

**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

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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-iiil.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 “*cuando*” (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-FAVOURLED 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.