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THE SETTLEMENT OF INVESTOR STATE DISPUTES AND CHINA: NEW DEVELOPMENTS ON ICSID JURISDICTION

*Jane Y. Willems**

INTRODUCTION

The ICSID Convention of 1965¹ created the International Centre for the Settlement of Investment Disputes (ICSID) as an arm of the World Bank. ICSID offers a venue for the resolution of legal disputes between foreign investors and host states, providing an alternative to the courts or administrative tribunals of the host state.² As of May 5, 2011, 157 states had signed the Convention and 147 States had deposited their instruments of ratification.³ China signed the ICSID Convention on February 9, 1990, ratified it on July 1, 1992 and deposited its instruments of ratification on January 7, 1993.⁴ The ICSID Convention entered into force for China on February 6, 1993.⁵

ICSID originally heard contract based investment disputes between foreign investors and host states. In the 1990s, the ICSID experienced a multiplier effect in new arbitration filings. ICSID's growth in arbitration cases is due to the emergence and dramatic

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¹ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965); *See* International Centre for the Settlement of Investment Disputes, *ICSID Convention, regulations and Rules*, ICSID/15/Rev.1 (2003), 7-22, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

² ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 570 (John H. Jackson ed., 2d ed. 2008).

³ International Centre for the Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention, as of May 5, 2011, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (noting that Russia, Brazil, Mexico, and Canada (signed by notified) are not contracting states).

⁴ *Id.* at 1.

⁵ *Id.*

increase of treaty based investment disputes between foreign investors and host states.⁶

The surge of these type of cases in the last fifteen years⁷ has been made possible by the availability of numerous new treaty instruments,⁸ and Bi-lateral Investment Treaties (BITs) created by states offering foreign investors access to international arbitration against the host state with jurisdiction in ICSID. The growth of ICSID arbitration filings also coincided with the many crises suffered in many countries in the 1990s and early 2000s (e.g., Argentina's, Russia's, Ecuador's, and Venezuela's financial crises). The use of the investor-state dispute resolution clauses in BITs by foreign investors to claim compensation before international arbitrators has given rise to a new type of international arbitration and has been seen as a revolution in international arbitration practice.

China is among the countries that have signed the largest number of BITs.⁹ BITs are intended to encourage foreign investment in a host country by promising to protect the legal rights of the foreign investor. The treaties therefore ordinarily contain both substantive and procedural protections to induce investors to make investments in foreign countries.

China began to execute BITs in the early 1980s, when it was changing its economic policy to encourage foreign direct investment in China. Chinese BITs of that era define the objectives of the

⁶ "The first investment treaty case, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, was registered in 1987 (23 non-investment treaty cases had been registered at ICSID prior to AAPL)." LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* 6-7 (2d ed. 2011).

⁷ "As of June 30, 2011, ICSID had registered 351 cases under the ICSID Convention and Additional Facility Rules" out of which 313 cases filed since 1997. International Centre for Settlement of Investment Disputes, *ICSID Caseload-Statistics*, Issue 2011-2, p. 7, available at www.icsid.worldbank.org/ICSID/Index.jsp.

⁸ United Nations Conference on Trade and Development reported almost 2,500 international investment agreements at the end of 2005. See UNCTAD *The Entry into Force of Bilateral Investment treaties (BITs)*, IIA MONITOR No. 3 (2006), UNCTAD/WEB/ITE/IIA/2006/9, available at http://www.unctad.org/en/docs/webiteiia20069_en.pdf.

⁹ There are currently 127 Chinese BITs, a complete list is available at http://www.unctad.org/sections/dite_pcbb/docs/bits_china.pdf, and copies of each BIT available at http://www.unctadxi.org/templates/docsearch_779.aspx.

Contracting Parties broadly, for example, a “desir[e] to develop economic cooperation between the two Contracting Parties.”¹⁰

Investment law on expropriation has been developing rapidly through decisions by international arbitral tribunals. The terms of different treaties have been interpreted in resolving actual disputes between investors and host states. Even though China has executed BITs since 1982, there has been no interpretation of the terms of a Chinese BIT in an investment arbitration case made against China by a foreign investor.

China’s early BITs contained language relating to investment arbitration jurisdiction for matters related to expropriation which China’s negotiators and scholars considered limited arbitral jurisdiction to one subset of jurisdictional issues---the amount of compensation which should be paid to the investor if a local court determined there had been an unlawful expropriation by China. China’s early model BIT language in the consent to arbitration clause (hereinafter “consent clause”) read: “[disputes] involving the amount of compensation for expropriation.”¹¹ China believed, like many Communist countries, that no foreign arbitral tribunal should have authority to judge the public necessity of its determinations of the ownership of property within China.

Therefore, it was ironic that the first investment treaty arbitration where Chinese BIT terms on jurisdiction were examined was on a claim by a Chinese investor in Peru who invoked the China-Peru BIT (1994)¹² to claim damages for expropriation by Peru.¹³ Mr. Tza Yap

¹⁰ Agreement between the Government of the People’s Republic of China and the Belgian-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments done at Brussels on June 4, 1984, entered into force Oct. 5, 1986, 1938 U.N.T.S.305 (“Belgian/Luxembourg-China BIT”), preamble.

¹¹ CHINESE MODEL BIT, *reprinted in* WENHUA SHAN & NORA GALLAGHER, CHINESE INVESTMENT TREATIES, POLICIES AND PRACTICE, app. 4 (Loukas Mistelis series Editor, Oxford Int’l Arb. Series, 2009).

¹² Agreement between the Government of the Republic of Peru and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments done at Beijing on June 9, 1994, entered into force Feb. 1, 1995, 1901 U.N.T.S. 257 (“Peru-China BIT”), art. 1(2)(a).

¹³ Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Feb. 12, 2007), *summary available at* <http://www.italaw.com/documents/TzaYapShumAwardIACLSummary.pdf>.

Shum invested in a Peruvian fishmeal plant to make food products for export to Asia.¹⁴ Mr. Tza claimed that in 2004, the Peru tax authority investigated his business and levied liens on the firm's bank accounts that "ended up destroying [Tza's] business operations and economic viability."¹⁵ This, he claimed, amounted to "indirect expropriation."¹⁶

Peru requested that the ICSID arbitral tribunal bifurcate the proceedings and decide first whether the tribunal had jurisdiction over Mr. Tza's claim.¹⁷ This article examines the decision of the *Tza* tribunal on jurisdiction.¹⁸ In addition this article will focus on several important concepts that the arbitrators relied upon in determining, over Peru's objection, that they were properly seized of jurisdiction taking into account the correct interpretation of multiple terms in the China-Peru BIT (1994). These include language relating to "nationality," to the scope of the language of the consent clause, to the so-called "fork in the road" clause and to the "most favored nation" (MFN) clause.

In particular, this article compares the ratio adopted in *Tza* to interpret the Chinese BIT language consent clause to five arbitral decisions by other investment arbitral tribunals on similar language and similar jurisdictional problems raised by the often ambiguous language used in BITs.¹⁹ These six decisions were written and filed contemporaneously with each other between 2006 and 2009, and yet they reach a multitude of different interpretations of virtually identical language contained in various BITs.

What is particularly important for analyzing the likely interpretation of China's BITs in future investment disputes is the treatment of MFN clauses by the six tribunals discussed in this article. That is because China has since entered into a new generation BITs. Whereas China had thought prior to *Tza* that the jurisdictional remit of its earlier BITs was restrictive, its later BITs executed since 2003 have openly broad language on jurisdiction. If the previous generations BITs are read by future tribunals to contain MFN clauses allowing

¹⁴ *Id.* ¶ 30.

¹⁵ *Id.* ¶ 31.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 32.

¹⁸ *Id.* The decision on the merits in *Tza* was issued July 5, 2011. Mr. Tza was awarded over \$700,000 in damages and \$200,000 in interest.

¹⁹ One is an English High Court decision, which reviews an *ad hoc* arbitral tribunal award and its interpretation of the similar BIT terms. *Czech Republic v. European Media Ventures*, [2007] EWHC (Comm) 2851, [2007] 2 C.L.C. 908 (Eng.).

broadened jurisdiction, then all prior China BITs would benefit from the broader jurisdictional language of its new BITs.

I. NATIONALITY OF THE FOREIGN INVESTOR IN TZA

The first issue raised by Peru in defense of the *Tza* claim relates to Mr. Tza's nationality.²⁰ Peru argued that Mr. Tza's residence in Hong Kong made his reliance on the China-Peru BIT improper.²¹ Peru said Mr. Tza must rely upon the separate Hong Kong-Peru BIT.²² This issue was a threshold issue for the arbitral tribunal in considering its jurisdiction over the claim because foreign nationality for an investor is crucial to ICSID jurisdiction. The issue is also very important to China investment dispute analysis because it involves the relationship between the PRC and Hong Kong SAR BITs.

ICSID jurisdiction requires three elements, namely a qualified foreign investor (personal jurisdiction or *rationae personae*), an investment dispute (subject-matter jurisdiction or *rationae materiae*) and consent.²³ Article 25(1) of the ICSID Convention provides as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

²⁰ *Id.* ¶ 42.

²¹ *Id.*

²² *Id.* ¶ 48.

²³ See CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 71-341 (2d ed. 2009), David A. Williams, *Jurisdiction and Admissibility*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 871 (Christoph Schreuer ed., 2008); accord Devashishm Krishan, *Nationality of Physical Persons*, in INVESTMENT TREATY LAW: CURRENT ISSUES II, 57-66 (British Inst. of Int'l and Comparative L. 2007); Roberto Aguirre Luzi & Ben Love, *Individual Nationality in Investment Treaty Arbitration: The Tension between Customary International Law and Lex Specialis*, in INVESTMENT TREATY LAW: CURRENT ISSUES III 183-208 (British Inst. of Int'l and Comparative L. 2009).

When the parties have given their consent, no party may withdraw its consent unilaterally.²⁴

Investors, individuals or corporations, allowed to bring an ICSID claim against the host state must meet a twofold nationality requirement: (i) a positive nationality requirement--the investor must have the nationality of a contracting state, and (ii) a negative nationality requirement--the investor must not be a national of the host state.²⁵ The nationality requirement is derived from the principle that disputes between a local investor and its own state should naturally be resolved before local state courts. Therefore, jurisdiction in ICSID is confined to international investments disputes, i.e., investment disputes between a foreign investor and the host state.

In *Tza*, the ICSID jurisdiction was based on the China-Peru BIT (1994). The ICSID tribunal was asked to determine the positive nationality requirement, whether under Article 25(2) and the relevant provisions of the applicable BIT, (a) the Chinese investor had met his burden to prove his nationality under Chinese law, and (b) even if the burden was satisfied, his residence in Hong Kong prevented him from having recourse to the China-Peru BIT.²⁶

A. NATIONALITY OF THE FOREIGN INVESTOR AS A NATURAL PERSON

Article 25(2) of the ICSID Convention defines the foreign 'natural person' as follows:

[A]ny natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.²⁷

The dual requirement under Article 25(2), that the natural person be a national of the contracting state but not a national of the host state,

²⁴ *ICSID Convention, Regulations and Rules*, *supra* note 1, at Art. 25(1).

²⁵ *Id.* at Art. 25(3).

²⁶ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 42 (Feb. 12, 2007).

²⁷ *ICSID Convention, Regulations and Rules*, *supra* note 1, at Art. 25(2).

excludes persons with a dual nationality in the State party to the dispute.²⁸ This nationality requirement is also a continuous requirement, and must be met on the date the parties consented to arbitration and on the date the foreign national files his request for arbitration.

Determination of nationality by ICSID tribunals is guided by two principles. First, the ICSID Convention itself does not set terms for the determination of the nationality of an individual. According to international law, the issue of nationality is usually dealt with by reference to the law of the State whose nationality is claimed.²⁹ The law governing the dispute, under Article 42 of the ICSID Convention, does not apply to the nationality of the individual claimant.³⁰

Chinese BITs provide that a natural person qualifies as a Chinese investor when such person has the nationality of the PRC in accordance with its laws.³¹ Questions of nationality are to be determined by

²⁸ David A. Williams, *Jurisdiction and Admissibility*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 884-85 (Christoph Schreuer ed., 2008).

²⁹ Tza, ¶ 54 (“There is no question that according to international law it is for each State to determine who their nationals are under its law.”).

³⁰ *ICSID Convention, Regulations and Rules*, *supra* note 1, at Art. 42.

³¹ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China Concerning the Promotion and Reciprocal Protection of Investments done at London on May 15, 1986, entered into force on May 15, 1986, 1462 U.N.T.S. 255 (“UK-China BIT”), Art. 1(c)(ii); Peru-China BIT, *supra* note 12, at art. 1(2)(a); Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of the People’s Republic of China done at Beijing on November 26, 2011, 2369 U.N.T.S. 219 (“Netherlands-PRC BIT”), Art. 1(2)(a): “The term ‘investor’ means, (a) natural person who have the nationality of either Contracting Party in accordance with the laws of that Contracting Party.” The recent FTAs signed respectively between China and ASEAN (Article 1(1)(i)) and New-Zealand (Article 135) provide for a unified definition and extend the protection to “permanent residents.” “‘natural person of a Party’ means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Party in accordance with its laws and regulations.” It is however to be noted that China does not have any domestic law for the treatment of permanent residents of foreign countries. Treaties available at http://www.unctadxi.org/templates/docsearch____779.aspx.

reference to the municipal law, subject to the applicable rules of international law.³²

Second, since the nationality of the individual claimant is a jurisdictional requirement, tribunals also apply the conditions set forth under the relevant municipal law in the frame of article 41 of the ICSID Convention. Article 41 grants tribunals the power to be the judge of their own competence.³³ Therefore, a tribunal is empowered to finally decide for itself and make its own ruling on the nationality of the claimant, giving weight to the facts and municipal law before it.

Under the China-Peru BIT (1994), Chinese law was the applicable law for the determination of Tza's nationality.³⁴ Under the Nationality Law of the PRC,³⁵ Chinese nationality is acquired by birth, and conferred upon any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national (Article 4). The Nationality Law of the PRC also provides that China does not recognize dual nationality for any Chinese national (Article 3). Since 1997, the Nationality Law directly applies to the Hong Kong SAR by way of promulgation and applies in the same way as it is applied in China.³⁶ In *Tza*, the claimant was born in 1948, in the Chinese province of Fujian, but he had been a Hong Kong resident since 1972. He held a Hong Kong SAR Passport stating he was born in China. Peru did not contest claimant was born in China from Chinese parents, nor did it allege that he had illegally acquired his nationality or had since acquired another nationality. Rather the respondent challenged the credibility of the evidence provided by the claimant³⁷ on the ground

³² Schreuer, *supra* note 23, ¶ 641.

