

# Kluwer Arbitration Blog

## Environmental Protection Policies and Foreign Investment in Latin America: Lessons from Michael Anthony Lee-Chin v. the Dominican Republic

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On October 6, 2023, an arbitral tribunal composed by Diego P. Fernández Arroyo (President), Christian Leathley, and Marcelo Kohén (the “**Tribunal**” or “**Arbitral Tribunal**”) issued the final award in the dispute between Michael Anthony Lee-Chin (“**Claimant**”), a Jamaican national, and the Dominican Republic (“**Respondent**”) (the “**Award**”). The [dissenting opinion](#) of Professor Marcelo G. Kohén accompanied the Award.

The Tribunal ruled on violations claimed by Michael Anthony Lee-Chin of the Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic (the “**Treaty**”).

The dispute between Michael Anthony Lee-Chin and the Dominican Republic arose from a concession agreement for the management and operation of the Duquesa Landfill, entered into between Lajun Corporation, S.R.L. (“**Lajun**”), a Dominican company indirectly acquired by the Claimant, and the Municipality of Santo Domingo Norte (“**ASDN**”).

### Background of the Dispute

The Respondent attempted to terminate the concession agreement with Lajun on at least two occasions despite having previously acknowledged that Lajun complied with its obligations under the concession and Dominican law. On the last attempt, before the end of the cure period in favor of Lajun, the Respondent initiated proceedings for the annulment of the concession and sought injunctive relief to take control of the Duquesa Landfill.

In addition, Respondent imposed various fines, refused to renew the environmental permit, occupied the landfill with the support of public force despite having certified at various times that Lajun was complying with its obligations, introduced hazardous waste without notifying Claimant of its existence, and even governmental officials made public statements accusing Claimant of committing fraudulent acts and of not owning the land on which the landfill is located. The Respondent, acting through the State Sugar Council, also initiated proceedings to annul the title of the sale of the land.

According to the Claimant, the Respondent systematically refused to revise the tariffs related to the concession, although it acknowledged that they were inadequate and even concealed documents to prove this. Claimant initiated the arbitration alleging that all these conducts constitute breaches of the Treaty.

### **Analysis of Jurisdiction: Investment, Legality and Abuse of Rights**

In a [preliminary decision](#), the majority of the Tribunal rejected jurisdictional objections raised by the Dominican Republic – Professor Marcelo G. Kohen also issued a [dissenting opinion](#).

In addition to the objections rejected in the partial award, the final award addressed further jurisdictional and admissibility objections relating to *(i)* the characterization of “investment” under the Treaty, *(ii)* the legality of the investment, and *(iii)* abuse of rights.

In this regard, the majority of the Tribunal found that the definition of “investment” in the Treaty is broad and does not expressly require the funds invested to be tied to the person who invested for that person to be considered an investor, nor does it require an assessment of the risk associated with the investment. According to this analysis, since investments may take different forms, and its implementation is not subject to the Tribunal’s review, the Claimant is not required to specifically establish the source of the funds used for the investment, as the Tribunal must exercise its discretion to assess whether the Claimant has been able to establish a link between himself and the funds invested.

Concerning the legality of the investment, the Arbitral Tribunal recognized that a general principle denies the protection of investment treaties to illegally acquired investments. However, the Award points out that there must be proportionality between the breach’s nature and the related penalty’s severity. Therefore, the illegality of an investment must be analyzed on a case-by-case basis, considering the nature and extent of the violation, emphasizing that the illegality must be related to the act by which the investment was made.

Regarding the alleged abuse of rights, the parties disputed whether the failure to issue share certificates evidencing Claimant’s indirect ownership of Lajun and the late registration of the purchase of the land on which the Duquesa Landfill is located demonstrated that the Claimant had developed a strategy to be able to initiate arbitration against the Dominican Republic, as the Respondent claimed that the Claimant acquired his investment once the disputed existed, or at least, once it was foreseeable.

The Tribunal recognized that it had a duty to prevent abuse of the international investment protection system when an investor undertakes corporate changes or transfers of ownership title to benefit from the protections of a treaty. However, the Tribunal found that the problem with the issuance of the share certificates was due to a regulatory change that required the certificates to be amended, which caused them to be dated after the actual date of Claimant’s acquisition of the investment.

### **Alleged Breaches to the Treaty**

On the merits, Claimant brought claims alleging that the Dominican Republic had:

1. Expropriated his investment;
2. Adopted measures in violation of the Fair and Equitable Treatment standard (“FET”), including the execution of arbitrary and discriminatory conduct against him;
3. Breached the Treaty’s Umbrella Clause.

