

**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

PARTIAL AWARD ON JURISDICTION

Members of the Tribunal

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

Secretary of the Tribunal

Ms. Marisa Planells-Valero

Place of Arbitration: Washington D.C.

Date of dispatch to the Parties: July 15, 2020

REPRESENTATION OF THE PARTIES

Representing Michael Anthony Lee-Chin:

Mr. Richard C. Lorenzo
Ms. Maria Eugenia Ramirez
Mr. Mark Cheskin
Ms. Juliana De Valdenebro
Hogan Lovells US LLP
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
United States of America

Representing the Dominican Republic:

Ms. Yahaira Sosa, Viceministra de Comercio Exterior
Mr. Marcelo A. Salazar, Director de la DICOEX
Ms. Leidylin Contreras, Subdirectora de la DICOEX
Ms. Raquel De La Rosa, Analista de la DICOEX
Ms. Mary Estefany Díaz, Analista de la DICOEX
Ministerio de Industria, Comercio y Mipymes (MICM)
Viceministerio de Comercio Exterior
Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales
Av.27 de Febrero Núm. 306, Bella Vista, Santo Domingo, República Dominicana
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
Av. Cayetano Germosén esq. Av. Gregorio Luperón, Ensanche El Pedregal, Santo Domingo, República Dominicana
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
Consultoría Jurídica del Poder Ejecutivo

Ave. México esq. Dr. Delgado, Palacio de la
Presidencia de la República,
Santo Domingo, República Dominicana
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
Ayuntamiento de Santo Domingo Norte
Av. Hermanas Mirabal Esq. General Modesto
Díaz, Villa Mella Santo Domingo Norte,
República Dominicana
and
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
1717 Pennsylvania Avenue, N.W. Suite 1300
Washington, D.C. 20006
United States of America

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
1.	The Parties	1
2.	Overview of the Dispute.....	1
3.	The Parties’ Requests	6
II.	PROCEDURAL HISTORY	6
1.	The Initial Phase	6
2.	The Written Phase on Jurisdiction.....	9
3.	The Hearing on Jurisdiction.....	10
4.	The Post-Hearing-on-Jurisdiction Phase	13
III.	THE PARTIES’ POSITIONS REGARDING JURISDICTION	14
1.	The Dominican Republic’s Position	14
A)	The Treaty does not contain an Offer of Consent to UNCITRAL Arbitration	14
B)	The Treaty does not Protects Indirect Investments or Indirect Investors.....	15
C)	Respondent’s Claims.....	16
2.	Michael Anthony Lee-Chin’s Position.....	16
A)	The Dominican Republic Consented to Arbitrate this Dispute	16
B)	The Treaty Protects Indirect Investments and Investors	17
C)	Claimant’s Claims.....	17
IV.	THE BASIC ELEMENTS FOR THE TRIBUNAL’S ANALYSIS.....	18
1.	The Text to Be Interpreted	18
2.	The Sources of the criteria for the interpretation of the Treaty	19
3.	The Preparatory Work	21
4.	The Circumstances of the Conclusion of the Treaty and Other Supplementary Means of Interpretation	21
5.	Invocation of judicial precedents	22
V.	FIRST JURISDICTIONAL OBJECTION – CONSENT TO ARBITRATE.....	23
1.	Consent to International Arbitration.....	23
A)	The Obligation Undertaken by the Contracting Parties to the Treaty.....	23
B)	On the Requirement for the Specific Choice of a “Forum”	37
2.	The Submission of a Dispute to International Arbitration	40
A)	The Issue Covered in Paragraph 2 of Article XIII.....	40
B)	The Scope of the Parties’ Potential Agreement	43

C) The Application of the UNCITRAL Rules	48
3. Reliance on the Most-Favored Nation Clause	53
4. The Supplementary Means under Article 32 of the Vienna Convention of 1986	54
VI. SECOND JURISDICTIONAL OBJECTION - THE ISSUE OF INDIRECT INVESTMENTS AND INDIRECT INVESTORS	55
1. Mr. Lee-Chin's Investments in the Dominican Republic	55
2. The Investments Protected by the Treaty	55
A) Respondent's Position	55
B) Claimant's Position	56
C) The Tribunal's Analysis	57
VII. COSTS	61
VIII. DECISION ON JURISDICTION	61

TABLE OF DEFINED TERMS

Article XIII	Article XIII of Annex III (Agreement on Reciprocal Promotion and Protection of Investments) of the Treaty
C-[#]	Claimant's Factual Exhibit
CL-[#]	Claimant's Legal Authority
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated July 3, 2019
First Legal Expert Report of Prof. Pauwelyn	Legal Expert Report of Professor Joost H.B. Pauwelyn dated December 22, 2018 (C-21)
Hearing	Hearing on Jurisdiction, held from February 27 to February 28, 2020
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial on Jurisdiction	Respondent's Memorial on Objections to Jurisdiction dated May 6, 2019
Notice of Arbitration	Notice of Arbitration dated April 6, 2018
Opposition to Bifurcation	Opposition to Respondent's Request for Bifurcation dated February 19, 2019
R-[#]	Respondent's Factual Exhibit
Rejoinder on Jurisdiction	Claimant's Rejoinder Memorial on Jurisdiction dated December 12, 2019
Reply on Jurisdiction	Respondent's Reply on Objections to Jurisdiction dated October 21, 2019
Request for Bifurcation	Respondent's Request for Bifurcation dated February 4, 2019
RL-[#]	Respondent's Legal Authority

Second Legal Expert Report of Prof. Pauwelyn	Rebuttal Legal Expert Report of Professor Joost H.B. Pauwelyn dated June 18, 2019 (C-131)
Statement of Claim	Claimant's Statement of Claim dated January 18, 2019
Tr. Day [#] [language] [page:line]	Hearing Transcript
Treaty	Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic, signed on August 22, 1998 and which entered into force on February 5, 2002
Tribunal	Arbitral Tribunal constituted on August 7, 2018
UNCITRAL Rules	1976 Arbitration Rules of the United Nations Commission on International Trade Law
Vienna Convention of 1986	Vienna Convention on the Law of Treaties between States and International Organizations (1986)

I. INTRODUCTION

1. This case concerns a dispute submitted on the basis of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Agreement Establishing the Free Trade Area between the Caribbean Community (“**CARICOM**”) and the Dominican Republic, signed on August 22, 1998 and which entered into force on February 5, 2002 (the “**Treaty**”), and the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).

1. The Parties

2. The Claimant is Mr. Michael Anthony Lee-Chin (“**Claimant**”), a national of Jamaica.
3. The Respondent is the Dominican Republic (the “**Republic**” or “**Respondent**”).
4. Claimant and Respondent are collectively referred to as the “**Parties**.” The Parties’ representatives and their addresses are listed on page (i).

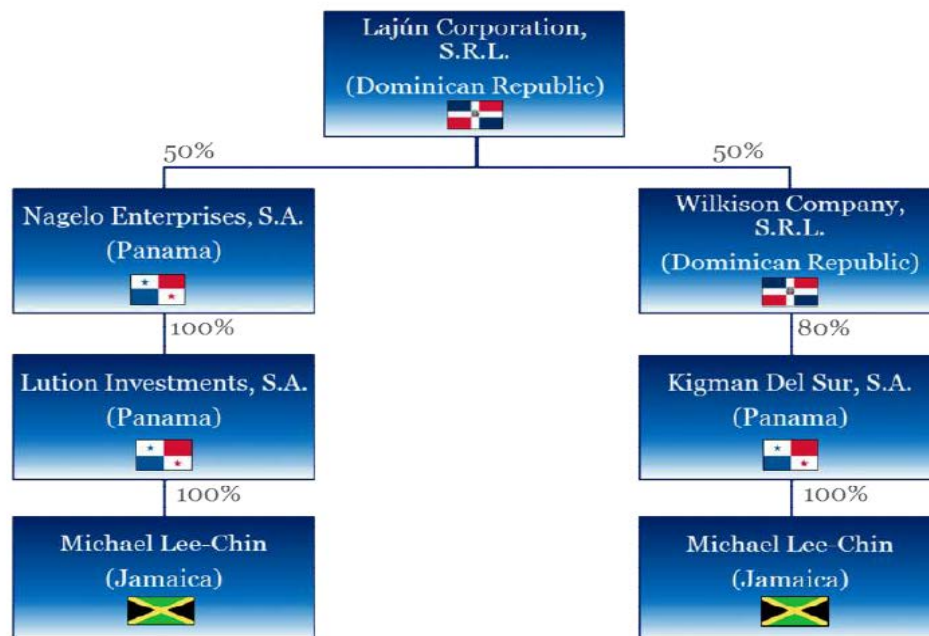
2. Overview of the Dispute

5. The Tribunal provides the following overview of the dispute and Claimant’s claims in order to contextualize the Parties’ jurisdictional arguments. Nothing stated in this section reflects any finding of fact or conclusion of law relating to the merits of the case.
6. This dispute has its origin in the Concession Agreement entered into on March 1, 2007 between the Dominican company Lajun Corporation, S.R.L. (“**Lajun**”) and the Municipality of Santo Domingo Norte (“**ASDN**”, by its acronym in Spanish) for the administration and operation of the Duquesa Landfill, in which final disposal of urban solid waste was carried out in the area of the Gran Santo Domingo in the Dominican Republic.¹ According to Claimant,

¹ *Notice of Arbitration*, § 23; *Memorial on Jurisdiction*, § 9; Exhibit C-1, Concession Agreement dated March 1, 2007. The Concession Agreement was amended in four occasions, two of them before Claimant made his alleged investments in the Republic in mid-2013 (Addenda 1 and 2) and the remaining two after that date (Addenda 2A and 3). See Exhibits C-2 and C-3 (amendments before June 26, 2013) and Exhibits R-8 and C-6 (amendments after June 26, 2013).

the Concession Agreement also provided for Lajun's right, and not only the eventuality, to build a waste to energy plant ("**WTE Plant**", by its acronym in English).²

7. On June 26, 2013, 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 Enterprises, S.A. ("**Nagelo**") and the remaining 50% to the Dominican entity Wilkison Company, S.R.L. ("**Wilkison**"). On that same date, Mr. López Díaz sold Nagelo and Wilkison 875,373.12 m² on which the Duquesa Landfill was located (the "**Land**"). 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 Nagelo share capital, and Kigman Del Sur, S.A. ("**Kigman**"), owner of 80% of Wilkison share capital,³ as follows:



² See, *inter alia*, *Statement of Claim*, §§ 58, 61, 64, 82.

³ *Statement of Claim*, §§ 27, 82. Claimant explains that the remaining 10% minority interest is owned by Dr. José Luis Asilis, a Dominican entrepreneur. See also, *Memorial on Jurisdiction* §§ 16-17.

8. On the basis of the foregoing, Claimant alleges that his investment in the Dominican Republic includes (i) the acquisition of the interests in Lajun, (ii) the acquisition of the Land, (iii) the right to develop a recycling facility and the WTE plant, and (iv) the Concession Agreement granted by the ASDN.⁴
9. Claimant explains that thereafter he made substantial investments in the Duquesa Landfill and fully complied with his contractual obligations, as acknowledged by the ASDN in many occasions,⁵ and continued to render services despite Respondent's contractual breaches and political interferences focused on depriving Claimant of his property.⁶
10. As consideration for the performance of services under the Concession Agreement, Lajun was authorized to charge the Municipalities of the Gran Santo Domingo area a fee of at least USD 2 per ton of waste (the "**Tipping Fee**").⁷ Claimant explains that the Tipping Fee did not suffice to cover the operating costs of the Duquesa Landfill and to make the investments required by the Concession Agreement,⁸ and that Respondent also acknowledged that the Fee was inadequate both in the amendments to the Concession Agreement and in the settlement agreements executed thereafter.⁹ Claimant recognizes that the Duquesa Landfill situation increasingly deteriorated over the years, but alleges that this was due to the lack of adequate compensation by the Dominican authorities for the services rendered by Lajun.¹⁰
11. According to Claimant, on July 9, 2013, under the pretext of a failure to comply with certain environmental regulations, the ASDN notified Lajun of its decision to rescind the Concession

⁴ *Notice of Arbitration*, § 81; *Statement of Claim*, § 1.

⁵ See, *inter alia*, *Statement of Claim*, §§ 92-96, 114, 132, 153; Exhibit C-52, Verification of Compliance with Obligations dated July 1, 2013; Exhibit C-16, Certification of Compliance dated July 9, 2014.

⁶ See, *inter alia*, *Statement of Claim*, §§ 24, 95, 158, 163, 173.

⁷ *Notice of Arbitration*, § 24; *Statement of Claim*, § 58; Exhibit C-1, Concession Agreement dated March 1, 2007, Clauses 3 and 4. See also, *Memorial on Jurisdiction*, § 11.

⁸ See, *inter alia*, *Statement of Claim*, §§ 8, 120, 129-130, 144, 152.

⁹ *Statement of Claim*, §§ 107-110, 115-116. *Infra* §§ 12 and 15.

¹⁰ *Statement of Claim*, §§ 107, 159.

Agreement,¹¹ taking possession of the Landfill and ejecting Lajun and their employees from the property.¹²

12. Claimant invokes that in February 2014 the ASDN and Lajun concluded a settlement agreement whereby the ASDN returned the possession of the land and authorized Lajun to continue with the operation and administration of the Landfill (the “**First Settlement Agreement**”).¹³ Claimant alleges that it continued to invest substantially in the upgrading of the machinery and technology used at the Duquesa Landfill and for construction of the WTE Plant on the basis of the commitments made by Respondent in the First Settlement Agreement and in the subsequent amendments to the Concession Agreement.¹⁴
13. By Resolution No. 53/2014 of July 25, 2014, the General Directorate of Public Procurement determined that the Concession Agreement had been executed in breach of certain provisions of Law No. 340-06 of Public Procurement.¹⁵
14. In 2016 and 2017 the Ministry of Environment imposed sanctions to Lajun for violations of the environmental permit and Law No. 64-00 of Environment.¹⁶
15. Claimant invokes that in May 2017, following an alleged new interference by Respondent in the Duquesa Landfill operation,¹⁷ the ASDN and Lajun executed a second settlement agreement pursuant to which Claimant regained control of his property (the “**Second Settlement Agreement**”).¹⁸

¹¹ *Statement of Claim*, §§ 88-89; Exhibit C-37, Act No. 817-2013, Notice of Termination of the Agreement of the Municipality of Santo Domingo Norte dated July 9, 2013.

¹² *Statement of Claim*, § 97; Exhibit C-29, Notice of Taking of Possession of the Landfill Site of the Duquesa Landfill and Verbal Process of Asset Inventory No. 470/2013 dated July 17, 2013.

¹³ *Statement of Claim*, § 100; Exhibit C-5, First Settlement Agreement between the ASDN and Lajun Corporation, S.R.L. dated February 10, 2014.

¹⁴ *Statement of Claim*, §§ 102-108, 122.

¹⁵ *Memorial on Jurisdiction*, § 19; Exhibit R-17, Resolution No. 53/2014 of the General Directorate of Public Procurement dated July 25, 2014.

¹⁶ *Statement of Claim*, §§ 123-125; *Memorial on Jurisdiction*, §§ 22 and 26.

¹⁷ *Statement of Claim*, §§ 157-158.

¹⁸ *Statement of Claim*, § 169; Exhibit C-8, Second Settlement Agreement between the ASDN and Lajun Corporation, S.R.L. dated May 24, 2017.

16. On July 19, 2017, the ASDN decided to exercise its unilateral termination right provided for under the Concession Agreement, notifying Lajun of alleged breaches of its obligations under the Concession Agreement and giving Lajun thirty days to cure them.¹⁹
17. Claimant explains that on August 10, 2017, before the expiration of the cure period, the ASDN initiated an administrative proceeding before the Superior Administrative Court of the Dominican Republic seeking the *nullification* of the Concession Agreement (the “**Nullification Action**”)²⁰ and, concurrently, a request for interim measures seeking judicial administration of the Duquesa Landfill until the conclusion of the Nullification Action.²¹
18. On September 27, 2017, the Superior Administrative Court issued an interim measure whereby it ordered the provisional intervention and administration of the Duquesa Landfill by a commission composed of the Minister of Environment and Natural Resources, the Minister of Public Health, and the Mayor of the ASDN.²² The following day, this commission took control of the Duquesa Landfill.²³ According to Claimant, this act constituted a forced expropriation with no compensation whatsoever.²⁴
19. On December 19, 2017, Claimant sent Respondent a Notice of Controversy, inviting the latter to resolve the dispute amicably.²⁵
20. On April 6, 2018, Claimant sent Respondent a Notice of Arbitration in compliance with Article 3 of the UNCITRAL Rules.

¹⁹ *Statement of Claim*, § 174; *Memorial on Jurisdiction*, § 27; Exhibit C-9, Complaint for Breach of the Agreement, Act No. 179/2017, submitted by the ASDN against Lajun Corporation S.R.L. dated July 19, 2017.

²⁰ *Statement of Claim*, § 177; Exhibit C-11, Administrative Proceeding aimed at Nullifying the Agreement for Administration and Operation of the Duquesa Landfill and its amending addenda dated August 10, 2017, p. 5, explaining that when the ASDN’s Mayor, René Polanco, took office in July 2016 Resolution No. 53/2014 was not on the ASDN’s records. See also, Exhibit R-38, Act No. 1535/2017 dated August 1, 2017 whereby the ASDN was given notice of Resolution No. 53/2014 of the General Directorate of Public Procurement.

²¹ *Statement of Claim*, § 179; *Memorial on Jurisdiction*, § 29.

²² *Statement of Claim*, § 184; *Memorial on Jurisdiction*, § 30; Exhibit C-13, Superior Administrative Court Judgment No. 0030-2017-SSMC-00082 dated September 27, 2017, pp. 34-35.

²³ *Statement of Claim*, § 185; *Memorial on Jurisdiction*, § 30; Exhibit R-41, Minutes No. 0001/2017 of the Commission for the Provisional Administration of the Duquesa Landfill dated September 28, 2017.

²⁴ *Statement of Claim*, § 185.

²⁵ Exhibit C-15, Notice of Controversy dated December 19, 2017.

21. On October 25, 2018, the Superior Administrative Court ruled on the Nullification Action filed by the ASDN, declaring the *nullification* of the Concession Agreement on the basis of violations of Law No. No. 340-06 of Public Procurement.²⁶ According to Claimant, this judgment was not served until January 10, 2019.²⁷

3. The Parties' Requests

22. On the basis of the facts summarily described above and the Dominican Republic authorities' acts, Claimant requests that the Tribunal declare that Respondent has breached its obligations under the Treaty regarding expropriation, fair and equitable treatment and full protection and security, discriminatory and arbitrary measures, umbrella clause, and treatment no less favorable and, on the basis thereof, order Respondent to pay the following:

- (i) damages in an amount ranging between USD 583.6 million and USD 596.1 million,
- (ii) moral damages in the amount of USD 5 million, and
- (iii) all costs relating to the present arbitration proceedings, including all of Claimant's attorneys' fees and expenses, as well as the interest accrued thereon.²⁸

23. Other than by making some references to Claimant's allegations, Respondent has not elaborated its defense on the merits of the case. So far, Respondent's positions and claims are limited to the jurisdictional aspects of the dispute.²⁹

II. PROCEDURAL HISTORY

1. The Initial Phase

24. On the basis of Article 3 of the UNCITRAL Rules, the Notice of Arbitration sent by Claimant on April 6, 2018 commenced this arbitration.
25. On July 19, 2018, the Parties notified the Secretary-General of ICSID of their agreement to appoint ICSID as Administering Authority of the arbitral proceedings. In addition, the Parties

²⁶ Exhibit C-130, Superior Administrative Court Judgment No. 0030-02-2018-SSen-00357 dated October 25, 2018.

²⁷ *Statement of Claim*, § 188.

²⁸ *Statement of Claim*, pages (vi) and (vii).

²⁹ *Infra*, §§ 63-65.

notified that, in accordance with Article 7 of the UNCITRAL Rules, Claimant had appointed Mr. Christian Leathley, a national of the United Kingdom, as arbitrator and Respondent had appointed Prof. Marcelo Kohen, a national of the Argentine Republic, as arbitrator. The Parties also informed that the co-arbitrators were in the process of appointing the President of the Tribunal.

26. On July 20, 2018, the Secretary-General of ICSID accepted the appointment as Administering Authority and informed the Parties that Ms. Marisa Planells-Valero, Legal Counsel at ICSID, would serve as Secretary of the Tribunal.
27. On August 3, 2018, the co-arbitrators appointed Prof. Diego P. Fernández Arroyo, a national of the Argentine Republic and the Kingdom of Spain, as President of the Tribunal.
28. On August 7, 2018, the Centre informed the Parties that Prof. Fernández Arroyo had accepted his appointment as Presiding Arbitrator. The Centre also informed the Parties that the reference number for the proceeding would be UNCT/18/3 and invited them to submit copies of the communications they had exchanged before the appointment of ICSID as Administering Authority and which were to be transmitted to the Tribunal.
29. On September 25, 2018, the Tribunal and the Parties held the preliminary procedural consultation by telephone conference. The following persons were in attendance:

Members of the Tribunal:

Prof. Diego P. Fernández Arroyo, President of the Tribunal

Mr. Christian Leathley, Arbitrator

Prof. Marcelo Kohen, Arbitrator

ICSID Secretariat:

Ms. Marisa Planells-Valero, Secretary of the Tribunal

For Claimant:

Mr. Richard C. Lorenzo, Hogan Lovells US LLP

Ms. Maria Eugenia Ramirez, Hogan Lovells US LLP

Ms. Juliana de Valdenebro Garrido, Hogan Lovells US LLP

For Respondent:

Mr. Marcelo A. Salazar, Director, Directorate of International Trade Agreements and Treaties Administration (“**DICOEX**”, by its acronym in Spanish)

Ms. Leidylin Contreras, Deputy Director, DICOEX

Ms. Maria Amalia Lorenzo, Analyst, DICOEX

Ms. Patricia Abreu, Vice Minister of Cooperation and International Affairs, Ministry of Environment and Natural Resources

Ms. Rosa Otero, Director, Vice Ministry of Cooperation and International Affairs, Ministry of Environment and Natural Resources

Ms. Johanna Montero, Counsel of the Office of Cooperation, Trade and Environment, Ministry of Environment and Natural Resources

Mr. Enmanuel Rosario, Ministry of Environment and Natural Resources

Ms. Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP

Ms. Gabriela Álvarez Ávila, Curtis, Mallet-Prevost, Colt & Mosle LLP

Ms. Elisa Botero, Curtis, Mallet-Prevost, Colt & Mosle LLP

30. During the preliminary procedural consultation, the Parties confirmed that the Tribunal had been duly constituted and that the Parties had no objection whatsoever regarding the appointment of the members of the Tribunal. It was agreed, *inter alia*, that the proceedings should be conducted pursuant to the 1976 UNCITRAL Rules. In addition, the Parties agreed that the procedural languages of the arbitration would be English and Spanish; that the place of arbitration would be Washington, D.C., although the Tribunal could hold hearings at any other place it considered appropriate if the Parties so agreed, and that the award shall be deemed to have been made at the place of arbitration.
31. Following the preliminary procedural consultation and after several additional exchanges, on October 23, 2018, the Tribunal issued Procedural Order No. 1, recording the Parties’ agreement on certain procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 also set forth the timetable for the various procedural phases.
32. On November 5, 2018, following exchanges between the Parties, the Tribunal issued a revised Procedural Calendar.

2. The Written Phase on Jurisdiction

33. On January 18, 2019, Claimant submitted his Statement of Claim, jointly with Witness Statements by Mr. Michael Anthony Lee-Chin and Mr. Adrian Christopher Lee-Chin, Expert Reports by Prof. Joost H.B. Pauwelyn (with Exhibits 1 to 57), Mr. Brent C. Kaczmarek (IAV Advisors) (with Exhibits IAV-1 to IAV-216), Mr. Thomas Tullo and by Mr. Francois Screve (Deltaway), Factual Exhibits C-1 to C-130, and Legal Authorities CL-1 to CL-42 (the “**Statement of Claim**”). In compliance with Section 10.2. of Procedural Order No. 1, Claimant submitted the Statement of Claim in English.
34. On February 4, 2019, Respondent submitted a request for bifurcation, jointly with Factual Exhibit R-1 and Legal Authorities RL-1 to RL-21 (the “**Request for Bifurcation**”) of two jurisdictional objections. In compliance with Section 10.2. of Procedural Order No. 1, Respondent submitted the Request for Bifurcation in Spanish.
35. On February 19, 2019, Claimant submitted his Opposition to Respondent’s Request for Bifurcation, jointly with Legal Authorities CL-43 to CL-57 (the “**Opposition to Bifurcation**”). In compliance with Section 10.2. of Procedural Order No. 1, Claimant submitted his Opposition to Bifurcation in English.
36. On March 6, 2019, the Tribunal issued Procedural Order No. 2 informing the Parties of its decision to grant Respondent’s Request for Bifurcation. The Tribunal further determined continuity of the arbitral proceedings according to Option II of the revised procedural calendar.
37. On May 6, 2019, Respondent submitted its Memorial on Objections to Jurisdiction, jointly with Factual Exhibits R-2 to R-48 and Legal Authorities RL-22 to RL-190 (the “**Memorial on Jurisdiction**”).
38. On July 3, 2019, Claimant submitted his Counter-Memorial on Objections to Jurisdiction, jointly with the Second Expert Report by Prof. Joost H.B. Pauwelyn (with Exhibits 58 to 70), Witness Statements by Ambassador Frederic Emam Zade and Ambassador George Anthony Hylton, Factual Exhibits C-131 to C-138, and Legal Authorities CL-58 to CL-61 (the “**Counter-Memorial on Jurisdiction**”).