³³ *ICSID Convention, Regulations and Rules*, *supra* note 1, at Art. 41.

³⁴ Peru-China BIT, *supra* note 12, at art. 1(2)(a).

³⁵ The Nationality Law (*Zhonghua Renmin Gongheguo guoji fa*) was adopted at the Third Session of the Fifth Chinese People's National Assembly (NPA) and effective as of September 10, 1980.

³⁶ PRICILLA LEUNG MEI-FUN, *THE HONG KONG BASIC LAW, HYBRID OF COMMON LAW AND CHINESE LAW* 93 (LexisNexis 2007). Pursuant to Article 18 and Annex III of the Basic Law of the Hong Kong SAR, the Nationality Law applied in the Hong Kong SAR from 1 July 1997. It was implemented through the "Explanations of Some Questions Concerning the Implementation of the Nationality Law of the PRC in the Hong Kong SAR" adopted by the Standing Committee of the NPA on May 15, 1996, a year prior to the Hong Kong handover that came into effect on July 1, 1997.

³⁷ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 55-56 (Feb. 12, 2007). Namely a copy of the HKSR passport showing his birth place was in Fujian, China, and a copy of the Hong Kong ID Card, an affidavit stating his was born in China.

that it was merely *prima facie* evidence of the claimant's nationality and that definitive proof of Chinese nationality required the production of the birth certificate, failing which Chinese nationality was not established. Mr. Tza was not able to provide his birth certificate since the relevant registry had been destroyed in 1949.

The examination of the evidence by the tribunal followed the consensus that an official document issued by the relevant competent national authority on the nationality of the party should be regarded as *prima facie* evidence of nationality only,³⁸ and that the issue was for the decision of the tribunal on all the evidence:

Therefore, according to the Nationality Act as interpreted by the Permanent Committee of the People's National Assembly for its application to Hong Kong, it seems to be clear, *prima facie*, that Claimant validly holds the Chinese nationality.... In the opinion of the Tribunal, the nationality conferred by a state to a person under its law has a strong presumption of validity.³⁹

The *Tza* tribunal referred to and adopted the solution found in *Micula v. Romania*.⁴⁰ It balanced the burden of proof and determined that claimant's evidence created a presumption that could be questioned, but the burden of proof then shifted to the respondent to invalidate such presumption and prove that the nationality was acquired in a manner that is inconsistent with international law.

This solution is also found in customary law embodied in the International Law Commission Draft Articles of Diplomatic Protection which provides under Article 4 that for the purpose of the diplomatic protection, "State of nationality means a State whose nationality that person has acquired, in accordance with the law of that state, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law."⁴¹

³⁸ ZACHARY DOUGLAS, *THE INVESTMENT LAW OF INVESTMENT CLAIMS* ¶ 537 (Cambridge Press Univ. 2009).

³⁹ *Tza*, ¶ 62-63.

⁴⁰ *Id.*

⁴¹ Draft Articles on Diplomatic Protection, UN Doc. A/61/10, Art. 4, 61st Sess. Supp No. 10 (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf.

Pursuant to the Sino-British Joint Declaration of December 19, 1984 (the Joint Declaration), the PRC resumed sovereignty over Hong Kong July 1, 1997. Peru claimed that even if the claimant's nationality were Chinese, under the law of the PRC, Hong Kong residents may not have recourse to the Sino-Peru BIT. This raised the question of the scope of application of the Sino-Peru BIT: whether it excluded Hong Kong residents. The respondent claimed HKSAR residents were excluded from the scope of application of this BIT because of the set of laws governing the relationship between the Mainland and the HKSAR, such as the Joint Statement and the Basic Law which listed the international conventions that were applicable to Hong Kong, among which the BIT at stake was not listed, and the numbers of BITs signed by Hong Kong with others States, among which was a Peru-Hong Kong BIT.

The tribunal took the view that the standard of its duty was in the terms of the ICSID Convention, and its duty under Article 25 of the ICSID Convention was limited to verifying whether claimant had the nationality of a "Contracting State." The tribunal found that the claimant met his burden, proving that all Chinese nationals, including those residing in Hong Kong, were included in the scope of Article 25.⁴² The tribunal did not entertain an examination of the relevant sets of laws and BITs.

Instead, it primarily relied on the general rules of interpretation of treaties. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that "a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in the light of its object and purpose."⁴³ The *Tza* tribunal noted that the BIT provision in respect of the Chinese investor nationality requirement merely provided "natural persons who have nationality of the PRC in accordance with its laws" and the intention of the Contracting Parties had to be considered as expressly provided for in the terms of the BIT, in accordance with Article 31.⁴⁴ Therefore the tribunal held Peru had not proven convincingly that the

⁴² *Tza*, ¶ 70.

⁴³ Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, Art. 31(1), *available at* http://www.oas.org/dil/Vienna_Convention_on_the_Law_of_Treaties.pdf.

⁴⁴ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 72 (Feb. 12, 2007), *citing* Peru-China BIT, *supra* note 12, at art. 1(2)(a).

Contracting Parties, Peru and China, had the intention to exclude Hong Kong residents from the scope of this BIT.⁴⁵

Finally, the *Tza* tribunal found that it is not superfluous for Hong Kong to conclude its own investment treaties with countries that China also has entered into BITs. Hong Kong has historically been home to people with multiple nationalities. For that reason the government “has deployed a policy that seeks the promotion and protection of investments in other countries for the benefit of all of its residents, regardless of their nationalities.”⁴⁶ Indeed Hong Kong BITs concluded before 1997 and even thereafter provide for protection covering persons who have a right to abode regardless of their nationality.⁴⁷

B. NATIONALITY OF THE FOREIGN INVESTOR AS A CORPORATION

The second category of investors, juridical persons, are defined under Article 25(2)(b) of the ICSID. The ICSID distinguishes between two types of foreign juridical persons: either the corporation has a nationality different from the one of the host state, or the corporation has the nationality of the host state but is under foreign control. Different from natural persons, the nationality requirement for juridical persons is not continuous and must be met only at the time the parties agreed to arbitrate. The ICSID convention does not define the term juridical person, but it is understood the entity must have legal personality.⁴⁸ Nor does the ICSID Convention define the juridical person’s nationality. It is left to BITs to define it. In order to determine the nationality of the corporation, traditional private international law uses the test of the place of incorporation (or registered office) or the effective seat (*siege social*) and the control test. Chinese BITs shows use of these tests and have often combined them.⁴⁹ The place of incorporation is often used.⁵⁰ The place of incorporation and the seat

⁴⁵ *Id.* ¶ 74.

⁴⁶ *Id.* ¶ 76.

⁴⁷ *Id.*

⁴⁸ SCHREUER, *supra* note 23, ¶ 693; *See also* Williams, *supra* note 28, at 890.

⁴⁹ Shan & Gallagher, *supra* note 11, ¶¶ 2.52-71.

⁵⁰ UK-China BIT, *supra* note 31, at art. 1(d)(ii) (“in respect of the People’s Republic of China: corporations, firms or associations incorporated or constituted under the law in force in any part of the People’s Republic of China.”).

criteria are combined to narrow the scope of application.⁵¹ The control test does not seem to have been used as the sole test but only as an alternative to the other tests.⁵²

The *Tza* decision left unresolved the status of companies incorporated in Hong Kong. That issue did not arise because a Chinese natural person made the Peruvian investment.

Pursuant to the resumption of sovereignty and the Basic Law, coming into force on July 1, 1997, the Hong Kong SAR has been granted legislative powers under Article 2 of the Basic Law and has conserved its pre-1997 common law system.⁵³ In particular, Hong Kong companies are subject to a body of statutes based on common law (the Companies Ordinance Chapter 32), while Mainland companies are subject to the Company Law of the PRC as revised in 2005. Article 18(3) of the Basic Law provides for the application of “national laws” in the Hong Kong SAR limited to a list of laws specifically identified (See Annex III of the Basic Law which expressly includes the above mentioned Nationality Law).⁵⁴

Also, in compliance with Article 151 of the Basic Law,⁵⁵ HK has

⁵¹ Peru-China BIT, *supra* note 12, at art. 1(2)(b) (“in respect of the People’s Republic of China: economic entities established in accordance with the laws of the People’s Republic of China and domiciled in the territory of the People’s Republic of China.”).

⁵² China-Peru Free Trade Agreement, China-Peru, done at Beijing on Apr. 28, 2009 (“China-Peru FTA”), ch. 10, art. 126 (definition of Investors: “(a)(ii) economic entities established in accordance with the laws of the People’s Republic of China and domiciled in the territory of the People’s Republic of China; or (iii) legal entities not established under the law of the People’s Republic of China but effectively controlled, by natural persons, as defined in subparagraph (a)(i) [Chinese nationals] or by economic entities as defined in subparagraph (a)(ii), that have made an investment in the territory of the other Party.”), available at <http://fta.mofcom.gov.cn/english/index.shtml>.

⁵³ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China [Constitution] Dec. 19, 1984, ch. I, art. 2 (“The National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”), ch. II, art. 17 (“The Hong Kong Special Administrative Region shall be vested with legislative power.”), available at <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>.

⁵⁴ *Id.*

⁵⁵ *Id.* at ch. VII, art. 151 (“The Hong Kong Special Administrative Region may on its own, using the name “Hong Kong, China,” maintain and develop relations and conclude and implement agreements with foreign states

continued to enter into international agreements, including BITs.⁵⁶ In these BITs, Hong Kong investors as legal persons are defined as: “corporations, partnerships and associations incorporated or constituted under the law in force in its area” (Article 4(b) of the Thailand-Hong Kong 2005 BIT, Article 1(f)(ii) of the UK-Hong Kong 1998 BIT).⁵⁷ In addition, in the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) dated June 29, 1999, the juridical person as service supplier under CEPA is defined in relation to the applicable laws of the area of each party to CEPA, as follows:

“juridical person” means any legal entity duly constituted or otherwise organized *under the applicable laws of the Mainland or the Hong Kong Special Administrative Region*, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association (business association) (Emphasis added).⁵⁸

Thus, unlike for natural persons where the Nationality Law has expressly been extended to Hong Kong under Annex III of the Basic

and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”); *See also* Sun Zhichao, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 CHINESE J. OF INT’L L., no. 2, 2008, at 339, 339-352, available at <http://chinesejil.oxfordjournals.org/content/7/2/339.full.pdf>.

⁵⁶ Agreement between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment done at Tokyo May 15, 1997, entered into force June 18, 1997, (“Hong Kong-Japan BIT”); Agreement between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments done at Hong Kong July 30, 1998, entered into force Apr. 12, 1999, (“Hong Kong-UK BIT”); Agreement between the Government of the Kingdom of Thailand and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China for the Promotion and Protection of Investments done at Busan Nov. 19, 2005, entered into force Apr. 18, 2006, (“Thailand-Hong Kong BIT”), all BITs available at http://www.unctadxi.org/templates/docsearch____779.aspx.

⁵⁷ *Id.*

⁵⁸ The Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA) (China 2003) (Article 2.3 to Annex 5 to the CEPA).

law, the definition of Chinese companies in Chinese BITs by the double requirement, “economic entities established in accordance with the laws of the PRC and domiciled in the territory of the PRC,” leaves the situation unresolved for companies incorporated in Hong Kong. The second requirement, i.e. establishment in the PRC, has been met since the resumption of sovereignty in 1997. However, the first requirement does not seem to be met if the term “the laws of the PRC” is construed, in the context of companies, to mean “national laws” or “law of the Mainland” as opposed to “laws of Hong Kong.” In such a case, companies incorporated under the laws of Hong Kong are not covered by Chinese BITs.⁵⁹

There remains the role of Hong Kong as a transshipping (and even a round shipping centre)⁶⁰ in particular for Chinese public and private investors who use Hong Kong companies to invest abroad. If controlled by Chinese investors, the latter may have resort to the control test used in recent Chinese BITs, to claim protection under Chinese BITs, under the following definition: “legal entities not established under the law of the PRC but effectively controlled, by natural persons, as defined in subparagraph (a)(i) [Chinese nationals] or by economic entities as defined in subparagraph (a)(ii), that have made an investment in the territory of the other Party.”⁶¹

II. PROCEDURAL REQUIREMENTS UNDER CHINESE BITS

BITs impose procedural steps before an aggrieved investor may trigger an international arbitration under the auspices of ICSID. Two mandatory procedural steps were contained in the China-Peru BIT: (i) a waiting or cooling off period of six months for amicable settlement, and (ii) the exercise of a choice of either local court process or international arbitration.⁶²

⁵⁹ *Contra* Shan & Gallagher, *supra* note 11, ¶¶ 2.76-80 (stating that Hong Kong corporate entities are, in principle, covered by Chinese BITs unless expressly excluded, as in the 2006 Russia-China BIT (which has not entered into force)).

⁶⁰ A “round shipping” center means an investment made by a Chinese citizen in a Hong Kong company for reinvestment in the PRC.

⁶¹ China-Peru FTA, *supra* note 52, at ch. 10, art.126 “Investors” (a)(iii).

⁶² *Id.*

A. WAITING PERIOD

In the Peru-China BIT (1994), consent to arbitration is subject to the condition that the dispute cannot be settled by negotiation.⁶³ Investors are required to attempt an amicable settlement to solve the dispute through negotiation or consultation prior to having recourse to arbitration.⁶⁴ This requires the investor to observe a “waiting period” or “cooling off” period, which was set in the treaty at six months.⁶⁵ The starting date of the waiting period may not be provided⁶⁶ or it might be triggered by the event giving rise to the dispute (state action, such as enactment of a statute) or from the “date when [the dispute] has been raised by one of the parties in dispute.”⁶⁷ In others, the date is measured from a written notification of the dispute,⁶⁸ or from a “request for consultations and negotiations”⁶⁹ from “the date either party requested amicable settlement.”⁷⁰ For example, in the 2008

⁶³ Peru-China BIT, *supra* note 12, at art. 8(1) (“Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.”).

⁶⁴ China-Peru FTA, *supra* note 52, at art. 139(1).

⁶⁵ Peru-China BIT, *supra* note 12, at art. 8(3).

