arbitrate can only emanate from the State, only the investor could be entitled to choose to institute an investor-State arbitration under Article XIII (¶ 97); the investor's election of one of the three options contained in paragraph 1 is thus the acceptance of the standing consent offered by the State (¶ 114). In addition, the reference to investor's consent to arbitration in paragraph 3 of Article XIII necessarily assumes that the State's offer of consent has been accepted by the investor's notice of arbitration, without any additional requirement of consent (¶120); finding of any additional requirements would require rewriting of the Treaty (¶¶ 134-135).

4.2 Article XIII does not require an ex post agreement to international arbitration

The Tribunal considered the provisions of paragraph 2 of Article XI provide the disputing parties of two options: either to submit the dispute to a sole arbitrator, or to arbitration before an *ad hoc* tribunal constituted by special agreement or under the UNCITRAL Rules (¶173). The Tribunal considered that the phrase "where the dispute is referred to international arbitration", interpreted in good faith and in accordance with its ordinary meaning (Article 31 VCLT), indicated that the entire content of paragraph 2 circumscribes to the scenario in which the international arbitration option is chosen (¶156). The Tribunal further rejected Respondent's submission that paragraph 2 only introduces the conditions to be met for a dispute to be submitted to international arbitration under UNICTRAL Rules (¶153). It would not be convincing to further assert that an *ex post* agreement is required for international arbitration and not for national arbitration (¶155). The Tribunal further disagreed with Respondent that Article XIII's purpose is to provide the possibility for the parties to refer the dispute to an arbitrator or tribunal; this is not, according to the Tribunal, a good faith interpretation in accordance with the ordinary meaning of the terms in paragraph 2 (¶171).

4.3 Article XIII does not provide for a default application of the UNCITRAL Rules

In light of the parties' opposite interpretation as to whether UNICTRAL Rules are the default option, the Tribunal opted for rejecting the latter argument. The Tribunal observed that the parties had the possibility and not the duty to adapt the organization of the arbitral proceeding to their preferences, and they chose to rely on the provisions of the UNICTRAL Rules (¶189). The Tribunal nonetheless considered that the express inclusion of the UNCITRAL Rules met the requirement of a written agreement under Article (1) of such rules, and therefore concluded that UNCITRAL Rules were applicable to the proceedings (¶194).

4.4 Investments protected by the Treaty

The Tribunal considered that the Treaty drafters' intention was to adopt an open definition. The Tribunal used the general maxim of interpretation whereby if the text does not make a distinction (between direct and indirect investments and investors), then the interpreter should not make a distinction either (¶212). Like in *Cemex v. Venezuela*, the tribunal held that indirect investments were not excluded because they were not specifically mentioned (¶212). While the Tribunal recognized the existing debate on the protection of indirect investors and investments in the field, such debate is focused on the claims filed by minority shareholders and the risk of parallel proceedings due to share dispersion, which is not the case here as Mr. Lee-Chin owns virtually the entire investment (¶216-217).

The Tribunal disagreed with Respondent's argument that, under international law, shareholders may not seek to recover the damages suffered by the companies in which they hold interest. In this case, Mr. Lee-Chin is claiming on his own behalf for the loss in value of his investments due to alleged violations by Respondent of its treaty obligations (¶218). The Tribunal further rejected Respondent's allusion to the International Court of Justice case law, as it considered that cases involving diplomatic protection differed from cases concerning the scope of investment protection under an investment treaty (¶218). Therefore, the Tribunal concluded that the Treaty applied to Claimant's investments in the Dominican Republic and to Mr. Lee-Chin as an investor (¶219).

5. Costs

Claimant and Respondent requested a decision on costs and submitted their statements on 20 April 2020, and 15 May 2020, respectively (¶220). The Tribunal reserved all matters concerning costs for a subsequent stage of the proceedings (¶221).