39. On July 16, 2019, Claimant submitted a request to the Tribunal to amend the procedural calendar. Attached to the request, Claimant submitted a communication by Respondent rejecting Claimant's proposal to amend the procedural calendar.
40. On July 17, 2019, in view of the disagreement between the Parties, the Tribunal rejected Claimant's request.
41. On August 5, 2019, following exchanges between the Parties and in compliance with Procedural Order No. 1, the Centre transmitted the Parties' respective requests for production of documents to the Tribunal.
42. On August 19, 2019, the Tribunal issued its decision on the Parties' requests for production of documents.
43. On October 21, 2019, Respondent submitted its Reply Memorial on Objections to Jurisdiction, jointly with Factual Exhibits R-49 to R-73 and Legal Authorities RL-191 to RL-269 (the "**Reply on Jurisdiction**").
44. On November 15, 2019, Claimant requested an extension for the submission of his Rejoinder on Objections to Jurisdiction. On that same date, Respondent confirmed its agreement with Claimant's request.
45. On November 18, 2019, in view of the Parties' agreement, the Tribunal granted Claimant's request.
46. On December 12, 2019, Claimant submitted his Rejoinder on Objections to Jurisdiction, jointly with the Second Witness Statements of Mr. Michael Anthony Lee-Chin and Ambassador George Anthony Hylton, Factual Exhibits C-139 to C-145, and Legal Authorities CL-62 to CL-75 (the "**Rejoinder on Jurisdiction**").

3. The Hearing on Jurisdiction

47. On January 13, 2020, the Centre transmitted to the Parties a draft agenda for the pre-hearing organizational meeting, inviting the Parties' comments.

48. On January 28, 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
49. On January 31, 2020, Respondent requested the Tribunal's leave to incorporate two new exhibits and a new legal authority into the case record. On February 6, 2020, Claimant indicated that he did not oppose Respondent's request provided that he was granted the opportunity to comment on Respondent's additional documents during the Hearing and that he was granted leave to incorporate a new legal authority. On February 11, 2020, Respondent informed that it did not oppose Claimant's request. On February 12, 2020, the Tribunal authorized the incorporation into the case record of both Parties' additional documents. Accordingly, on February 13, 2020, Claimant incorporated a new legal authority under the reference CL-76, and Respondent incorporated two new exhibits under the references R-74 and R-75 and a new legal authority under the reference RL-270.
50. On February 11, 2020, the Tribunal issued Procedural Order No. 3 on the organization of the hearing.
51. On February 14, 2020, Claimant informed of Ambassador Frederic Emam Zade's decision not to appear to testify at the Hearing and provided a letter from him explaining that his decision resulted from the potential political implications of his testimony in the face of the upcoming presidential elections in the Dominican Republic. On February 18, 2020, Respondent requested that, in view of the foregoing, Ambassador Zade's witness statement be stricken from the case record. On February 21, 2020, Claimant submitted additional comments. On February 24, 2020, in compliance with Section 17.4 of Procedural Order No. 1, the Tribunal decided to strike from the case record Ambassador Zade's witness statement, and any reference thereto in the Parties' pleadings, as it considered that the Claimant had failed to prove the existence of exceptional circumstances preventing Ambassador Zade from participating at the Hearing.
52. The Hearing on Jurisdiction was held in Washington D.C. on February 27 and 28, 2020. The following persons were present at the Hearing:

Tribunal:

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

Presiding Arbitrator
Arbitrator
Arbitrator

ICSID Secretariat:

Ms. Marisa Planells-Valero

Secretary of the Tribunal

For Claimant:

Mr. Richard C. Lorenzo
Mr. Mark R. Cheskin
Ms. Maria E. Ramirez
Ms. Juliana De Valdenebro
Ms. Marta M. Urrea
Ms. Wilzette Louis
Mr. Michael Anthony Lee-Chin
Mr. Adrian Lee-Chin
Ms. Lorraine Sullivan

Hogan Lovells US LLP
Hogan Lovells US LLP
Hogan Lovells US LLP
Hogan Lovells US LLP
Hogan Lovells US LLP
Hogan Lovells US LLP
Claimant
Affiliated to Claimant
Affiliated to Claimant

For Respondent:

Ms. Claudia Frutos-Peterson
Ms. Gabriela Álvarez Ávila
Mr. Fernando Tupa
Ms. Natalia Linares
Ms. Belén Ibañez
Ms. Jaclyn Messemmer
Ms. Stephania Ocampo
Mr. Marcelo A. Salazar

Ms. Leidylin Contreras

Ms. Raquel De La Rosa

Ms. Patricia Abreu Fernández

Ms. Rosa Otero Nieves

Mr. Enmanuel Rosario Estévez

Ms. Johanna Montero De Los Santos

Curtis, Mallet-Prevost, Colt & Mosle LLP
Curtis, Mallet-Prevost, Colt & Mosle LLP
Curtis, Mallet-Prevost, Colt & Mosle LLP
Curtis, Mallet-Prevost, Colt & Mosle LLP
Curtis, Mallet-Prevost, Colt & Mosle LLP
Curtis, Mallet-Prevost, Colt & Mosle LLP
Curtis, Mallet-Prevost, Colt & Mosle LLP
Directorate of International Trade
Agreements and Treaties Administration
Directorate of International Trade
Agreements and Treaties Administration
Directorate of International Trade
Agreements and Treaties Administration
Ministry of Environment and Natural
Resources
Ministry of Environment and Natural
Resources
Ministry of Environment and Natural
Resources
Ministry of Environment and Natural
Resources

Court Reporters:

Mr. David Kasdan	B&B Reporters
Ms. Marjorie Peters	B&B Reporters
Mr. Dionisio Rinaldi	D-R Esteno
Ms. Carla Pagura	D-R Esteno

Interpreters:

Ms. Judith Letendre
Ms. Estela Zaffaroni
Mr. Luis Eduardo Arango

53. During the Hearing, the following persons were examined:

Presented by Claimant:

Ambassador George Anthony Hylton (as witness)	Jamaica
Prof. Joost H.B. Pauwelyn (as expert)	Graduate Institute of International and Development Studies, Geneva (Switzerland)

54. At the end of the Hearing, the Tribunal and the Parties agreed that no post-hearing briefs would be submitted.

4. The Post-Hearing-on-Jurisdiction Phase

55. On April 2, 2020, the Parties submitted the corrected versions of the Hearing transcripts. Due to certain mismatches observed in the translations, the Parties requested the Tribunal to only take into account the versions the transcripts in the original language. On April 3, 2020, the Tribunal confirmed that it would act as requested by the Parties.
56. On April 7, 2020, the Secretary of the Tribunal sent to the Parties and the Tribunal the final versions of the Hearing transcripts prepared on the basis of the corrections to the transcripts sent by the Parties on April 2, 2020.
57. On April 10, 2020, the Tribunal invited the Parties to submit their Statements of Costs.

58. On April 20, 2020, Claimant submitted his Statement of Costs and Respondent requested an extension until May 15, 2020 for the submission of its Statement of Costs due to the difficulties caused by the COVID-19 crisis.
59. On that same date, Claimant informed that he had no objection to Respondent's request provided that both Respondent and the Tribunal agreed that the Tribunal could issue its decision on jurisdiction as soon as possible, and that any such decision could be followed by a decision on costs after receipt of the Respondent's Statement of Costs.
60. On April 21, 2020, in view of the exceptional circumstances caused by the COVID-19 crisis, the Tribunal extended the deadline for submission or amendment, if any, of the Parties' Statements of Costs until May 15, 2020.
61. On May 15, 2020, Respondent submitted its Statement of Costs. On May 17, 2020, the Secretary of the Tribunal sent Claimant's Statement of Costs dated April 20, 2020 and Respondent's Statement of Costs dated May 15, 2020 to the other Party and to the Tribunal.

III. THE PARTIES' POSITIONS REGARDING JURISDICTION

62. In this section, the Parties' main arguments are presented succinctly. The Tribunal shall refer to some of them in more detail during the course of its analysis, when deemed necessary.

1. The Dominican Republic's Position

A) The Treaty does not contain an Offer of Consent to UNCITRAL Arbitration

63. In its written and oral submissions, the Republic challenges the jurisdiction of the Tribunal on the basis of the following arguments:

- (i) paragraph 1 of Article XIII cannot be construed as an open offer of consent to international arbitration under the UNCITRAL Rules;³⁰

³⁰ *Memorial on Jurisdiction*, §§ 38 and 88. *Reply on Jurisdiction*, §§ 6-24.

- (ii) paragraph 2 of Article XIII requires the Republic to grant its *ex post* consent to the existence of a dispute for it to be referred to international arbitration under the UNCITRAL Rules;³¹
- (iii) Claimant bears the burden to prove in a clear and unambiguous manner the consent to UNCITRAL arbitration by the Republic and he has failed to meet any such burden;³²
- (iv) the most-favored nation clause cannot be invoked to ground the Republic's consent³³ neither can it be used to "confirm" the interpretation of Article XIII.³⁴

B) The Treaty does not Protects Indirect Investments or Indirect Investors

64. Respondent is also of the view that the Treaty protects neither indirect investments nor indirect investors, on the following grounds:

- (i) the lack of protection to indirect investments and indirect investors is consistent with the essential international law principle under which shareholders of a company cannot claim for damages suffered by the company in which they hold shares;³⁵
- (ii) there are multiple textual references in several Treaty provisions that show the intention thereof was to protect only direct investments and direct investors;³⁶
- (iii) excluding indirect investments and indirect investors from protection is warranted by public policy reasons, such as avoiding the exponential risk of parallel proceedings. Accordingly, it is reasonable to assume that if the Contracting Parties did not expressly provide for that protection, it was because they wanted to exclude it.³⁷

³¹ *Reply on Jurisdiction*, §§ 24-45.

³² *Memorial on Jurisdiction*, § 84, footnote 73. *Reply on Jurisdiction*, §§ 108-113.

³³ *Memorial on Jurisdiction*, §§ 88-146. *Reply on Jurisdiction*, §§ 124-150.

³⁴ *Reply on Jurisdiction*, §§ 118-123.

³⁵ *Memorial on Jurisdiction*, §§ 173-176. *Reply on Jurisdiction*, § 162.

³⁶ *Memorial on Jurisdiction*, § 177. *Reply on Jurisdiction*, § 164.

³⁷ *Reply on Jurisdiction*, § 165.

C) Respondent's Claims

65. On the basis of the foregoing, Respondent requests that the Tribunal:

- (i) declare its lack of jurisdiction to resolve this dispute;
- (ii) reject all claims contained in the Statement of Claim for lack of jurisdiction; and
- (iii) order Claimant to pay all costs of these proceedings, including Respondent's legal fees and expenses, as well as the interest accrued thereon.³⁸

2. Michael Anthony Lee-Chin's Position

A) The Dominican Republic Consented to Arbitrate this Dispute

66. Mr. Lee-Chin, both in his memorials and at the Hearing on Jurisdiction, submits that the Republic consented to this arbitration on the basis of the following arguments:

- (i) paragraph 1 of Article XIII represents a unilateral offer of consent to international arbitration by the Republic;³⁹
- (ii) paragraph 2 of Article XIII assumes, in the first sentence, that a dispute has already been submitted to international arbitration;⁴⁰
- (iii) the wording of paragraph 2 of Article XIII simply allows the Parties to agree on whether arbitration should be referred to a sole arbitrator or to an arbitral tribunal, which shall be appointed by a special agreement or, in the absence of such agreement (that is, by default), established under the UNCITRAL Rules;⁴¹
- (iv) the most-favored nation clause, contained in Article III of Annex III of the Treaty, confirms Respondent's consent to international arbitration.⁴²

³⁸ *Memorial on Jurisdiction*, § 181. *Reply on Jurisdiction*, § 170.

³⁹ *Counter-Memorial on Jurisdiction*, §§ 19-42. *Rejoinder on Jurisdiction*, §§ 8-21.

⁴⁰ *Counter-Memorial on Jurisdiction*, §§ 24. *Rejoinder on Jurisdiction*, §§ 43-45.

⁴¹ *Counter-Memorial on Jurisdiction*, §§ 25. *Rejoinder on Jurisdiction*, § 23.

⁴² *Counter-Memorial on Jurisdiction*, §§ 40-41, 81-105. *Rejoinder on Jurisdiction*, §§ 70-77.

B) The Treaty Protects Indirect Investments and Investors

67. Additionally, Mr. Lee-Chin states that the Treaty protects both indirect investments and indirect investors, relying on the following arguments:

- (i) the terms “investor” and “investment” defined in the Treaty are unquestionably broad and unrestricted;⁴³
- (ii) the Treaty does not limit its protection to “direct” investors or “direct” investments; indeed, the term “direct” is nowhere to be found under the definitions section of the Treaty.⁴⁴

C) Claimant’s Claims

68. On the basis of the foregoing, Claimant requests an award from the Tribunal containing the following relief:

- (i) A declaration that the dispute is within the jurisdiction and competence of the Tribunal;
- (ii) A declaration summarily dismissing the Republic’s jurisdictional challenge contained in its Jurisdictional Memorials;
- (iii) A declaration that the dispute will immediately be proceeding to the merits phase;
- (iv) An order directing the Republic to pay all of Claimant’s costs, with interest, relating to the present bifurcation and arbitration proceedings, including all of his attorneys’ fees and expenses; and
- (v) An order granting any further relief the Tribunal deems just and proper under the circumstances.⁴⁵

⁴³ *Counter-Memorial on Jurisdiction*, §§ 106-111. *Rejoinder on Jurisdiction*, §§ 78-87.

⁴⁴ *Counter-Memorial on Jurisdiction*, §§ 112-114. *Rejoinder on Jurisdiction*, § 81.

⁴⁵ *Counter-Memorial on Jurisdiction*, § 119. *Rejoinder on Jurisdiction*, § 89.

IV. THE BASIC ELEMENTS FOR THE TRIBUNAL'S ANALYSIS

1. The Text to Be Interpreted

69. The Parties' discussion at this jurisdictional phase focuses on the interpretation of the provision contained in Article XIII of Annex III to the Treaty dealing with the reciprocal promotion and protection of investments, and on whether the Treaty provides for the protection of indirect investments and indirect investors.

70. As to the first point, Article XIII, entitled "Settlement of Disputes Between an Investor and a Contracting Party",⁴⁶ provides as follows:

1. *Disputes between an investor of one Party and the other Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to the courts of that Party or to national or international arbitration.*
2. *Where the dispute is referred to international arbitration, the investor and the Party concerned in the dispute may agree to refer the dispute to an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.*
3. *Neither Party shall give diplomatic protection or bring an international claim, in respect of a dispute which one of its investors has consented to submit to arbitration, unless the other Party which is party to the dispute shall have failed to abide by and comply with the award rendered in such dispute by the arbitral tribunal. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute by the arbitral tribunal.*
4. *The awards of the arbitrator shall be definitive, compulsory and without appeal for the Contracting Party and the investor.*

⁴⁶ In order to avoid any confusion with the Parties to the proceedings, any reference to the "Contracting Parties to the Treaty" shall mean the Parties to the Treaty.

2. The Sources of the criteria for the interpretation of the Treaty

71. Both Parties agree to widely rely on the Vienna Convention on the Law of Treaties between States and International Organizations of 1986 (“**Vienna Convention of 1986**”⁴⁷), particularly the articles included in Section 3 on treaty interpretation. Said Convention is not in force, although such articles, which are identical to those of the Vienna Convention on the Law of Treaties of 1969, may be deemed to reflect the status of the applicable customary international law.
72. Given the many references in this regard, the relevant articles shall be transcribed below:

Article 31

General rule of interpretation

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.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - a) *Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
 - b) *Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - a) *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - b) *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - c) *Any relevant rules of international law applicable in the relations between the parties.*

⁴⁷ Exhibit RL-34, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, signed on March 21, 1986. The Parties refer to this Convention as the “VCLT II”. Nevertheless, on account of the existence of several “Vienna” conventions and for the avoidance of confusion, the Tribunal shall rather refer to it as the “Vienna Convention of 1986”.

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a) Leaves the meaning ambiguous or obscure; or*
- b) Leads to a result which is manifestly absurd or unreasonable.*

Article 33

Interpretation of treaties authenticated in two or more languages

1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*
2. *A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*
3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*
4. *Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

73. As it shall be highlighted in due course, according to the Parties, the interpretation that they respectively propose is the only one in line with the principles of interpretation under the Vienna Convention of 1986. The Tribunal is aware that, in some particular cases, there could be more than one reading consistent with this Convention. In any event, the duty of this Tribunal is to unravel the meaning of the relevant rules of the Treaty, by adopting the interpretation that it considers as the most appropriate.

3. The Preparatory Work

74. Unlike references to other treaties not applicable to this case, the preparatory work of the Treaty the provisions of which are being interpreted (expressly mentioned as “supplementary means of interpretation” in Article 32 of the Vienna Convention of 1986) may, in some instances and under specific circumstances, help find the intent of the Contracting Parties to the Treaty in adopting such provisions.
75. In this case, both Parties agree to rely on them, though stressing different aspects.⁴⁸ The Parties have also discussed the difficulties encountered in obtaining a complete version of the preparatory work and the consequences of taking this preparatory work into consideration.⁴⁹

4. The Circumstances of the Conclusion of the Treaty and Other Supplementary Means of Interpretation

76. The Parties have resorted to other supplementary means of interpretation in their attempt to convince the Tribunal that their respective positions are well-founded. In particular, and as for the interpretation of Article XIII of the Treaty, Claimant has devoted considerable effort so that the Tribunal take into consideration the opinions of two negotiators of the Treaty.⁵⁰ Only one of those opinions can be taken into account, namely, the opinion of Ambassador George Anthony Hylton,⁵¹ introduced by Claimant as the leader of the Jamaican delegation during the negotiation of the Treaty, as well as other similar instruments.⁵²
77. Respondent denies that this sort of testimony has any relevance and submits a series of arguments to such effect.⁵³ In particular, Respondent underscores that, based on the clear interpretation it proposes, Article 32 of the Vienna Convention of 1986 prevents from resorting to “supplementary means of interpretation” to assert precisely otherwise.⁵⁴ For

⁴⁸ *Reply on Jurisdiction*, §§ 59 *et seq.*; *Rejoinder on Jurisdiction*, §§ 39 *et seq.*

⁴⁹ Tr. Day 1, Spanish, p. 18, l. 1-p. 21, l. 5 (Respondent); Tr. Day 1, English, p. 197, l. 8-p. 199, l. 14 (Claimant).

⁵⁰ *Rejoinder on Jurisdiction*, §§ 48 *et seq.*; *Counter-Memorial on Jurisdiction*, §§ 33 *et seq.*

⁵¹ Exhibit C-138, Declaration of Ambassador George Anthony Hylton dated June 26, 2019.

⁵² As regards the exclusion of Ambassador Frederic Emam Zade as a witness, see *supra* § 51.

⁵³ *Reply on Jurisdiction*, §§ 67 *et seq.*

⁵⁴ *Reply on Jurisdiction*, § 68.

Respondent, those means of interpretation may be relevant only to confirm the result of the application of Article 31 of the Vienna Convention of 1986.⁵⁵

78. However, the Tribunal considers that the testimony provided by the leader of a negotiating delegation may have, with all the limitations inherent in a fact witness, some relevance to confirm the arguments of the party that calls the witness or to undermine the arguments of the opposing party. Indeed, the Tribunal considers that the declarations of Ambassador Hylton at the Hearing on Jurisdiction offered interesting perspectives. Nevertheless, the Tribunal noted the contrast between Ambassador Hylton's inability to recall basic logistic elements as well as the negotiation of other aspects of the Treaty, on the one hand, and his very specific and detailed recollection of the terms of Article XIII discussed in this arbitration, on the other hand. In the Tribunal's view, it is not appropriate to draw conclusions about the truthfulness of Ambassador Hylton's testimony, but such testimony lacks the necessary consistency to be included in the Tribunal's analysis.

5. Invocation of judicial precedents

79. As it is usually the case in investment disputes, both the Parties' pleadings and their oral submissions are full of references to judicial precedents. In fact, numerous international decisions, particularly but not exclusively arbitral decisions, have been cited by the Parties to support their respective positions and persuade the Tribunal of the prevailing interpretation of the notions raised before it. Some arbitral decisions have been analyzed in great detail, offering the Tribunal a comprehensive analysis of the conflicting views of the Parties about them.
80. In this regard, the Tribunal cannot but recall that there is no *stare decisis* doctrine in international law.⁵⁶ Tribunals are independent from each other and there is no hierarchic organization among them which could make them subject, under certain circumstances, to the decisions of others. However, the Tribunal believes it desirable, in general, to foster the development of a *jurisprudence constante* based on previous decisions, not only as a means of providing certain

⁵⁵ *Ibid.*

⁵⁶ G. Guillaume, "Le précédent dans la justice et l'arbitrage international" (Lalive Lecture, June 2, 2010), *Journal de droit international*, 2010-3, pp. 685-703.

predictability to the parties but also as a response to an ongoing demand for more consistency within the international investment system, a demand rooted in the need to enhance its legitimacy. In fact, typically, the Parties' citations to judicial precedents are aimed at stating what a good faith interpretation should be according to the ordinary meaning of the terms under discussion, which is the basic rule of interpretation.

81. The foregoing is by no means contradictory with the Tribunal's primary duty which is, undoubtedly, to render a decision regarding the dispute, on the basis of all the specific factual and legal elements before it. In this regard, maybe it is pointless to mention that the search for consistency based on a detailed analysis of previous decisions is, in many cases, unsuccessful. Logically, special care should always be exercised to determine the similarities or differences between the present case and those cases in which such previous decisions were adopted. The very fact that the Parties cite the same cases to propose opposing interpretations evidences the limits of the desire to have a consistent case-law within an absolutely decentralized system and reminds us to what extent the Tribunal should be careful about using case law.

V. FIRST JURISDICTIONAL OBJECTION – CONSENT TO ARBITRATE

1. Consent to International Arbitration

A) The Obligation Undertaken by the Contracting Parties to the Treaty

a. Respondent's Position

82. According to Respondent, the purpose of paragraph 1 of Article XIII is to merely identify potential alternatives for the resolution of disputes and to set the preconditions for submitting a dispute to any of these alternatives.⁵⁷
83. For Respondent, the word "shall" that precedes those alternatives may have several meanings and is used here "to denote something that will eventually occur in the future, not an obligation."⁵⁸ [Tribunal's Translation]. According to Respondent, interpreting "shall" as an

⁵⁷ *Reply on Jurisdiction*, § 9; *Memorial on Jurisdiction*, § 45.

⁵⁸ *Reply on Jurisdiction*, § 14.

obligation in this provision “would lead to the absurd conclusion that a dispute should be simultaneously submitted to three methods of dispute resolution, since the alleged obligation would be applicable to the three methods, which makes no sense.”⁵⁹ [Tribunal’s Translation].

b. Claimant’s Position

84. Claimant, on the other hand, states that paragraph 1 of Article XIII undoubtedly contains the Republic’s “complete” consent to international arbitration and that, as a result, foreign investors – such as Claimant in this case – are provided with “an immediate right of access to international arbitration”, with no need for the State to agree or consent a second time once the dispute arises.⁶⁰

85. According to Claimant, “the use of the word ‘shall’ in paragraph one confirms the binding nature of the State’s consent.”⁶¹ In Claimant’s words, for this interpretation to lead to the absurd conclusion – as erroneously suggested by Respondent – that a dispute should be simultaneously submitted to the three alternatives indicated in paragraph 1,⁶² we would have to ignore the word “or” used to separate the different alternatives.⁶³

c. The Tribunal’s Analysis

86. As noted above and as it could hardly be otherwise,⁶⁴ both Parties have naturally and repeatedly stated that the Treaty and, in particular, Article XIII should be interpreted following the criteria provided by the Vienna Convention of 1986. Therefore, the application of the international law in force, which the Tribunal would have applied anyway is, in the present case, underpinned by the Parties’ strong conviction. The problem, as usual, is that the approaches to apply those interpretation criteria as well as the specific results obtained differ dramatically.

⁵⁹ *Reply on Jurisdiction*, § 15.

⁶⁰ *Rejoinder on Jurisdiction*, § 9.

⁶¹ *Ibid.*; *Counter-Memorial on Jurisdiction*, § 45.

⁶² See *supra*, § 83.

⁶³ *Rejoinder on Jurisdiction*, § 16.