⁶⁶ See Agreement between the Government of the Republic of Botswana and the Government of the People’s Republic of China on Promotion and Protection of Investments done at Beijing June 12, 2000, (“China-Botswana BIT”), art. 9(2), available at http://www.unctadxi.org/templates/docsearch___779.aspx.

⁶⁷ Agreement between the People’s Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, Beijing, December 1, 2003, 2362 U.N.T.S. 253 (“China-German BIT”) Art. 9(1) (Entered into force November 11, 2005).

⁶⁸ See UK-China BIT, *supra* note 31, at art. 7(1).

⁶⁹ Free Trade Agreement in Between the Government of the Peoples Republic of China and the Government of New Zealand, (“China-New Zealand FTA”) art. 152 (Entered into force Oct. 1, 2008) available at <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>.

⁷⁰ China-Netherlands BIT, *supra* note 31, at art. 10(3); see also Agreement between the Czech Republic and the People’s Republic of China on the Promotion and Protection of Investments done at Prague Dec. 8, 2005, (“Czech-China BIT”), art. 9(2) (“six months of the date when the request for the settlement has been submitted.”), available at http://www.unctadxi.org/templates/docsearch___779.aspx; Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the People’s Republic of China and the Association of

China-Mexico BIT a formal notice requirement is found with a notice period of “at least 6 months.”⁷¹ Consent clauses do not merely provide for a waiting requirement but also require the parties to take active action in trying to settle amicably. The wording of the clause “shall” or “should” may be binding.

More recent BITs also require, in addition to the above, a notice period before arbitration proceedings,⁷² and in certain cases, the service of a notice of claim followed by observance of an additional 3 or 6 month notice period prior to starting arbitration.⁷³ Therefore, this raises the occurrence of a double notice period (notice for negotiation and notice of intent to arbitrate) and a double waiting period (negotiation period and arbitration notice period).

Arbitral tribunals have examined waiting clauses by taking note of the compliance of the investor with this clause. In some cases, tribunals have tested its legal effect when there is a claim of alleged non-compliance with the requirement. Decisions are not unanimous on the issue, but most decisions hold that the failure to respect the negotiation time limit has no effect on the jurisdiction of the tribunal. These tribunals hold that the waiting period constitutes a mere procedural requirement⁷⁴ that does not affect the standing of the claim as long as it can be shown that no prospect of amicable solution could be found. In *Goetz v Burundi*, which involved the Burundi-Belgium BIT 1989, the pre-arbitration procedural requirement included (i) written notice of intent prior to arbitration, and (ii) 3 months negotiation at diplomatic level between contracting states seems to be more restrictive because of the level of negotiation.⁷⁵

Southeast Asian Nations, Bangkok, August 15, 2009 (“China – ASEAN FTA”) art. 14(4) (Entered into force February 15, 2010).

⁷¹ Agreement between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investments done at Beijing July 11, 2008, entered into force June 6, 2009, (“Mexico-China BIT”), art. 12(2) & Appendix A, available at http://www.unctadxi.org/templates/docsearch___779.aspx.

⁷² China-New Zealand FTA, *supra* note 69, at art. 153(2).

⁷³ See China-Peru FTA, *supra* note 52, at art. 139(4).

⁷⁴ *Enron Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 88 (Jan. 14, 2004) (discussing whether the waiting period is a procedural or jurisdictional requirement), available at <http://www.asil.org/ilib/Enron.pdf>.

⁷⁵ *Goetz v. Burundi*, ICSID Case No. ARB/95/3, Award, (Feb. 10, 1999), 15 ICSID Rev.-F.I.L.J. 454 (2000), available at <http://italaw.com/documents/Goetz-Award.pdf>.

There are cases, however, where tribunals have given force to the interaction of a notice of claim requirement and negotiation requirement. In *Western NIS Enterprise Fund v Ukraine*, the tribunal ordered the claimant to comply with the notice of intent prior to arbitration and suspended the proceedings from the date of notification.⁷⁶ In *Ethyl Corp. v Canada*, the tribunal found that claimant's failure to exhaust the waiting period did not affect its jurisdiction, yet it considered the proceedings premature.⁷⁷ The tribunal did not suspend the arbitral process to demand compliance, but granted damages to the respondent for breach of the term.

B. EXHAUSTION OF LOCAL REMEDIES AND FORK IN THE ROAD CLAUSE.

Exhaustion of local remedies is a concept traditionally used in investment arbitration as a condition precedent to access to international arbitration. Whether exhaustion of local remedies is required when jurisdiction is based upon a BIT is a matter of wording of each treaty. Article 26 of the ICSID Convention provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.⁷⁸

The effect of this provision is to reverse the situation under customary international law in that the contracting states waive the traditional requirement of exhaustion of local remedies unless otherwise stated.⁷⁹ If a state conditions its consent to arbitrate to exhaustion of local remedies in a BIT, then this requirement trumps the

⁷⁶ W. NS Enter. Fund v. Ukraine, ICSID Case No. ARB/04/2, Order, (March 16, 2006), available at http://italaw.com/documents/ARB042_ORDER_reNotice.pdf.

⁷⁷ Ethyl Corp. v. Canada, UNICTRAL (NAFTA), Award on Jurisdiction, ¶ 88 (June 24, 1998), 38 ILM 708 (1999), available at <http://italaw.com/documents/Ethyl-Award.pdf>.

⁷⁸ *ICSID Convention, Regulations and Rules*, supra note 1, at Art. 26.

⁷⁹ See CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 347 (2008) (presentation of an exhaustion of local remedies under customary international law).

first sentence of Article 26.⁸⁰ In investment arbitration, it is rare that consent would require exhaustion of local remedies as a condition precedent to access arbitration, as the very aim of investment agreements is to grant the foreign investor a direct right to international arbitration against the host state. Requirement of exhaustion would seem to contradict this very principle, but the ICSID Convention permits it.

“Fork in the road clauses” are opposites to the requirement of exhaustion of local remedies. Under a fork in the road clause, the investor may lose access to international arbitration by selecting local remedies. Typical BIT fork in the road clauses require the investor to choose a forum at the outset of the dispute resolution process: the claimant irrevocably elects a procedural remedy when it commences its legal proceedings in either the courts of the host state or international arbitration.⁸¹ The wording of the relevant BIT clauses may differ and each must be examined carefully. For example, the China-Argentina BIT provides: “Where an investor has submitted a dispute either to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final.”⁸²

Sometimes the wording of the clause does not make the intention explicit and construction by the tribunal is required. For instance, in *Tza*, the China-Peru BIT (1994) contained wording that was described by the tribunal as a fork in the road clause:

2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled **to submit this dispute to the**

⁸⁰ SCHREUER, *supra* note 23, at 388, 390-91.

⁸¹ Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 830, 848 (Peter Muchlinski et al eds., 2008), *see also* Christoph Schreuer, *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE, no. 2, Apr. 2004, at 231.

⁸² Agreement between the Government of the People’s Republic of China and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments done at Beijing on Nov. 5, 1992, entered into force June. 17, 1994, 1862 U.N.T.S. 3 (“China-Argentina BIT”), art. 8(3). *See also*; Agreement between Japan and the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investment done at Beijing on Aug. 27, 1988, entered into force May 14, 1989, 1555 U.N.T.S. 197 (“Japan-China BIT”), all BITS *available at* http://www.unctadxi.org/templates/docsearch____779.aspx.

competent court of the Contracting Party accepting the investment.

3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to the international arbitration of ICSID. Any 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 disputes so agree. **The provisions of this Para. shall not apply if the investor concerned has resorted to the procedure specified in Para. 2 of this Art.** (emphasis added).⁸³

In *Tza*, the fork in the road issue arose in the context of construing the meaning of the arbitration consent clause under Article 8(3). The tribunal found the fork in the road clause acted to prevent the claimant from ever exercising the choice for arbitration. It found that under this BIT, (i) if state courts have exclusive jurisdiction for the liability stage of the dispute as affirmed in Article 8(2), and (ii) if recourse to state courts bars access to international arbitration as affirmed in Article 8(3), then there existed no possibility to arbitrate the dispute at all.⁸⁴ As held by the *Tza* tribunal, the arbitrator finds himself with an “irrevocable either or choice, also known as fork in the road, may not under any circumstance make use of ICSID arbitration to settle the dispute involving the amount of compensation for expropriation.”⁸⁵

III. CONSENT CLAUSE TO ARBITRATION

Consent to ICSID jurisdiction is a two-step process. First, the home state of the investor and the host state must be party to the ICSID Convention (Contracting States).⁸⁶ Failure to ratify the ICSID Convention by the state of either party prevents ICSID jurisdiction. Hence, non-Contracting States must use alternative arbitration rules,

⁸³ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 159 (Feb. 12, 2007).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Williams, *supra* note 28, at 872 (stating that it is often seen as the Contract State’s personal jurisdiction requirement).

such as ICSID additional facilities, the International Chamber of Commerce rules, the Hong Kong International Arbitration Center rules or *ad-hoc* arbitration under the UNCITRAL arbitration rules. Before China's ratification of the ICSID Convention, Chinese BITs provided for *ad-hoc* arbitration under UNCITRAL rules. Some Chinese BITs also anticipated China's ratification and consented to ICSID jurisdiction, conditional upon China ratifying the Washington Convention,⁸⁷ or by requiring the signature of a protocol after ratification.⁸⁸ After ratification of the Convention, most Chinese BITs immediately offered ICSID as the sole forum or as an option.⁸⁹ Only a few Chinese BITs continued to use *ad-hoc* arbitration.⁹⁰

⁸⁷ Agreement between the Government of the People's Republic of China and Spain on the Reciprocal Encouragement and Protection of Investments done at Madrid on Feb. 9, 1992, entered into force May 1, 1993, 1746 U.N.T.S. 167, ("China-Spain BIT"), art. 9(2) (allowing the investor to choose ICSID arbitration, if both states become party to the ICSID convention, for disputes concerning an amount of compensation referred to in Article 4 [expropriation]); *See also* Agreement between the Government of the Republic of Lithuania and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments done at Peking on Nov. 8, 1993, entered into force June 1, 1994, 2366 U.N.T.S. 42647 ("Lithuania-China BIT"), art. 8(2)(c); Agreement between the Government of the People's Republic of China and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment done at Beijing on June 17, 1999, entered into force Jan. 4, 2000, ("China-Bahrain BIT"), art. 9(3)(b), all BITS *available at* http://www.unctadxi.org/templates/docsearch___779.aspx.

⁸⁸ Agreement on the Mutual Protection of Investments between the Government of the Kingdom of Sweden and the Government of the People's Republic of China done at Beijing on Mar. 29, 1982, entered into force Mar. 29, 1982, 1350 U.N.T.S. 247 ("Sweden-China BIT"), Protocol, *available at* http://www.unctadxi.org/templates/docsearch___779.aspx.

⁸⁹ China-Peru BIT, *supra* note 12, at art. 8(3). *Contra* Kim M. Rooney, *ICSID and BIT Arbitrations and China*, 24 J. OF INT'L ARB., no. 6, 2007, at 704 (stating that after China's accession to the Washington Convention became effective it took some years for references to ICSID arbitration as an alternative dispute resolution method to be generally included in the first generation of China BITs).

⁹⁰ Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China on the Promotion and Protection of Investments done at Jakarta on Nov. 18, 1994, entered into force Apr. 1, 1995, 1901 U.N.T.S. 291 ("Indonesia-China BIT"), art. 9(3) ("If a dispute involving the amount of compensation resulting from expropriation cannot be settled as specified in paragraph 1 of this Article within six months, it

Second, there must be a specific consent in writing to arbitration between the investor from a Contracting State, the foreign investor, and the host state.⁹¹ This specific consent in writing may be found in direct agreements entered into between the foreign investor and the host state. In BITs, specific consent in writing is derived from the meeting of a binding offer to arbitrate made in the BIT by the host state to qualifying investors, on the one hand, and an acceptance of the offer by a qualifying investor resulting from the submission of a claim against the host state before the arbitration center.⁹² The scope of the consent to arbitration contained in the host state's binding offer directly affects the tribunal's subject matter and personal jurisdiction. It is particularly true with respect to Chinese BITs, with the consent clauses worded to reflect each of the stages of China's international economic and investment policy.

A. SCOPE OF CONSENT IN CHINESE BITs

In order to determine the scope of the consent to arbitration, each treaty has its own wording and no general rule can be drawn. Some treaty consent clauses are very general and include broad wording, such as "any legal dispute ... concerning an investment." Other clauses are worded in more limited terms.⁹³ China BITs consent clauses provide a good illustration of differences.⁹⁴

China's first BIT with Sweden in 1982 did not contain any direct investor-State dispute arbitration clause.⁹⁵ Subsequent Chinese BITs

may be submitted to an ad hoc arbitral tribunal."), available at http://www.unctadxi.org/templates/docsearch____779.aspx.

⁹¹ *ICSID Convention, Regulations and Rules*, *supra* note 1, at Art. 25.

⁹² See Jan Paulsson, *Arbitration Without Privity*, 10 *ICSID REV. – FOREIGN INV. L. J.*, no. 2, Fall 1995, at 232, available at http://www.arbitration-icca.org/media/0/12254614477540/jasp_article_-_arbitration_without_privity.pdf; DUGAN ET AL., *supra* note 78, at 219; Schreuer, *Consent to Arbitration*, *supra* note 79, at 832.

⁹³ See presentation of all types of limitations on consent in treaties, in SCHREUER, *supra* note 23, ¶ 526-540.

⁹⁴ See Kong Qingjiang, "Bilateral Investment Treaties: The Chinese Approach and Practice," in *ASIAN YEARBOOK OF INTERNATIONAL LAW*, Volume 8, 2003 Brill, p. 105 ¶ 4.8.

⁹⁵ Sweden – China BIT, *supra* note 88. See also Agreement between the Government of the Kingdom of Thailand and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, Bangkok, March 12, 1985 1443 U.N.T.S. 31 ("China-Thailand

limited consent clauses to the amount of compensation resulting from one or some of the rights granted under the BIT. For example, China BITs used these various phrasings: “*the dispute concerning the amount of compensation referred to in para. 3 of Article 5 [protection of investments and returns],*”⁹⁶ “*dispute involving the amount of compensation resulting from expropriation, nationalization, or other measures having effect equivalent to nationalization or expropriation,*”⁹⁷ “*if the disputes concerns the amount of compensation referred to in Art. 4 [expropriation],*”⁹⁸ “*dispute . . . concerning an amount of compensation.*”⁹⁹

In *Tza*, the China-Peru BIT provided under Article 8(3): “If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to the international arbitration of ICSID.”¹⁰⁰ This type of consent clause is

BIT”) (no investor-State dispute resolution clause); Agreement between the Government Australia and the Government of the People’s Republic of China on the Reciprocal Encouragement and Protection of Investments, Beijing, July 11, 1988, 1514 U.N.T.S. 65 (“China-Australia BIT”) (providing only for local judicial or administrative remedy, and arbitration in a third country to be agreed upon subsequently).

