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“Special meanings” in the Interpretation of Dispute Resolution Clauses: A Commentary on Lee-Chin v. the Dominican Republic

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A recent partial award on jurisdiction in *Michael Lee-Chin v. the Dominican Republic* debated the interpretation of dispute resolution clauses and State consent to investment arbitration. While interpreting the Free Trade Agreement between the Caribbean Community and the Dominican Republic (“CARICOM-DR FTA”), the majority concluded that Respondent gave advance consent to submit disputes to one of the three mechanisms listed in Article XIII, pursuant to the principle of *effet utile*. Prof. Marcelo Kohen dissented, concluding that the tribunal lacked jurisdiction over the dispute.

This post addresses the debate on the use and value given to treaty drafting practice of States when interpreting a dispute resolution clause, which is likely to take place in other cases. The majority analyzed the use of drafting practice to discern a “special meaning” under Article 31(4) of the 1986 Vienna Convention on the Law of Treaties, (VCLT); while the dissent analyzed treaty practice as a circumstance of conclusion of the treaty under Article 32 of the VCLT.

The majority’s approach to the interpretation of State consent

- **Characterizing State consent**

The parties debated whether the existence of three dispute settlement alternatives in Article XIII (domestic litigation, national arbitration and international arbitration), and the absence of express language entitling the investor to initiate proceedings, constituted consent to arbitrate. Article XIII reads:

> Disputes between an investor of one Party and the other Party concerning an obligation of the latter under this Agreement […] shall, […] be submitted to the courts of that Party or to national or international arbitration. […]

In line with landmark cases such as *Plama v. Bulgaria* (¶ 198), the majority emphasized the need for clear and unambiguous consent to arbitrate. Recalling *Judge Higgins’ opinion in Oil Platforms*,

the interpretation of jurisdictional clauses should not be liberal nor strict while asserting jurisdiction, as doing so would be contrary to the principles of treaty interpretation.

As to the existence of multiple dispute settlement alternatives, the partial award concluded that the way in which the obligation is assumed by the State does not undermine its existence. Instead, the options in Article XIII referred to ways of implementing such obligation (¶ 109). Thus, while consent shall not be presumed, the existence of conditions in the means by which consent was provided shall not be invoked "to escape freely assumed obligations" (¶ 110).

- **Analyzing "special meaning" in contrast with other treaties**

Article 31 (4) of the VCLT has been rarely invoked in investment arbitration, and never successfully. The provision addresses treaties in which a term has a special meaning, reflecting a technical concept or a particular intention of the contracting parties. Article 31 (4) of the VCLT establishes that "A special meaning shall be given to a term if it is established that the parties so intended."

For example, in *Parkerings-Compagniet AS v. Lithuania* the tribunal considered whether Lithuania and Norway intended a special meaning for the terms "fair and reasonable treatment." The tribunal concluded that a difference between "reasonable" or "equitable" was insignificant, and no evidence supported a different protection than granted by the fair and equitable standard (¶ 277). In other cases, States have argued that terms such as "investment" (*Quiborax v. Bolivia*, ¶ 212; KT Asia Investment Group v. Kazakhstan, ¶ 165) and "public order" (*Continental v. Argentina*, ¶ 171) had special meanings per Article 31(4) of the VCLT. However, arbitral tribunals have not found clear agreements between the States parties to depart from ordinary meanings of such terms in the respective treaties.

While in the cases mentioned the analysis concerned the meaning to be given to a term in the treaty, in *Lee-Chin,* Respondent's argument and the point of divergence between the arbitrators concerned the absence of certain terms to be attributed a special meaning. Respondent argued that unlike the language in other treaties it signed, Article XIII (1) does not expressly allow the investor to choose among the three *fora* (¶ 129). The majority was not persuaded. While such provision did not specify the investor's right to choose the dispute resolution mechanism, that did not imply that such right was not conferred.