⁶⁴ *Supra*, §§ 71 *et seq.*

87. However, before discussing the crucial point of disagreement between the Parties, it should be noted that there is no discrepancy about the generality of the terms of paragraph 1 of Article XIII.
88. Thus, the Parties do not seem to find it difficult to accept that the disputes referred to in Article XIII should arise between an investor of a Contracting Party to the Treaty and the other Contracting Party thereto.
89. Also, the Parties agree that the disputes mentioned in paragraph 1 are those “concerning an obligation” in relation to an investment under Annex III to the Treaty, which must be complied with by the Contracting Party to the Treaty that is the host State.
90. The Parties further agree that the disputes concerned must not have “been amicably settled [...] after a period of three months from written notification of a claim.”⁶⁵
91. It follows from the above that recourse to one of the dispute resolution methods becomes available upon failure to settle this type of dispute in accordance with the described timeframe and manner. Neither the existence of a dispute as defined in paragraph 1 of Article XIII, nor the fact that it has not been settled as required in said paragraph are under discussion in this case.
92. Thus, without having to depart from the first hypothesis of the “general rule of interpretation” included in Article 31 of the Vienna Convention of 1986, the Parties have been able to agree on virtually the entire paragraph 1 of Article XIII.
93. However, the Parties disagree on the last phrase of such paragraph 1. What Claimant considers as a clear expression of consent by the Contracting Parties to the Treaty is, in Respondent’s view, nothing but a mere indication of situations that might occur in the future. Thus, the discrepancy between the Parties focuses on the crucial issue of the mandatory submission to one of the dispute resolution mechanisms provided.
94. For the Tribunal, the use of the expression “shall [...] be submitted” in the English version is unambiguous. It expresses a duty. The analysis of both the text of paragraph 1 of Article XIII

⁶⁵ *Memorial on Jurisdiction*, § 46; *Reply on Jurisdiction*, § 20; *Counter-Memorial on Jurisdiction*, § 22.

and the context in which it is embedded support this interpretation. On this basis, the Tribunal finds no difficulty in asserting unanimously that paragraph 1 of Article XIII clearly contains an obligation undertaken by the Contracting Parties to the Treaty. This obligation consists in submitting the disputes defined therein between an investor and a Contracting Party to the Treaty to one of the fora indicated at the end of the paragraph, namely: the courts of the Contracting Party, national arbitration, or international arbitration.

95. It is true that, in Spanish, the future tense of the indicative mood of a verb may be used for different purposes and the meaning may vary according to the formula used and the syntax of the complete sentence in which the verb appears. That applies to the verb “*serán*”, the future indicative of the verb to be. The same happens in English with the auxiliary verb “*shall*.” However, in this case, taking into account the wording of the expression, the complete sentence in which it appears and, mainly, its inclusion in a legislative text, no other meaning may be found.
96. Indeed, the use of such expression in relation to disputes arising from the violation of the obligations under the Treaty can only be read as a commitment undertaken by the holders of those obligations. In the context of the interpretation of the expression “shall be submitted”, it is important to take into account the very title of Article XIII, which leads to think that all its provisions must have been drafted in order to enable the “settlement of disputes between an Investor and a Contracting Party.”
97. As a consequence of the foregoing, given that the investors have granted no agreement to arbitrate, the advance offer to arbitrate can only emanate from the State. For this apparent reason, it follows that the only party which is able to institute an investor-State arbitration under Article XIII is the investor (whose rights would have been violated). Therefore, it is the investor (and only the investor) who is entitled by Article XIII to choose international arbitration among the three options offered.
98. The Respondent’s suggestion that the expression “shall be submitted” be construed in this context as an event that might occur in the future is not acceptable. This argument raised by Respondent is based, first, on one of the meanings of the word “*shall*” included in two dictionaries and, second, on a passage contained in the Decision on Jurisdiction in the case

Planet Mining v. Indonesia.⁶⁶ For the Tribunal, those reasons do not support the interpretation sought by Respondent.

99. As regards the word “shall”, Respondent asserts that it has several meanings, and that the one that “refers to something that will occur in the future” is as valid as the one that “connotes an obligation”. [Tribunal’s Translation]. In this respect, Respondent recalls one of the definitions mentioned, respectively, in *Lexico Dictionary*⁶⁷ and in *Black’s Law Dictionary*.⁶⁸ However, those definitions do not fit the context in which the verb “shall” is used in paragraph 1 of Article XIII.
100. In effect, *Lexico Dictionary* includes four meanings. The first and the fourth should be excluded, as the first meaning refers to the use in the first person and the fourth meaning relates to interrogations, two situations not falling within the scope of the provision under review. The two other meanings are: (2) “[e]xpressing a strong assertion or intention;” and (3) “[e]xpressing an instruction, command, or obligation.” The only one of the four meanings that includes a legal standard as an example is (3): “every employer shall take all practicable steps to ensure the safety of employees.”
101. In turn, the *Black’s Law Dictionary*, which is knowingly a legal dictionary widely used to look up legal definitions in English, includes five meanings of the term “*shall*.” Respondent cites three of them, which refer to a possibility (“*should*”, “*may*”) and something that will occur in the future (“*will*”). However, Respondent fails to emphasize the first meaning and, most importantly, the two special notes included in the definition. The first meaning reads: “[h]as a duty to; more broadly, is required to.” The first special note – accompanying the first meaning – reads: “[t]his is the mandatory sense that drafters typically intend and that courts typically uphold.” The last special note is even more conclusive, at the end of the definition, following the five meanings: “[o]nly sense 1 is acceptable under strict standards of drafting.”
102. The only meaning in *Collins Concise English Dictionary* (another widely used dictionary) which might refer specifically to the context under review, that is, the one that mentions its current

⁶⁶ *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (“*Planet Mining v. Indonesia*”).

⁶⁷ Exhibit RL-191, *Lexico Dictionary*, Definition of “*shall*.”

⁶⁸ Exhibit RL-192, *Black’s Law Dictionary* (Thomson Reuters, 2014), Definition of “*shall*.”

use especially in official documents, reads that “*shall*” is “used as an auxiliary to indicate compulsion.”

103. Thus, it clearly follows from all the lexicographic entries mentioned above that the only definition applicable to the wording and context of paragraph 1 of Article XIII is the one that takes the term “shall” as an obligation.

104. Relying on a paragraph of the Decision on Jurisdiction in *Planet Mining v. Indonesia* does not really support the interpretation suggested by Respondent either. It is true that the arbitral tribunal in such case (which actually consists of two consolidated cases⁶⁹), refrains at one point from adopting one of the meanings of the term “*shall*” in reference to a text that has little to do with the one under discussion in these arbitration proceedings.⁷⁰ However, as timely pointed out by Claimant,⁷¹ in the same Decision, the tribunal pristinely states: “the use of the word ‘shall’ without a stated exception leaves no doubt that Indonesia was obliged to grant its consent.”⁷² This information must surely be known by Respondent’s representatives who also acted on behalf of Indonesia in *Planet Mining*.

105. Apart from that, Respondent explains that, “in this case, the term ‘*shall*’ is followed by three possible alternatives,” which means, according to Respondent, that said term “is being used to denote something that will potentially occur in the future, rather than a duty.”⁷³ [Tribunal’s Translation] Despite such insistence, it is worth mentioning that the term “shall” does not actually precede the three dispute resolution mechanisms provided in paragraph 1 of Article XIII, but the expression “shall [...] be submitted to.”

106. This clarification also renders untenable Respondent’s statement pursuant to which understanding the expression “shall [...] be submitted to” as an obligation would lead to the absurd result of having to submit the dispute to all three options specified at the end of

⁶⁹ Exhibit RL-193, *Planet Mining v. Indonesia*, Decision on Jurisdiction dated February 24, 2014, and Exhibit RL-194, *Churchill Mining v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (“***Churchill Mining v. Indonesia***”), Decision on Jurisdiction dated February 24, 2014.

⁷⁰ *Planet Mining v. Indonesia*, Decision on Jurisdiction dated February 24, 2014, § 163. In the same vein, *Churchill Mining v. Republic of Indonesia* (same reference and date), § 162.

⁷¹ *Rejoinder on Jurisdiction*, § 15.

⁷² *Planet Mining v. Indonesia*, Decision on Jurisdiction dated February 24, 2014, § 201.

⁷³ *Reply on Jurisdiction*, § 14.

paragraph 1.⁷⁴ According to Respondent, since the obligation would apply to each option, such understanding would force a claimant to initiate court proceedings, national arbitration and international arbitration.

107. Under no circumstance could this reasoning be accepted. Paragraph 1 of Article XIII is particularly clear in this respect; the duty must be fulfilled with regard to one of the options, which are precisely that, options, as recognized by Respondent itself.⁷⁵ No interpretative effort is needed to conclude that this is what follows from the use of the disjunctive conjunction “or” to separate each of the possibilities offered to Claimant: “shall [...] be submitted to the courts of that Party or to national or international arbitration.”⁷⁶

108. Claimant, on the other hand, stresses the importance of the *Legal Expert Report of Professor Joost H.B. Pauwelyn*, who in turn cites a paragraph from the academic material on ICSID arbitration prepared by professor Christoph Schreuer for UNCTAD, which expressly reads that “Some BITs do not specifically mention consent. But formulations to the effect that a dispute ‘shall be submitted’ to the Centre or that the parties have the right to initiate proceedings leave no doubt as to the binding character of these clauses.”⁷⁷

109. The Tribunal agrees on the main point, in the sense that the expression “shall be submitted” indicates a binding nature. Nevertheless, Respondent objects to the relevance of said citation of the UNCTAD document, alleging that it refers to rules in which “there is a submission *to a single method* of dispute resolution and *a forum is specified* (ICSID).”⁷⁸ [Tribunal’s Translation]. The Tribunal considers that the obligation assumed by the State is not undermined by the fact that there are one or more available options, as they refer to the way of implementing the obligation and not to the existence of the obligation itself.

⁷⁴ *Supra* § 83.

⁷⁵ *Reply on Jurisdiction*, §§ 18, 28.

⁷⁶ On the Tribunal’s discussion with Respondent in this regard, see Tr. Day 1, English, from p. 53, l. 20.

⁷⁷ *Rejoinder on Jurisdiction*, § 9 (emphasis added by Claimant), referring to UNCTAD, *Course on Dispute Settlement, ICSID – Module 2.3: Consent to Arbitration* (UNCTAD/EDM/Misc.232/Ad.2), March 11, 2003 (“**UNCTAD, Consent to Arbitration**”), p. 17, provided as Annex 55 to the *First Legal Expert Report of Prof. Pauwelyn*, § 36.

⁷⁸ *Reply on Jurisdiction*, § 16 (emphasis added by Respondent). Although Respondent expressly cites Article 8 of the Treaty between the United Kingdom and Sri Lanka, that is not the specific reference used in the UNCTAD document to illustrate the statement concerned, but Article 11 of the German Model Agreement. While this Article expressly mentions the ICSID Convention, it empowers the parties to reach a different agreement. *UNCTAD, Consent to Arbitration*, pp. 17-18.

110. The choice of one of the three options cannot deny the existence thereof. In other words: the fact that the Contracting Parties to the Treaty have consented to three options cannot mean that they have not consented to any of them. Otherwise, the sentence – and its mandatory nature (“shall be”) – would be meaningless. This is, indeed, what leads to the assertion that each of these options is valid and that the Contracting Parties to the Treaty have consented to all of them.

111. In support of his position, Claimant also relies on the Decision on the Objection to Jurisdiction for Lack of Consent in *Garanti Koza LLP v. Turkmenistan*,⁷⁹ which includes the interpretation of a provision whose first paragraph is considerably similar to that in the present case and contains the same expression under discussion. The relevant provision – Article 8(1) of the United Kingdom-Turkmenistan BIT – provides: “*Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.*”⁸⁰ The tribunal in *Garanti Koza* decided by a majority that “[t]he use of the auxiliary verb ‘shall’ makes that statement mandatory.”⁸¹

112. Respondent challenges the citation of this decision, stating, on the one hand, that the provision interpreted in *Garanti Koza* only refers to international arbitration, rather than to the three options as paragraph 1 of Article XIII in this case, and, on the other hand, said provision is followed by a second paragraph which expressly sets forth the UNCITRAL Rules as the option by default, something that – according to Respondent – paragraph 2 of Article XIII does not.⁸²

113. The Tribunal agrees with the reasoning of the tribunal in *Garanti Koza* as regards the interpretation of the expression “shall be submitted.” As stated *supra*,⁸³ the fact that

⁷⁹ Exhibits RL-160/CL-58, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent dated July 3, 2013 (“*Garanti Koza v. Turkmenistan*”).

⁸⁰ *Ibid.* § 17.

⁸¹ *Ibid.* § 28.

⁸² *Reply on Jurisdiction*, § 16. Respondent also criticizes the decision cited arguing that it is a decision by a majority and qualifying the reasoning as “erroneous”.

⁸³ *Supra* §§ 94, 109.

international arbitration appears alone or together with two other options does not change at all the compulsory nature of the expression but, in any case, how it is implemented.⁸⁴

114. First, the Contracting Parties to the Treaty made an election when deciding they would offer three options and that one of them could be chosen to settle a given dispute. This, in itself, was a significant act and not an empty or senseless gesture made by the States in the context of the Treaty dispute settlement provisions. Secondly, the text does not name (identifying “State” or “investor”) who elects which of the three options is adopted because it is not necessary; it is self-evident: the investor. This is so because, as already stated, only the investor may legally elect to arbitrate, and only the investor needs to do so on the basis of the standing offer of consent granted by the State. The investor’s election is not the imposition of an option, but the acceptance of the standing consent offered by the State. There can be no imposition whatsoever because the State has given its consent. This does not undermine the equality of the parties, but rather recognizes and confirms the sequence set forth in the Treaty itself.
115. The unanimity of the Tribunal’s interpretation of Article XIII comprises both the compulsory nature of the submission to one of the dispute resolution mechanisms mentioned in its paragraph 1 and the definition of a dispute thereunder.
116. Such unanimity is especially important, particularly taking into account the number of pages and the time devoted by the Parties to discuss the issue, facing an obligation with a mere indication of options that could exist in the future.
117. However, said unanimity does not extend to the implementation of the obligation clearly undertaken by the Contracting Parties to the Treaty. Indeed, for the majority of the Tribunal, the obligation undertaken by the States to settle disputes by international arbitration (among other options) undoubtedly constitutes the State’s consent, and its implementation requires interpreting paragraph 1 together with its context, that is, together with the three other paragraphs included in the same Article. In the Tribunal’s majority opinion, the consent expressed by the Contracting Parties to the Treaty has been subsequently perfected by the

⁸⁴ A similar situation arises as regards the application of the UNCITRAL Rules, as discussed later. *Infra* §§ 175 *et seq.*

Notice of Arbitration (set forth in Article 3 of the UNCITRAL Rules), served by Claimant upon Respondent.

118. All the members of the Tribunal agree that the State's consent is inevitably required so that arbitration may take place. For the majority of the Tribunal, said consent is expressed in the obligation undertaken by the Contracting Parties to the Treaty and is what gives meaning to it. The *effet utile* of the provision that establishes the obligation to submit a dispute to arbitration – unquestionably contained in paragraph 1 of Article XIII – is to serve as an offer of consent. In this sense, the obligation to submit a dispute to arbitration and the consent to arbitrate have the same meaning. The effectiveness of such obligation cannot depend on whether arbitration is the only available mechanism or it is accompanied by other dispute resolution mechanisms. For a State, consenting (and offering early consent) to more than one dispute resolution option is perfectly conceivable. International law does not deny this possibility, as evidenced by the vast majority of bilateral and multilateral investment treaties. Similarly, there is no express or implied reference in the text of the Treaty that allows concluding that consent is excluded or limited because the Contracting Parties to the Treaty have included three options.

119. The majority of the Tribunal adopts Respondent's assertion that the consent of the State (as well as that of any obligor) must be clear and unambiguous. It is essential that the tribunal called upon to resolve a dispute be persuaded that all the parties concerned (*inter alia*, a State in our case) have agreed to submit thereto. In the view of the Tribunal, the requirement that consent have such features should be understood in the sense that it must arise from the text, interpreted pursuant to the criteria accepted under international law, and not from presumptions or inferences based on expressions not contained therein. The proposition that a State's consent is not to be presumed⁸⁵ is as true as the proposition that a State may not invoke its condition as such in order to escape freely assumed obligations.

120. That consent be clear and unambiguous does not mean that the provision in which it is contained should be subject to restrictive interpretation. One assertion does not follow the other. In this regard, the Tribunal endorses the well-known opinion of Judge Rosalyn Higgins: "It is clear from the jurisprudence of the Permanent Court and of the International Court

⁸⁵ Exhibits RL-160/CL-58, *Garanti Koza v. Turkmenistan*, §§ 21-22.

that there is no rule that requires a restrictive interpretation of compromissory clauses [...]. The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.”⁸⁶ Accordingly, the Tribunal considers that it should be neither liberal nor strict in deciding on its jurisdiction. Neither of those approaches is directed by the Treaty and both of them would be contrary to the principles of interpretation applicable under the Vienna Convention of 1986.

121. In contrast, the minority believes that the obligation set out in paragraph 1 of Article XIII – the existence of which considers as undeniable – requires, to be perfected, a subsequent agreement on the forum to settle the dispute. The minority emphasizes that there is no indication that either party is free to make that choice.⁸⁷ In no way does the argument put forward by the majority entail or assume that States concluding a treaty may not require a separate agreement. However, in this case, it is evident that no additional agreement is required from the parties concerned in the dispute.

122. An international arbitration is commenced upon a claimant lodging the notice of arbitration with respondent. In the instant case, it is all that is required as a precondition to apply paragraph 2 of Article XIII (in accordance with the UNCITRAL Rules or whichever other agreed rules). The State has no option to institute an arbitration under Article XIII. Therefore, there is only one way to apply paragraph 2 of Article XIII: the institution of an arbitration by the investor. There is no other option whatsoever.

123. It is true that, unlike the absence in Article XIII highlighted by the minority, Article XIV of Annex III to the Treaty, concerning the “Settlement of Disputes between the Parties,” expressly mentions in its second paragraph who can submit the dispute to arbitration as

⁸⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of December 12, 1996, Separate Opinion of Judge Higgins, ICJ Reports 1996 (submitted as Annex 37 to the *Second Legal Expert Report of Prof. Pauwelyn*), p. 857, § 35. See also Exhibit RL-159, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion of Laurence Boisson de Chazournes dated July 3, 2013, § 48, cited in *Rejoinder on Jurisdiction*, § 67.

⁸⁷ It should be noted that the provision under discussion in the Decision on Jurisdiction issued in *Garanti Koza* (Article 8(1) of the U.K.-Turkmenistan BIT) includes that specification at the end: “Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes” (Exhibits RL-160/CL-58, *Garanti Koza v. Turkmenistan*, § 17).

follows: “If a dispute between the Parties cannot thus be settled, it shall, upon the request of either Party, be submitted to an arbitral tribunal.”

124. Nonetheless, the majority of the Tribunal understands that the text of Article XIV confirms the States’ assumption that the only scenario envisaged by Article XIII is that of the submission of a claim for arbitration by an investor.

125. In fact, within the framework of the Treaty, there is only one way to institute investor-State arbitration.⁸⁸ Specifically, States have offered their consent in Article XIII, and that consent is perfected when an investor accepts the offer by instituting an arbitration proceeding. This is widely known as anticipated consent or offer of consent to arbitrate. The opposite way is not possible – at least, regarding arbitration – as the investor is clearly not a Contracting Party to the Treaty.⁸⁹ Likewise, the anticipated consent set out in paragraph 1 of Article XIII may only be given by State Parties to the Treaty.

126. The language used in paragraph 3 of Article XIII, which expressly addresses the exclusion of diplomatic protection, confirms the foregoing idea when referring to “a dispute which one of its investors has consented to submit to arbitration.” The provision takes the investor’s consent as a unilateral act (which follows the consent given by the State) without mentioning or suggesting that such consent is to arise from a separate agreement. Plainly speaking, the investor’s consent can only follow the anticipated consent to arbitrate given by the State. Consequently, the fact that paragraph 3 of Article XIII refers to the investor consenting to arbitration necessarily assumes that the offer of consent has been accepted by means of the investor’s unilateral act (the Notice of Arbitration). In the opinion of the majority of the Tribunal, there is no other possible explanation or interpretation.

⁸⁸ According to Claimant’s Expert, this is related to how the disputes covered by the Treaty are defined. *Second Legal Expert Report of Prof. Pauwelyn*, § 13: “Since Article XIII of Annex III of the Treaty only covers treaty claims by investors against their host state (“[d]isputes between an investor of one Party and the other Party concerning an obligation of the latter under this Agreement”), it is up to the investor, and the investor alone, to select domestic courts, national arbitration or international arbitration to resolve disputes with the host state.”

⁸⁹ The majority is cognizant of the fact that, in different contexts, arguments have been developed to support that a State can file a claim against an investor. But, within the framework of a treaty such as that at issue here, those arguments could only be invoked through a counterclaim. In any case, this issue has not been raised before this Tribunal.

127. Therefore, the Tribunal cannot endorse Respondent's reading of paragraph 3 of Article XIII whereby diplomatic protection would be excluded only when there exists a "perfected consent to arbitrate,"⁹⁰ [Tribunal's Translation] obtained via a separate agreement. "Perfected consent" exists when the investor accepts the offer made by the State. A good faith reading of paragraph 3 of Article XIII does not allow us to deduce that there is an additional requirement of consent.⁹¹ Nothing in the text suggests such an interpretation.

128. The Tribunal's position on this issue is not exactly novel. There are relevant examples that make specific reference to the issue under discussion. Thus, for instance, in *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*,⁹² when confirming its jurisdiction, the tribunal eloquently pointed out that "The Parties' mutual consent to arbitration derived from Article VI of the Treaty is not, [of] course, a treaty between two States. The Parties' consent is contained in the separate Arbitration Agreement subject to international law between the Claimants and the Respondent, that was formed upon the Claimants' written acceptance (by their Notice of Arbitration) of the Respondent's standing, general offer to arbitrate contained in Article VI of the Treaty."⁹³

129. Respondent insists that, unlike other treaties signed by the Republic, the text of paragraph 1 of Article XIII in this case fails to mention the investor's right to choose one of the alternative dispute resolution methods.⁹⁴ The Tribunal considers that, in general, the fact that an international instrument is drafted in terms different from those of another can hardly prove which is the most suitable interpretation of either of them or record the intention of the contracting parties in the terms of Article 31(4) of the Vienna Convention of 1986. This is so because the conditions of negotiation, the objectives pursued by each of the contracting parties and/or the relationships between them are essentially different for each treaty.

⁹⁰ *Reply on Jurisdiction*, § 45.

⁹¹ *Rejoinder on Jurisdiction*, §§ 27-28; *First Legal Expert Report of Prof. Pauwelyn*, § 67.

⁹² *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, *Second Partial Award on Track II* dated August 30, 2018, § 7.85.

⁹³ Although the text of the treaty in question (the BIT between the Republic of Ecuador and the United States, concluded in 1993 and denounced by Ecuador in 2017) is different from that of the Treaty between the Dominican Republic and the CARICOM, the citation to the decision transcribed is of interest, in view of the fact that the BIT between Ecuador and the United States did not include a provision requiring additional consent from the State, other than the early consent under Article VI.

⁹⁴ *Reply on Jurisdiction*, § 18 and note 48.

130. Moreover, interpreting a treaty on the mere basis of the language differences with other treaties concluded by the same State presents at least two problems: on the one hand, language differences do not necessarily entail differences in regimes; and, on the other hand, this position seems to assume that the drafting of all those treaties depends on such State only, when it is evident that there is another State (or other States, like in this case) that is also responsible for the drafting of each particular treaty. For all these reasons, the majority of the Tribunal considers that relying upon the provisions of a treaty may only have an effect on the interpretation of another treaty insofar as specific and conclusive data show that the provisions of the former qualify as interpretative guidelines of the latter or when such specific and conclusive data allow to identify the intention of each of the contracting parties.
131. The Tribunal does not deny the existence of similarities between the texts of the treaties, but, in any case, they should be addressed with utmost care. It is true that the text of other treaties is often relied upon so as to demonstrate the “ordinary meaning” of the terms used, in the terms of Article 31(1) of the Vienna Convention of 1986, but, in that case and for the reasons stated in the foregoing paragraph, such references should be analyzed very carefully. Automatic extrapolations should be ruled out.
132. In the instant case, no particular element has been shown to persuade the Tribunal that the fact that other treaties – which do not apply here – make express reference to the investor’s right to choose the forum means that there is no such right under the Treaty. On the contrary, the reading of Article XIII under the guidelines of Article 31(1) of the Vienna Convention of 1986 confirms such right.
133. In turn, the scenario of disputes between States, envisaged in Article XIV of the Treaty, is completely different. In this case, it is reasonable for either of the Contracting Parties who have mutually agreed to settle their disputes this way to institute the arbitration.
134. For all the reasons stated *supra*, the majority of the Tribunal believes that paragraph 1 of Article XIII contains the expression of consent of the Contracting Parties to the Treaty to submit the disputes referred to therein to one of the three mechanisms mentioned. In other words, the Contracting Parties to the Treaty have built three doors through which an investor

can pass. All these three doors can be opened, but only one of them can be opened at a time.⁹⁵ All it takes is (1) an investor who meets the conditions laid down in the Treaty in order to be authorized to pass through one of those doors (*ratione personae* and *ratione temporis*); (2) a reason to do it (notably, a dispute must exist) (*ratione materiae*); and (3) a choice of the door to be used. Since the only party who can pass through the doors is the investor (as the claimant formally instituting the dispute resolution proceeding), it is the investor who must choose the door to be used.

135. The options available to the investor are clear, and the grounds pursuant to which they can be invoked are apparent. Any effort to discover additional requirements there would imply to rewrite the Treaty.

B) On the Requirement for the Specific Choice of a “Forum”

a. Respondent’s Position

136. Respondent insists that paragraph 1 of Article XIII not only fails to include an obligation, but purportedly has another incurable defect: a failure to identify a specific international arbitration institution and/or regime. Respondent contends that this alleged lack of forum is decisive, as, in its opinion, “in international law, there is no such thing as an consent to international arbitration *in abstracto*,” namely, a consent that is not “forum-specific.”⁹⁶ Such defect would also impact the first phrase of paragraph 2 (“Where the dispute is referred to international arbitration”), since, in Respondent’s words, “it is not possible to ‘refer’ a dispute to international arbitration in a vacuum.”⁹⁷ [Tribunal’s Translation].