⁹⁶ Japan-China BIT, *supra* note 82, at Art. 11.

⁹⁷ Agreement between the Government of the People’s Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, Beijing, November 21, 1985, 1443 U.N.T.S. 279 (“China-Singapore BIT”) Art. 13 (February 7, 1986)

⁹⁸ Agreement between the Government of the People’s Republic of China and the Government of the Hellenic Republic for the Encouragement and Reciprocal Protection of Investments, Beijing, June 25, 1992 (“China-Greece BIT”) Art. 10(2); *Accord* Agreement between the Government of the People’s Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments, Beijing, October 12, 1989 (“China-Ghana BIT”) Art. 10(1) (providing for ad-hoc arbitration for disputes “*concerning the amount of compensation for expropriation*”); China and Denmark Agreement concerning the encouragement and reciprocal protection of investments, Beijing, April 29, 1985 (“China-Denmark BIT 1985”) Art. 8(3) (“*dispute involving the amount of compensation resulting from expropriation mentioned in article 4*”).

⁹⁹ UK-China BIT, *supra* note 31, at Art. 7(1).

¹⁰⁰ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 144 (Feb. 12, 2007), *see also* Spain and China Agreement on reciprocal encouragement and protection of investments, Madrid, February 6, 1992, 1746 U.N.T.S. 167 (“China-Spain BIT”) Art. 9(2) (“*concerning an amount of compensation referred to in Article 4 [expropriation]*”); Monika C E. Heymann, *International Law and the*

similar to those in BITs signed by the former Soviet Union, the Czech Republic and Hungary, and they will be examined in detail *infra* Section C.

The traditional interpretation of these clauses limited the arbitrator's jurisdiction to determine the amount of compensation for expropriation. The fact of expropriation would have to be decided by the local courts. One author has said this "tradition" had been broken by two BITs entered into with Germany and the Netherlands.¹⁰¹ However, the change was more subtle than that. The beginning of change in China BITs was with the insertion of comprehensive dispute settlement clauses, providing for either ad-hoc or ICSID arbitration, in the late 1990's¹⁰² with the 1998 China-Barbados BIT¹⁰³ and was followed by the 2000 China-Botswana BIT,¹⁰⁴ the 2000 China-Iran BIT,¹⁰⁵ and the 2001 Jordan-China BIT.¹⁰⁶ Thereafter, they were

Settlement of Investment Disputes relating to China, 11 J. Int'l Econ. L., 507-526 (2008) (China-Lithuania BIT, China-Bahrain 1999 BIT quoted in fn 60 and 61, respectively).

¹⁰¹ Peter J. Turner, *Investor-State Arbitration*, MANAGING BUSINESS DISPUTES IN TODAY'S CHINA – DUELLING WITH DRAGONS 234 (Michael J. Moser ed., 2007).

¹⁰² See Wang Guiguo, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575, 584-85 (2009), see also Stephan W. Schill, *Tearing down the Great Wall: the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 89-93 (2007).

¹⁰³ Agreement Between the Government of Barbados and The Government of the People's Republic of China for the Promotion and Protection of Investments, Bridgetown, July 20, 1998 ("China – Barbados BIT"), *but see* Agreement between the Government of the People's Republic of China and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, Beijing, June 17, 1999 ("China – Bahrain BIT") art. 9 (The dispute clause limited ad-hoc tribunal or ICSID arbitration to disputes regarding the amount of the compensation for expropriation or nationalization).

¹⁰⁴ Agreement Between the Government of the Republic of Botswana and the Government of the People's Republic of China on Promotion and Protection of Investments, Beijing, June 12, 2000 ("China – Botswana BIT") art. 9(3) (not yet entered into force) (Providing for dispute settlement via ICSID or ad-hoc arbitral tribunal, the latter of which allows the contracting party involved to require exhaustion of domestic remedies).

¹⁰⁵ Agreement on Reciprocal Promotion and Protection of Investment between the Government of the People's Republic of China and the Islamic Republic of Iran, Beijing, June 22, 2000 ("Iran – China BIT") art. 12 (provides for ad-hoc arbitration for "any dispute ... with respect to an investment.").

followed by the renegotiated China-German and China-Netherlands BITs in 2001 and 2003, respectively. China has now entered into 90 BITs and more than 30 contain a comprehensive dispute resolution clause.

The scope of the arbitration clauses in the newer Chinese BITs is broad. For example, new Chinese BIT dispute resolution clauses provide for “any dispute ... in connection with an investment,”¹⁰⁷ or “concerning an investment,”¹⁰⁸ or “with respect to an investment,”¹⁰⁹ or “related to an investment.”¹¹⁰ It also includes in other BITs “any investment dispute”¹¹¹ or “any legal dispute.”¹¹² The new model Chinese BIT, Version III, provides for “any legal dispute ... in

¹⁰⁶ Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the People’s Republic of China on the Reciprocal Promotion and Protection of Investments, Amman, November 5, 2001 (“Jordan – China BIT”) art. 10 (not yet entered into force) (provides for the option of ICSID or ad-hoc arbitration at the investor’s request “for any legal dispute”); *see generally* Shan & Gallagher, *supra* note 11, at 42, (list as of July 2008 of Chinese BITs and FTAs with open access to international arbitration).

¹⁰⁷ China – Bahrain BIT, *supra* note 103, at art. 9(1); China – Botswana BIT, *supra* note 104, at art. 9(1); Agreement Between the Czech Republic and the People’s Republic of China on the Promotion and Protection of Investments, Prague, December 8, 2005 (“Czech Republic – China BIT”) Art. 9(1).

¹⁰⁸ Agreement on encouragement and reciprocal protection of investments between the Government of the Kingdom of the Netherlands and the Government of the People’s Republic of China (with protocol). Beijing, November 26, 2001, 2369 U.N.T.S. 219 (“China – Netherlands BIT”) Art.10(1) (Entered into force August 1, 2004); *see also* China-German BIT, *supra* note 67, at Art. 9(1).

¹⁰⁹ Agreement on Reciprocal Promotion and Protection of Investment between the Government of the People’s Republic of China and the Islamic Republic of Iran, Beijing, June 22, 2000 (“Iran – China BIT”) Art. 12(1).

¹¹⁰ Agreement Between the Government of the Russian Federation and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investments, Beijing, November 9, 2006 (“China-Russia BIT”) Art. 9(1).

¹¹¹ China – Barbados BIT, *supra* note 103, art.10; *see also* Axel Berger, Ger. Dev. Inst., *China’s New Bilateral Investment Treaty Programme: Substance, rational and implications for international investment law making*, 11, n. 50 (2008) (Prepared for ASIL IELIG 2008 Biennial Conference “The Politics of International Economic Law: The Next Four Years”) *available at* <http://www.asil.org/files/ielconferencepapers/berger.pdf>.

¹¹² Jordan – China BIT, *supra* note 106, at art. 10 (not yet entered into force).

connection with an investment.”¹¹³ Even the China-Pakistan FTA Chapter IX Investment Agreement from 2006 provides for a scope of consent similar to the wording of Chinese BITs: “Any legal dispute ... in connection with an investment.”¹¹⁴

The wording in the newer China BITs is similar to the European BITs’ consent clauses which provide for jurisdiction over “any dispute concerning an investment.”¹¹⁵ This broad clause would include not only an investor’s claim for violation of the BIT’s substantive standards, but also a claim made in connection with a contract arising out of an investment.¹¹⁶ In particular, this language in a consent clause has been construed to allow an arbitral tribunal’s jurisdiction over an investor’s claims against the host state based on breach of a contract.¹¹⁷ One author has questioned the possibility of applying this broad wording to investment contracts on the grounds that such contracts are not entered into with the state at all.¹¹⁸ However, it should be noted that for investors in China the prevalence foreign investors who form Chinese Joint Ventures with Chinese SOEs. Chinese SOEs are owned by local or central government, and may in principle be subject to veil piercing procedures.

¹¹³ CHINESE MODEL BIT VERSION III (Current) Art. 9(1), *reprinted in* Shan & Gallagher, *supra* note 11, app. 4, at 436.

¹¹⁴ Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan, Islamabad, November 24, 2006 (“China-Pakistan FTA”) Art. 54.

¹¹⁵ UNITED KINGDOM MODEL BIT (2005), Art. 8, *reprinted in* Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS*, app. 10, at 564 (2009).

¹¹⁶ *See* SCHREUER, *supra* note 23, at 71-341; Schreuer, *Consent to Arbitration*, *supra* note 81, at 830, 837-39; *see also* Shan & Gallagher, *supra* note 11, ¶ 8.66, 327-28.

¹¹⁷ *See* Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case no. ARB/00/4, Decision on Jurisdiction, ¶ 43-49 (July 23, 2001), 6 ICSID Rep. 400 (2004); SGS Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶ 128 (January 29, 2004) 8 ICSID Rep. 518 (2005); *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, (July 3, 2002), 6 ICSID Rep. 340 (2004). *See generally* Schreuer, *Consent to Arbitration*, *supra* note 81, at 830 837-39.

¹¹⁸ Shan & Gallagher, *supra* note 11, ¶ 8.68, 328-29.

More recent Chinese BITs¹¹⁹ provide for a scope of consent limited to treaty breaches: “disputes . . . arising from an alleged breach of an obligation set forth in Chapter II entailing loss or damage”¹²⁰ or “[a]ny legal dispute arising under this Chapter . . . directly concerning an investment.”¹²¹ The arbitral jurisdiction in the ASEAN-China Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation (ASEAN-China Investment Agreement) is also expressly limited to claims for the breach of one of the treaty standards.¹²² This newest formulation is in line the US practice of BITs limiting arbitral jurisdiction to claims arising from

¹¹⁹ As of April 2011 China has signed five FTAs: with Chile in 2005 (no Chapter on Investments), with Pakistan in 2006 (Investment Chapter 9), with New Zealand in 2008 (Investment Chapter 11), with Singapore in 2008 (no Chapter on Investments but refers to the ASEAN-China Investment Agreement which is incorporated into and forms an integral part of the China-Singapore FTA), with Costa Rica in 2010 (Investment Chapter 11), *see* FTAs texts *available at* <http://fta.mofcom.gov.cn/english/index.shtml>

¹²⁰ Agreement Between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investments, Beijing, July 11, 2008 (“China-Mexico BIT”) Art. 11 (Chapter II “Protection to Investment” contains provides for six substantial protections, national treatment (Article 3), most favored national treatment (Article 4), minimum standard of treatment (Article 5), compensation for losses (Article 6), expropriation and compensation (Article 7), transfers (Article 8)).

¹²¹ Free Trade Agreement between the Government of the People’s Republic of China and the Government of New Zealand, Beijing, April 27, 2008 (“China – New Zealand FTA”) Art. 152 Ch. 11, *available at* <http://gjs.mofcom.gov.cn/assessory/200804/1208158780064.pdf>.

¹²² China – ASEAN FTA, *supra* note 70, art. 14(1), (“This Article shall apply to investment disputes between a Party and an investor of another Party concerning an alleged breach of an obligation of the former Party under Article 4 (National Treatment), Article 5 (Most-Favored-Nation Treatment), Article 7 (Treatment of Investment), Article 8 (Expropriation), Article 9 and Repatriation of Profits), which causes loss or damage to the investor in relation to its investment with respect to the management, conduct, operation, or sale or other disposition of an investment.”); *see also* Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Singapore, Beijing, October 23, 2008 (“China-Singapore FTA”) Art. 84(1) (providing “Upon the conclusion of the [ASEAN-China Investment Agreement], the provisions of that agreement shall, *mutatis mutandis*, be incorporated into and form an integral part of this Agreement unless the context otherwise requires.”), *available at* <http://fta.mofcom.gov.cn/english/index.shtml>.

breaches of the substantive standards of the treaty,¹²³ and with the scope of consent to arbitration found under Article 1116 of the NAFTA Treaty and Article 26(1) of the ECT.¹²⁴

B. ARTICLE 25(4) OF THE ICSID CONVENTION

The ICSID Convention also allows contracting states to make “notification of intent concerning classes of disputes” under Article 25(4). Through this notification, contracting states may declare to ICSID, at the time of ratification, acceptance or approval of the ICSID convention or at any time thereafter, the “*class or classes of disputes which would or would not consider submitting to the jurisdiction of ICSID.*”¹²⁵ This mechanism allows contracting states to make known in advance which matters they were willing or not willing to submit to the jurisdiction of ICSID.¹²⁶

Some contracting states have notified their intention to exclude many different types of disputes, such as *rationae materiae*, narrowing the scope of consent, providing requirements as to the investment (permission of the investment required), as to the economic field of the investment (oil, mineral natural resources, real estate) or to add procedural requirements (exhaustion of local remedies). On January 7, 1993, China made known pursuant to article 25(4) of the ICSID Convention that it “*would only consider submitting to the jurisdiction of disputes over compensation resulting from expropriation and nationalization.*”¹²⁷

As mentioned above, ICSID jurisdiction requires a double consent: first ratification of the ICSID Convention by the host state, and second, specific consent between the foreign investor and the host state to ICSID jurisdiction by inclusion of an ICSID arbitration clause in the relevant instrument (contract or BIT). The effect of notifications of intent has been debated. First, it was affirmed that they do not constitute a reservation to the ICSID Convention.¹²⁸ Second, the

¹²³ See SCHREUER, *supra* note 23, at 532, referring to Article 24 of the 2004 US Model BIT; *see also* Shan & Gallagher, *supra* note 11, ¶ 8.49.

¹²⁴ SCHREUER, *supra* note 23, at 535.