Regarding the expropriation claim, the Tribunal’s majority held that for an investor to claim that the State deprived it of a reasonable expected economic benefit, that expectation must be based on an obligation expressly assumed by the State or on an agreement granting the investor a right guaranteed by the State. The Tribunal held that a violation of the Treaty, in this case, an indirect expropriation, may occur regardless of whether the national courts have approved specific measures taken by the State to the detriment of the investor.

Regarding the FET claim, the Tribunal noted that the concept must be analyzed based on specific contemporary requirements, which include the obligations to *(i)* respect legitimate expectations; *(ii)* act in a non-discriminatory manner; *(iii)* act transparently; and *(iv)* act consistently.

Regarding arbitrary and discriminatory behavior, Article V of Annex III of the Treaty prohibits the adoption of arbitrary and discriminatory measures that affect the use and development of investments. The Tribunal recognized that the obligation not to act in a discriminatory manner is already contained in the expropriation requirements and that, although the Treaty does not include in the FET provision the prohibition of arbitrary conduct by States, taking into account that the analysis of the FET must be made according to contemporary standards, the analysis of arbitrary conduct by the State is included in it. However, the Tribunal noted that Article V of Annex III of the Treaty requires that discriminatory and arbitrary conduct be exercised in conjunction.

Regarding the violation of the Treaty’s umbrella clause, the Tribunal noted that Article V of Annex III of the Treaty recognizes the existence of an umbrella clause by stating that “*Each Party shall comply with its commitments regarding investment*”. The Tribunal found that, in the absence of express limitations on the application of the umbrella clause, it must be understood that this provision protects agreements entered into by any governmental entity with investors. The Tribunal further noted that if the contract is related to typical state functions and involves the performance of different state organs in the exercise of their governmental powers, such contract is protected by the umbrella clause of the Treaty.

In addition, according to the reasoning of the Tribunal, the fact that the agreement between the investor and the State contains an exclusive dispute settlement clause does not limit the application of the umbrella clause established by the Treaty since to do so, it would allow the State to violate its international obligations.

Based on the above, the Tribunal found that the Dominican Republic had violated its obligations under the Treaty with respect to expropriation, FET, and the umbrella clause, and ordered the State to pay over 43 million USD in damages to the Claimant.

The Respondent raised a general objection based on the protection of its national interests, claiming that Lajun’s negligence in the operation of the Duquesa Landfill and its various breaches of the concession agreement caused a public health crisis that endangered the national security and created a risk of a national health and environmental crisis (as this landfill handled almost half of

the country's solid waste). Therefore, Respondent argued that the measures adopted were justified under the Treaty.

In analyzing this circumstance, the majority of the Tribunal concluded that, although environmental protection is an essential priority in all human activities, adopting measures to protect national interests is not exempt from scrutiny to determine whether the conditions outlined in the Treaty for non-compliance with its text are met. In this sense, the Tribunal ruled that the Respondent had failed to prove that the alleged crisis had a national impact and was of the gravity alleged in the arbitration and, therefore, that its national security interests were at risk.

Finally, Professor Marcelo G. Kohen, in his dissenting opinion, stated that he disagreed with the reasoning set forth in the Award concerning *(i)* the existence of an investment protected by the Treaty; *(ii)* the finding of breaches of the Treaty since its colleagues did not consider Lajun's breaches of the concession; and *(iii)* the finding of the non-existence of a situation affecting national security.

## Conclusion

The Tribunal's decision and dissent will undoubtedly revitalize the old debates regarding the legality of investments and the right of foreign investors to bring investment claims. However, we believe that the true relevance of this decision is that it profoundly develops fundamental discussions regarding national and environmental interests vis a vis foreign investors' rights. We are convinced that as climate change and environmental protection continue to be the greatest challenge of our time, host states, particularly in Latin America, will continue to rely on arguments based on environmental protection to justify policies that may affect foreign investors. Decisions like the one in *Lee-Chin v. the Dominican Republic* provide helpful guidance and reference for all stakeholders on what to expect regarding environmental policies in the region.

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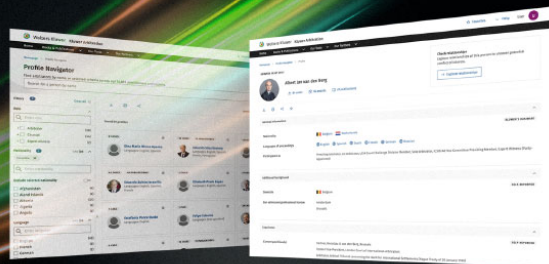
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