⁹⁵ The lack of a separate “fork in the road” provision claimed by the minority cannot affect the consent given in paragraph 1. The Treaty explicitly distinguishes the three options as alternatives by using the word “or”.

⁹⁶ *Reply on Jurisdiction*, § 10; *Memorial on Jurisdiction*, § 48.

⁹⁷ *Reply on Jurisdiction*, § 23.

b. Claimant's Position

137. For Claimant, the fora mentioned by Respondent are the three options set out in paragraph 1.⁹⁸ Specifically, according to Claimant, the Treaty “does contain a reference to an arbitral forum” and “provides for the default application of the UNCITRAL Arbitration Rules.”⁹⁹

c. The Tribunal's Analysis

138. For the Tribunal, Respondent's assertion that “there is no consent without a forum” [Tribunal's Translation] may be shared or not, depending on what it refers to. As emphasized in the Parties' written and oral submissions, the formulae contained in the Treaties for the valid expression of consent to one or more dispute settlement mechanisms are varied.¹⁰⁰ In other words, there is clearly not one single ritualistic drafting in order to assume this obligation.¹⁰¹ What must exist as a *conditio sine qua non* is the conviction that a party has expressed its intent to resolve certain disputes in a given way.¹⁰² And in order to figure out whether there has been such an expression of intent in the present case, the Tribunal follows – as requested by the Parties – the rules of interpretation established in the Vienna Convention of 1986. As stated *supra*, such rules advocate for neither a restrictive nor a liberal approach towards consent provisions.¹⁰³

139. A potential scenario in which a State's intent – clearly expressed – to submit to a given dispute settlement mechanism is frustrated by the inability to put it in practice should not be ruled out. Such inability may be based, for example, on the failure to meet one or several of the particular conditions or definitions included in the body of rules containing consent. There could also be incurable drafting defects. Now, for drafting defects to be deemed incurable, it

⁹⁸ Tr. Day 2, English, p. 478, ll. 1-8 (Claimant).

⁹⁹ *Rejoinder on Jurisdiction*, § 12.

¹⁰⁰ The Tribunal specifically refers to the consent expressed by means of international treaties – whether concerning investments or not – given that, when the expression of consent is channeled through other means – state laws or contracts – interpretation guidelines are, at least partially, different.

¹⁰¹ The fact that other tribunals have concluded that a specific provision of a treaty does not reflect the respondent State's consent to a particular type of arbitration with regard to the very dispute for which such provision is relied upon is not at all shocking. Let alone can those particular responses rise to the category of principles of international law.

¹⁰² This is a long-standing principle in international law. See Advisory Opinion of the Permanent Court of International Justice in *Status of Eastern Carelia* dated July 23, 1923. *PCIJ Series B*, No. 5, p. 27.

¹⁰³ *Supra* § 120.

is necessary to exhaust all logical interpretative possibilities offered by the Treaty provision containing the State's consent – and the Treaty in general – in light of the principles of interpretation offered by international law that apply to the relevant case.

140. It may be conceived that, if the content of Article XIII were limited to the provisions of paragraph 1, a scenario such as that presented by Respondent could exist. Yet, that is not the situation faced by this Tribunal. In the case at issue, it is not necessary to go too far. The very Article in which the Contracting Parties to the Treaty have regulated the “Settlement of Disputes between an Investor and a Contracting Party” provides all the answers.

141. Indeed, on the basis of a good faith interpretation, the Contracting Parties to the Treaty have clearly undertaken, in paragraph 1 of Article XIII, to submit (*inter alia*) to international arbitration in order to settle the disputes mentioned therein.¹⁰⁴ And it is also evident that the other three paragraphs of such Article regulate different aspects of the settlement of those disputes by means of international arbitration.¹⁰⁵

142. Respondent contends that the interpretation made by Claimant and his expert is not a good-faith interpretation, as “the principle of good faith may not be used to modify the text of Article XIII or create obligations that do not exist.”¹⁰⁶ [Tribunal's Translation].

143. For the Tribunal, as stated *supra*, the obligation undertaken by the Contracting Parties to the Treaty is beyond doubt, it being unnecessary to modify a single word of paragraph 1 of Article XIII.¹⁰⁷ The Tribunal is particularly aware of the importance of this issue. In this respect, just as it is not allowed to modify the text and incorporate new obligations, it is not allowed to deprive words of their ordinary meaning. In plain language, consent can be neither added nor deleted.

144. Paragraph 2 of Article XIII, in particular, establishes what happens when a choice is made to institute an international arbitration.¹⁰⁸ The choice is vested upon the investor, who has the

¹⁰⁴ *Supra* § 94.

¹⁰⁵ The complete “chronological” sequence envisaged in Article XIII appears *infra* in § 172.

¹⁰⁶ *Reply on Jurisdiction*, § 54.

¹⁰⁷ *Supra* §§ 87-92.

¹⁰⁸ *Infra* §§ 145 *et seq.*

unilateral power to invoke its right to arbitrate, provided that both the investor and the investment on which the claim is based meet the conditions imposed by the Treaty. Along this line of thought, in our case, no apparent obstacle, in principle, may frustrate consent. As a matter of fact, both Parties have rightly stressed the need to read Article XIII as a whole.¹⁰⁹

2. The Submission of a Dispute to International Arbitration

A) The Issue Covered in Paragraph 2 of Article XIII

a. Respondent's Position

145. According to the interpretation advocated for by Respondent, the purpose of paragraph 2, interpreted in good faith and in accordance with the ordinary meaning of the terms used therein, is to state that, for consent to UNCITRAL arbitration to exist, the investor and the State (a Contracting Party to the Treaty) must conclude a *de novo* agreement once a dispute has arisen between them.¹¹⁰

146. As to the first phrase of paragraph 2 (“Where the dispute is referred to international arbitration”), the Republic considers that it only intends to “introduce the conditions to be met for a dispute to be submitted to international arbitration under the UNCITRAL Rules; no more, no less.”¹¹¹ This understanding does not mean for Respondent that the issues addressed in paragraph 2 can be reduced to mere procedural questions. “It is evident that paragraph 2 not only regulates a ‘procedural question,’ but expressly requires Respondent to give its consent *ex post* the existence of the dispute, so that it can be submitted to international arbitration under the UNCITRAL Rules.”¹¹² [Tribunal’s Translation].

147. Respondent also contrasts the use of the plural “disputes” in paragraph 1 of Article XIII with the singular “dispute” in paragraph 2. For the Republic, this difference “shows” that paragraph 2 requires its consent. According to this interpretation, the three dispute resolution options set out in paragraph 1 “would be potentially available” to resolve the disputes which

¹⁰⁹ *Counter-Memorial on Jurisdiction*, § 30; *Reply on Jurisdiction*, § 53.

¹¹⁰ *Reply on Jurisdiction*, § 25.

¹¹¹ *Reply on Jurisdiction*, § 24.

¹¹² *Reply on Jurisdiction*, § 26.

“may hypothetically arise” between an investor and a State. Instead, paragraph 2 provides that, “for a specific dispute to be submitted to international arbitration, the parties concerned in the dispute must consent to refer such dispute to an international arbitrator or *ad hoc* arbitration tribunal, under the UNCITRAL Rules or to be appointed by a special agreement.”¹¹³ [Tribunal’s Translation].

b. Claimant’s Position

148. Claimant’s view on the purpose of paragraph 2 of Article XIII is totally different. For him, that paragraph already assumes that a dispute has been submitted to international arbitration and its purpose is to address the question of “how to appoint arbitrators.” Consequently, it is a procedural question that arises once international arbitration has been initiated, not a substantive question “capable of undermining the Dominican Republic’s unilateral binding offer of consent to international arbitration set out in paragraph one of Article XIII.”¹¹⁴

149. In Claimant’s view, Respondent’s interpretation does not conform to the principles of treaty interpretation set forth in the Vienna Convention of 1986, particularly in Article 31.¹¹⁵ Claimants raises, *inter alia*, two main points in support of this assertion. On the one hand, Respondent fails to interpret paragraph 2 of Article XIII in context by purporting that the phrase “may agree” conditions everything in such Article, even the consent given in paragraph 1.¹¹⁶ On the other hand, Respondent’s interpretation fails to give effect to all the terms of the Treaty, for example, regarding the introductory phrase of paragraph 2, which is entirely ignored by Respondent.¹¹⁷

c. The Tribunal’s Analysis

150. As stated *supra*,¹¹⁸ paragraph 2 of Article XIII is the first paragraph which specifically regulates the international arbitration regime. Perhaps, we should wonder why the regime of this

¹¹³ *Reply on Jurisdiction*, § 28.

¹¹⁴ *Rejoinder on Jurisdiction*, § 22; *Counter-Memorial on Jurisdiction*, § 25.

¹¹⁵ *Rejoinder on Jurisdiction*, § 24.

¹¹⁶ *Rejoinder on Jurisdiction*, § 25.

¹¹⁷ *Rejoinder on Jurisdiction*, § 30.

¹¹⁸ *Supra* § 144.

specific mechanism for the settlement of disputes between an investor and the host State is specifically addressed, while the other two mechanisms set out in paragraph 1 are not.

151. The answer to that question seems evident. Only the operation of international arbitration requires an explanation, as the other two options mentioned in paragraph 1 of Article XIII would be subject to the law of the State where the national court or arbitration mechanism is set in motion. For international arbitration, rather, there is no uniform system, which makes it necessary to lay down some guidelines for that option to be exercised. Paragraph 2 is, thus, the product of this obvious conclusion by the Contracting Parties to the Treaty.

152. The terms of the sentence “Where the dispute is referred to international arbitration,” interpreted in accordance with their ordinary meaning, indicate, in a clear, straightforward and unambiguous manner, that the entire content of paragraph 2 is circumscribed to the case in which the claimant selects that option. The context is the evident link between that phrase and the final phrase of paragraph 1, which presents international arbitration as one of the dispute settlement options. The settlement of disputes arising between an investor and a Contracting Party to the Treaty is actually the object and purpose of Article XIII. These considerations do not imply that the majority of the Tribunal deems the drafting of Article XIII to be perfect. However, no good faith interpretation of the phrase under analysis, of paragraph 2, and of Article XIII in general can ignore the fact that those texts have been drafted so as to allow, not prevent, the settlement of disputes.

153. Nevertheless, as stated *supra*, Respondent believes that “the first sentence of Paragraph 2 of Article XIII only intends to introduce the conditions to be met for a dispute to be submitted to international arbitration under the UNCITRAL Rules.”¹¹⁹ [Tribunal’s Translation]. This assertion is unsupported by the very terms of the relevant sentence and, hence, cannot be shared by the Tribunal. It is worth pointing out that there is nothing there imposing any such condition as that proposed by Respondent. Notably, paragraph 2 does not start by saying “For a dispute to be submitted” or anything to that effect, but by “Where the dispute is referred.” Therefore, the language used in the introductory sentence is plain and unconditional.

¹¹⁹ *Supra* § 146.

154. Likewise, Article XIII contains no term requiring that any given conditions “have to be met.”

On the contrary, it merely provides that the parties concerned in the dispute may (indeed, hypothetically) agree on certain issues regarding international arbitration, as explained *infra*. The mechanism to set international arbitration in motion set out in paragraph 2 of Article XIII is that frequently used, namely, the notice of arbitration. For the majority of the Tribunal, the absence of any express reference to how arbitration should be initiated can only be interpreted as a clear confirmation that no additional condition is required.

155. Furthermore, it is worth highlighting that, if Respondent’s interpretation was deemed correct, to the effect that paragraph 1 of Article XIII contains no consent whatsoever, the Contracting Parties to the Treaty would have consented to none of the options set out in the final phrase of paragraph 1. Such understanding would imply that national arbitration, in particular, is actually excluded as an option, since the Treaty does not provide for the possibility of an *ex post* agreement for this arbitration method. On this point, it could be said that the conclusion of an agreement between the State and the investor in order to submit to national arbitration would always be possible, even if the Treaty does not provide for it. Yet, as the Parties’ power to agree to submit to a dispute settlement mechanism exists in any case, that assertion would turn redundant the requirement to enter into an agreement once the dispute has arisen for purposes of international arbitration. In other words, the Tribunal cannot adopt Respondent’s interpretation to the extent that it is difficult to understand why the alleged requirement to conclude such *ex post* agreement is explicitly envisaged for international arbitration, but not for national arbitration. Respondent furnishes no convincing explanation in this regard.

156. For the reasons stated *supra*, an interpretation in good faith and in accordance with the ordinary meaning to be given to its terms in their context leads to the conclusion that paragraph 2 of Article XIII refers to the scenario in which the international arbitration option is chosen.

B) The Scope of the Parties’ Potential Agreement

a. Respondent’s Position

157. For Respondent, paragraph 2 of Article XIII, and especially the expression “may agree” contained therein, is essential. According to the Republic, this phrase clearly indicates that the

execution of an agreement between the investor and the host State after the dispute has arisen is crucial for resorting to an UNCITRAL arbitration.

158. In fact, Respondent understands that “a good faith interpretation, in accordance with the ordinary meaning to be given to the terms used in Paragraph 2” leads to reading the paragraph at issue as follows: “the investor and the Party concerned may agree to refer their dispute to an UNCITRAL arbitration.”¹²⁰ And further *infra*, in the same pleading, Respondent insists: “the ordinary meaning of the terms in Paragraph 2 of Article XIII, is clear regarding the fact that a separate agreement between the investor and the host State is necessary to refer a certain dispute to international arbitration.”¹²¹ [Tribunal’s Translation].

159. Respondent also asserts that the phrase “may agree” refers not only to the body adjudicating the arbitration (an international arbitrator or *ad hoc* arbitration tribunal), but also to the rules applicable to the arbitration proceedings, which may be those defined by the parties by a special agreement or the UNCITRAL Rules.¹²² According to Respondent, to define any of those points it is imperative that the parties execute an agreement. Respondent sees no contradiction or redundancy whatsoever between “may agree” and “special agreement.”¹²³

160. Under Respondent’s interpretation, the potential agreement referred to in paragraph 2 of Article XIII is, thus, the unavoidable pathway for the State to consent to arbitration. It is on this basis that Respondent asserts that “[i]t is evident that Paragraph 2 does not merely regulate a ‘procedural issue’”¹²⁴ as Claimant purports. [Tribunal’s Translation].

b. Claimant’s Position

161. Claimant, in turn, understands that the scope of the aforementioned agreement is much more limited. According to Claimant, any such agreement is not an unavoidable condition to access arbitration but just an option open to the parties to opt for a sole arbitrator or an arbitration tribunal. For Claimant, the interpretation proposed by Respondent, which renders

¹²⁰ *Reply on Jurisdiction*, § 25.

¹²¹ *Reply on Jurisdiction*, § 54.

¹²² *Reply on Jurisdiction*, §§ 29-30.

¹²³ *Reply on Jurisdiction*, § 31.

¹²⁴ *Reply on Jurisdiction*, § 26.

unavoidable the execution of an *ex post* agreement in order to resort to arbitration, would make all references to international arbitration contained in Article XIII superfluous because, even without those references, the State and the investor may always agree *ex post* to submit a dispute that has arisen between them to arbitration.¹²⁵

162. Furthermore, for Claimant it is decisive that, in contrast to the use of the mandatory verb “shall” in paragraph one, paragraph two only uses the permissive verb “may”, “thus distinguishing the binding character of paragraph one from the permissive character of paragraph two.”¹²⁶ From this contrast, Claimant deduces that Respondent’s interpretation violates Article 31 of the Vienna Convention of 1986.¹²⁷

163. Claimant also asserts that the inclusion of the expression “special agreement” would not make much sense and would be redundant if the whole paragraph is deemed subject to the demand of an *ex post* agreement, since one would be saying that “the parties ‘may agree’ to a ‘special agreement’.”¹²⁸

c. The Tribunal’s Analysis

164. The Parties deeply disagree about the scope that shall be granted to the agreement they are authorized to in the terms of paragraph 2 of Article XIII. Respondent understands that such agreement is the only possible pathway for it to express its consent to international arbitration. Consequently, since no *ex post* agreement has been concluded in the case at issue, the Tribunal lacks jurisdiction to hear the dispute. Claimant, in turn, limits the scope of any such agreement to the specific context of the sentence in which the expression “may agree” is included. Therefore, the agreement between the investor and the host State may only refer to the specific configuration of the body that shall adjudicate the dispute.

¹²⁵ *Rejoinder on Jurisdiction*, § 31; *Second Legal Expert Report of Prof. Pauwelyn*, § 21.

¹²⁶ *Rejoinder on Jurisdiction*, § 25.

¹²⁷ *Ibid.*

¹²⁸ *Rejoinder on Jurisdiction*, § 31.

165. The Tribunal has analyzed all of the Parties' arguments, focusing on what is the interpretation which, made in good faith, is more in line with the ordinary meaning of the terms included in the sentence at issue in their context, always in the light of its object and purpose.
166. First of all, it is essential to recall the wording that has been broadly discussed in these arbitral proceedings. It is the expression "may agree." Both Parties agree that the wording used implies that the agreement between the litigating parties is a possibility, *i.e.*, a fact of uncertain realization. Claimant asserts it with considerable emphasis.¹²⁹ Respondent, as well, although giving the agreement a different meaning.¹³⁰ Specifically, for Respondent, the agreement to which the expression "may agree" refers is the only pathway for Respondent to express its consent to international arbitration, a pathway Respondent may choose not to go through, thus denying consent, which is what, in its view, has happened in this case.
167. The foregoing plainly indicates that, although their positions are different, both Parties admit that the expression "may agree" alludes to a possibility. In other words, the Parties dismiss the idea that it may be something that shall unavoidably occur.
168. The substantial positions differ in that, for Claimant, the expression refers to the possible configuration of the arbitral body called to settle the dispute, whereas, for Respondent, the possibility is that of consenting to international arbitration. Therefore, the lack of agreement leads, for Claimant, to the application of the rules by default and, for Respondent, to the lack of jurisdiction of the Tribunal.
169. Facing this dissociation in the respective positions, it is necessary to determine what the provision at issue says verbatim. Well, the express text sets forth that the parties to the dispute "may agree to refer the dispute to an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."

¹²⁹ *Counter-Memorial on Jurisdiction*, § 7: "the language included in paragraph 2 of Article XIII merely allows the Parties to agree to a sole arbitrator or to an arbitral tribunal, to be 'established' under the UNCITRAL Arbitration Rules (by default, without the need for *ex post* agreement) or under other rules, this time explicitly made subject to 'special agreement'."

¹³⁰ *Reply on Jurisdiction*, §§ 25-26.

170. There is no doubt whatsoever that the text does not say that the purpose of the agreement may be that of submitting the dispute “to international arbitration under the UNCITRAL Rules” [Tribunal’s Translation], as Respondent purports, but that of referring the dispute to an arbitrator or a tribunal, which shall be constituted in one of the ways provided for.

171. The contextual analysis confirms and gives meaning to the terms used. In fact, the question envisaged in paragraph 2 of Article XIII is, undoubtedly – given the clarity of the terms used in the first sentence of the Article –, that of a dispute submitted to international arbitration.¹³¹ Consequently, it is not acceptable to interpret (or rather, rewrite) the paragraph at issue as reading in the way Respondent purports, which is the following: “the investor and the Party involved in the dispute may refer their dispute to an UNCITRAL arbitration.”¹³² Much less can it be purported that any such reading expresses “a good faith interpretation, in accordance with the ordinary meaning to be given to the terms used in Paragraph 2”, or that it “puts beyond doubt” the requirement of an *ex post* agreement to submit a dispute to arbitration. It suffices to observe what happens when adding the first sentence of paragraph 2, which Respondent has left out in its redrafting, to confirm that from both an argumentative as well as a syntactic point of view, the outcome is not satisfactory: “When the dispute is referred to international arbitration, the investor and the Party concerned may refer their dispute to an UNCITRAL arbitration.” [Tribunal’s Translation.] On the relevance of this interpretation, it may be of interest to point out that Respondent itself paraphrases the International Court of Justice to assert that “it is the duty of the Court to interpret the Treaties, not to revise them.”¹³³ The Tribunal openly agrees with this wise assessment.¹³⁴

172. In the Tribunal’s view, recapitulating the analysis conducted, Article XIII shall be understood as a chronological explanation of how the dispute resolution system designed by the Treaty works. Thus, paragraph 1 contains the offer of consent made by the Contracting Parties of the Treaty; paragraph 2 sets forth the different configurations international arbitration may

¹³¹ *Supra* § 156.

¹³² *Reply on Jurisdiction*, § 25.

¹³³ *Reply on Jurisdiction*, § 152, with respect to the International Court of Justice *Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; Second Phase*, issued on July 18, 1950 (ICJ Reports 1950, p. 221), which reads as follows: “It is the duty of the Court to interpret the Treaties, not to revise them”. For more quotes in the same sense, *Memorial on Jurisdiction*, § 149.

¹³⁴ Likewise, the Expert presented by Claimant “obviously” agrees with this assertion. *Second Legal Expert Report of Prof. Pauvelyn*, § 93.

adopt when this is the mechanism chosen by the investor; paragraph 3 clarifies the standard question in investment arbitration, pursuant to which diplomatic protection is restricted when the investor has instituted an arbitration proceeding against the host State; and paragraph 4, finally, enshrines the compulsory, definitive and unappealable nature of arbitral decisions.

173. Within that scheme, and for all the reasons stated *supra*, the Tribunal is of the view that, a good faith interpretation of paragraph 2 of Article XIII, without adding or removing anything from the text thereof, allows the Tribunal to assert that, after setting the framework in which such paragraph develops – that of international arbitration, which is the one chosen in this case –, the paragraph itself offers the disputing Parties two options: (i) arbitration before a sole arbitrator, or (ii) arbitration before an *ad hoc* arbitration tribunal constituted according to any of the methods provided for (by a special agreement or pursuant to the provisions set forth in the UNCITRAL Rules).

174. In the case at hand, it is apparent that the Parties have opted for a three-member tribunal for the constitution of which they have followed the precepts of the UNCITRAL Rules, even if considering that Respondent has done so for procedural reasons and reserving its objections to the Tribunal's jurisdiction.¹³⁵

C) The Application of the UNCITRAL Rules

a. Respondent's Position

175. Respondent asserts, as already stated,¹³⁶ that the application of the UNCITRAL Rules is possible only if the parties conclude an agreement to such effect. Accordingly, in Respondent's words, the phrase "they may agree" "also refers to the selection of applicable rules: either specific rules defined by the disputing parties (special agreement) or the UNCITRAL Rules."¹³⁷ This statement is based, according to Respondent, on the use of "or" to separate both options, as the existence of both alternatives requires "a manner to determine if one or the other

¹³⁵ Procedural Order No. 1, §§ 2(1) and 2(2).

¹³⁶ *Supra* § 159.

¹³⁷ *Reply on Jurisdiction*, § 30.

applies.”¹³⁸ [Tribunal’s Translation]. This would be accomplished by the conclusion of an agreement.

176. The Republic draws attention to Article 1(1) of the UNCITRAL Rules, which requires that the Parties conclude a written agreement to apply the Rules.¹³⁹ For Respondent, Article XIII does not contain any such agreement which, in its words, must be “clear and unambiguous.”¹⁴⁰

177. Respondent also denies that the UNCITRAL Rules are applicable “by default.” In this regard, it explains that, on the one hand, the last phrase of paragraph 2 of Article XIII places the “special agreement” and the UNCITRAL Rules at the same level, “without favoring one option over the other” [Tribunal’s Translation], and, on the other hand, the Treaty does not expressly provide that UNCITRAL arbitration is the default option, unlike other treaties signed by the Republic.¹⁴¹ Respondent adds that the initial wording of the provision on the settlement of disputes between an investor and a Contracting Party to the Treaty proposed by CARICOM did not mention a default option either, and it also included the option of ICSID arbitration.¹⁴²

178. Respondent rejects the fact that the comma that separates the second from the third phrase, in the Spanish version of the paragraph in question, has any effect on the interpretation proposed by Respondent. For Respondent, such comma, not found in the English version, “merely indicates that what comes before the comma applies to what comes after.”¹⁴³ [Tribunal’s Translation].

179. Finally, Respondent denies having consented to UNCITRAL arbitration by the fact of being involved in the arbitral proceedings and the constitution of the Tribunal. It states that such

¹³⁸ *Ibid.*

¹³⁹ *Reply on Jurisdiction*, §§ 10, 101 and note 205.

¹⁴⁰ *Memorial on Jurisdiction*, §§ 84-87.

¹⁴¹ *Reply on Jurisdiction*, §§ 36, 38 and note 73.

¹⁴² *Reply on Jurisdiction*, §§ 37, 64. Exhibits R-50/C-143, CARICOM’s Comments on Agreement on Reciprocal Promotion and Protection of Investments dated March 8, 1998.