¹²⁵ *Id.* at 921.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ ICSID Convention, Regulations, and Rules, *Notifications by Contracting States, Report of the Executive Directors on the Convention on the*

question was whether they affect the specific consent under Article 25(1) of the ICSID Convention? Article 25(4) of the ICSID Convention states that “*Such notification shall not constitute the consent required by paragraph (1).*” But does the notification of intent affect or stand in the way of the specific consent of a party to ICSID arbitration under a BIT? This issue has arisen both in the context of BITs providing for a specific consent larger than that contemplated in a pre-existing notification of intent of the Contracting States and in the context of notifications of intent aimed at limiting the scope of the consent offered in preexisting BITs.¹²⁹ It has been decided that consent to ICSID arbitration is only subject to specific consent and not to the notification of intent. Therefore, the wording of a notification does not constitute consent nor does it stand in the way of consent.¹³⁰ Therefore, China may not claim that its 1993 Notification was a bar to any offer to ICSID arbitration granting full jurisdiction to ICSID. However, if the notification of intent serves “purposes of information only” and is designed to “avoid misunderstanding” and does not have “any direct legal consequence,”¹³¹ the 1993 notification could be used as a supplementary means of interpretation to “elucidate the parties’ intent” under the BIT pursuant to article 32 of VCLT.

In *Tza*, Peru argued that the 1993 notification limited the tribunal’s jurisdiction. Peru argued that similarity of the terms used in the 1993 notification, on the one hand, and in the consent clause of the China-Peru BIT (which provides “dispute involving the amount of compensation for expropriation” (Article 8(3)), on the other hand, showed China did not intend to arbitrate the type of dispute brought by *Tza*. The argument prompted the tribunal to fully examine the issue. The arbitral tribunal rejected Peru’s argument:

Settlement of Investment Disputes between States and Nationals of other States, ¶ 31 ICSID/15 (April 2006).

¹²⁹ *E.g.*, News Release, ICSID, Ecuador’s Notification under Article 25(4) of the ICSID Convention (Dec. 4, 2007) (indicating that it would not consent to ICSID arbitration of disputes pertaining to investments in natural resources, such as oil, gas, and minerals), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9>.

¹³⁰ *Id.*

¹³¹ *ICSID Convention, Regulations, and Rules*, *supra* note 1, ¶ 31.

¹³² *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 165 (Feb. 12, 2007).

It would be questionable to interpret the consent of the parties to the BIT under Article 8 thereof based on the notification which addresses a completely different treaty such as the ICSID Convention, the wording whereof does not even constitute the consent of the PRC to the convention. For these reasons, the tribunal does not consider that the notification of the PRC pursuant to Article 25 of the Convention would invalidate the scope of Article 8 of the BIT when it is interpreted in accordance with Article 31 of the Vienna Convention.¹³²

C. INTERPRETATION OF CONSENT CLAUSES

The interpretation of consent clauses, which determine the jurisdiction of the arbitral tribunal, is subject to international law and not to the law applicable to the merits of the dispute.¹³³ In ICSID arbitration, the issue is governed principally by Article 25 rather than Article 42 of the Convention.¹³⁴ The VCLT is commonly used by arbitral tribunals to interpret the specific provisions of BITs to determine the parties' consent.

1. PRINCIPLES OF TREATY INTERPRETATION AND ROLE OF PRIOR ARBITRAL AWARDS

(a) Vienna Convention on the Law of Treaties (VCLT)

Investment treaties like any treaty instrument need to be interpreted. Some BITs and FTAs provide internal guidance for rules of interpretation. For example, the China-New Zealand FTA provides “[f]or the avoidance of doubt, the Parties agree that the provisions of this Agreement shall be clarified in accordance with the customary rules of treaty interpretation of public international law.”¹³⁵

In international law, principles of interpretation have been developed so as to form a set of maxims of interpretation adopted by international tribunals, such as the International Court of Justice (ICJ). These customary rules have been codified in the VCLT, which sets out the law and procedure for the making, operation and termination of a

¹³³ Schreuer, *Consent to Arbitration*, *supra* note 81, at 864-66.

¹³⁴ SCHREUER, *supra* note 23, at 248, Fn783.

¹³⁵ China-New Zealand FTA, *supra* note 69, at art. 190(3).

treaty. The VCLT was adopted on May 22, 1969 and entered into force on January 27, 1980.¹³⁶ Article 31 of the VCLT provides for the three basic principles of treaty interpretation: good faith, ordinary meaning of the treaty terms in their context and the treaty's object and purpose. Article 32 of the VCLT provides for the use of supplementary means of interpretation, such as preparatory documents used in the negotiations leading to the execution of the treaty.¹³⁷

The rules of interpretation contained in Articles 31 and 32 are today universally adopted. They have been recognized by the ICJ as being an accurate statement of customary international law.¹³⁸ The VCLT is commonly used to interpret treaties by the WTO's dispute settlement body,¹³⁹ by arbitral tribunals for the settlement of investment treaty based disputes,¹⁴⁰ as well as applied by domestic courts in the context of applications to set aside arbitral awards.¹⁴¹

¹³⁶ Vienna Convention on the Law of Treaties, *supra* note 43.

¹³⁷ DUNGAN, *supra* note 79, at 204-13; *accord* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 108-19 (Wolters Kluwer Int'l 2009), Thomas Wälde, *Interpreting Investment Treaties: Experience and Examples*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 724 (Oxford Univ. Press, 2009), Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 TRANSNATIONAL DISPUTE MGMT. 129, Apr. 2006.

¹³⁸ "These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point." Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Summary of the Judgment, I.C.J. 220-24 (Nov. 12, 1991); *see also* Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J Reports 6, ¶ 41 (Feb. 3, 1994); Case Concerning Oil Platforms (Islamic Republic of Iran v. United States), Judgment, I.C.J Reports 161, ¶ 41 (Nov. 6, 2003).

¹³⁹ "This rule has received its most authoritative and succinct expression in the [VCLT]... That general rule of interpretation has attained the status of a rule of customary or general international law." *See* Appellate Body Report, United States: Standards for Reformulated and Conventional Gasoline ¶ 20, WT/DS2/AB/R, (Apr. 29, 1996).

¹⁴⁰ Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 80 (Aug. 3, 2004).

¹⁴¹ "A treaty is governed by International law, which includes the rules of interpretation. The international rules on treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention... The rules set out in Articles 31 and 32 of the Vienna Convention have been accepted by the International Court of Justice as being an accurate statement of customary International law and are therefore part of English law," *Czech Republic v. European Media Ventures*,

Treaty interpretation by arbitral tribunals begins with reference to the principles formulated by Articles 31-32 of the VCTL. However, use of these provisions is not always consistent and reflects different approaches, such as the textual and the object, purpose and effective approach (teleological approach). Also, tribunals do not hesitate to combine these principles or to depart from them by adopting alternative interpretation methods, such as dictionary definitions, state practice, *travaux préparatoires*, *effet utile*. Some most recent BITs and FTAs, like the NAFTA Treaty, Article 1131, add that a joint interpretation of the BIT shall be binding.¹⁴²

In addition to the *Tza* decision on jurisdiction, six other decisions (five published awards and a High Court decision) rendered between 2006 and 2009 have had the occasion to interpret consent clauses limited to dispute on the amount of the compensation such as the one found in the China-Peru BIT 1994.¹⁴³ All of them adopted the VCTL as a reference for the interpretation of the BIT consent clause.

In *Berschader v. The Russian Federation*, the Tribunal had to examine an objection to jurisdiction raised by the Russian Federation. The Federation claimed that the issue of jurisdiction had to be considered in light of the applicable Belgium/Luxemburg-Russian Treaty, Russian Law and generally accepted norms and principles of international law.¹⁴⁴ The arbitral tribunal found that only the VCTL applied to the issue:

The Tribunal finds that the principle source of law applicable to the question of the Tribunal's

[2007] EWHC (Comm) 2851, [2007] 2 C.L.C. 908 (Eng.); see *also* Ecuador v. Occidental Exploration & Prod. Co., (2005) EWHC (Comm) 774.

¹⁴² See China-Mexico BIT, *supra* note 120.

¹⁴³ *Berschader v. Russian Federation* (Berschader), Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004 (Apr. 21, 2006) (involving the Belgium/Luxembourg-Russian BIT of 1989); *RosInvest Co. UK Ltd. v. Russian Federation* (RosInvest), Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005 (Oct. 2007) (involving the UK-Russian BIT of 1989); *Renta 4 S.V.S.A et al. v. Russian Federation* (Renta4), Arb. Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007 (Mar. 20, 2009) (involving the Spanish-Russian BIT of 1991); *Austrian Airlines v. Slovak Republic* (Austrian Airlines), UNCITRAL, Final Award (Oct. 9, 2009) (involving the Austrian-Czech BIT of 1990), *available at* http://italaw.com/alphabetical_list_content.htm; European Media Ventures, *supra* note 19.

¹⁴⁴ *Berschader*, ¶ 95-96.

jurisdiction must be provisions of the Treaty. Insofar as the terms of the Treaty are unclear or require interpretation or supplementation, the Vienna Convention requires the tribunal to consider ‘the relevant rules of international law applicable in relations between the parties.’

The Vienna Convention provides no role for the domestic law of contracting states in the interpretation of international treaties. Therefore, in the instant case, it is clear that Russian national law is of no relevance in that regard. While Russian law may be relevant in establishing certain factual circumstances involved in the merits of the case, it has no role to play in determining the jurisdiction of the tribunal.¹⁴⁵

The *Tza* tribunal also used the VCTL as a guide for interpretation of the treaty provisions, and held: “The Vienna Convention on the law of treaties constitutes the main guide to interpret treaties based in international law, in particular Articles 31 and 32.”¹⁴⁶

It was also the case in *Austrian Airlines v. The Slovak Republic*, where the *ad-hoc* arbitral tribunal, which had to determine whether it had jurisdiction over the expropriation claim made by the claimant, found that the VCLT ‘guided’ its interpretation in the review of the scope of the consent clause (article 8 of the Austria-Czech BIT 1990).¹⁴⁷

In *RosInvest v. The Russian Federation*, the tribunal applied the VCLT not as customary international law but as a legal obligation of the Contracting States to the BIT:

[T]he present is one of those cases – surprisingly rare in practice – in which the Vienna Convention is more than just a convenient reference point for the rules of general international law, but is in fact a treaty in force between the Russian Federation and the United Kingdom, and which is entered into force before the IPPA itself was negotiated and concluded. The

¹⁴⁵ *Id.*

¹⁴⁶ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 38 (Feb. 12, 2007).

¹⁴⁷ *Austrian Airlines v. Slovak Republic (Austrian Airlines)*, UNCITRAL, Final Award, ¶ 95 (Oct. 9, 2009).

consequence is that, under the terms of its Article 4, the Vienna Convention applies as a matter of legal obligation to the interpretation and application of the IPPA.¹⁴⁸

The same approach was used in *Renta4 v. The Russian Federation*. Article 10 of the applicable Spanish-Russian BIT provided for the arbitral tribunal to base its decisions on the provisions of the BIT, the national legislation of the host state, the universally recognized norms and principles of international law (¶ 5 of the award on jurisdiction).¹⁴⁹ The tribunal found that the BIT “is an international instrument that if necessary falls to be interpreted in accordance with the Vienna Convention on the Law of treaties. Both Spain and Russia are parties to that Convention.”¹⁵⁰

(b) Role of Prior Arbitral Awards

An important secondary source of interpretation is also found in arbitral awards rendered on the same subject.¹⁵¹ The publication of investment arbitral awards allows arbitrators to take into account earlier rendered decisions which involve similar fact patterns; e.g. foreign investment cases subsequent to the Argentina crisis of 1999, or treaty clauses worded in similar terms such as scope of consent clauses and MFN clauses. It is also particularly true for the definition of recurrent concepts such as “investor,” “nationality” and “investment” of Article 25 of the ICSID Convention. Although there is no doctrine of precedent in international law,¹⁵² counsel appearing before international arbitral tribunals do make reference to and rely on the principles established in

¹⁴⁸ *RosInvest Co. UK Ltd. v. Russian Federation (RosInvest)*, Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 38 (Oct. 2007).

¹⁴⁹ *Renta 4 S.V.S.A et al. v. Russian Federation (Renta4)*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007 (Mar. 20, 2009).

¹⁵⁰ *Id.* ¶ 15.

¹⁵¹ NEWCOMBE & PARADELL, *supra* note 137, at 101-06; Gabrielle Kaufmann-Kohler, *The 2006 Freshfields Lecture. Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357 (2007); Paulsson, *supra* note 92, at 241-65; Wälde, *supra* note 137, at 724.

¹⁵² Article 59 of the Statute of the ICJ provides for *res judicata* and not precedent: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” *ICSID Convention, Regulations and Rules*, *supra* note 1, at ¶ 25.

earlier decisions. Arbitrators then refer to the status to be given to earlier awards in a special section of the award in the preliminary issues next to applicable law and undisputed facts,¹⁵³ or to outline in the reasoning of this source of interpretation.¹⁵⁴ Arbitral tribunals frequently recall at the same time the lack of precedential effect of earlier cases and the conditions upon which the current case may rely on or depart from these decisions.

In *Berschader*, while Russia, the respondent, claimed the case had to be decided solely on Russian law without recourse to international law or international case law, the tribunal found international investment case law to be a “persuasive source of law.”

While such case law and practice is in no way binding upon the Tribunal or parties, the Tribunal must, nonetheless, be entitled to consider and take into account the conclusions of others arbitral tribunals who have addressed similar issues with respect to similar treaties and identical provisions. Moreover, jurisprudence and doctrine emanating from the decisions of international tribunals and the works of learned authors is frequently referred to as a source of international law for the purpose of interpreting treaty under the Vienna Convention.¹⁵⁵

In *RosInvest*, the tribunal also agreed to give consideration to earlier decisions:

It is at all events plain that the decisions of other tribunals are not binding on this Tribunal This does not however preclude the Tribunal from

¹⁵³ The *Austrian Airlines* tribunal devoted in its General Consideration a section named “Relevance of Previous Awards and Decisions of other Tribunals.” *Austrian Airlines v. Slovak Republic (Austrian Airlines)*, UNCITRAL, Final Award, ¶ 83-84 (Oct. 9, 2009).

¹⁵⁴ In *Tza*, the Tribunal outlined the same level of consideration given to earlier decisions than to articles 31 and 32 VCLT by dividing its discussion on the scope of the consent clause (Article 8 of the Peru-China BIT) into three sections respectively devoted to the interpretation in accordance with Article 31 VCLT, in accordance with 32 VCLT and interpretation “based on other arbitral decisions and awards.” *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 173 (Feb. 12, 2007).