The partial award noted that a difference in wording between treaties could hardly prove which interpretation should be preferred, or evidence a "special meaning" for a term under Article 31 (4) of the VCLT (¶ 129). For the majority, a reference to the different terms used in a State's other treaties to ascertain a "special" meaning for a term at issue in the treaty before it might pose difficulties. First, it considered that a difference in wording does not necessarily imply a difference in the effects the clauses are aimed to produce (¶ 130). Second, the context of a negotiation must be considered when determining the meaning to be given to the treaty's terms: the differences in wording choices between treaties may reflect factors such as the conditions of negotiation, the objectives pursued, and the particularities of the relationship of the parties to each treaty (¶ 129).

The burden of proof to establish that a treaty's contracting parties intended a special meaning for a given term falls on the party invoking such special meaning. However, the standard of proof has not been established clearly. The International Court of Justice suggested that the party claiming

the special meaning must "demonstrate convincingly the use of the term with such special meaning" (*Western Sahara Advisory Opinion*, ¶ 116). The majority in *Lee-Chin* was slightly more specific. The partial award considered that relying on treaty provisions to influence the interpretation of the specific wording (or its absence) in a different instrument will be relevant only if "specific and conclusive data show that the former [treaties] qualify as interpretative guidelines … [or] …to identify the intention of each of the contracting parties" (¶ 130). Thus, the special meaning intended by the parties per article 31(4) of the VCLT would require a high burden for the party asserting it, to demonstrate an actual agreement of the parties to depart from the ordinary meaning of the terms (or eventually their absence).

Dissenting opinion: State practice as the 'circumstances of conclusion' of the treaty

The Dissenting Opinion agreed on the need for clear and unambiguous State consent but argued that the determination of who could initiate the proceedings was a key question in assessing the existence of consent. In the view of the dissenter, the Dominican Republic had not provided through the treaty a standing offer to arbitrate, but a list of alternatives upon which the investor and the State could agree to in future disputes.

Prof. Kohen dissented from the majority's approach to the use of State practice in the interpretation of Article XIII. Pursuant to Article 32 of the VCLT, he considered that other investment agreements concluded by parties to the treaty and the "probable origin" of Article XIII, may in fact be considered as circumstances of the treaty's conclusion (¶ 51). Article 32 of the VCLT establishes that:

> 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.

The dissenting opinion compared provisions in treaties entered into by the Respondent, CARICOM and Jamaica with express references to the investor's unilateral choice among dispute resolution alternatives. Among the circumstances of conclusion of the treaty, the dissent also considered the text of article 8(1) the UK Model BIT of 1991 as the "probable origin" of Article XIII (¶70), and Article 8(1) of the Turkmenistan-UK BIT, which was based on the same model BIT (¶ 74).

While not referring expressly to Article 31(4) of the VCLT, the dissenting opinion concluded that the Respondent did not intend to allow the investor to choose among dispute settlement alternatives. For Prof. Kohen, the investor's possibility to choose had been implied by the majority while "the Dominican Republic actually decided not to include it" in contrast with other treaties (¶ 61). Thus, the absence of an express enabling clause for the investor to initiate international arbitration did not constitute "clear and unambiguous" consent of the Respondent and should have resulted in a tribunal without jurisdiction.

Conclusion

Article XIII of the CARICOM-DR FTA prompted a debate likely to occur in other cases concerning the use and value given to a State's treaty practice in the context of interpretation. Unlike the use of State practice where a term is not clear, or has changed over time, this interesting discussion was provoked by the controversy over an absent wording, and whether such absence should be attributed a specific value.

The standard of proof suggested by the majority for the party arguing a "special meaning" under Article 31(4) of the VCLT could provide a reasonable threshold to depart from the "ordinary meaning" of the terms. As the analysis concerns the intention of each of the parties in choosing specific words, such threshold could avoid a speculative exercise as to the specific reasons to include or exclude certain wording. Requiring a party to conclusively demonstrate the intention of each of the contracting parties has two relevant effects. First, it could prevent the tribunal (or the parties, via interpretation) from re-drafting the treaty. Second, it acknowledges the need to avoid plain term-comparison, and requires the parties and arbitrators to analyze other factors that may have influenced the treaty-drafting process.

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