¹⁴³ *Reply on Jurisdiction*, § 41.

involvement was necessary precisely “in order to object to the Tribunal’ jurisdiction.”¹⁴⁴ [Tribunal’s Translation].

b. Claimant’s Position

180. Claimant does not dispute the importance of the conjunction “or” included in the last phrase of paragraph 2 of Article XIII. For Claimant, “or” indicates that the Treaty affords the parties an opportunity to reach a special agreement on the appointment of the arbitrators “or” apply, “by default”, the UNCITRAL Rules in the absence of such a special agreement.¹⁴⁵

181. Claimant finds such application “by default” of the UNCITRAL Rules evident, as a special agreement, which may exist only if the parties negotiate and reach an agreement, cannot be a default option. By contrast, Claimant adds, the UNCITRAL Rules are expressly mentioned in the Treaty, and these arbitration rules exist independently of any “special agreement” between the parties; consequently, the parties can always “fallback” on the option of applying the pre-existing UNCITRAL Rules.¹⁴⁶

182. In Claimant’s view, the emphasis as regards Article 1(1) of the UNCITRAL Rules should be put on the requirement that the parties have “agreed in writing” that the dispute shall be referred to arbitration under the UNCITRAL Rules, discarding any additional requirement not found in such provision, such as that the agreement be “clear and unambiguous.”¹⁴⁷

183. Claimant attaches importance to the comma before the last phrase of paragraph 2 of Article XIII.¹⁴⁸ According to Claimant, that comma (in the Spanish version) would underline that the permissive words “may agree” (“*podrán acordar*”) only apply to the phrase that includes them, that is, the phrase before the comma (sole arbitrator or *ad hoc* tribunal), and does not apply to or condition the last phrase of paragraph 2.¹⁴⁹

¹⁴⁴ *Reply on Jurisdiction*, § 34.

¹⁴⁵ *Rejoinder on Jurisdiction*, § 29.

¹⁴⁶ *Rejoinder on Jurisdiction*, § 34.

¹⁴⁷ *Counter-Memorial on Jurisdiction*, §§ 71-72.

¹⁴⁸ *Rejoinder on Jurisdiction*, §§ 23, 32.

¹⁴⁹ *Counter-Memorial on Jurisdiction*, § 27.

184. Finally, Claimant refers to the correspondence exchanged between the Parties and their counsel at the beginning of this arbitration, stating that it evidences that the Republic not only agreed to use and apply the UNCITRAL Rules, but was also the one that suggested that the Parties apply the 1976 original version rather than the 2010 initially suggested by Claimant.¹⁵⁰

c. The Tribunal's Analysis

185. The final part of paragraph 2 of Article XIII indicates that the *ad hoc* arbitral tribunal may be “appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.”

186. In an effort to contest Claimant’s interpretation that the UNCITRAL Rules are the default option, Respondent asserts that the two options offered are at the same level, without privileging either one.¹⁵¹ The Tribunal has attempted to verify the effectiveness of such statement. The conclusion is that, assuming that Article XIII offers two options to constitute the tribunal and that both options are equally valid, the fact that the parties do not reach any special agreement to appoint the arbitral tribunal necessarily leads to the other option, specified in this provision after the disjunctive conjunction “or”, that is, the establishment of the tribunal under the UNCITRAL Rules. Similarly, the use of a special mechanism to establish the tribunal would mean that the parties discard the UNCITRAL Rules for such purpose.

187. However, the options provided in the last phrase of paragraph 2 of Article XIII are not presented on an identical basis. The distinction between the verbs “appointed” and “established” respectively used for each of them is important. The fact that the tribunal may be established under the UNCITRAL Rules clearly indicates that such rules are applicable.

188. Respondent itself expressly recognizes that UNCITRAL arbitration is included in Article XIII as one of the dispute resolution options.¹⁵² Thus, the fact that the two other options (national courts or national arbitration) have not been chosen opens the door to international arbitration

¹⁵⁰ *Counter-Memorial on Jurisdiction*, § 32.

¹⁵¹ *Reply on Jurisdiction*, § 36.

¹⁵² *Reply on Jurisdiction*, § 101: “the Republic only expressed its willingness to consider UNCITRAL arbitration as one of the options for dispute resolution and to make a decision ‘on a case-by-case basis only.’” [Tribunal’s Translation]

under the UNCITRAL Rules, which has been selected by the investor upon filing the Notice of Arbitration.

189. In addition, the Parties could have agreed to appoint a sole arbitrator (an “international arbitrator”) or provided for a special mechanism to appoint arbitrators. They did neither, relying on the provisions of the UNCITRAL Rules.
190. The effect of the use of a comma to separate the second and third phrases in the Spanish version of paragraph 2 of Article XIII has been exaggerated by Claimant. The Tribunal considers, as the Respondent, that a punctuation mark which only exists in one of the official versions of the Treaty should not be that relevant. With his emphasis, Claimant attempts to prove that the phrase “may agree” of paragraph 2 only refers to the option between a sole arbitrator and an arbitral tribunal. Respondent, on the other hand, minimizes the importance of the comma in its attempt at persuading the Tribunal that the disputing parties “may agree” on both the constitution of the tribunal and the applicable rules. More importantly, for Respondent, in the absence of such agreement, there could be no tribunal, no rules and, logically, no arbitration.
191. Actually, this comma does not significantly change the meaning of the provision under review. With or without a comma, the crucial fact is that the parties have the possibility, not the duty, to adapt the organization of the arbitral proceeding to their preferences.
192. Strictly speaking, the Parties did not question the applicability of the UNCITRAL Rules to the constitution of the Tribunal or to any of the actions taken so far. They only argued about the applicable version, with the 1976 original version prevailing. Even accepting Respondent’s allegation that it accepted the application of these rules in order to object to the jurisdiction, since, according to Respondent, the Republic had never consented to international arbitration, the truth is that it did so on the basis of the UNCITRAL Rules without proposing the application of any other arbitral instrument. Thus, the express inclusion of the UNCITRAL Rules in Article XIII does not seem unremarkable. In that regard, said inclusion meets the written agreement requirement under Article 1(1) of the UNCITRAL Rules, as the submission to arbitration “under the Arbitration Rules of [UNCITRAL]” is one of the options consented to by the Contracting Parties to the Treaty and is precisely the option selected in this case.

Taking the arguments to an extreme, we might also say that the cited provision does not mention treaties as a form of expressing consent but just contracts. However, to our knowledge, no tribunal has adopted this interpretative approach.

193. The issue of the correspondence exchanged between the Parties for the purpose of constituting the Tribunal does not affect this reasoning, as the Parties' consent to arbitration is unambiguous, as already explained. Nevertheless, it should be mentioned, given the importance that the Parties have placed on it. Claimant argues that this correspondence shows that the Republic not only agreed to use and apply the UNCITRAL Rules, but also proposed using the 1976 version of these Rules (although Claimant had initially proposed applying the 2010 version).¹⁵³ The Tribunal cannot read a consent to arbitrate in Respondent's suggestion. In the Tribunal's view, Respondent is correct to state – consistently with the expert proposed by Claimant – that the involvement of a party in the constitution of an arbitral tribunal cannot be interpreted as a consent to the jurisdiction of such tribunal.¹⁵⁴ In other words, the consent to the Tribunal's jurisdiction should not be sought in the correspondence between the Parties. Instead, such correspondence evidences the Parties' agreement to constitute a three-member tribunal under the UNCITRAL Rules and to appoint ICSID as Administrative Authority.¹⁵⁵ There is no special agreement in this correspondence to appoint the members of the tribunal in a specific manner and/or pursuant to a different set of rules.

194. Therefore, in view of the above, the Tribunal finds that the UNCITRAL Rules are applicable to these proceedings.

3. Reliance on the Most-Favored Nation Clause

195. The Parties have discussed about the appropriateness of establishing consent on the basis of the most-favored nation clause contained in Article III of Annex III to the Treaty. Specifically, Claimant relies on such clause to “confirm” its interpretation of the consent granted by the Republic, while the Respondent denies that the clause may be relied upon for such purpose

¹⁵³ *Counter-Memorial on Jurisdiction*, § 32.

¹⁵⁴ *Reply on Jurisdiction*, § 33; *Second Legal Expert Report of Prof. Pauwelyn*, § 42.

¹⁵⁵ *Supra* § 25.

and, in broader terms, that the clause may be relied upon to import the Republic's consent in other treaties.¹⁵⁶

196. Nevertheless, since the majority of the Tribunal considers that it follows from the analysis of Article XIII of the Treaty that the Republic has, clearly and unambiguously, granted consent to international arbitration, it is unnecessary to address the argument on the most-favored nation clause.

4. The Supplementary Means under Article 32 of the Vienna Convention of 1986

197. The Parties have also developed various positions regarding the use of the supplementary means of interpretation set out in Article 32 of the Vienna Convention of 1986.¹⁵⁷ In particular, they have paid attention to the preparatory work of the Treaty, despite the difficulties encountered in locating the evidence of such preparatory work.¹⁵⁸

198. In this regard, the Tribunal has examined all the arguments put forward by the Parties. However, the meaning of Article XIII of the Treaty having been clearly determined by application of Article 31 of the Vienna Convention of 1986, the majority of the Tribunal does not consider that it should make use of the possibility offered by Article 32 thereof. In fact, analyzing the supplementary means of interpretation in order to confirm the interpretation made is unnecessary (especially in view of the limitations mentioned in the foregoing paragraph). For the majority of the Tribunal, the other condition for the application of Article 32 of the Vienna Convention of 1986 does not apply in this case, since the interpretation according to Article 31 does not leave the meaning of the provision subject to interpretation ambiguous or obscure, let alone leads to a result which is manifestly absurd or unreasonable. This makes it even more difficult to give to the supplementary means of interpretation the weight attached by the minority.

¹⁵⁶ *Supra* §§ 63(iv) and 66(iv).

¹⁵⁷ *Supra* §§ 74-78.

¹⁵⁸ *Supra* § 75.

VI. SECOND JURISDICTIONAL OBJECTION - THE ISSUE OF INDIRECT INVESTMENTS AND INDIRECT INVESTORS

1. Mr. Lee-Chin's Investments in the Dominican Republic

199. The Parties' submissions contain the same description of the structure of Mr. Lee-Chin's investments in the Dominican Republic.¹⁵⁹ By means of that structure, Claimant allegedly owns 90% of Lajun and the Land, whereas the remaining 10% is purportedly owned by Dominican entrepreneur, Mr. Luis José Asilis Elmudesi.¹⁶⁰

200. Apart from the acquisition of Lajun and the Land, Claimant alleges that his investments in the Dominican Republic also include the right to develop a recycling facility and the WTE plant, and the Concession Agreement granted by the ASDN.¹⁶¹

2. The Investments Protected by the Treaty

A) Respondent's Position

201. Respondent contends that the Treaty protects neither indirect investments nor indirect investors. For Respondent, the broad definition of investments relates to the kind of rights or assets protected by the Treaty, not to the way in which they are held.¹⁶² In its own words, such definition "has nothing to do with the issue of protection of indirect investments."¹⁶³ [Tribunal's Translation].

202. According to Respondent, the absence of an express reference to indirect investments and indirect investors leads to the inescapable conclusion that the Treaty only applies to investors who have made a direct investment. In support thereof, Respondent relies upon various

¹⁵⁹ *Supra* § 7.

¹⁶⁰ *Counter-Memorial on Jurisdiction*, § 108; *Memorial on Jurisdiction*, § 17.

¹⁶¹ *Supra* § 8.

¹⁶² *Reply on Jurisdiction*, § 155, and Exhibit RL-144, *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction dated October 22, 2012.

¹⁶³ *Memorial on Jurisdiction*, §§ 155-156.

treaties including such express reference, as well as on scholarly articles and some arbitral decisions supporting its position.

203. Moreover, Respondent highlights that its position “is consistent with the fundamental principle of international law whereby a company’s shareholders may not seek to recover damages suffered by the company in which they hold shares,”¹⁶⁴ and that “it was Claimant himself who set up an entire corporate structure precisely because he did not want to hold the investment directly.”¹⁶⁵ [Tribunal’s Translation].

204. Lastly, Respondent submits that it can be reasonably assumed that the Contracting Parties to the Treaty did not expressly provide for the protection of indirect investments and indirect investors so as to avoid the exponential increase of the risk of parallel proceedings that such protection would entail.¹⁶⁶

B) Claimant’s Position

205. Claimant emphasizes the “extremely broad terms” used by the Treaty in order to define both “investment” and “investor,”¹⁶⁷ which causes Mr. Lee-Chin’s investments to be protected by the “clear and unambiguous text of the Treaty.”¹⁶⁸ Claimant cites a series of arbitral decisions to this effect in support of his interpretation.¹⁶⁹

206. Claimant notes that it is true that the Treaty makes no express reference to the protection of indirect investments and indirect investors, however it is also true that there is no mention to the protection of direct investments and direct investors.¹⁷⁰ In this context, Claimant rejects Respondent’s contention that the fact that other treaties expressly refer to “indirect”

¹⁶⁴ *Memorial on Jurisdiction*, §§ 173-176. *Reply on Jurisdiction*, § 162.

¹⁶⁵ *Reply on Jurisdiction*, § 166.

¹⁶⁶ *Reply on Jurisdiction*, § 165.

¹⁶⁷ *Rejoinder on Jurisdiction*, § 79.

¹⁶⁸ *Rejoinder on Jurisdiction*, § 80.

¹⁶⁹ *Counter-Memorial on Jurisdiction*, §§ 115-117. *Rejoinder on Jurisdiction*, §§ 82-83.

¹⁷⁰ *Rejoinder on Jurisdiction*, § 81.

investments and investors confirms that the Treaty is intended to protect only direct investments.¹⁷¹

207. Claimant submits that Respondent misrepresents the nature of Mr. Lee-Chin's claim when stating that a company's shareholders may not seek to recover damages suffered by the company on which they hold interests.¹⁷² In this regard, Claimant explains that he is not seeking damages on behalf of Lajun, but rather damages associated with the loss in value of his investment in the Dominican Republic. He further stresses that the Treaty itself expressly recognizes the right of shareholders to initiate investment arbitrations against the State by defining protected investments to include "shares . . . of companies."¹⁷³

C) The Tribunal's Analysis

208. The Parties agree that Mr. Lee-Chin's investments in the Dominican Republic are indirect and that Mr. Lee-Chin is, thus, an indirect investor.¹⁷⁴ These considerations are not modified by the fact that Respondent repeatedly qualifies such investments as "alleged" or Claimant as an "alleged investor," as the purpose of these qualifiers is to state its opinion that neither the former nor the latter are protected by the Treaty. Claimant's Jamaican nationality has not been disputed so far, in spite of certain expressions used by Respondent which might have suggested otherwise.¹⁷⁵

209. Nor is there any dispute about the broadness of the definition "arising from the text of the [T]reaty," as expressly recognized by Respondent.¹⁷⁶ [Tribunal's Translation].

¹⁷¹ *Rejoinder on Jurisdiction*, § 84.

¹⁷² *Rejoinder on Jurisdiction*, § 86.

¹⁷³ *Ibid.*

¹⁷⁴ *Reply on Jurisdiction*, § 154; *Memorial on Jurisdiction*, § 153.

¹⁷⁵ In the *Memorial on Jurisdiction*, § 179, Respondent asserts that, "in his exchanges with state bodies and entities and in his immigration entries into the territory of the Republic, Mr. Michael Lee-Chin always identified himself as a national of Canada, not a Jamaican citizen." [Tribunal's Translation]. Rigorously speaking, the foregoing does not deny Claimant's nationality but attributes him a certain conduct, which is not the same, despite Claimant's reading of that assertion. *Counter-Memorial on Jurisdiction*, § 110.

¹⁷⁶ *Reply on Jurisdiction*, § 155 and note 335.

210. Specifically, Article I(1) of the Treaty defines the term “investments” as “every kind of asset and in particular, though not exclusively, includes: [...] (b) shares, stocks and debentures of companies or interests in the property of such companies [...].”
211. The text cited in the foregoing paragraph shows the Treaty drafters’ intention to adopt an open definition of the investments covered thereby. In general, it is worth pointing out that the drafters were free to reduce the scope of protected investments. The Tribunal finds no sign of a restrictive legislative policy option to such effect in this text. On the contrary, in light of the language of the provision under analysis, the Tribunal cannot but conclude that the intention of the Contracting Parties to the Treaty was the exact opposite. The Tribunal is aware of the general maxim of interpretation whereby where the text makes no distinction, the interpreter should make no distinction as well. The Tribunal could adopt similar maxims such as *expressio unius est exclusio alterius* as bases, although with some differences, to reach the same conclusion.
212. In other words, the text makes no specific reference to direct or indirect investments, rather using the formula “though not exclusively, includes,” which is much more expressive. Based on these arguments, the tribunal in *Cemex v. Venezuela* similarly concluded that indirect investments were not excluded because they were not specifically mentioned.¹⁷⁷ In view of the broad formula chosen by the Treaty drafters, the analysis could end at this point. Nevertheless, since the Parties have discussed the issue in some detail, the Tribunal deems it necessary to elaborate thereupon in the following paragraphs.
213. Respondent devotes a significant portion of the second part of its submissions on jurisdiction¹⁷⁸ to transcribing an entire series of investment treaties concluded by the Republic which include an express reference to indirect investments.
214. The fact that other treaties expressly include indirect investors and indirect investments under the protection offered thereby is not enough by itself to prove that the Treaty does not include

¹⁷⁷ Exhibits RL-75/CL-53, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction dated December 30, 2010, §§ 151-158.

¹⁷⁸ This part is called “Item II” in both submissions and takes up approximately 13% of each of them.

them.¹⁷⁹ Absent any specific evidence in this regard, the Tribunal cannot share the general validity of the phrase cited by Respondent from the award rendered in *Berschader v. The Russian Federation*,¹⁸⁰ whereby “it would seem likely that if the Contracting Parties had so intended, they would have expressly provided protection for such indirect investments in the terms of the Treaty, as in the case of the other relevant BITs concluded by Belgium and Luxembourg.”¹⁸¹

215. In this sense, the Tribunal echoes the words of the tribunal in *Anglo American PLC v. Bolivarian Republic of Venezuela*, which contends: “A literal interpretation of Article 1(a) of the Treaty handed down by the Arbitral Tribunal, in addition to being in accordance with the rules of interpretation of the Vienna Convention, is not affected by the mere fact that, in other treaties, the Contracting States have chosen to specify that indirect investments were protected. No interpretative conclusion can be inferred from this circumstance for purposes of this case.”¹⁸²

216. The Tribunal is cognizant of the existence of a debate in international investment law on the protection of indirect investors and indirect investments. Yet, it should be noted that an important part of this debate has revolved around the claims filed by minority shareholders.¹⁸³ In such cases, a paradox may arise in which a State amicably settles a dispute with the management of a company and that settlement is somehow disrupted by a relatively small group of shareholders. It is especially in cases of significant share dispersion that the risk of parallel proceedings invoked by Respondent can be identified.¹⁸⁴

¹⁷⁹ *Supra* § 212.

¹⁸⁰ Exhibit RL-134, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award dated April 21, 2006 (also including the Separate Opinion of Prof. T. Weiler).

¹⁸¹ *Ibid.* § 147, expressly highlighted by Respondent in *Reply on Jurisdiction*, § 159.

¹⁸² Exhibit CL-51, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award dated January 18, 2019, § 197. See also *Rejoinder on Jurisdiction*, § 84.

¹⁸³ See, for example, D. Pérez-Salgado, “Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?”, *JIDS*, vol. 8-1, 2017, pp. 101-124. The Tribunal is aware that this academic debate has revived under the current efforts to reform the investor-State dispute resolution mechanism. Nonetheless, it is evident that the Tribunal is to decide the specific dispute submitted to it under the pertinent applicable law.

¹⁸⁴ *Reply on Jurisdiction*, § 165, citing Exhibit RL-260, K. Yannaca-Small, “Parallel Proceedings”, *Oxford Handbook of International Investment Law*, 2008, pp. 1011-1012.

217. In the instant case, Mr. Lee-Chin owns virtually the entire investment, and, regardless of what might be thought about how that investment was conceived and managed – an issue which has raised contrary opinions from the Parties but is yet to be discussed in this arbitration –, it can hardly be doubted that the investment is closely linked to his person. Besides, as stated *supra*, the only minority shareholder, which allegedly holds 10% of the shares of Lajun, is described as a national of the Dominican Republic,¹⁸⁵ which would exclude him from any claim against Respondent under the Treaty.

218. With respect to the doctrine whereby shareholders may not seek to recover the damages suffered by the companies in which they hold interests,¹⁸⁶ it is worth pointing out that that is not the situation existing in this arbitration. Claimant in this case is Mr. Lee-Chin, who claims on his own behalf for the loss in value of his investments in the Republic purportedly arising from the alleged violation by the Republic of several obligations set out in the Treaty.¹⁸⁷ The Tribunal observes that the point of contention in the cases before the International Court of Justice cited by Respondent is diplomatic protection, and the Court itself has noted the differences between this issue and that regarding claims by shareholders.¹⁸⁸ The point of contention in our case is not diplomatic protection. Respondent fails to put the Court's arguments, which, in any case, are limited to customary international law, in the proper context. Respondent merely asserts that the Treaty does not derogate from such customary principles but furnishes no evidence in support thereof. In this regard, the Tribunal agrees with other tribunals on the importance of distinguishing between cases concerning diplomatic

¹⁸⁵ *Supra* § 199.

¹⁸⁶ *Memorial on Jurisdiction*, § 176.

¹⁸⁷ *Statement of Claim*, § 353.

¹⁸⁸ Thus, in the case (relied upon by Respondent) submitted as Exhibit RL-176, *Abmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Decision on Preliminary Objections dated May 24, 2007, *ICJ Reports 2007*, p. 582, § 88, which reads: “The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. **In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative**” (emphasis added.) See also K. Yannaca-Small, “Who is entitled to Claim: The Definition of Nationality in Investment Arbitration”, in K. Yannaca-Small (ed.), *Arbitration under international investment agreements: A Guide to the Key Issues*, OUP, 2018, § 10.28.

protection under customary international law and cases concerning the scope of investment protection under a treaty governing investment protection (such as the case at issue here.)¹⁸⁹

219. On the basis of the foregoing arguments, the Tribunal considers that the Treaty applies to Claimant's investments in the Dominican Republic as well as to Mr. Lee-Chin as an investor from one of the States bound by the Treaty (Jamaica).

VII. COSTS

220. Both Parties requested a decision on costs and submitted their respective statements. Claimant's Statement of Costs was submitted on April 20, 2020, and Respondent's Statement of Costs was submitted on May 15, 2020.

221. The Tribunal reserves all matters concerning costs for a subsequent stage of the proceedings.

VIII. DECISION ON JURISDICTION

222. For the foregoing reasons, the Tribunal decides:

- (i) To declare that this dispute is within the jurisdiction of the Tribunal;
- (ii) To reject the jurisdictional objections filed by Respondent;
- (iii) To continue the arbitral proceeding as per the calendar to be fixed in consultation with the Parties in accordance with Option I of the Procedural Timetable (Revised Annex A¹⁹⁰ to Procedural Order No. 1);
- (iv) To defer the adoption of the decision on costs.

¹⁸⁹ Exhibit CL-51, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award dated January 18, 2019, § 203; Exhibits CL-52/RL-158, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction dated August 3, 2004, § 141.

¹⁹⁰ As of November 5, 2018.

[*Signed*]

Mr. Christian Leathley
Arbitrator

Date: July 9, 2020

[*Signed*]

Prof. Marcelo Kohen
Arbitrator
Subject to the attached Dissenting Opinion

Date: July 10, 2020

[*Signed*]

Prof. Diego P. Fernández Arroyo
President of the Tribunal

Date: July 9, 2020

**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 Kohen

Table of Contents

I.	INTRODUCTION.....	3
II.	ARTICLE XIII OF THE TREATY DOES NOT ALLOW THE INVESTOR TO CHOOSE ONE OF THE THREE DISPUTE SETTLEMENT OPTIONS	3
A.	Article XIII.....	4
(1)	Ordinary Meaning of the Terms in their Context.....	5
a.	Paragraph 1 of Article XIII	5
b.	Paragraph 2 of Article XIII	11
c.	Paragraph 3 of Article XIII	13
d.	Paragraph 4 of Article XIII	14
(2)	The Broader Context.....	14
a.	The Title of Article XIII	15
b.	Comparison between the Provisions of Articles XIII and XIV	16
(3)	The Object and Purpose of the Treaty.....	17
(4)	Good Faith.....	18
(5)	Supplementary Means of Interpretation.....	19
c.	The Preparatory Work	20
d.	The Circumstances of the Conclusion of the Treaty.....	21
i.	Other BITs and FTAs Concluded by the Dominican Republic.....	21
ii.	Other FTAs Concluded by CARICOM	25
iii.	BITs Concluded by Jamaica.....	27
e.	Conclusion on Preparatory Work as Well as Other BITs and FTAs Concluded by the Parties.....	27
f.	Model Potentially Followed by Article XIII	28
g.	Conclusion on Supplementary Means of Interpretation	29
B.	Conclusion: Article XIII Does Not Grant the Investor a Right to Unilaterally Decide to Submit the Dispute to Arbitration	31
III.	THE MOST-FAVOURLED NATION CLAUSE PROVIDES NO BASIS FOR JURISDICTION.....	36
IV.	THE PROTECTION OF THE SO CALLED “INDIRECT” INVESTMENTS.....	39
V.	CONCLUSION	41

I. INTRODUCTION

1. I regret not being able to concur with the vote of the majority of the Tribunal which gives rise to the Partial Award on Jurisdiction (“Partial Award”). The question at stake is of utmost importance in the field of international arbitration. It is the need of consent to be able to resort thereto. This Tribunal had the task to interpret for the first time the State-investor dispute settlement clause (“Article XIII”) of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Free Trade Agreement between the Caribbean Community and the Dominican Republic (CARICOM) (“the Treaty”). To my knowledge, it is also the first time an UNCITRAL/ICSID tribunal shall interpret a clause drafted in the way Article XIII is.
2. Claimant invokes the clause in Article XIII as basis of the Tribunal’s jurisdiction and, as an argument in the alternative, the most-favored nation clause contained in Article III for the UNCITRAL arbitration. Respondent invoked two jurisdictional objections: that Article XIII does not allow the investor to trigger international arbitration directly and that, in any event, Claimant is not a direct investor and, therefore, his action falls outside the scope of the Treaty. The majority of the Tribunal analyzed and rejected both objections. In this dissenting opinion I explain my disagreement. Additionally, I shall consider Claimant’s alternative argument and explain why the most-favored nation clause contained in the Treaty cannot establish this Tribunal’s jurisdiction either.