¹⁵⁵ *Berschader v. Russian Federation (Berschader)*, Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶ 97 (Apr. 21, 2006).

considering other arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.¹⁵⁶

The *Austrian Airlines* tribunal adopted the solution established in *Saipem v Bangladesh* on the Tribunal's "duty to adopt solution established in a series of consistent cases,"¹⁵⁷ and concluded:

The tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunal. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.¹⁵⁸

Likewise, the *Renta4* tribunal expressed its attentiveness to other cases brought to its attention by the parties. However, It also expressed the its desire to reach a decision case by case, rather than enforcing a duty of making consistent decisions (as in *Austrian Airlines* above). Therefore, the tribunal in *Renta4* limited the effect of other decisions' to those constituting "fully reasoned" cases, as opposed to series of "consistent" cases (as in *Austrian Airlines*).¹⁵⁹

¹⁵⁶ *RosInvest Co. UK Ltd. v. Russian Federation (RosInvest)*, Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 49 (Oct. 2007).

¹⁵⁷ *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award, ¶ 90 (June, 30, 2009). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Pakistan*, ICSID Case No. ARB/03/9, Award, ¶ 145 (Aug. 27, 2009).

¹⁵⁸ *Austrian Airlines*, ¶ 83-84.

¹⁵⁹ *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 16 (Mar. 20, 2009), "The present Parties are entitled to a decision based on the arbitrators' examination of the facts and arguments presented in this case. The arbitrators do not in any event operate in a hierarchical and unitary system which requires them to follow precedent . . . Moreover they are inclined to do so on the premise that there is value in considering the reasoning of decision-makers who have given careful attention to issues similar to those

In *Tza*, The application of these principles of interpretation and prior decisions will be examined *infra* in light of the scope of the consent clause and of the MFN clause.

2. INTERPRETATION OF CONSENT CLAUSES BY ARBITRAL TRIBUNALS

A few decisions have interpreted the limited consent clauses found in the Russian, Czech and Hungarian and now Chinese BITs by arbitral tribunals, either ICSID, SCC or *ad-hoc* in light of the above principles of interpretation. The subject matter of the arbitration clauses of the relevant BITs basically covered “disputes on the quantum of an indemnity” for expropriation. The wording of the provision was in each case unique but the decisions when compared show two main trends of interpretation. In three of the cases, *Berschader*, *RosInvest* and *Austrian Airlines*,¹⁶⁰ the arbitral tribunal found that the arbitration clause did not cover the dispute over entitlement to an indemnity. In three other cases, *European Media Ventures SA*, *Tza* and *Renta4*,¹⁶¹ the High Court and the arbitral tribunals respectively, found that the wording of the clause allowed such examination.

(a) Arbitral tribunals that rejected jurisdiction

In *Berschader*, the relevant consent clause interpreted by the arbitral tribunal constituted under the auspices of the SCC covered “disputes concerning the amount or mode of compensation to be paid under Article 5 of the present [expropriation, nationalization or other measures having a similar effect].”¹⁶² In *RosInvest*, the consent clause provided for “disputes . . . concerning the amount of payment or

that arise here. The arbitrators would be hesitant to depart from a proposition followed in a series of fully reasoned decisions reflecting *jurisprudence constante*.”

¹⁶⁰ *Berschader v. Russian Federation* (*Berschader*), Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶ 129 (Apr. 21, 2006).

¹⁶¹ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 188 (Feb. 12, 2007); *Renta4*, ¶ 28.

¹⁶² *Berschader*, quoting in full Treaty Between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg, and the Government of the Union of Soviet Socialist Republics on the Promotion and Mutual Protection of Investments, Belg.-Lux-U.S.S.R., Feb. 9, 1989, 1996 U.N.T.S. 312 (unofficial English translation). Article 5 provides: “Investments made by investors of one Contracting Party in the territory of the other Contracting Party may not be expropriated, nationalized, or subjected to any other measures having a similar effect.”

compensation under Article 4 or 5 [expropriation] of this Agreement or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement” (Article 8(1) of the 1988 UK-Soviet BIT/IPPA) and the BIT did not provide for a forum for disputes on liability.¹⁶³

The reasoning adopted in these three decisions to decline jurisdiction on the entitlement to an indemnity for expropriation shows the tribunals search for the ordinary meaning of the clause. Thereafter the meaning of the terms is explored in the context of the expropriation clause only. Finally, the tribunals, in support of their primary findings, use some supplementary means of interpretation such as *travaux préparatoires* or treaty practice.

First, the arbitral tribunals affirmed the clarity of the relevant terms: “The tribunal is of the view that the ordinary meaning of the [Article being interpreted] is quite clear.”¹⁶⁴ They immediately affirm that the words, based on their ordinary meaning, work as a limitation or a qualification of the types of dispute contemplated under the expropriation clause to which they refer. The *Berschader* tribunal held that “[t]he wording expressly limits the type of disputes, which may be subjected to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act.”¹⁶⁵

Likewise in *Austrian Airlines*, the arbitrators said:

[The words] mean that only disputes “concerning the amount or the conditions of payment of a compensation” can be submitted to arbitration. The scope of Article 8 is therefore limited to disputes

¹⁶³ *RosInvest Co. UK Ltd. v. Russian Federation (RosInvest)*, Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 57 (Oct. 2007).

¹⁶⁴ *Berschader*, ¶ 152; see also *Austrian Airlines*, *supra* note 147, ¶ 96: “The ordinary meaning of Article 8(1) arises from the words used in that provision which are clear by themselves.”

¹⁶⁵ *Berschader*, ¶ 152. The use of the ordinary meaning made in *Berschader* was criticized in *Renta4*, as amounting to no analysis: “This is no more than a restatement of the problem. It is necessary to determine whether these words exclude disputes over entitlement to compensation (with the effect of limiting jurisdiction to mere quantification or mode of payment).” *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 24 (Mar. 20, 2009) (emphasis omitted).

about the amount of the compensation and does not extend to the review of the principle of expropriation.¹⁶⁶

Second, the arbitral tribunals interpreted the “ordinary meaning [of the words] in their context,” by limiting the “context” to the sole provision of the BIT to which the arbitration clause expressly referred, the expropriation clause. They made no mention of the treaties “object and purpose” or of any right of the investor to international arbitration. Rather they hold that the ordinary meaning of the provision excluded disputes concerning “whether or not an act of expropriation actually occurred under Article 5.”¹⁶⁷ If such a dispute occurred, this tribunal believed it would have to be resolved by the dispute procedure agreed in the contract or in the domestic courts of the host state.¹⁶⁸

In *RosInvest*, the relevant part of the arbitration clause covered two subject matters relating to expropriation, namely: (i) “the amount or payment of compensation under” Articles 4 or 5 of the Agreement (First Jurisdiction Clause), and (ii) “concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement” (Second Jurisdiction Clause).¹⁶⁹ As to the First Jurisdiction clause covering “the amount or payment of compensation,” the *RosInvest* Tribunal’s analysis was based upon its interpretation of the reference to Article 5.¹⁷⁰ The tribunal found that the order and the

¹⁶⁶ *Austrian Airlines v. Slovak Republic* (Austrian Airlines), UNCITRAL, Final Award, ¶ 96 (Oct. 9, 2009), *see also* *RosInvest Co. UK Ltd. v. Russian Federation* (*RosInvest*), Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 110-115 (Oct. 2007).

¹⁶⁷ *Berschader v. Russian Federation* (*Berschader*), Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶ 153 (Apr. 21, 2006).

¹⁶⁸ *Berschader*, ¶ 152–53. Once again this approach was criticized in *Renta 4*: “This is a simple affirmation. It does not appear to be supported by analysis. . . . Words may have an “ordinary meaning” as units of language. It does not follow that their import is self-evident when viewed in context.” *Renta4*, *supra* note 149, ¶ 25-26.

¹⁶⁹ *RosInvest*, ¶ 110-115 (*quoting* Article 8.1 of the UK-Russian BIT).

¹⁷⁰ *Id.* ¶ 111–12. Article 5(1) of the UK-Russian BIT provided “Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party **except** for a purpose which is in the **public interest** and is **not discriminatory** and **against the payment, without delay, of adequate and effective compensation**. Such compensation shall

wording of the expropriation clause in Article 5, introducing the compensation in the second half of the provision and as the last of the three exceptions to the principle that an investment cannot be expropriated, supported their interpretation of the limitation of the jurisdictional clause.¹⁷¹

As to the Second Jurisdiction Clause, the *RosInvest* tribunal also concluded that “any other matter consequential upon an act of expropriation” had to exclude entitlement to compensation.¹⁷² Focusing on the word “consequential,” the tribunal found the clause could not sensibly be read to include “expropriation” claims or it would render “these preconditions ... meaningless.”¹⁷³

The *Austrian Airlines* tribunal’s use of the expropriation clause (Article 4(4) and 4(5) of the Austrian-Slovak BIT) to confirm the context of the arbitration clause to interpret its ordinary meaning may have been prompted by the particular wording of the expropriation clause and reference to the “unmistakable meaning of Articles 8 and 4.”¹⁷⁴ The expropriation clause under Article 4 contained a cross reference to the arbitration clause (Article 8), while this was not the case in the two above mentioned Russian BITs where only the arbitration clause referred to the expropriation clause. The tribunal also noted that Article 4(4) provided for a forum choice before state courts for disputes relating to the “‘legitimacy’ of the expropriation,” whereas Article 4(5) gave the investor a choice to challenge the amount of compensation before either a local court or an arbitral tribunal: “Claims about the principle of expropriation are for the local authorities under Article 4(4) and claims about the amount of compensation are for the local authorities or for an arbitral tribunal under Articles 4(5) and 8.”¹⁷⁵

Third, the awards do not use the ‘object and purpose’ of the BIT to construe the interpretation of the intent of the parties. Instead, they make extensive use of contextual documents, such as *travaux préparatoires* and treaty practice. Under Article 32 of the VCLT, *travaux préparatoires* constitute a supplementary means of

amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge....” (Emphasis added).

¹⁷¹ *Id.*

¹⁷² *Id.* ¶ 115–16.

¹⁷³ *Id.*

¹⁷⁴ *Austrian Airlines v. Slovak Republic* (Austrian Airlines), UNCITRAL, Final Award, ¶ 110 (Oct. 9, 2009).

¹⁷⁵ *Id.* ¶ 97-98.

interpretation used to confirm the meaning resulting from the primary means of interpretation (Article 31 of the VCLT), or when the meaning is ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.¹⁷⁶ As noted above, *travaux préparatoires* were used in *Austrian Airlines* in support of the Tribunal's findings:

The tribunal's conclusions are further supported by the *travaux préparatoires* of the treaty. The negotiation history shows that the final wording of Article 8 is the result of a process by which the scope of the disputes subject to arbitration was purposefully restricted ... one can only deduct from this sequence of texts that the Contracting States deliberately narrowed down the initially broad scope of arbitral disputes.¹⁷⁷

In *Berschader*, as noted in the award, the arbitral tribunal was not provided with *travaux préparatoires*, but it also refused to give weight to the Belgian MFA's explanatory statement on the Belgium-Soviet BIT prepared for the purpose of the ratification of that treaty by the Belgian Parliament.¹⁷⁸ In that document, the consent clause was defined as an arbitration clause that covered all disputes over expropriation.¹⁷⁹ The tribunal refused to explore this document based on the finding that "the language of the treaty [was] quite clear and in the view of the Tribunal such language could not possibly lend itself to the interpretation suggested in the explanatory statement."¹⁸⁰ Indeed, as noted by commentators, caution is required with "unilateral statements" in the ratification process.¹⁸¹ Nevertheless, "ratification

¹⁷⁶ See Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration* 18 (Feb. 7, 2006), available at http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf. See also Walde, *supra* note 127, at 777: "In practice, the *travaux* are as unreliable in deciding difficult interpretation issues as they are always invoked if they appear to helpful to counsel or tribunal."

¹⁷⁷ *Austrian Airlines*, ¶ 105-07.

¹⁷⁸ *Berschader v. Russian Federation (Berschader)*, Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶ 158 (Apr. 21, 2006).

¹⁷⁹ *Id.*

¹⁸⁰ *Austrian Airlines v. Slovak Republic (Austrian Airlines)*, UNCITRAL, Final Award, ¶ 105-07 (Oct. 9, 2009).

¹⁸¹ See Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, *supra* note 17, at 18; see also Walde, *supra* note 137, at 778, "as they may simply record a view of an ambiguous text by one delegation, which is not shared by the others; it may even involve

memoranda tend to paint a particular innocuous view of the treaty in order not to wake up sleeping wolves during ratification.¹⁸² Furthermore, assuming the *Berschader* tribunal's decision was based on a conservative application of Article 32 VCLT, implying that the use of supplementary means of interpretation, such as an explanatory statement, may arise only where the clause is ambiguous, one may wonder why the same tribunal needed to use state practice with third parties, something that is not even a mean of interpretation contemplated in the VCLT. The decision of the *Berschader* tribunal shows that supplementary means of interpretations are excluded when they alter the tribunal's interpretation of the ordinary meaning and are adopted only when they confirm it.

The *Berschader* and *RosInvest* tribunals both interpreted the treaty in light of the current and subsequent treaty practice of the host state, Russia, with third countries (France, UK and Canada) in order to outline a change of policy that confirmed their interpretation:

[T]he majority of these early BITs illustrate an identifiable practice on the part of the Soviet Union, which corresponds with the policy considerations alleged by the Respondent to lie behind the restrictive wording of Article 10 of the Treaty. Moreover, it is interesting to note that a definite change of policy can be observed in the BITs concluded by the Russian Federation in the late 1990s subsequent to the dissolution of the Soviet Union. The arbitration clauses in these later BITs are generally much broader in their scope and, undoubtedly, encompass disputes concerning the occurrence of an act of expropriation. This further indicates that the restrictive wording of Article 10 arose from the

an attempt by a delegation to achieve by unilateral interpretative conduct what they did not obtain by negotiation.” See also the *ad-hoc* decision in *Malaysian Historical Salvors SDN BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 57 (Apr. 16, 2009) “In any event, courts and tribunal interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure.”

