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The First (Tricky) Interpretation of the Consent to Arbitrate in CARICOM-DR FTA: The Lee-Chin v Dominican Republic Award

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On 15 July 2020, an UNCITRAL Tribunal rendered a Partial Award on Jurisdiction in a dispute between Mr. Lee-Chin and the Dominican Republic (DR) concerning the alleged expropriation of a landfill in Santo Domingo. The arbitrators had to decide whether the arbitration clause – enshrined in Article XIII, Annex III, of the Caribbean Community-Dominican Republic Free Trade Agreement (CARICOM-DR FTA) – provided the Tribunal with jurisdiction or – as suggested by the DR – it required a subsequent *ad hoc* agreement to arbitrate. Article XIII reads as follows:

1. Disputes between an investor of one Party and the other Party […] shall […] 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 [UNCITRAL Rules].

The Award is noteworthy inasmuch as it was the first to deal with the interpretation and application of the (indeed, poorly written) Article XIII. Furthermore, as similarly drafted arbitration clauses are very common in IIAs (see e.g. *Churchill Mining v Indonesia*), the Tribunal's interpretation is sure to be a relevant precedent for future investment tribunals.

This post argues that the majority, in interpreting Article XIII, unconvincingly broadened the scope of the Respondent State's consent to arbitrate. Furthermore, it contends that the Dissenting Opinion of Prof. Kohen – albeit reaching the sounder conclusion that Article XIII was incapable of grounding the jurisdiction of the Tribunal – equally followed an approach which should not be endorsed.

The Decision of the Majority

The majority found that Article XIII(1) could grant jurisdiction, since the wording "shall […] be submitted" did represent an offer to arbitrate which, to be perfected, only needed the unilateral acceptance by the investor through the institution of arbitral proceedings.

As for Article XIII(2), the majority interpreted it as only offering the possibility to conclude a subsequent agreement to choose between a sole arbitrator and a three-member tribunal. In the

Tribunal's view, absent such a choice, the UNCITRAL Rules would apply by default, thus enabling the establishment of the tribunal without any further step by the parties.

In support, the Tribunal advanced two main arguments. First, it relied on the *effet utile* doctrine, stating that "[t]he *effet utile* of the provision that establishes the obligation to submit a dispute to arbitration […] is to serve as an offer of consent" (para. 118). Secondly, the Tribunal found that the verbs "appointed" and "established" were to be respectively interpreted as requiring a special agreement between the parties and, lacking that, providing for the default application of the UNCITRAL Rules (paras. 185 ff.). Hence, the Tribunal concluded the dispute was within its jurisdiction. However, neither of the mentioned arguments appear compelling.

Firstly, the reliance on the *effet utile* – or 'useful effect' – doctrine seems misplaced. According to the International Law Commission, the doctrine requires that

> [w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, […] the former interpretation should be adopted.

Furthermore, a corollary of such doctrine requires that when a treaty is open to multiple interpretations, the interpretation which would achieve the treaty's intended effect should be preferred. However, as clearly pinpointed by the International Court of Justice in its Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,

[i]t is the duty of the Court to interpret the Treaties, not to revise them. The principle of interpretation […] often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions […] a meaning which […] would be contrary to their letter and spirit (p. 229, emphasis added).

In this respect, the Tribunal appears to have disregarded the wording of the treaty ("may agree to refer") by relying on the *effet utile* doctrine. Furthermore, even if the clause were to be interpreted as not containing an offer to arbitrate, it would not be *futile*, inasmuch as it would still create an obligation *de contrahendo*, i.e. the one to later consent to arbitrate a dispute. Therefore, to argue that an obligation to submit a dispute to arbitration only makes sense if interpreted as an offer to arbitrate seems to distort the treaty's meaning. This is confirmed by the very existence of various IIAs whose arbitration clauses require a case-by-case consent.[1)]

Secondly, the distinction between the verbs "appointed" and "established" sounds quite arbitrary. The Tribunal neglected to notice that both the options follow the only verb "may agree to refer". Hence, the application of the UNCITRAL Rules would also require the subsequent agreement of the parties. Furthermore, the fact that the verb "to establish" conveys the idea that UNCITRAL Rules operate automatically is contrasted by the *Garanti Koza v Turkmenistan* decision, which the Tribunal explicitly quoted as endorsing its interpretation of Article XIII. Indeed, the provision at issue in *Garanti Koza* – Article 8(2) UK-Turkmenistan BIT – established that

Where the dispute is referred to international arbitration, the [investor] and the Contracting Party concerned in the dispute *may agree to refer* the dispute either to: […]

1. c) an international arbitrator or ad hoc arbitration tribunal *to be appointed* by a special agreement

> or *established* under the [UNCITRAL Rules].
>
> If […] there is no agreement to one of the above alternative procedures, *the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the [UNCITRAL Rules]* (emphasis added).

To the extent that this provision mirrors Article XIII(2), the automatic application of UNCITRAL Rules as the default option cannot be solely derived from the difference between the two verbs "appointed" and "established". *A contrario*, if the interpretation of the Tribunal were to be followed, the last part of the quoted provision would be deprived of any effect since the application of UNCITRAL Rules would directly stem from Article 8(2)(c).

Prof. Kohen's Dissenting Opinion

In light of the foregoing, it seems that Article XIII does not contain any offer to arbitrate. In this regard, we share the conclusion of Prof. Kohen. In his Dissenting Opinion, he agreed with the majority's interpretation of Article XIII(2) but adopted a different interpretation of Article XIII(1). According to his view, nothing in this paragraph suggested that the investor could *unilaterally* elect one of the three dispute settlement mechanisms provided therein. In this respect, he stated that

> [t]here is no offer by the State to one of the three options at the investor's choice […]. 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 (Dissenting Opinion, para. 6).

Prof. Kohen further contended that the principle of equality of the parties compelled this interpretation, to the extent that

> [d]ispute settlement mechanisms *shall be deemed open to both parties alike unless the treaty imposes the opposite*. […] 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 dispute with the foreign investor (Dissenting Opinion, para. 10, emphasis added).

As agreeable as the outcome may be, Prof. Kohen's reasoning does not seem entirely convincing. The argument according to which a State – by consenting to arbitrate an investment dispute – waives its right to pursue domestic remedies does not find support in the practice of international investment law.[2)] Actually, the only purpose of an offer to arbitrate is to provide the investor with a mere faculty to resort to arbitration; this does not entail any waiver of the right to go before domestic courts on the part of either the host State or the investor. What the Dissenting Opinion does not properly stress is that the whole construction of Article XIII(2) is sustained by the verb "may agree", thus subordinating the jurisdiction of the tribunal to a subsequent agreement of the parties.

Conclusions

In conclusion, the reasoning of both the majority and Prof. Kohen seems to disregard the wording of the arbitration clause providing that the parties “may agree to refer” the dispute to arbitration. In addition, one has to stress that the reading maintained by Prof. Kohen risks weakening the effectiveness of ISDS. Indeed, it would follow from such an interpretation that every arbitration clause which does not expressly entitle the investor to unilaterally resort to arbitration should be interpreted as requiring a subsequent agreement between the host State and the specific investor. This seems to both contradict the common interpretation of this kind of clauses and undermine the well-established mechanism of *arbitration without privity*.

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References

?1 Article 6 Malaysia-Sweden BIT; Article 10 Japan-Pakistan BIT; Article 9 Korea-United Arab Emirates BIT. See also, *Planet Mining v Indonesia*.

?2 C. Schreuer, *Consent to Arbitration*, in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p. 836-837.

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