II. ARTICLE XIII OF THE TREATY DOES NOT ALLOW THE INVESTOR TO CHOOSE ONE OF THE THREE DISPUTE SETTLEMENT OPTIONS

3. For the sake of facilitating the understanding of my analysis, I repeat here the State-investor dispute settlement clause of Article XIII, the interpretation of which is subject to fundamental discrepancies between the Parties and in the heart of the Tribunal itself:
 1. *Disputes between an investor of one Party and the other Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to the courts of that Party or to national or international arbitration.*
 2. *Where the dispute is referred to international arbitration, the investor and the Party concerned in the dispute may agree to refer the dispute to an international arbitrator or*

ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law. (UNCITRAL)

3. *Neither Party shall give diplomatic protection or bring an international claim, in respect of a dispute which one of its investors has consented to submit to arbitration, unless the other Party which is party to the dispute shall have failed to abide by and comply with the award rendered in such dispute by the arbitral tribunal. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute by the arbitral tribunal.*
4. *The awards of the arbitrator shall be definitive, compulsory and without appeal for the Contracting Party and the investor.*

4. The majority of the Tribunal contends that “the obligation undertaken by the States to settle disputes by international arbitration (among other options) undoubtedly constitutes the State’s consent, and its implementation requires interpreting paragraph 1 together with its context, that is, together with the three other paragraphs included in the same Article. In the Tribunal’s majority opinion, the consent expressed by the Contracting Parties to the Treaty has been subsequently perfected by the Notice of Arbitration (set forth in Article 3 of the UNCITRAL Rules), served by Claimant upon Respondent.”¹ But, at the end of the day, I have not found in the Partial Award an explanation of how any such conclusion is reached. For my colleagues, “[t]he fact that the Contracting Parties to the Treaty have consented to three options cannot mean that they have not consented to any of them.”² But the problem is the State bound itself to submit disputes not to international arbitration, but to one of three different options, which include international arbitration, but without consenting to the investor having the power to choose which of the three shall be used to settle the dispute. If there is no unilateral possibility of choice, there is no unilateral consent by the State that can be perfected when the investor makes his/her choice. An *ex post* agreement between the parties is necessary. This is nothing new or exclusive to the Treaty under review, as shall be seen *infra*.³

A. ARTICLE XIII

5. I will now present my interpretation of Article XIII following therefor the rules of interpretation unanimously accepted, as reflected in the Vienna Convention of 1986 (the

¹ Partial Award, para. 117.

² Partial Award, para. 110.

³ *Infra*, para. 32.

treaty at issue is a treaty concluded by a State with an international organization, although in the name and on behalf of their then member States).

(1) Ordinary Meaning of the Terms in their Context

a. Paragraph 1 of Article XIII

6. Paragraph 1 of Article XIII establishes the subjects of the dispute, its content, and the obligation to notify in writing the existence of a claim, a minimum period of three months to attempt “amicable” settlement thereof (“conciliate it”) and, absent any such settlement, the obligation to submit the dispute to the courts of the Parties, to national or international arbitration. That is strictly the content of this paragraph, in its literal interpretation. I agree with Claimant and my colleagues in the sense that there is an obligation to submit the dispute to an adjudicative arrangement after three months have elapsed without the parties having been able to settle the dispute “amicably.” I have nothing to add to the interpretation of the Partial Award as regards the scope of the expression “shall be submitted” (“serán sometidas”). Nevertheless, I disagree with my colleagues on the scope of the obligation established therein. It is undeniable that the text fails to state who shall proceed to the election of one of the three adjudicative dispute settlement means mentioned therein or how this is to be done. It does not follow from the text that the investor may opt for one of the options and impose it upon the other party. There is no offer by the State to one of the three options at the investor’s choice, as held by the majority of the Tribunal. There is here no consent to any of the three possibilities: there is just an obligation for the parties to settle the dispute by any of the three options. The situation would be different if the Treaty imposed a single dispute settlement manner, as set forth in the examples of compromissory clauses quoted in the Partial Award to maintain that the expression “shall be submitted” imposes an obligation.⁴ If there is only one manner to solve the dispute, that is the one to be followed.⁵ If there are several means and it is set forth that the election of the forum lays on the investor or on any of the parties, that shall be the situation. If there are several

⁴ For example, the United Kingdom-Soviet Union BIT: “Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes” (CL-62); United Kingdom-Turkmenistan BIT: “Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes” (CL-58).

⁵ Obviously, within the framework of the parties’ free will, the parties can always reach an agreement to follow other means.

means and the modality of putting them into practice has not been established, and neither has the fact that one or any of the parties may choose it unilaterally, the standard situation is that one party cannot choose a means at its own convenience. The difference is considerable with bilateral and multilateral investment treaties that provide for different options *and which set forth that the election may be of the investor or any of the parties to the dispute*.⁶ Article XIII does not contain any such possibility. It is fundamental that, in this circumstance, neither party may impose a choice upon the other party. The contrary would additionally imply a potential conflict of jurisdictions impossible to overcome if the parties chose different means. The limit of the Parties to the Treaty's consent is set forth there: they bound themselves to negotiate with the investors which of the three settlement means shall be finally chosen when a dispute arises and it is not possible to settle it "amicably" within the term provided. There is nothing extraordinary in that. At the international level, there are several treaties containing dispute settlement clauses of this nature.⁷

7. Both the Expert appointed by Claimant as well as the majority of the Tribunal hold the opposite. My colleagues hold that "For the majority of the Tribunal, the absence of any express reference to how arbitration should be initiated can only be interpreted as a clear confirmation that no additional condition is required."⁸ For the Expert appointed by Claimant, quoted in the Partial Award, only the investor could institute a court or arbitration proceedings since disputes that may be submitted to any such proceedings are those concerning an obligation of one of the Parties to the Treaty in relation to an investment.⁹ That is to say, if a dispute arises, it is because an investor considers a State breached its obligation, or in other words, the State failed to respect an investor's right

⁶ See below the examples of the other treaties concluded by the Dominican Republic and CARICOM, as well as other treaties, *infra*, paras. 52-73.

⁷ See *infra*, para. 32. To quote an example of a dispute resolution clause between a State and a non-State stakeholder: "Resolution of Disputes. 1. Disputes arising out of the application or interpretation of this Declaration of Principles, or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations through the Joint Liaison Committee to be established pursuant to Article X above. 2. Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties. 3. The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both parties, the parties will establish an Arbitration Committee". (Art. XV, Israel/Palestine Liberation Organization, Declaration of Principles on Interim Self-Government Arrangements, September 13, 1993, available at: <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx>)

⁸ Partial Award, para. 154.

⁹ Partial Award, para. 121 and its note 88 quoting the *Second Legal Expert Report of Prof. Pauwelyn*, § 13: "Since Article XIII of Annex III of the Treaty only covers treaty claims by investors against their host state ('[d]isputes between an investor of one Party and the other Party concerning an obligation of the latter under this Agreement'), it is up to the investor, and the investor alone, to select domestic courts, national arbitration or international arbitration to resolve disputes with the host state."

acknowledged in the Treaty. They conflate the content of the obligation giving rise to the dispute with the determination of the jurisdiction to solve the dispute.

8. The Expert, and the majority of the Tribunal with him, seem to conclude that what happens in the commonality of the cases suffices to interpret a rule in the sense that what “usually” happens is the only thing that can happen according to the rule. But *sollen* and *sein* are not conflated. It is absolutely true that, in most cases, disputes between a State and a foreign investor reach international arbitration by the action of the latter on the basis of a compromissory clause contained in a treaty or contract, *when the clause at issue so allows*. But any such disputes can also reach international arbitration, and they have, although being a minority, by means of a commitment or bilateral agreement once their existence is established.¹⁰ The same is true for inter-State disputes, for instance, before the International Court of Justice or the International Tribunal for the Law of the Sea. For the most part, the cases have been brought via unilateral claims. Those which have been brought via special agreement (*compromis*) are also a minority in those instances.
9. For the majority of the Tribunal, the three dispute settlement options are “three doors” and any of them may be opened just by the investor and at his/her choice. As per the view of the majority, the most this first paragraph contains by way of limitation is that “only one of them can be opened at once.”¹¹ However, the Treaty does not contain the so called “*fork in the road*” clause. The Expert appointed by Claimant also evinced the lack of any such clause in the Treaty.¹² This absence is consistent with the interpretation followed here: if the parties to the dispute still have to agree on which of the three means of dispute resolution shall be followed, any such clause is not necessary. Only by agreement of the parties to the dispute can one pathway be used. To follow another one, an agreement would also be necessary. The “*fork in the road*” clause could only be considered if just one of the parties could choose one of the indicated pathways. This is not the case here.
10. The majority of the Tribunal interprets the Treaty in a way that seriously affects the principle of equality of the parties in dispute settlement. Dispute settlement mechanisms shall be deemed open to both parties alike unless the treaty imposes the opposite. That

¹⁰ For instance, *MINE v. Guinea*, 4 ICSID Reports 67, 80; *Swiss Aluminium Ltd. and Icelandic Aluminium Co. Ltd. v. Iceland*, ICSID Case No. ARB/83/1; *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1.

¹¹ Partial Award, para. 134.

¹² First Legal Expert Report of Prof. Pauwelyn, paras. 33 and 115.

applies to both foreign investment treaties as well as State-investor contracts in which the dispute settlement mechanism set forth is arbitration. In fact, when arbitration is the dispute settlement means agreed upon, the State waives its right to pursue the domestic administrative and judicial channels and, therefore, it must have a manner to solve its disputes with the foreign investor. As pointed out by the *Institut de Droit international* in its Hague Resolution of 2019, clauses regarding State/investor dispute settlement shall be interpreted taking into account the principle of equality of the parties.¹³

11. It is significant that the Expert for Claimant confirmed the possibility that the State may be the one initiating the arbitration route in this case; nevertheless, he estimated that this would be illogical, because what is at issue is the State's breach of an obligation under the Treaty and therefore, according to the Expert, the State is not going to be the one initiating the dispute.¹⁴ The Expert is right regarding the first issue: the State may institute the arbitral proceedings, but I would like to add that to that end, the State shall propose to do so and come to an agreement with the investor. His second assertion begs the question. Should a dispute arise, and the existence thereof be determined, both parties may be interested in its settlement. In the context of foreign investments, as far as the State is concerned, that has to do not only with the wish to settle the particular dispute itself, but also with the impact that pending disputes with foreign investors may have on potential future foreign investors' decision making. If it were not so, there could be no explanation for the reason why States that are subject to claims against them would accept to take their disputes to arbitration or before the international courts through special agreements. Neither could there be an explanation for the reason why many investment treaties leave the possibility to resort to international arbitration open to both States and investors.
12. I shall elaborate on the majority of the Tribunal's main argument, which is consistent with the opinion of the Expert appointed by Claimant. Having been asked why the investor would be the only party that could decide which of the three options contained in paragraph 1 should be used to settle the dispute, the Expert appointed by Claimant asserted: "the reason for that is because the Clause is worded very restrictively, unlike the

¹³ Resolution "Equality of Parties before International Investment Tribunals", "Art. 2 (1): Both the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent, interpreted in accordance with the principle of the equality of the parties. (2) No State is obliged to submit its claim against an investor to a tribunal, unless it gives its consent and elects to do so. Otherwise, a State remains entitled to use the rights and remedies provided by its own national legal system in order to pursue such a claim before its own courts." Available at: <https://www.idi-ijl.org/app/uploads/2019/09/18-RES-EN.pdf>

¹⁴ Tr. Day 2, English Original, p. 400, 7-21. [For consistency with further references to the Hearing Transcript]

Cuba-CARICOM FTA that I had up a moment ago where it covers any dispute concerning an investment. The jurisdictional clause here is limited to disputes between an Investor and the State concerning an obligation of the State under this Agreement.”¹⁵ When I asked the Expert about the reason why the State, after having received a claim and having determined there is a dispute with an investor which is governed by an international treaty and which concerns its own obligations, could not submit any such dispute to adjudication, his answer was as follows: “No. I think if –I think it’s a hypothetical – it’s theoretically possible, but I cannot imagine a State initiating a case against itself or saying ‘Please, Tribunal, look at whether I have breached the Treaty’. There has to be a Claimant, and the Claimant would be an Investor. That’s also what the first paragraph says.”¹⁶

13. The Partial Award follows the same line of reasoning: “given that the investors have granted no agreement to arbitrate, the advance offer to arbitrate can only emanate from the State. For this apparent reason, it follows that the only party which is able to institute an investor-State arbitration under Article XIII is the investor (whose rights would have been violated). Therefore, it is the investor (and only the investor) who is entitled by Article XIII to choose international arbitration among the three options offered.”¹⁷
14. I agree with my co-arbitrators that “the investors” have granted no agreement to arbitrate. It is evident that in a bilateral treaty the investors cannot give their consent to anything. Those that determine the investors’ rights that are to be protected and the way to settle disputes between the Parties and the investors are exclusively the States (and where appropriate, the regional organizations Parties to the treaties). The Parties can thus define the jurisdictional adjudicative scope of action of the investor and the Parties themselves. They may impose international arbitration as the single means for one or the other party to the dispute, in which case, neither the investor nor the State has any choice whatsoever. The only choice they would have would be to decide whether or not to resort to the only available means of dispute settlement. If the investor decides to resort to arbitration, more than “consenting” thereto, he/she is exercising the right to use the only dispute settlement means that States (or competent regional organizations) have established. In the instant case, however, what the Parties established is different. The

¹⁵ Tr. Day 2, English Original, p. 395, 7-13.

¹⁶ Tr. Day 2, English Original, p. 400, 15-21.

¹⁷ Partial Award, para. 97. See also paras. 114 and 134.

question here lies in determining the scope of the dispute settlement framework the Parties to the Treaties have set.

15. Paragraph 1 does not state that there must be a claimant and even less so that the claimant must be the investor. What paragraph 1 asserts is that the dispute concerns an obligation of one Party to the Treaty in relation to an investment and that a claim to this effect shall be made in writing. Afterwards a three-month period opens within which the parties may amicably settle the dispute. Obviously, that includes the possibility of establishing the manner in which the parties are going to solve it. The Expert mentioned that during the three-month period to settle the dispute the parties may agree to take the case before an international arbitral tribunal, but that for him this was not essential.¹⁸
16. In the field of international arbitration, whatever the nature of the parties might be, what is not essential is that the dispute be unilaterally submitted and that there always be a claimant and a respondent. There shall be a party that will advance a claim against the other party and, for this reason, there is a dispute. Then, there shall be a “petitioner” (“reclamante”) and a “respondent” (“reclamado”) (and sometimes this can be mutual) but there are cases in which there is not a “claimant” and a “respondent” because the case came through a special agreement (*compromis*).¹⁹ It may be possible that one of the parties to the dispute be the one who proposes the arbitration. That does not automatically mean any such party has the right to institute it without further ado. One of the most resounding and emblematic cases in the history of international investment arbitration, *Aminoil/Kuwait*, was submitted to an international tribunal through a special agreement.²⁰ For the reasons stated *supra*, the inference according to which when the dispute concerns an obligation of the State, only the investor can institute the proceedings fails. Apart from that, it cannot be seen where at paragraph 1 one can read an “unconditional offer” by the State party to the Treaty for the investor to be who decides which of the three means shall be followed to solve the dispute.

¹⁸ Tr. Day 2, English Original, p. 395, 14-22.

¹⁹ It is interesting to highlight the way in which the International Court of Justice refers in English to the parties to the dispute when this reaches the Court through an Application : it is “Applicant” (not “Claimant”) and “Respondent.” Also, the way in which the titles of the cases in which there are an Applicant and a Respondent (“A v. B”) and the cases in which there are not (“A/B”) differs.

²⁰ V. the Arbitration Convention of June 23, 1979: Arbitration Tribunal: Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (Aminoil), 24 March 1982, International Legal Materials, 21 (5), pp. 979-981.

b. Paragraph 2 of Article XIII

17. Paragraph 2 of Article XIII establishes what happens or may happen “where the dispute is referred to international arbitration” (“cuando la controversia es referida ante arbitraje internacional”). For the majority of the Tribunal, “[p]aragraph 2 of Article XIII, in particular, establishes what happens when a choice is made to institute an international arbitration.”²¹ According to the majority, “The terms of the sentence ‘Where the dispute is referred to international arbitration,’ interpreted in accordance with their ordinary meaning, indicate, in a clear, straightforward and unambiguous manner, that the entire content of paragraph 2 is circumscribed to the case in which the claimant selects that option.”²² The Expert for Claimant was more cautious. According to him, “the language in Article XIII, paragraph 2, may not be a model of absolute clarity and the text could have been drafted in a simpler fashion.”²³
18. In fact, what this paragraph does “concretely” and “clearly” is simply examining the situation where, out of the three existing options, international arbitration is the one followed. It fails to establish *how* the dispute is referred to international arbitration, it only regulates the scenarios *where* this happens. Nowhere in the text is it established the way to implement it, it only regulates the situation created if what is implemented is the international arbitration proceeding. Much less does it arise from the text that one of the parties may unilaterally refer the dispute to international arbitration.
19. To explain the scope of paragraph 2, it is worth wondering why this paragraph specifically regulates international arbitration and not the other options described at paragraph 1. The reason is simple and clear to understand, and it is so asserted in the Partial Award:²⁴ if the dispute settlement proceeding followed is that of the national courts or that of national arbitration, the national legislation is the one that regulates either which is the competent court or the way in which the arbitral tribunal shall be constituted, as well as the procedural rules to be followed or established. Within the framework of Article XIII, it is only necessary to determine the way in which the international arbitral tribunal shall be appointed and the procedural rules to be applied when the third option for dispute settlement is followed.

²¹ Partial Award, para. 144.

²² Partial Award, para. 152.

²³ First Legal Expert Report of Prof. Pauwelyn, para. 23.

²⁴ Partial Award, para. 151.

20. After mentioning “where the dispute is referred to international arbitration” the text continues to point out that “the investor and the Party concerned in the dispute may agree.”²⁵ It is significant that right after the temporary reference of the moment in which the dispute is referred to international arbitration the text mentions the *parties’ agreement*. The verb is used in the present tense: “where the dispute *is referred* to international arbitration.” It is at that time that “the investor and the Party concerned in the dispute may agree.” To justify his point of view, according to which the investor *chose before* and imposed international arbitration, the Expert interprets paragraph 2 changing the verb tense: “Indeed, paragraph 2 of Article XIII is delinked from paragraph 1 and by its very terms assumes that the dispute has *already been referred* to international arbitration (“[w]here the dispute is referred to international arbitration.”)²⁶ Indeed, the text uses the verb in Spanish in the future (“podrán”, “may” in English) when referring to “agree”, which means there may or may not be agreement between the parties. But that agreement or disagreement refers to the option between the appointment of a (sole) arbitrator or an *ad hoc* arbitral tribunal when what is being decided is international arbitration as the means of dispute settlement.
21. I agree with Claimant and my colleagues’ interpretation of the meaning of the remaining part of this paragraph (“to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law”): absent an agreement between the parties with respect to the election of a sole arbitrator or a tribunal, then the UNCITRAL Arbitration Rules shall apply. This shows as well that the Parties to the Treaty know how to draft an option by default when they want to include it. They failed to do so in paragraph 1. Nothing is said with respect to a procedure to be followed absent an agreement regarding the choice of one of the three dispute settlement mechanisms established.
22. From the text of paragraph 2, it does not arise that it is the investor who has the ability to choose international arbitration. Neither does the text state that the agreement to submit the dispute to international arbitration would be perfected with the investor’s unilateral choice. The fact that “the investor and the Party concerned in the dispute may agree” on a sole arbitrator or a tribunal “where the dispute is referred to international arbitration”

²⁵ The English version of the Treaty uses “where” to mean the Spanish “*cundo*” (when) (“Where the dispute is referred to international arbitration...”) That does not alter the meaning of the paragraph. Here, the term “where” does not specify the place but the time.

²⁶ First Legal Expert Report of Prof. Pauwelyn, para. 40.

denotes that, at the time of referring the dispute to international arbitration, the action is collective (the parties) rather than individual. Nothing in paragraph 2 denotes that it is the investor who has the ability to choose the international arbitration means. The conclusion that follows is consistent with that of paragraph 1: therein, there was no immediate offer to resort to international arbitration, nor is there in paragraph 2 a possibility for the investor to accept a non-existent international arbitration offer.

c. Paragraph 3 of Article XIII

23. Paragraph 3 governs diplomatic protection. It provides that neither Party shall give diplomatic protection “in respect of a dispute which one of its investors has consented to submit to arbitration.” The paragraph does not distinguish between the two arbitration options available: national or international. The paragraph excludes the *giving* of diplomatic protection, that is, it refers to a situation where the investor requires protection from the State of which it is a national and the State does not give such protection. It follows from this paragraph that diplomatic protection may be given when the dispute settlement procedure is through national courts.
24. The difference of treatment between national or international arbitration and national courts can be easily explained: national courts are State organs, whereas arbitral tribunals, either national or international, are not. Paragraph 3 establishes both the rule of no diplomatic protection if a dispute is submitted to arbitration and the exception: if the Party to the Treaty fails to abide by and comply with the award rendered in such dispute by the arbitral tribunal or if the Parties to the Treaty perform informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute by the arbitral tribunal.
25. Besides the issue of diplomatic protection, it only follows from this paragraph as regards arbitration options that the investor’s consent is necessary, without it there can be no arbitration. However, the majority understands that paragraph 3 of Article XIII “takes the investor’s consent as a unilateral act (which follows the consent given by the State) without mentioning or suggesting that such consent is to arise from a separate agreement.”²⁷ I wonder why this paragraph should mention or suggest it when it merely deals with diplomatic protection and its appropriateness or inappropriateness.

²⁷ Partial Award, para. 126.

26. Let us, nevertheless, examine the argument. For the majority, the investor's "unilateral act" is its Notice of Arbitration, which would be in response to the alleged prior consent by the State. Again, what could be a possibility and in practice occurs *where the treaty or contract so allows*, is here considered an applicable axiom. It is necessary to carefully examine the content of paragraph 3.
27. This paragraph refers to the possible diplomatic protection of the investor and excludes it in the event that the investor has consented to submit the dispute to arbitration. Nothing is said about how such consent was granted. In a way, every consent, as an expression of a person's will, is a "unilateral act." Nevertheless, the *consent* may be expressed both by means of a unilateral act (an instrument of ratification, a note to the co-contractor) or as a single act (the signature of all the parties to a treaty or contract). It does not follow from paragraph 3 that an investor's consent is necessarily expressed by means of a unilateral act and may not be expressed in a single act, that is, an act expressing the agreement of both parties to the dispute. Moreover, paragraph 3 does not allow to figure out the investor's right to unilaterally choose international arbitration and thus impose it on the State.
28. Indeed, the text of paragraph 3 only refers to the investor's consent, without specifying or suggesting at all whether such consent is expressed unilaterally or by means of an agreement. There is no logical need to do it. Again, the majority makes statements without demonstrating that it is the investor who has the power to choose which of the three means to settle the dispute with the State will be used.

d. Paragraph 4 of Article XIII

29. Paragraph 4 of Article XIII refers to the binding and final nature of arbitral decisions. Unlike national courts where the binding nature of the decision and the manner it becomes final are subject to the relevant domestic law, it was necessary to establish in the Treaty the binding nature of arbitral decisions. As such, this paragraph is not helpful in determining whether the State has given its prior consent and whether the investor may unilaterally decide to submit a dispute to international arbitration.

(2) The Broader Context

30. I discussed *supra* the terms of Article XIII in their immediate context, that is, taking phrases and paragraphs as a whole, rather than isolated words. I did not find that this Article contains the State's consent to the investor deciding which of the three dispute

settlement means should be followed. I will now examine a broader context, including the title of the Article, the Article immediately following this provision, which provides for the settlement of disputes between the Parties to the Treaty and, more generally, the CARICOM-Dominican Republic Free Trade Agreement and its Annex on investment protection, which contains the aforementioned article.

a. The Title of Article XIII

31. The title of Article XIII is “Settlement of Disputes between an Investor and a Contracting Party.” According to the Partial Award, the very title of Article XIII “leads to think that all its provisions must have been drafted in order to enable the ‘settlement of disputes between an Investor and a Contracting Party.’”²⁸ However, “enable” does not mean that such purpose has been achieved or may be achieved or that the parties have ultimately taken all reasonable steps towards such end. It all depends on the effectiveness of the selected means and their compulsory or non-compulsory nature.
32. Numerous treaties refer to the “settlement of disputes” but contain mechanisms that do not ultimately allow settling them if the disputing parties subsequently fail to decide which means they will use to do so. It would be pointless to list all bilateral or multilateral treaties under which judicial or arbitral means of dispute settlement may be used only if the disputing parties so decide afterwards.²⁹ Those are the treaties that contain dispute settlement clauses referring to arbitration or judicial means with *opt-in* or *opt-out* mechanisms. That is, the clause is not sufficient to use arbitration or judicial settlement.