¹⁸² Walde, *supra* note 137, at 724.

deliberate intention of the Contracting Parties to limit the scope of arbitration.¹⁸³

As noted by authors, tribunals have repeatedly looked at other BITs in interpreting the treaty in question as they “can shed light on the meaning of a term or the function of a treaty mechanism.”¹⁸⁴ However, the use of treaty practice with other parties, as opposed to state practice between the treaty parties as contemplated under Article 31(2) of the VCLT, to ascertain state policies denies the simple fact revealed by their examination: every BIT is unique and the result of a particular negotiation that renders state practice with other states irrelevant for the purpose of ascertaining the meaning of that BIT. Indeed, the variety of wording in limited wide consent clauses shows it is hard to ascertain the same consequences from similarities identified in other treaties but taken out of context.¹⁸⁵ This will be seen below in the three cases that accepted jurisdiction.

(b) Arbitral tribunals that have accepted jurisdiction

In *European Media Ventures*, the English High Court examined an application to set aside an award, pursuant to section 67(1)(a) of the English Arbitration Act 1996, made by the Czech Republic on the grounds that the arbitral tribunal lacked jurisdiction. In its *ad-hoc* award on jurisdiction made in London, the arbitral tribunal had to construe the scope of consent clause of the Belgian/Luxembourg-Czech BIT 1989 providing for disputes “concerning compensation due by virtue of article 3 paragraphs (1) and (3) [expropriation].”¹⁸⁶ It had found that such scope was not limited to issues of quantification.

¹⁸³ *Berschader v. Russian Federation* (Berschader), Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶ 155 (Apr. 21, 2006).

¹⁸⁴ See Walder, *supra* note 137, at 767.

¹⁸⁵ See *Mox Plant Case* (Ir. v. U.K.), ITLOS Case No. 10, Order ¶ 51 (Dec. 3, 2001); see also *RosInvest Co. UK Ltd. v. Russian Federation* (RosInvest), Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 39 (Oct. 2007).

¹⁸⁶ *Id.* at ¶ 8. The opinion noted that “[t]he Tribunal provided its interpretation of that limitation as follows: ‘It would seem to exclude from that jurisdiction any claim for relief other than compensation (e.g. a claim for restitution or a declaration that a contract was still in force).’” *Id.* at ¶ 9. The Award on Jurisdiction rendered on May 15, 2007 in London under the UNCITRAL arbitration Rules is not published.

The *Renta4* tribunal had to examine the scope of the Spanish-Russian BIT consent clause which covered disputes “relating to the amount or method of payment of the compensation due under Article 6 (nationalization, expropriation) of this Agreement.”¹⁸⁷ The *Tza* tribunal had to construe the scope of the Peru-China BIT consent clause which covered “disputes involving the amount of compensation for expropriation.”¹⁸⁸ Under Article 8 of the Peru-China BIT, the contracting states had agreed that any dispute connected with an investment be examined by the state courts of the host state¹⁸⁹ and added that (i) disputes involving the amount of compensation for expropriation be submitted to ICSID, and (ii) any other disputes concerning other matters be submitted to ICSID subject to the parties’ agreement.¹⁹⁰ The reasoning adopted in these three cases to retain jurisdiction on the entitlement to an indemnity for expropriation shows the search of an ordinary meaning based on a textual approach and in light of the expropriation clause but also the purpose and object of the treaty. Additionally, the tribunal referred to *travaux préparatoires* and prior decisions.

First, these tribunals took a cautious step by departing from the view that the wording of the provision was clear or introduced a limitation. The *Tza* tribunal first recalled that communist regimes were generally not familiar with independent tribunals and that this implied a “certain degree of distrust”¹⁹¹ which created a conflict between the positions of the negotiating parties to the consent clause and therefore some ambiguity.¹⁹² A virtually identical reasoning was applied by the tribunal in *European Media Ventures*, where another former socialist country was a signatory to the BIT.¹⁹³ The compromise created an ambiguity:

¹⁸⁷ *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 5 (Mar. 20, 2009), citing Spanish-Russian BIT, Art. 10.

¹⁸⁸ Peru-China BIT, *supra* note 12, at art. 8(3).

¹⁸⁹ *Id.* at art. 8(2).

¹⁹⁰ *Id.* at art. 8(3).

¹⁹¹ *Mox Plant*, ¶ 145.

¹⁹² *Id.* ¶ 149. As noted above the *Renta4* tribunal refuted the assumption of a limited scope derived from the reading of the consent clause: “words may have an ‘ordinary meaning’ as units of language. It does not follow that their import is self-evident when viewed in context.” *Renta4*, ¶ 26.

¹⁹³ See *Czech Republic v. European Media Ventures*, [2007] EWHC (Comm) 2851, [2007] 2 C.L.C. 908 (Eng.).

In the present case each side appears to have adopted opposing negotiating positions, and there was a degree of compromise. In my view the arbitration provision of this Treaty fell into a further category, in which the width of the arbitration clause was left unclear: possibly to the satisfaction of both sides.¹⁹⁴

Second, in all three cases the textual approach to interpret the ordinary meaning of the term in their context was adopted by the arbitral tribunals. For example, in *European Media Ventures*, the Court held:

It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method).¹⁹⁵

Similar terms were used in *Renta 4*, “[w]ords may have an ‘ordinary meaning’ as units of language. It does not follow that their import is self-evident when viewed in context.”¹⁹⁶

This approach to analyzing treaty language resulted in a broad interpretation of the consent clause. The terms of the arbitration clause were interpreted in their context and not in the context of the expropriation clause to which they nevertheless all refer. In utilizing this textual approach, the tribunals used the dictionary to interpret and weight the surrounding terms used in the clause, such as “involving the amount of compensation for expropriation,”¹⁹⁷ “concerning compensation due by virtue of ”¹⁹⁸ or “compensation due under”¹⁹⁹ *European Media Ventures* noted the tension between the wide meaning of these surrounding terms, on the one hand, and the limiting sense of the term compensation, on the other hand. The High Court

¹⁹⁴ *Id.* ¶ 32.

¹⁹⁵ *Id.* ¶ 16.

¹⁹⁶ *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 26 (Mar. 20, 2009).

¹⁹⁷ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 129 (Feb. 12, 2007). Note in ¶ 151 the use of the Oxford Dictionary to conclude ‘involving’ means “include” with no restriction thereto.

¹⁹⁸ *European Media Ventures*, ¶ 44-45.

¹⁹⁹ *Renta4*, ¶ 19.

nevertheless decided that the combination did not preclude them from hearing the preconditions to quantum, and found:

The use of the word ‘compensation’ limits the scope of the arbitration. It may be contrasted with broad phrases such as ‘any disputes’ which may be found in other BITs. Its impact is to restrict the jurisdiction of the tribunal to one aspect of expropriation. The word ‘concerning,’ however, is broad. The word is not linked to any particular aspect of ‘compensation.’ ‘Concerning’ is similar to other common expressions in arbitration clauses, for example ‘relating to’ and ‘arising out of.’ Its ordinary meaning is to include every aspect of its subject: in this case ‘compensation due by virtue of Paragraphs (1) and (3) of Article 3.’ As a matter of ordinary meaning this covers issues of entitlement as well as quantification.²⁰⁰

The tribunal’s jurisdiction is therefore not limited by the reference to the expropriation clause in which the consent clause refers to quantum, but instead to all events contemplated by the expropriation clause. In particular, in *European Media Ventures*, the arbitration clause was referred to in Articles (3) and (1) of the BIT,²⁰¹ the High Court found that all of the elements within the scope of Article (3) and (1) of the BIT were included in the international tribunal’s jurisdiction.²⁰²

²⁰⁰ Czech Republic v. *European Media Ventures*, ¶ 44 [2007] EWHC (Comm) 2851, [2007] 2 C.L.C. 908 (Eng.).

²⁰¹ *European Media Ventures*, ¶ 6 (“Article 3(1): Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are:

(a) taken in accordance with a lawful procedure and are not discriminatory;

(b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay. The amount shall correspond to the real value of the investments on the day before the measures were taken or made public. . . .

Article 3(3): The provisions of paragraphs 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party.”)

²⁰² *European Media Ventures*, ¶ 41.

In *Renta4*, Russia's argument was that the words "amount or method of payment" in the consent clause (Article 10 of the BIT) allowed nothing but a narrow debate about quantum, timing, or currency of the compensation for expropriation. It further alleged that the word "due" meant that the dispute before the arbitrators was limited to amounts already established as "due" by a final decision, acknowledging that there has been a compensable event as defined in Article 6 (the expropriation clause). The tribunal refuted this interpretation:

The Tribunal does not believe that the text allows a curtailment of the international tribunal's authority to decide whether compensation is "due". That perforce entrains the power to determine whether there has been a compensable event in the first place

Article 6 defines the precondition of compensation being "due" for the purpose of Article 10. It is an aspect of Article 6 which cannot be beyond the arbitrators reach.²⁰³

The same construction as in *European Media Ventures* lead the *Renta4* tribunal to a somehow narrower subject-matter jurisdiction given a concession made by the Claimants in the course of the proceedings: the subject matter jurisdiction did not cover all aspects of compensation but compensation only.²⁰⁴ It did not extend to all aspects of expropriation. The Tribunal therefore decided that the reference to

²⁰³ See *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 28 (Mar. 20, 2009). Article 6 of the Spain-Russian BIT provides: "Any nationalization, expropriation or any other measures having similar consequences taken by the authorities of either party against investments made within its territory by investors of the other party, shall be taken only on the grounds of public use and in accordance with the legislation in force in the territory. Such measures should on no account be discriminatory. The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency."

²⁰⁴ The arbitrators are not asked to determine whether Russia has acted discriminatorily or without the justification of public purpose. Nor would they be entitled to do so given the Claimant's concession (see paragraph 42 above). It is unnecessary to consider issues that might have arisen of this concession had not been made. (A familiar feature of this area of international law is precisely the proposition that the lawfulness or otherwise of a measure of dispossession may affect the amount of compensation.)

“compensation due under article 6” allowed its subject-matter jurisdiction to cover the last sentence of Article 6 only, namely: “The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency,” i.e., whether there had been a “compensable expropriation.”²⁰⁵ The tribunal excluded from its jurisdiction the first two sentences of Article 6, which concern justification of expropriation for public purpose and discrimination, respectively.²⁰⁶

Third, the object, purpose, and effectiveness approaches, which had not been discussed in the above awards rejecting jurisdiction, were used in *Tza* as well as in the two other arbitral decisions to reaffirm the tribunal’s findings using the textual interpretation.²⁰⁷ In *Tza*, and in the two other cases, the tribunal found that the object and purpose, by reference to the preamble of the treaty (purpose of conferring certain benefits to promote investments), and to the perception of the benefit of BITs by the foreign investor, extended entitlement to ICSID arbitration, internationalization of the dispute, or conferring a valuable right to arbitrate. In *European Media Ventures*, the High Court found:

In these circumstances it seems to me plain that in interpreting a BIT the Court is entitled to take into account that one of the objects of the treaty was to confer rights on an investor, including a valuable right to arbitrate. If the suggestion made in *Ecuador v. Occidental (No.2)* at §28, that it is permissible to resolve uncertainties in the interpretation of a BIT in favor of an investor, who is not a party to the treaty, is said to amount to a rule of interpretation, the suggestion goes rather further than appears to be justified in International law.²⁰⁸

The *Tza* tribunal also referred to the inclusion of the entitlement to submit certain disputes to ICSID arbitration as an intention to confer certain benefits to promote investments.²⁰⁹ The *Renta4* tribunal did the same, holding that investment is not promoted by purely formal or

²⁰⁵ *Renta4*, ¶ 63.

²⁰⁶ *Renta4*, ¶ 46.

²⁰⁷ *Czech Republic v. European Media Ventures*, ¶ 48 [2007] EWHC (Comm) 2851, [2007] 2 C.L.C. 908 (Eng.).

²⁰⁸ *European Media Ventures*, ¶ 23.

²⁰⁹ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 39 (Feb. 12, 2007).

illusory standards of protection. A fundamental advantage perceived by investors in “BITs is that of the internationalization of the host state’s commitments.” The tribunal said the “dispute would not be internationalized if the respondent State could simply declare whether there is an obligation to compensate for expropriation.”²¹⁰

What also follows from this interpretation is the principle of *effet utile*. Not only is international arbitration within the ambit of the treaty guaranties, but its protection must also carry some weight, it must not lead to an “incoherent conclusion, namely that investor would never have access to arbitration.”²¹¹

The interest in the effectiveness reasoning adopted in *Tza* resides in the wording of the dispute resolution of the China-Peru BIT 1994, which included a fork in the road clause. The consent clause is divided into three paragraphs: Article 8(1) provided for amicable settlement through consultation,²¹² Article 8(2) called for litigation in the host state courts, i.e., Peruvian courts in the present case.²¹³ Finally, Article 8(3) introduced the access to international arbitration in three sentences: (a) ICSID arbitration for disputes “involving the amount of compensation for expropriation,” (b) ICSID arbitration, subject to the parties’ agreement, for disputes concerning other matters, and (c) ICSID arbitration was excluded if the investor has had recourse to litigation in the host state courts. This last sentence (c) contained the fork in the road clause, and provided: “The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article [state courts].”²¹⁴

Peru’s position was that access to ICSID arbitration under Article 8(3) was limited to disputes concerning the quantum of the compensation for expropriation under sentence (a) above. It claimed

²¹⁰ *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 56 (Mar. 20, 2009).

²¹¹ *Tza*, ¶ 154.

²¹² China-Peru BIT, *supra* note 12, at art. 8(1) (“Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.”).

²¹³ *Id.* at art. 8(2) (“If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit this dispute to the competent court of the Contracting Party accepting the investment.”).

²¹⁴ *Id.* art. 8(3).

that since the parties had not agreed to submit the dispute over entitlement to compensation to ICSID arbitration under sentence (b) above, the treaty called for litigation in the Peruvian courts (Article 8(2)) to solve the dispute over entitlement to compensation.²¹⁵ The ICSID tribunal found that this three-step reading of the clause employed by Peru when compared with the reading of sentence (c) above led to an incoherent conclusion: recourse to state courts by the foreign investor, under sentence (c), prevents the application of the provisions of Article 8(3), and therefore precludes recourse to ICSID arbitration.²¹⁶ The tribunal found that this last sentence (c) created a final choice of jurisdiction for the investors and amounted to a fork in the road, thus preventing subsequent recourse to ICSID arbitration as per (a). Should disputes over the entitlement to compensation be brought by an investor before State courts pursuant to Article 8(2), the fork in the road clause triggered an irrevocable choice not allowing any subsequent recourse to ICSID arbitration.²¹⁷ Balancing the narrow interpretation of the scope of the clause sustained by Peru and the effect of the fork in the road clause preventing the internationalization of the dispute, the tribunal concluded that this was an “incoherent conclusion.”²¹⁸ The principle of effectiveness, guided by the concern that the state’s promise of ICSID arbitration had to carry weight and could not be read as strictly denying any access to arbitration, led the ICSID tribunal to reject the textual approach alleged by Peru and to opt for a large interpretation of the scope of the consent clause.²¹⁹

Fourth, all of the tribunals’ decisions refer to *travaux préparatoires* in aid of their conclusion. While questioning their relevance for the purpose of treaty interpretation in some instances,²²⁰ the tribunals still

²¹⁵ Tza, ¶ 147.

