

Another misapplication of MFN? Tza Yap Shum v. The Republic of Peru

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The Decision on Jurisdiction and Competence (19 June 2009) in *Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6) is noteworthy as the first publicly available decision involving a claim by a Chinese investor under a Chinese investment treaty. The claim is a tangible reminder of the fact that Chinese investors are increasingly a significant source of foreign direct investment. This economic reality explains why Chinese investment treaty practice has shifted to protect Chinese outward direct investment (See Gallagher and Shan, Chinese Investment Treaties, Oxford 2009). This brief comment focuses on one aspect of the *Tza Yap Shum* decision—the interpretation of the MFN treatment provision.

Mr. Tza Yap Shum invested in Peru through TSG Peru S. A. C., a Peruvian Company in the business of producing and exporting fish-based food products. Mr. Tza Yap Shum claimed that various actions of the Peruvian tax authorities breached investment protection standards under the China/Peru BIT (the BIT). Like other early Chinese BITs, the BIT's investor-state arbitration provision limited tribunal jurisdiction to disputes "involving the amount of compensation for expropriation". Art. 8(3) of the BIT also provides that: "[a]ny disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Centre if the parties to the dispute so agree."

The Respondent objected to the tribunal's jurisdiction on several grounds, including that the Claimant did not qualify as an investor under the BIT, did not make an investment before the dispute arose, the BIT does not protect indirect investments and that the tribunal did not have jurisdiction to determine whether an expropriation had occurred. The tribunal concluded that Mr. Tza Yap Shum was an investor with an investment in Peru and that it had jurisdiction to determine whether the Peruvian tax measures were expropriatory. With respect to the scope of the tribunal's jurisdiction, the tribunal states that "...the words "involving the amount of compensation for expropriation" include not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any." (A similar issue arose in another recent case, Renta 4 S.V.S.A et al. v. Russian Federation.)

In the last part of its decision, the tribunal addressed the Claimant's argument that the BIT's MFN treatment provision could be used to broaden the subject matter scope of the tribunal's jurisdiction, as Peru had signed other BITs without limited subject matter jurisdiction. The MFN clause in the BIT provided: "The treatment and protection referred to in Paragraph 1 of this Article [fair and equitable

treatment] shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.”

The tribunal found that the submission to investor-state arbitration in Art. 8(3) reflected the parties’ agreement on two fundamental issues—agreement to submit expropriation disputes to ICSID arbitration and that specific agreement would be needed to submit other types of disputes to ICSID arbitration. The tribunal therefore determined that the “specific wording of Article 8(3) should prevail over the general wording of the MFN clause in Article 3” (para. 216).

In my view, the reasoning that a specific provision, or a specifically negotiated provision, should trump an MFN clause is flawed. This “*effet utile*” approach is unsound because it differentiates between the application of the MFN clause based on an *a priori* categorization of general and specific provisions. This approach is not grounded in principles of treaty interpretation. The issue is the proper interpretation of the MFN clause, the purpose of which is to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned (*Rights of Nationals of the United States of America in Morocco (France v. U. S.)*).

The first error in the reasoning in *Tza Yap Shum* is the consideration of the MFN clause in the first place. Under Art. 8(3) of the BIT, the tribunal’s jurisdiction is limited to expropriation. Jurisdiction over all other matters is subject to express agreement. Those “other matters” include the interpretation of the MFN clause in the first place. In other words, where the initial subject matter grant of jurisdiction is limited, a tribunal lacks the subject matter jurisdiction to even consider whether MFN can be applied to expand subject matter jurisdiction.

The second error, common to many tribunals, is the failure to distinguish between whether the MFN clause applies to investments and/or investors. As I have argued in [a previous posting](#), arbitration is a procedural right of an investor, not an investment. A right to invoke arbitration is a personal right, a right that must be held by an investor not an investment. The MFN clause in Art. 3 of the BIT applies only to investment and could not, in any event, apply to dispute settlement rights accruing to investors.

Finally, the scope of the MFN clause at issue, was limited. MFN applied to fair and equitable treatment and constant protection, not to all matters under the treaty (contra, see [Judge Brower’s Separate Opinion in *Renta*](#)).

In conclusion, the reason why the MFN clause in the China/Peru BIT could not expand tribunal subject matter jurisdiction was not that a specific provision trumps an MFN clause (or MFN clauses cannot be used to expand tribunal jurisdiction) but because the tribunal lacked jurisdiction to consider the MFN clause in the first place and the MFN clause, on its own terms, did not apply.

N.B. This analysis is based on the unofficial English translation of the decision. The official Spanish version is available [here](#).