²⁸ Partial Award, para. 96.

²⁹ I shall simply cite the clause of an agreement widely discussed during this pandemic: The International Health Regulations:

“Article 56. *Settlement of disputes*

1. In the event of a dispute between two or more States Parties concerning the interpretation or application of these Regulations, the States Parties concerned shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. Failure to reach agreement shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it.

2. In the event that the dispute is not settled by the means described under paragraph 1 of this Article, the States Parties concerned may agree to refer the dispute to the Director-General, who shall make every effort to settle it.

3. A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States applicable at the time a request for arbitration is made. The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate.

4. Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.

5. In the event of a dispute between WHO and one or more States Parties concerning the interpretation or application of these Regulations, the matter shall be submitted to the Health Assembly.”

Another step must be taken (act or omission) so that the State accepts or refuses to resort to a court or arbitral tribunal.³⁰ Or those treaties that do not even consider the possibility of using compulsory means leading to binding decisions. A detailed study could evidence that both types of treaties are the majority. Obviously, there are also treaties that contain compulsory arbitral or judicial dispute settlement means. The ensuing conclusion is simple: the title alone gives no indication whatsoever in order to determine the scope of consent of the Parties to the Treaty or to determine who may choose one of the three dispute settlement mechanisms available under Article XIII.

b. Comparison between the Provisions of Articles XIII and XIV

33. It is useful to compare the two dispute settlement clauses of the Treaty, namely, the one about disputes between a State and the investors of another State (Article XIII), and the one about disputes between the State Parties (the Dominican Republic and the Member States of CARICOM) (Article XIV). The latter provides that “[i]f a dispute between the Parties cannot thus be settled, it shall, *upon the request of either Party*, be submitted to an arbitral tribunal.”³¹
34. There is a net distinction between how arbitration is reached in each case. For the majority, Article XIV confirms “the States’ assumption that the only scenario envisaged by Article XIII is that of the submission of a claim for arbitration by an investor.”³² According to my colleagues, in inter-state arbitration, any party may initiate the proceedings, whereas, in State-investor arbitration, only the investor. As noted in the Partial Award, in disputes between States, “it is reasonable for either of the Contracting Parties who have mutually agreed to settle their disputes this way to institute the arbitration.”³³ It is therefore unclear why what “is reasonable” in a case which only provides for one settlement mechanism with no options *needs an express reference* (“shall be submitted, *upon the request of either Party*, to an arbitral tribunal”), whereas, in the other case, in which there are also three different dispute settlement options, it would not be “reasonable” to specify who may exercise such options.

³⁰ See, for example, A. Kedgley Laidlaw and S. Kang, The Dispute Settlement Mechanisms in Major Multilateral Treaties, National University of Singapore, Centre for International Law Working Paper 18/02 (2018) (available at: <https://cil.nus.edu.sg/wp-content/uploads/2018/10/NUS-CIL-Working-Paper-1802-The-Dispute-Settlement-Mechanisms-in-Major-Multilateral-Treaties.pdf>), paras. 100-113.

³¹ Emphasis added.

³² Partial Award, para. 124.

³³ Partial Award, para. 133.

35. The explanation furnished in the Partial Award is unconvincing. In Article XIV, arbitration is the only option available. It provides that the dispute shall be submitted by either Party to the arbitral tribunal. If the majority interpretation of Article XIII is applied to Article XIV, the phrase “upon the request of either Party”, would be superfluous in the latter. Indeed, it would suffice to state “[i]f a dispute between the Parties cannot thus be settled, *it shall be submitted to an arbitral tribunal*” so that there is consent to arbitration and either party to the dispute may initiate it.
36. The formula “upon the request of either Party” clearly indicates the situation and leaves no shadow of a doubt that nothing else is required so that either Party may initiate arbitral proceedings. The Parties to the Treaty knew how to draft a dispute settlement clause which stated that only one of the parties could submit a dispute to arbitration. Contrary to the majority view, the noticeable difference between the texts of Articles XIII and XIV confirms that the former requires the consent of both parties to choose any of the three dispute settlement options mentioned.

(3) The Object and Purpose of the Treaty

37. The Partial Award refers to the object and purpose of Article XIII, that is, the settlement of disputes between investors and State Parties.³⁴ As I have already explained, that fact alone does not determine that it is one of the parties to a dispute that may decide how such dispute should be settled.
38. The Treaty is an “agreement on reciprocal promotion and protection of investments.” There is no preamble. Article II defines such object and purpose and provides that “[e]ach Party shall in its territory promote, as far as possible, the investment made in its territory by investors of the other Party and shall admit these investments in accordance with its laws.” Article VIII provides that “[e]ach Party shall provide appropriate means and procedures for asserting claims and enforcing rights regarding investments and investment agreements.” For Claimant’s Expert, this article

“is hard to square with a reading that under Article XIII a host state could block or nullify its consent to international arbitration in paragraph 1 by exercising an alleged right to disagree with UNCITRAL Arbitration Rules

³⁴ Partial Award, para. 152. “The settlement of disputes arising between an investor and a Contracting Party to the Treaty is actually the object and purpose of Article XIII. These considerations do not imply that the majority of the Tribunal deems the drafting of Article XIII to be perfect. However, no good faith interpretation of the phrase under analysis, of paragraph 2, and of Article XIII in general can ignore the fact that those texts have been drafted so as to allow, not prevent, the settlement of disputes.”

under paragraph 2. All 11 BITs in force today for the Dominican Republic provide for *ex ante* consent to international arbitration – including, each time, arbitration under UNCITRAL Arbitration Rules – without such right to block appointment procedures. Not doing the same for a closer integration treaty such as the present FTA would be inapposite and, one would expect, have warranted much clearer treaty text.”³⁵

39. This interpretation faces two fundamental problems. First, it presupposes the existence of direct consent to international arbitration in paragraph 1 of Article XIII, which needs to be proved. Second, it formulates a judgment of meta-legal value in comparing the Dominican Republic/CARICOM Agreement to the other BITs that provide for *ex ante* consent to international arbitration. If the other BITs contain unambiguous formula of early acceptance of international arbitration and the Agreement concerned in this case contains a different formula, this is quite the contrary to what Claimant’s Expert suggests. There must be some reason for this exception. Respondent’s decision to have a different regime for its immediate neighbors is a political decision and it is not for this Tribunal to examine.
40. In view of the above, it does not follow from the object and purpose of the Treaty that Article XIII should be interpreted as granting a right to the investor to decide which of the three dispute settlement mechanisms under Article XIII shall be used.

(4) Good Faith

41. The provisions of Article 31 of the Vienna Convention of 1986 and the general rule of interpretation under general international law require interpreting treaties in good faith. It is the first aspect that is mentioned. Indeed, it is a basic idea not just for the interpretation of treaties but also for social relationships in general.
42. The Partial Award refers repeatedly to the interpretation in good faith of different paragraphs of Article XIII in support of the arguments presented.³⁶ It is unclear whether good faith adds something to the reasoning followed or it is mentioned to suggest that any other interpretation would not be in good faith.
43. I agree with the Partial Award when it states that “just as it is not allowed to modify the text and incorporate new obligations, it is not allowed to deprive words of their ordinary

³⁵ First Legal Expert Report of Prof. Pauwelyn, para. 70.

³⁶ Partial Award, paras. 127, 141, 152, 156, 165, and 173.

meaning. In plain language, consent can be neither added nor deleted.”³⁷ The problem is that the majority does not indicate which words would be deprived of their ordinary meaning or would be deleted if a different interpretation were made. Eventually, it is the Partial Award that adds a new obligation not arising from the Treaty.

44. In my opinion, the mere reference to good faith does not contribute to clarifying the content of Article XIII. In 1985, in the *Guinea/Guinea Bissau Maritime Boundary case*, after recalling that both parties recognized without restriction the rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties, the arbitral tribunal stated in its award that:

*“Cependant les interprétations qu’elles ont données dans leurs mémoires et débattues dans leurs plaidoiries, avec suffisamment de motifs pour que rien n’autorise un tribunal international à y voir autre chose qu’une manifestation de leur entière bonne foi, ont abouti à des conclusions finales divergentes.”*³⁸

45. A good faith interpretation must be reasonable. The principle of equality of the parties, abidance by the rule that there is no jurisdiction without consent, and the fact that the three different dispute settlement options were considered by the Parties to the Treaty, without any of them prevailing over the others or without explicitly establishing who has the right to select one of those options, support the interpretation proposed herein.

(5) Supplementary Means of Interpretation

46. The Parties to the dispute and the Tribunal recognize that recourse may be had to supplementary means of interpretation, such as the preparatory work and the circumstances of the conclusion of the Treaty, pursuant to Article 32 of the Vienna Convention of 1986, in order to confirm the interpretation resulting from the general rule of interpretation set out in Article 31 of such Convention, or to determine the meaning of the interpretation, when the interpretation according to such rule leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Regrettably, the majority decided not to resort to such supplementary means, as it believes that its interpretation based on paragraph 1 of Article 31 suffices.³⁹ I disagree, especially when my colleagues considered it necessary to explain that their considerations

³⁷ Partial Award, para. 143.

³⁸ *Affaire de la délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau*, Award, February 14, 1985, Reports of International Arbitral Awards, vol. XIX169, para. 46.

³⁹ Partial Award, para. 198.

“do not imply that the majority of the Tribunal deems the drafting of Article XIII to be perfect.”⁴⁰

47. The best practice on the matter is that of the International Court of Justice. In cases where it considered that its interpretation based on Article 31 of the Vienna Convention of 1969 sufficed, nevertheless, it did not hesitate to resort to supplementary means so as to confirm its interpretation.⁴¹ Unlike the Partial Award, the following paragraphs use such supplementary means.

c. The Preparatory Work

48. The Partial Award fails to examine the preparatory work available on the issue. I agree with my colleagues in that the testimony provided by Ambassador Hylton, a member of the Jamaican delegation in the negotiation of the Treaty and other like instruments, did not contribute anything relevant,⁴² although I do not think that such witness evidence can be deemed part of the preparatory work.
49. The preparatory work available reveals that the Dominican Republic did not propose an investor-State dispute settlement clause, but it was CARICOM that did so later.⁴³ Its proposal was the following:

“Settlement of Disputes Between an Investor and a Contracting Party

- (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to the courts of that Contracting Party or to international arbitration.

⁴⁰ Partial Award, para. 152.

⁴¹ “The Court considers that it is not necessary to refer to the *travaux préparatoires* to elucidate the content of the 1955 Treaty; but, as in previous cases, it finds it possible by reference to the *travaux* to confirm its reading of the text” (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 27, para. 55); “In view of the foregoing, the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention” (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 653, para. 53); see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1995, p. 21, para. 40; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 175, para. 95.

⁴² Partial Award, para. 78.

⁴³ Reply on Jurisdiction, paras. 62-63; Rejoinder on Jurisdiction, para. 41.

- (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) International Convention for Settlement of Investment Disputes (I.C.S.I.D.)

(b) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.”⁴⁴

50. The text is similar to the provision of Article XIII eventually adopted. The possibility of national arbitration was added, and the ICSID option when the dispute is referred to international arbitration was deleted. It may be assumed that both modifications were proposed by the Dominican Republic, despite not being of vital importance for the interpretation of the article under analysis. What does matter for this purpose is that a party did not wish to include an investor-State dispute settlement clause and the other did. Even though the preparatory work does not allow expanding the interpretation criteria arising from the application of the general rule, it may be of interest if examined together with the circumstances of the conclusion of the Treaty.

d. The Circumstances of the Conclusion of the Treaty

51. I agree with Claimant’s Expert in that other bilateral investment treaties (“BITs”) concluded by the Parties to the Treaty, as well as the probable origin of the clause contained in Article XIII, may be taken into consideration as circumstances of its conclusion.⁴⁵

i. Other BITs and FTAs Concluded by the Dominican Republic

52. Claimant’s Expert identified 11 BITs and three free-trade agreements (“FTAs”) concluded by the Dominican Republic which include an investor-State dispute settlement clause.⁴⁶ I consider those concluded immediately before and after the CARICOM Agreement of August 22, 1998, to be particularly important. They are the BIT concluded with Spain in 1995, and the BITs concluded with France and the Chinese province of Taiwan in 1999.

⁴⁴ CARICOM’s Comments on Treaty Draft, dated March 8, 1998, Comments to Article 11 (R-50).

⁴⁵ First Legal Expert Report of Prof. Pauwelyn, paras. 71-76.

⁴⁶ First Legal Expert Report of Prof. Pauwelyn, Annex 3.

53. The Spain BIT of March 16, 1995 contains the following clause in relevant part:

“1. Any investment-related dispute which may arise between a Contracting Party and an investor of the other Contracting Party with respect to issues regulated by this Agreement shall be notified in writing by the investor, together with a detailed report, to the host Contracting Party of the investment. The parties to the dispute shall, as far as possible and without prejudice to the legal procedures of the host Contracting Party of the investment, endeavour to settle such differences amicably.

2. If the dispute cannot be thus settled within six months from the date of the written notification mentioned in paragraph 1, it shall be submitted for arbitration at the request of either of the parties to the dispute to an *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law.”⁴⁷

54. The text explicitly states that the dispute may be submitted for arbitration “at the request of either of the parties to the dispute” and designates a single method of establishment of the tribunal (UNCITRAL). In spite of including the Dominican Republic/Spain BIT on the list prepared to such effect, the Expert failed to examine this article. As it can be recalled, his main argument is that, while other treaties indicating that arbitration may be triggered “at the request of one of the parties” cover *disputes concerning investments*, which allows both the State and the investor to file claims, the Treaty in the instant case only refers to *obligations undertaken by the Parties thereto in relation to an investment*, which is why only the investor could file claims, and, thus, it is the investor who would have the right to choose which of the three procedures available is to be followed.⁴⁸

55. Nevertheless, the clause of the BIT with Spain shows that, even though the text makes reference to “any investment-related dispute,” it considers that claimant will be the investor. In fact, the text provides that the dispute “shall be notified in writing by the investor, together with a detailed report, to the host Contracting Party of the investment.” Paragraph 2 establishes that, if the dispute cannot be settled amicably within six months from the date of the notification, “it shall be submitted for arbitration at the request of either of the parties to the dispute.” This demonstrates two issues relevant to our analysis: (1) that, although the claim is filed by the investor, both the investor and the State may submit the dispute to arbitration. This undermines not only the Expert’s main argument, but also that adopted by the majority in the Partial Award;

⁴⁷ Article 11, Agreement between the Kingdom of Spain and the Dominican Republic on the Reciprocal Protection and Promotion of Investments, March 16, 1995, Spain, State Official Gazette No. 282, 11/22/1996, pp. 35303-35305, available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1996-25931

⁴⁸ Tr. Day 2, English Original, 395:7-13, 398:7-12.

and (2) that the clause explicitly admits that the investor may unilaterally submit the dispute to arbitration, which does not occur in Article XIII of the Treaty, which is the subject-matter of the Partial Award.

56. The BIT concluded by the Dominican Republic immediately after the CARICOM Agreement was the Treaty concluded with France on January 14, 1999, the text of which in relevant part reads:

“1. Any investment dispute between one of the contracting Parties and a national or company of the other contracting Party shall be settled amicably between both parties concerned.

2. If the dispute cannot be settled within six months from the date on which it was raised by either Party to the dispute, it shall be submitted at the request of either Party to an “ad-hoc” tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or to the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on March 18, 1965, provided that both Parties are members thereof.”⁴⁹ [Translation]

57. This text makes reference to disputes which may be raised *by either party to the dispute* and explicitly states that it may be submitted to arbitration *by either party thereto*. This text differs significantly from the text of Article XIII in several aspects. In particular, it provides that the dispute may concern investments, which makes it possible to go beyond the obligations set out in the BIT; that both parties may file a claim; and explicitly indicates that both parties may unilaterally submit the dispute to arbitration.

58. The other BIT concluded by the Dominican Republic in 1999 was that involving the “Republic of China” (the Chinese province of Taiwan). Once again, the Expert includes this BIT on his list, but fails to analyze the relevant article, which reads as follows:

“Disputes arising within the framework of this Agreement between one of the Contracting Parties and an Investor in the territory of the former shall be settled, as far as possible, by means of amicable consultations.

If a solution cannot be reached by means of such consultations within six months from the date of the request for settlement, the investor may refer the dispute:

⁴⁹ Agreement between the Government of the Dominican Republic and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments, Article 7 (RL-157).

- a) To the competent courts of the Contracting Party in whose territory the investment was made,
- b) To National arbitration of the Party in whose territory the investment was made, or
- c) To International arbitration:
 - i) To arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) if one of the Parties is not an ICSID member.
 - ii) To the Court of Arbitration of the International Chamber of Commerce (ICC).⁵⁰ [Translation]

59. Unlike the France BIT, this clause limits the scope of the disputes between the Party to the BIT and investors of the other Party to those “arising within the framework of the Agreement.” This BIT *only* contains *obligations for the Parties*, not for the investors. Consequently, disputes arising “within the framework of the Agreement” concern obligations of the State parties. If the dispute cannot be settled amicably within six months, the BIT explicitly provides that *the investor may refer the dispute* to the courts of the Party, to national arbitration, or to international arbitration. Here is a similarity with Article XIII: there are three dispute settlement options. But, unlike Article XIII, *it is the investor* who may unilaterally decide which of those three to choose.
60. It would be tedious to cite and analyze all the investor/State dispute settlement clauses included in the other BITs or FTAs concluded by the Dominican Republic. Suffice it to say that, in all cases, but for a noteworthy exception, the investor is explicitly given the unilateral decision to choose to resort to arbitration.⁵¹ The exception is, naturally, Article XIII of the Agreement with CARICOM, which is the subject-matter of our analysis.

⁵⁰ Agreement between the Government of the Dominican Republic and the Government of the Republic of China on the Reciprocal Protection and Promotion of Investments, Article 11. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1049/download>

⁵¹ See Article XI of the Chile BIT (RL-41), Article 9 of the Finland BIT (RL-168), and Article 8 of the Morocco BIT (<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1044/download>), Article IX of the Panama BIT (RL-44), Article 9.2 of the Switzerland BIT (RL-45), Article X of the Argentina BIT (RL-197), Article 9 of the Netherlands BIT (RL-42), Article XI of the Italy BIT (<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3194/download>), Article 8 of the BIT with the Republic of Korea (RL-43), Article 9.20 of the FTA with Central America (RL-226), and Article 10.16 of the FTA with Central America and the United States of America (RL-46).

61. It is unacceptable to presume that, since the Dominican Republic explicitly admitted in the other cases the possibility that the investor unilaterally resort to arbitration,⁵² this acceptance should be found to be implied when the Dominican Republic actually decided not to include it. Rather, the fact that Respondent decided in the Agreement with CARICOM not to vest such right upon the investor when it did in all other cases confirms the interpretation whereby Article XIII does not offer the possibility of a unilateral choice.

ii. Other FTAs Concluded by CARICOM

62. The FTAs concluded between the regional organization CARICOM and States immediately before or after the 1998 Treaty with the Dominican Republic are the Colombia FTA of July 24, 1994 and the Cuba FTA of July 5, 2000. The Colombia FTA merely encourages the possibility of concluding future BITs, and, thus, fails to provide for the settlement of disputes between one Party and investors of the other Party.⁵³ The Cuba FTA, in contrast, contains an annex on investments, which includes an investor/State dispute settlement clause:

“1. Any dispute between one Party and an Investor of the other Party concerning an Investment of the latter, in the territory of the former, shall, if possible, be settled amicably. If such a dispute has not been settled amicably within a period of three months from the date of written notification of the claim, either Party may submit the dispute to the courts of that Party or to national or international arbitration

2. Where the dispute is referred to international arbitration, the investor and the Party concerned in the dispute may agree to refer the dispute to an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.”⁵⁴

63. Paragraph 1 of this article differs from paragraph 1 of Article XIII in establishing that the relevant disputes concern the investment made by the investor of the other Party, not the obligations undertaken by one of the Parties to the Agreement. Both articles coincide on the three dispute settlement options: courts of the Party to the Agreement, or national or

⁵² Claimant invokes this explicit acceptance in 11 BITs in support of his argument that, by application of the MFN clause in Article III of the Treaty, Claimant could resort to UNCITRAL international arbitration (Statement of Claim, para. 225).

⁵³ Agreement on Trade, Economic and Technical Cooperation between the Caribbean Community (CARICOM) and the Government of the Republic of Colombia, July 4, 2004 (RL-91).

⁵⁴ Agreement on Reciprocal Promotion and Protection of Investments, Article XII (RL-48).

international arbitration. The second difference is that the Cuba Agreement explicitly provides that *either party to the dispute* may submit it to any of the three options.

64. In regard to the other FTAs concluded by CARICOM, the only one that contains a dispute settlement clause is that concluded with Costa Rica on March 9, 2004. The clause in its relevant part reads as follows:

“1. Any investment dispute which may arise between one Party and an investor of the other Party with respect to matters regulated by this Chapter, shall be notified in writing by the investor to the host Party. Such notification shall include in detail all relevant information. To the extent possible, the dispute shall be settled amicably between the parties.

2. If a dispute has not been settled amicably within a period of six (6) months from the date of the notification referred in paragraph 1 above, it may be submitted, at the choice of the investor concerned, either to the competent Courts or Administrative Tribunals of the Party in whose territory the investment was made, or to international arbitration. Where the dispute is referred to international arbitration, the investor may submit the dispute to either:

(a) the International Centre for the Settlement of Investment Disputes (ICSID), established by the "Convention on the Settlement of Investment Disputes between States and Nationals of other States" opened for signature at Washington D.C. on 18 March 1965, provided both Parties are signatories of the ICSID Convention; or

(b) the Additional Facility Rules of ICSID, provided that one of the Parties, but not both, is a party to the ICSID Convention; or

(c) an *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), where none of the Parties is a signatory of the ICSID Convention.”⁵⁵

65. The subject-matter of the dispute under this article is framed in the section of the Agreement concerning investment protection. It is narrower than the FTA with Cuba and resembles Article XIII of the Treaty with the Dominican Republic, as the latter refers to the obligations of the Parties in relation to investments, whereas the relevant section of the FTA with Costa Rica *only mentions obligations of the Parties*, not the investors. Unlike Article XIII, the CARICOM/Costa Rica FTA *explicitly* offers, *twice, the choice of the means of settlement (national courts or international arbitration) to the investor*.

⁵⁵ Agreement between the Caribbean Community (CARICOM) and the Government of the Republic of Costa Rica, Article X.11. 2. (RL-47).

iii. BITs Concluded by Jamaica

66. The witness submitted by Claimant, Jamaica's Ambassador George Anthony Hylton, referred to the fact that Jamaica was the country mainly in charge of preparing the negotiations of the Treaty with the Dominican Republic.⁵⁶ It is of interest to examine the BITs concluded by Jamaica around that time.
67. The BIT concluded between Jamaica and the United States of America in 1997 uses the following formula: "*the national or the Company concerned may choose to submit the dispute... .*"⁵⁷ The Egypt/Jamaica BIT concluded in 1999 provides in relation to the dispute that "*it may be submitted upon request of either party... .*"⁵⁸ In turn, the Indonesia/Jamaica BIT also concluded in 1999 establishes that "when: a dispute has been raised by the investor and the parties disagree as to the choice of (i) or (ii) *the opinion of the investor shall prevail.*"⁵⁹ In sum, all BITs whereby the investor has the possibility of unilaterally deciding to resort to arbitration make express provision for such choice. It is worth highlighting that Article XIII fails to provide so.

e. Conclusion on Preparatory Work as Well as Other BITs and FTAs Concluded by the Parties

68. On the basis of the foregoing, it arises that both Parties to the Treaty have been very careful in the inclusion of investor/State dispute settlement clauses. The Dominican Republic preferred not to include such clause in its Treaty with CARICOM, which latter made a proposal that was different from all others. In the face of its counterparty's initial position, it proposed a more tenuous formula than those in which the investor is explicitly given the possibility of unilaterally choosing international arbitration. The Dominican Republic has adopted a cautious attitude towards its close neighbors, which contrasts with the BITs or FTAs concluded with other States. It has no BIT in force with Haiti or Cuba and has the Treaty with its CARICOM neighbors which contains a formula that is totally different from that accepted in the other BITs or FTAs: it does not grant the investor the unilateral right to impose international arbitration thereon.

⁵⁶ Second Declaration of Ambassador George Anthony Hylton, Paragraph 7 (C-139).

⁵⁷ Treaty between the United States of America and Jamaica concerning the Reciprocal Encouragement and Protection of Investment, Article VI (2) (RL-96).

⁵⁸ Agreement for the Promotion and Protection of Investments between the Arab Republic of Egypt and the Government of Jamaica, Article VI 2 (RL-99).

⁵⁹ Agreement between the Government of the Republic of Indonesia and the Government of Jamaica concerning the Promotion and Protection of Investments, Article IX 3 (RL-100).

f. Model Potentially Followed by Article XIII

69. If one wishes to compare clauses from other BITs concluded by different parties, the greatest interest lies in the treaties which may have served as a model for the conclusion of the Treaty. The founding members of CARICOM are all former British colonies that follow the Common Law tradition. Haiti and Suriname, the two CARICOM member States that were not British colonies, joined later. Haiti did so in 2002.

70. I agree with the Expert for Claimant in that the probable origin of the text of Article XIII may be deemed a circumstance of the conclusion of the Treaty. According to the Expert, “[i]t is no secret that treaty language often derives from existing templates or models. Parts of Article XIII seem to be derived from Article 8 [Alternative] of the Model UK BIT of 1991. Article 8, paragraph 1 of this Model UK BIT is very similar to Article XIII paragraph 1 of the present Treaty (concluded in 1998):

“Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.”⁶⁰

71. In this model, I highlight: “if the national or company concerned so wishes.”

72. The Parties and the Tribunal also considered Article 8(1) of the BIT between the United Kingdom and Turkmenistan of 1991 extensively, but did so mostly in order to determine whether such article contains an obligation, which, in my view, is undisputable. Nonetheless, this is not the main interest of this BIT for the case at issue. This BIT closely follows the British BIT model to which the Expert for Claimant made reference. The point of contention here is whether the investor may unilaterally impose international arbitration. The chief purpose is to find differences from and similarities with Article XIII so as to reach conclusions. Like the British BIT model, Article 8 (1) of the Turkmenistan/United Kingdom BIT provides:

“Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written

⁶⁰ First Legal Expert Report of Prof. Pauwelyn, para. 73.

notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.”⁶¹

73. Indeed, the text is virtually identical to that of paragraph 1 of Article XIII of the Treaty, but for three differences. Both of them contain the exact same definition of the subject-matter of the dispute: limited to an obligation of a Contracting Party under the Agreement in relation to an investment. Once again, this is the fundamental reason why both the Expert for Claimant and the majority of the Tribunal believe that only the investor may institute arbitration proceedings and that there is an offer from the State to submit to international arbitration, which would be perfected when the investor gave its consent by instituting the proceedings.
74. Apart from the one-month difference between the periods set for the parties to the dispute to endeavor to settle it amicably, the other two differences are significant: (1) only international arbitration appears as a dispute settlement means; and (2) it is specifically added that the dispute will be submitted to arbitration proceedings *if the investor concerned so wishes*. Were the interpretation made by both the Expert and the majority of the Tribunal to be followed, this last reference would be not only meaningless, but also superfluous or redundant. This final phrase of the paragraph could be assigned no practical effect whatsoever: in view of the subject-matter of the dispute, only the investor could impose international arbitration by instituting the proceedings.

g. Conclusion on Supplementary Means of Interpretation

75. In sum, the other BITs and FTAs concluded by the Dominican Republic or by CARICOM, as well as the highly probable model followed for the drafting of Article XIII, expressly provide that the investor or either party may institute international arbitration. It would be absurd to believe that, since the other treaties authorize the investor to unilaterally resort to arbitration, then Article XIII should also be interpreted that way, although it says nothing to that effect. The logical conclusion is actually the opposite: the fact that this possibility has not been included for the investor means that, in this case, the investor has no such possibility.
76. The majority purports Article XIII to include a unilateral and unconditional offer of arbitration by the State which the investor accepts by instituting it, thus forming the consent agreement. What it does in support of its position is to explain this situation. But

⁶¹ Cited in Partial Award, para. 111.

this is not about explaining how this possibility, included in other treaties, works, but about demonstrating that it exists in Article XIII. It is symptomatic that, in order to explain the operation of consent by means of a standing offer by the State and a subsequent acceptance by the investor, the majority systematically resorts to examples of treaties that do contain such possibility. Thus, it cites the decision issued in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*.⁶² The BIT between Ecuador and the United States which was applied in that case contains the following formula in its investor/State dispute settlement clause:

“2. (...) If the dispute cannot be settled amicably, *the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:*

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- (c) in accordance with the terms of paragraph 3.

4. *Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:*

- (a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
- (b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”).”⁶³

77. It is all about interpreting an investor/State dispute settlement clause. It is then useful to examine the different types of existing clauses, and a comparison is not futile. A study of clauses in BITs including the possibility of arbitration showed the following:

“44% of the sample treaties that provide access to international arbitration for the settlement of investment disputes make only one single forum available. Among the other treaties, an overwhelming majority gives the investor a *unilateral choice* between listed fora.

⁶² Partial Award, para. 124.

⁶³ Emphasis added. Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Article VI. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1066/download>.

Some other treaties require an *agreement between the parties* to access specified fora; if the parties fail to find an agreement, the treaty may designate a tribunal by default or give the prerogative to the investor.

Yet other treaties are silent on who has the right to choose the forum.”⁶⁴

78. In the instant case, we are faced with the last of the possibilities mentioned: the treaty is silent on who has the right to choose the forum. The conclusion that follows is that which governs all international legal relationships on the matter: if there is no consent to the existence of a right to a third party that would not otherwise exist, such right does not exist.
79. It can, therefore, be concluded that supplementary means of interpretation of treaties not only fail to confirm the hypothesis adopted by the majority of the Tribunal or allow to advance it, but support the interpretation whereby the possibility that the investor choose which of the three dispute settlement methods available to adopt was excluded.

B. CONCLUSION: ARTICLE XIII DOES NOT GRANT THE INVESTOR A RIGHT TO UNILATERALLY DECIDE TO SUBMIT THE DISPUTE TO ARBITRATION

80. A good faith interpretation of Article XIII according to the meaning of its terms within their context and taking into account the object and purpose of the Treaty, shows that there are three dispute settlement options between a State and an investor, that none is preferred, and that the Parties did not consent to either one of the disputing parties or only the investor deciding which of the three dispute settlement means shall apply. The supplementary means of interpretation, both the preparatory work and the other agreements concluded by the Parties, either BITs or FTAs, or the model likely used when drafting Article XIII, confirm this interpretation or, in the alternative, make it possible considering that the main means of interpretation would not have allowed achieving a clear result because the text of Article XIII is ambiguous and obscure.
81. Indeed, interpreting, like the majority, that paragraph 1 contains an unconditional offer by the State to submit the dispute to international arbitration, perfected upon the investor’s notice of arbitration under paragraph 2, is untenable. An “unconditional offer” requires consent by the State so that the investor chooses one of the three options, and there is no such consent.

⁶⁴ J. Pohl, K. Mashigo, A. Nohen, Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey, OECD Working Papers on International Investment 2012/02, pp. 21-22 (available at: <https://www.oecd-ilibrary.org/docserver/5k8xb71nf628-en.pdf?expires=1591123554&id=id&accname=guest&checksum=9369CB799ADBE83B01D2E33B8681C9A0>).

82. The determination of the subject that can initiate international adjudicative proceedings is a key question in assessing consent to such proceedings. This is the case both in general dispute settlement treaties and in dispute settlement clauses of treaties on special matters, whether multilateral or bilateral. The lack of determination of the subject leaves the situation as is: a State cannot be forced to accept a dispute settlement means to which it did not consent. This is particularly true even in a situation in which there are multiple dispute settlement means with no predefined priority or preference.
83. Certainly, consent may also be implied but must arise from some manifestation by the State through an act or omission. This is not the case here. From the beginning, Respondent expressed its reservations about the existence of a State-investor dispute settlement clause in the Treaty and therefore submitting the dispute to international arbitration. CARICOM, the other Party to the Treaty, did not include in its draft article the possibility that the choice rest with the investor.
84. One could assume that the absence of a reference to how and by whom any of the three dispute settlement options may be chosen is a real or alleged deficiency of the Treaty. In that case, the deficiency cannot be replaced with the purported interpretation thereof. This is even more important when it comes to the decision on the jurisdiction of the Tribunal itself.
85. The manner in which the International Court of Justice addressed the issue of conventional deficiencies of compromissory clauses in the case of *Interpretation of Peace Treaties (second phase)* is enlightening. The peace treaties with Bulgaria, Hungary and Romania after World War II provided for an obligation to submit disputes to a commission composed of three arbitrators: one appointed by each party, and a third member chosen by common agreement between the two parties, failing which the third member would be appointed by the Secretary-General of the United Nations. The treaties did not indicate what should be done if one of the parties failed to appoint an arbitrator, as the three aforementioned States effectively did. The Court rejected that it be appointed by the Secretary-General, or that the tribunal conducts the proceedings with two appointed arbitrators. In its advisory opinion, the Court performed the following analysis:

“The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation

cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.”⁶⁵

86. As regards the *effet utile* rule of interpretation, the Court stated in this case:

“The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.”⁶⁶

87. The Court added, as regards the fact that the Parties had not envisaged the likely failure by any of them to appoint an arbitrator, that it “does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision.”⁶⁷

88. States’ consent to international arbitration is a matter of utmost importance. As explained by Professor Georges Abi-Saab,

“In international law, all tribunals - not only arbitral, but even judicial - are tribunals of attributed, hence limited jurisdiction (...) all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (...) This is the reason why, the fundamental principle and basic rule in international adjudication, is that of the consensual basis of jurisdiction. It also explains the prominent place of questions of jurisdiction both in the jurisprudence and in the writings on international adjudication. It explains as well the widely shared perception that the first task of an international tribunal is to ascertain its jurisdiction; and the great care international tribunals take in establishing from the outset, the existence and limits of the consent of the parties before them, on which their jurisdiction is founded.”⁶⁸

89. The International Court of Justice set the standard for determining the existence of consent to international jurisdiction in a case where a claimant submitted a dispute, absent the respondent’s prior consent, which it gave afterwards. In doing so, it cited its *jurisprudence constante*, which includes that of its predecessor:

“The consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*. As

⁶⁵ *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 229

⁶⁶ *Ibid.*

⁶⁷ *Id.*, pp. 229-230.

⁶⁸ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab to the Decision on Jurisdiction and Admissibility, August 4, 2011, paras. 7-8 (First Legal Expert Report of Prof. Pauwelyn, Annex 15).

the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must “be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable’ manner” (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2006, p. 18; see also *Corfu Channel (United Kingdom v. Albania)*, *Preliminary Objection, Judgment*, 1948, I.C.J. Reports 1947-1948, p. 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1996 (II), pp. 620-621, para. 40; and *Rights of Minorities in Upper Silesia (Minority Schools)*, *Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 24*)”.⁶⁹

90. An arbitral tribunal has properly summarized the situation which this Tribunal is also facing:

“Given that States are subject to binding third party dispute settlement procedures only if they so consent and, given the weight of authority referred to earlier, particularly as found in decisions of the International Court of Justice and in the particular ICSID context, the Tribunal considers that its approach should be cautious. In the words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be “voluntary and indisputable”, and in the words of both ICSID tribunals “clear and unambiguous”. The necessary consent is not to be presumed. It must be clearly demonstrated.”⁷⁰

91. In the end, the reasoning followed by the majority is the result of a series of inferences made from each of the three first paragraphs of Article XIII. Its postulates repeatedly presented upon reviewing those paragraphs are always the same: every adjudicative procedure involves a claimant and a respondent, there is a unique manner to initiate arbitral proceedings, and the only party that may initiate them is the investor. This is not stipulated in or inferred from the Treaty, unlike all other dispute settlement clauses under the BITs or FTAs concluded by both Parties, which explicitly provide so. The Partial Award does not address this material difference. Those postulates are clearly refuted by the numerous investment treaties that provide for the possibility to institute arbitral proceedings by one or both parties to the dispute, which unquestionably means that the State may also initiate arbitral proceedings against investors, and that the latter are not the only ones that may institute them.

⁶⁹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment*, I.C.J. Reports 2008, p. 204, para. 62.

⁷⁰ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013 (RL-74), para. 254.

92. My co-arbitrators focused the questions they posed to the Claimant appointed Expert on what the standard of “clear and unequivocal” consent would mean for the interpretation of Article XIII.⁷¹ Both my co-arbitrators and the Expert claim that the interpretation of the State-investor dispute settlement clause should not be restrictive or extensive (or “liberal”). In support, the Expert for Claimant cited a study by the UNCTAD: “Neither a principle of restrictive interpretation nor a doctrine of ‘*effet utile*’ will do justice to a consent clause.”⁷²
93. In view of the above, the conclusion is simple: the Parties to the Treaty agreed to settle disputes with investors through one of the three dispute settlement means but did not leave the decision to investors. Thus, the only obligation under Article XIII is to settle the dispute by any of the three dispute settlement methods indicated. In the absence of a provision on the selection method, the general rule, which may well be deemed a general principle of law, shall apply. This obligation requires the disputing parties to negotiate in good faith the selection of the means that will be used to settle the dispute.
94. In Article XIII, negotiation between a State and an investor forms part of the dispute settlement process. In fact, the first part of paragraph 1 provides so. If they cannot settle the dispute “amicably” (that is, by negotiation), they shall use all efforts to do it by any of the three possible jurisdictional means indicated. The selection cannot be unilateral. Therefore, submitting the dispute to an international arbitral tribunal requires the common agreement between the parties. In the event that there is no such agreement and the investor intends to settle the dispute by any other means, there is always the residual solution in these cases: resorting to national courts and requesting diplomatic protection from its State.
95. Moreover, if the investor’s State considers that the host State failed to comply in good faith with its obligation to negotiate the selection of the adjudicative means indicated in paragraph 1 of Article XIII, it may rely on Article XIV of the Treaty and submit the dispute to arbitration without the need for its investor to exhaust all domestic remedies.
96. These residual options may or may not be convenient to the members of the Tribunal; however, it is not their task to evaluate the dispute settlement mechanisms agreed upon

⁷¹ Tr. Day 2, English Original, 386:11-393:20.

⁷² UNCTAD, *Dispute Settlement, International Centre for Investment Disputes*, 2.3 *Consent to Arbitration*, New York and Geneva, 2003, pp. 33-34, First Legal Expert Report of Prof. Pauwelyn, para. 16.

by the Parties, but to strictly apply the Treaty, rather than forcing the Treaty to state what it fails to state.

97. In the case at hand, it is evident that the agreement of the Parties to submit the dispute to international arbitration is absent. Claimant did not attempt to agree on the mechanism to settle the dispute. In its Notice of Dispute dated December 19, 2017, it took for granted his purported right to pursue international arbitration following the three-month period after the submission of such notice.⁷³ Respondent objected to this claim. Therefore, this Tribunal lacks jurisdiction to hear the case.

III. THE MOST-FAVOURED NATION CLAUSE PROVIDES NO BASIS FOR JURISDICTION

98. Since the majority considered that in Article XIII Respondent allowed the investor to choose international arbitration as a dispute settlement mechanism, it was not necessary to address in the Partial Award the subsidiary argument of reliance on the Most-Favored Nation clause of Article III of the Treaty. Since I have found quite the opposite, I believe it is necessary to briefly discuss this argument submitted by Claimant.

99. The text of Article III, entitled “General Principles Governing Treatment”, reads:

“Each Party shall admit and treat investments in a manner not less favourable than the treatment granted in similar situations to investments of its investors except for investments in areas to be identified in the Appendix to this Annex.”⁷⁴

Each Party shall admit and treat investments in a manner not less favourable than the treatment granted in similar situations to areas related to Most-Favoured-Nation treatment [...]

The obligation to grant treatment no less favourable than is granted to third States does not apply to:

- (a) any treatment or advantage resulting from any existing or future customs union or free trade area or common market or monetary union or similar agreement to which a Party is a party; or
- (b) any international agreement or arrangement relating wholly or mainly to taxation.”

⁷³ Notice of Controversy to the Dominican Republic Pursuant to Annex III of the CARICOM Free Trade Agreement, paras. 7 and 52 (C-15).

⁷⁴ Agreement Establishing Free Trade Area Between the Caribbean Community and the Dominican Republic, Annex III, Article III (CL-5).

100. Claimant summarizes his position in the following terms:

“More specifically, by operation of Article III (MFN) of Annex III of the Treaty, Claimant’s investments have a right to “treatment no less favourable” than that accorded by the Dominican Republic under all the bilateral investment treaties currently in force for the Dominican Republic. To date, the State has at least eleven bilateral investment treaties in force. In all of these bilateral investment treaties, the State has consented to arbitration under the UNCITRAL Arbitration Rules so they may be “unilaterally” invoked by the investor without the need for any *ex post*, “special agreement” between the Parties.”⁷⁵

101. Without delving into the disputed issue of the possibility to generally apply the MFN clause to dispute settlement means and, where appropriate, the scope of any such applicability, it may be asserted in general terms that “the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT.”⁷⁶

102. There are three reasons why it is not possible to base an alleged offer to UNCITRAL international arbitration by Respondent subject to the investor’s unilateral decision on the basis of Article III. The first reason is the following: Claimant invokes the clause to hold that, if paragraph 1 includes an unconditional offer to international arbitration by the State, the MFN clause may be invoked for paragraph 2, and thus determine that the UNCITRAL arbitration may be followed. Having reached the conclusion according to which there is no immediate consent to international arbitration in paragraph 1, it is not necessary to examine whether the UNCITRAL arbitration would be available through application of the MFN clause. Even if there were any such consent, there would be two additional reasons why the MFN clause cannot operate in the instant case, which I proceed to analyze.

103. Article III of the Treaty applies the MFN treatment only to investments, unlike MFN clauses that include treatment to both investments and investors. This is the case dealt with in *Venezuela US v. Venezuela*, in which the Tribunal unanimously concluded that:

“The Tribunal observes that Article 3(1) deals with treatment of “investments”, while Article 3(2) deals with treatment of “nationals or companies of the other Contracting Party” (*i.e.*, investors). The right to submit a dispute to arbitration is a right accorded by Article 8 of the BIT, under the conditions specified therein, to an “investor”. Article 8(2) uses the expression “the investor shall have the right to submit the dispute to

⁷⁵ Counter-Memorial on Jurisdiction, para. 41.

⁷⁶ *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award, July 26, 2016, para. 105 (RL-162), para. 105.

arbitration.” It follows that MFN treatment can extend to dispute settlement provisions only through the operation of Article 3(2) of the Treaty. ‘Investment’ as such has no procedural rights, therefore Article 3(1) is without relevance for the purpose of the Tribunal’s inquiry into its jurisdiction.”⁷⁷

104. Finally, it shall be highlighted that Article III of the Treaty refers to its application or not to “areas.” The Expert appointed by Claimant is of the view that the dispute settlement clause of Article III is an “area” covered by Article III.⁷⁸ The Appendix to which the English text refers to, and which should have identified the areas to which the national treatment would not apply, was produced by neither Party to this dispute.⁷⁹
105. The use of the term “areas” in the Treaty shows that it refers to the spheres of productive and commercial activities or services.⁸⁰ The dispute settlement clause is not an “area.” Moreover, that can be corroborated by the Guidelines defined by CARICOM for use in the negotiation of BITs:

“CARICOM countries should, as part of their development plans and strategies, determine the terms on which foreign investment may enter their economies; *the areas of their economies* from which foreign investment would be prohibited or in which it would be permitted only under special conditions and the circumstances and criteria which will occasion restriction of foreign investment from any sector or activity.

Where no determination of such areas, circumstances or criteria has been made in advance of the negotiations, the BIT should incorporate an elaboration of the policy and/or criteria governing foreign investment.”⁸¹

106. In view of the foregoing, Claimant’s invocation of Article III of the Treaty does not allow justifying the existence of an unconditional offer by Respondent for an investor to be able to unilaterally resort to UNCITRAL arbitration.

⁷⁷ *Ibid.*, para. 104.

⁷⁸ Second Legal Expert Report of Prof. Pauwelyn, paras. 77-78.

⁷⁹ I asked the witness for Claimant, Ambassador Hylton, in this regard, and he stated not recalling to which areas Article III referred to or if the Appendix had been negotiated (Tr. Day 1, 279:14-22, 280: 1-16)

⁸⁰ See Articles II (vi) and IX of the CARICOM-Dominican Republic Free Trade Agreement and Article XII (3) of the Agreement on Trade in Goods (Annex I) (R-1 in Spanish and CL-5 in English).

⁸¹ *CARICOM Guidelines for use in the Negotiation of Bilateral Treaties*, Caribbean Community Secretariat (1984) (Emphasis added), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2879/download>

IV. THE PROTECTION OF THE SO CALLED “INDIRECT” INVESTMENTS

107. Having considered that the Tribunal lacks jurisdiction to hear the present case, it would not be necessary to examine the second jurisdictional objection. Nevertheless, as my co-arbitrators rejected the first jurisdictional objection, I shall express my opinion on the question, which I will also do succinctly.
108. The parties and the Tribunal devoted considerable time and space to the question of knowing whether “indirect” investments are covered by the Treaty. The parties agree that Mr. Lee Chin’s investments in the Dominican Republic can be qualified as “indirect.”⁸² There is unanimous agreement to consider the Treaty does not expressly include indirect investments in its definition of investments. The Treaty makes no reference to corporate control either. We would be here before a fourth-degree indirect investment. The Partial Award contains the scheme presented by Claimant which shows his interests in a number of Panamanian and Dominican companies ending up in Lajun Corporation S.R.L., the Dominican company subject of the measures contested by Claimant.⁸³ It is through four companies and at different levels that Claimant holds interests in Lajun.
109. The Partial Award conducts a detailed analysis in order to determine whether indirect investments are covered by the Treaty, although it makes no explicit reference thereto as other BITs or FTAs do and concludes that they indeed are covered.⁸⁴ I do not need to opine on the general issue of indirect investments. My duty is merely to address the scope of the protection afforded by the Treaty to the investments and the investors of the other Party.
110. The Treaty considers “investments” the “shares, stocks and debentures of companies or interests in the property of such companies.”⁸⁵ Claimant is the sole owner of shares, stocks and interests, but in two Panamanian companies (Lution Investment SA and Kigman Del Sur SA), which, in turn, hold shares, stocks and interests in a Panamanian company (Nagelo Enterprises SA) and in a Dominican company (Wilkison Company SRL), which, in turn, hold shares, stocks and interests in Lajun Corporation SRL. Thus, the holder of the rights granted to investors under the Treaty, as defined in Article II (2), is not Claimant, but the Panamanian company Nagelo Enterprises SA and the Dominican

⁸² Reply on Jurisdiction, para. 154; Memorial on Jurisdiction, para. 153.

⁸³ Partial Award, para. 7.

⁸⁴ Partial Award, paras. 212-219.

⁸⁵ Article I (1) (ii).

company Wilkison Company SRL. If any measure adopted by Respondent were to affect the rights of Wilkison Company SRL, the holder of the rights granted to investors under such article would be the Panamanian company Kigman del Sur SA.

111. However, the CARICOM/Dominican Republic Treaty applies neither to Panamanian companies nor to Dominican companies having investments in the Dominican Republic. The issue of the investments mentioned herein might include the shares, stocks and interests of the two Panamanian companies in the Dominican companies Wilkison and Lajun. I note in passing that there is a BIT between the Dominican Republic and Panama which contains an investor-State dispute settlement clause.⁸⁶
112. Accordingly, the Tribunal lacks *ratione personae* and *ratione materiae* jurisdiction, as Claimant and his interests do not qualify as “investor” and “investments”, respectively, under the terms of the Treaty.
113. Given that the majority decided otherwise, I go on to address the scope of the *ratione materiae* jurisdiction of the Tribunal on the merits of the case. The jurisdiction of the Tribunal will require determining whether the State’s behavior somehow violates the rights arising from the ownership of the shares, stocks or interests in the property of Lajun Corporation SRL.
114. In the instant case, attention was drawn to the court or administrative proceedings initiated against Lajun in the Dominican Republic.⁸⁷ The Claimant appointed Expert rightly stated that there is no *ratione personae*, *ratione materiae* and *causa petendi* identity between the proceedings before Dominican courts or tribunals and the case at issue here.⁸⁸ The State could only sue Lajun Corporation SRL if it considered that there is a dispute with it, unless in the event of joint and several liability of shareholders, which obviously exceeds the scope of this analysis.
115. The present case does not concern Respondent’s actions towards Mr. Michael Lee-Chin, but against Lajun Corporation SRL, approximately 80% of the capital of which is held by the former, which was revealed after piercing the veil of four other companies at four

⁸⁶ Agreement between the Dominican Republic and the Republic of Panama on the Promotion and Protection of Investments (RL-44).

⁸⁷ Notice of Arbitration, para. 65

⁸⁸ First Legal Expert Report of Prof. Pauwelyn, paras. 31-32.

different levels. The fact that Mr. Lee-Chin has decided to act through three Panamanian companies is a matter of choice that is not to be examined by the Tribunal.

V. CONCLUSION

116. The Partial Award rightly asserts that the consent of the State must be “clear and unambiguous.” It adds:

“It is essential that the tribunal called upon to resolve a dispute be persuaded that all the parties concerned (*inter alia*, a State in our case) have agreed to submit thereto. In the view of the Tribunal, the requirement that consent have such features should be understood in the sense that it must arise from the text, interpreted pursuant to the criteria accepted under international law, and not from presumptions or inferences based on expressions not contained therein.”⁸⁹

117. It takes a lot of imagination to believe that the Parties to the Treaty have “clearly and unambiguously” consented to the possibility that the investor alone decide to choose to refer the dispute to international arbitration. The Partial Award is systematically based on inferences, both for the analysis of each of the paragraphs of Article XIII and the determination that the so-called “indirect” investments fall within the scope of protection of the Treaty.

118. International courts and tribunals must be extremely cautious in analyzing the existence of their jurisdiction. The exercise of jurisdiction over a dispute in which a State has not given its consent entails a serious disregard for the sovereignty of the State(s) concerned. The determination of jurisdiction by an *ad hoc* tribunal must be conclusively established. The continuance of the work of its members depends on their own decision on the matter. For all the reasons stated in this dissenting opinion, I consider that the Tribunal lacks jurisdiction to hear the dispute submitted thereto.

[*Signed*]

Professor Marcelo G. Kohen
Date: July 10, 2020

⁸⁹ Partial Award, para. 119.