²¹⁶ Tza, ¶ 147-54.

²¹⁷ *Id.*

²¹⁸ Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 154 (Feb. 12, 2007).

²¹⁹ Tza, ¶ 159.

²²⁰ Czech Republic v. European Media Ventures, ¶ 31 [2007] EWHC (Comm) 2851, [2007] 2 C.L.C. 908 (Eng.), (“It seems to me that the court or tribunal’s task is to interpret the Treaty rather than to interpret the supplementary means of interpretation. If the material relied on is unclear or equivocal it is unlikely to confirm or determine a meaning.” “As already noted above, the task of the Court is not to search for a notional common intention; but to give a meaning to the words used in the context in which they came to be agreed.”); Renta 4 S.V.S.A et al. v. Russian Federation, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V

used them to validate the adopted interpretation.²²¹ Echoing the decisions, and in a complete opposite ratio to *RosInvest* and *Berschader*, the tribunals examined both *travaux préparatoires* as contextual documents, and the Soviet and the Czech state practice. The tribunals found these texts were unclear and inconsistent, and therefore non-conclusive for the purpose of interpreting the intent of a limited consent. In *European Media Ventures*, the High Court found:

In the present case each side appears to have adopted opposing negotiating positions, and there was a degree of compromise. In my view the arbitration provision of this Treaty fell into a further category, in which the width of the arbitration clause was left unclear: possibly to the satisfaction of both sides. I would add that I did not find material in which commentators sought to describe and explain the terms of the Treaty, by way of *précis*, to be of any significant assistance in the task of interpretation.²²²

The *Renta4* tribunal referred to the Russian participation mentioned previously in *Berschader* and to a paper on BITs published by one of the Russian negotiators. The tribunal found that both sources were silent on the central issue before the arbitrators: the issue of the arbitral tribunal's jurisdiction to determine whether there had been an expropriation.²²³ However, it also said a series of BITs signed by the USSR in the years of perestroika, shortly before the dissolution of the Union, may be seen as a divergence from past socialist dogma which signaled the USSR's acceptance of an international regime intended to reassure investors.²²⁴

024/2007, ¶ 20 (Mar. 20, 2009). , (“The premise that one may consider the intention of one of the parties to a BIT is questionable in the first place.”).

²²¹ *Tza*, ¶ 162 (“To dispel any doubts, the Tribunal has also sought guidance in supplementary interpretation means as authorized by Article 32, including preparatory works of the BIT and the circumstances surrounding its conclusion”); *Renta4*, ¶ 46 (“The textual approach above is sufficient to decide the issue at hand. There is strictly speaking no need to consider whether extraneous considerations confirm the conclusion. Nevertheless, the Tribunal believes it appropriate to explain why it finds that both evidence of the purported intentions of the parties and inferences as to object and purpose of the Spanish BIT validate the arbitrators’ conclusion”).

²²² *European Media Ventures*, ¶ 32.

²²³ *Renta4*, ¶ 49-51.

²²⁴ *Id.*

What was contemplated by commentators in view of the nature of early Chinese BITs was a test of the scope of these consent clauses before ICSID arbitration where China, as the host state, and respondent would challenge the international tribunal's subject matter jurisdiction.²²⁵ In *Tza*, the host state was not the contracting party that asserted a national policy of a limited scope of consent state; instead, Peru had offered a consent clause covering all disputes during the negotiation. As noted in the award, the wording that appears in the China-Peru BIT 1994 had been prompted and drafted by the Chinese negotiators who had rejected Peru's proposal of a wide consent clause as evidenced by the exchange between the negotiators.²²⁶ In the context of a south-south investment emanating from a Chinese investor, Peru was in a *bataille a front renverse*, relying on the restrictive state practice of the other contracting state. The tribunal found that both the Chinese negotiators' reply and China's practice of BITs, although revealing a restrictive practice, were not able to clearly assert that the consent was indeed limited to disputes involving only the amount of compensation for expropriation or involving any issue on expropriation.²²⁷

Finally, we examine the role of prior decisions on consent clauses. *Tza* and *Renta4* focus their analysis on *Berschader*, *RosInvest* and *European Media Ventures*.²²⁸ Both tribunals use prior awards to address the national policy and the parties' intent arguments of *Berschader* and *RosInvest*; they also compare the interpretation of the consent clause in *Berschader* and *European Media Ventures*. Also, while the *Tza* tribunal seems to have compiled and used all decisions available on narrow consent clauses, the *Renta4* tribunal, first examined

²²⁵ Monika C E. Heymann, *International Law and the Settlement of Investment Disputes relating to China*, JOURNAL OF INTERNATIONAL ECONOMIC LAW 11(3), 507-526 (2008); Kim M. Rooney, ICSID and BIT Arbitrations and China, 24 JOURNAL OF INTERNATIONAL ARBITRATION 24(6) 689-712 (2007); Stephan W. Schill, *Tearing down the Great Wall: the New Generation Investment Treaties of the People's Republic of China*, CARDOZO J. INT'L & COMP. L. 73-118 (2007); Peter J. Turner, *Investor-State Arbitration*, in MANAGING BUSINESS DISPUTES IN TODAY'S CHINA – DUELLING WITH DRAGONS, 233-258, Kluwer Law International ed. 2007.

²²⁶ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 170 (Feb. 12, 2007).

²²⁷ *Id.* ¶ 171-72.

²²⁸ The *Tza* decision devoted an entire section to other awards at the end of its reasoning, while the *Renta4* decision integrated the decisions in its reasoning.

the weight of *Berschader* and *RosInvest* and determined those two cases do not carry any *stare decisis*. None of the awards were decided on jurisdiction solely based on a narrow scope of the consent clause. As noted by the *Renta4* tribunal, in *Berschader* the tribunal had already reached the decision to decline jurisdiction based on the lack of direct investment on the part of the claimants before examining the consent issue.²²⁹ In *RosInvest*, the tribunal declined jurisdiction on the scope of the consent clause but retained jurisdiction on the MFN clause.²³⁰

Referring to *Berschader* and *RosInvest*'s findings on the reflection of a "national policy," the *Tza* tribunal departed to reach the conclusion that nothing allowed them to interpret the narrow consent clause as a reflection of the intent of the parties and a national policy of communist countries:

[T]he tribunal in *Berschader* maintained that 'the restrictive wording (of Article 10) arose from the **deliberate intention of the Contracting Parties to limit** the scope of the arbitration under the Treaty' (emphasis added).

The Tribunal seems to reach such conclusion by comparing the wording of the BIT in question with that of posterior treaties and by so doing infers the purpose of the wording in the Belgium/Luxembourg – USSR BIT. We find in the award no other indication that the parties had such an intention nor any clear statement of policy of either party proving such intention.

Similarly, in *RosInvest* Respondent argued that it seemed that certain aspects of the national policy of the former Soviet Union should be considered as a determining factor of what it may agree or not in

²²⁹ *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 23 (Mar. 20, 2009). ("The impact of *Berschader*'s consideration of this point [consent clause] is attenuated by the fact that its conclusion was superfluous [The arbitrators'] conclusion was that there was no jurisdiction with respect to the claimants' indirect investment. The door had therefore already been shut on the claimants by the time the arbitrators next turned to consider the phrase 'amount or mode of compensation'. Their conclusions in this regard may be considered *obiter*.").

²³⁰ *Id.* ¶ 48 ("It is also noteworthy that the tribunal at any rate found that it had jurisdiction on another ground (MFN)").

specific bilateral treaties. The Award, however, does not prove that Respondent has produced tangible evidence of such national policies. In any case, the Tribunal seems to have placed little importance to these arguments.²³¹

The *Renta4* tribunal was also skeptical of considering the intentions of one of the parties to a BIT. They found no evidence that the policy of the Soviet Union was consistent in the various BITs concluded during that period. They also found no evidence of official Spanish comment directly on point.²³²

Equally interesting, the *Tza* and *Renta4* tribunals lean on the absence of objection from the host state. In those cases, involving narrow consent clauses, (*Telenor v Hungary* and *Saipem v Bangladesh* the consent clause was limited to expropriation claims) the Tribunals question the existence of such a national policy:

Surprisingly, none of these awards analyze the alleged national policy arguments. On the contrary, as in the famous mystery that was solved with the clue of the ‘dog that had not barked,’ it seems that none of the governments (two of which, Hungary and Russia, were communist states) had even tried to argue that the expressions ‘involving compensation’ or ‘involving the amount of compensation’ established public policies and the parties’ intention to exclude all legal issues related to expropriation from the consent to international arbitration. Had the restrictive interpretation been the result of a policy deeply enrooted (and presumably hard to negotiate), it would have been unlikely that the involved governments had decided not to discuss it.²³³

In *Tza* and *Renta4* the tribunals criticise *Berschader’s* analysis, or lack of analysis, in interpreting the consent clause. In particular, it is not decisive in the *Tza* tribunal’s view that the enlargement of the scope from “dispute on the amount of compensation” to “any dispute” in subsequent treaties helps to explain, in retrospect, the nuance of the

²³¹ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 174-75 (Feb. 12, 2007).

²³² *Renta4*, ¶ 51-53.

²³³ *Tza*, ¶ 176.

meaning of “amount of the compensation” differently than “any issue on compensation including entitlement.”²³⁴

These findings should be approved. While there was a change in the wording of the consent clause in Chinese BIT to enlarge it from “dispute on the amount of compensation” to “any dispute,” such a change cannot itself constitute sufficient proof to restrict in retrospect the meaning of “dispute on the amount to compensation” and exclude the jurisdiction of the arbitral tribunal. However, the comparison of the wording of consent clauses contained in other treaties signed by the host state becomes significantly more relevant when the investor seeks the application of those clauses by means of the most favored nation clause mechanism.

D. MOST FAVORED NATION CLAUSE AND JURISDICTIONAL EXTENSION

BITs frequently contain most favored nation (MFN) clauses. These terms are to ensure that the host state does not discriminate among nationals of different countries. These clauses require the host state to treat a foreigner from one country no less favorably than it treats foreigners from another country under their separate BITs. If the host state provides better treatment to other foreigner investors, it must increase the level of treatment to all foreigners no matter that their BIT may have more restrictive terms.

MFN clauses are found in international trade treaties dating back to the 18th Century.²³⁵ Their scopes vary and are subject to interpretation. The subject matter of the state’s duty may extend to provide “treatment” no less favorable than, or it may be limited to “activities” in connection with the investment.²³⁶ It may also be limited to the

²³⁴ Tza, ¶ 185.

²³⁵ Treaty of the Bogue, China – Gr. Brit, art. VIII, Oct. 8, 1843 (“The Emperor of China having been graciously pleased to grant, to all foreign countries, whose Subjects, or Citizens, have hitherto traded at Canton the privilege of resorting for purposes of Trade to the other, four Ports of Fuchow, Amoy, Ningpo and Shanghai, on the same terms as the English, it is further agreed, that should the Emperor hereafter, from any cause whatever, be pleased to grant, additional privileges or immunities to any of the subjects or Citizens of such Foreign Countries, the same privileges and immunities will be extended to and enjoyed by British Subject. . . .”)

²³⁶ See Agreement on Encouragement and Reciprocal Protection of Investments, Ger.- China, art. 3.2, 3.2, Dec. 1, 2003, 2362 U.N.T.S. 253 (stating that each contracting party shall accord to investments and activities associated with such investments by the investors of the other Contracting

treatment of investors after the admission of the investment, or extend to admission and establishment of the investment.²³⁷ It may cover “all matters,” or an enumerative list of “matters” under the BIT.²³⁸ For instance, in the UK-China BIT the MFN clause covers “treatment” in general:

Investments by investors of either Contracting State in the Territory of the other Contracting State shall not be subjected to a treatment less favorable than that accorded to investments by investors of third States.²³⁹

In the Peru-China 1994 BIT, the scope of the MFN clause was limited to the guarantee of ‘fair and equitable treatment’ (FET) and provided:

1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.

2. The treatment and protection referred to in para. 1 of this article shall not be less favorable than that accorded to investments and activities associated with such investment of investors of a third state.²⁴⁰

The identification of the protections that can be included in the terms ‘treatment and protection’ has been the subject of extensive investment tribunal jurisprudence for the last ten years. While the

Party treatment not less favorable than that accorded to investments and activities by its own investors or investors of any third State); Agreement on Encouragement and Reciprocal Protection of Investments, China- Neth., art. 3.3, Nov. 26, 2001, 2369 U.N.T.S. 219.

²³⁷ China does not grant any treatment before admission and approval.

²³⁸ Agreement on Encouragement and Reciprocal Protection of Investments, China- Japan, art. 3.1, Aug. 27, 1988, 1555 U.N.T.S. 197 (“The treatment accorded by either Contracting Party within its territory to nationals and companies of the either Contracting Party with respect to investments, returns and business activities in connection with the investments shall not be less favorable than that accorded to nationals and companies of any third state”).

²³⁹ Agreement on Mutual Protection of Investment, China-Swed., art. 2.2, Mar. 29, 1982, 1350 U.N.T.S. 247.

²⁴⁰ China-Peru BIT, *supra* note 12, art.3.

application of the MFN clause to substantive protections has not been contested, its extension to procedural rights, such as access to international arbitration, has been debated and was one of the issues before the *Tza* tribunal. Mr. Tza sought to avoid the limited scope of the dispute resolution clause under the Peru-Chinese BIT by incorporating in reliance to the above MFN clause the more favorable dispute resolution clause in the third party treaty, the Peru-Columbia BIT (which allowed arbitration over any disputes).

The core of the developing case law, to which *Tza* brought its contribution, is the extent to which an investor may use the MFN clause of the basic treaty to incorporate the more favorable procedural protection of a third party BIT to improve its procedural treatment.²⁴¹ In connection with procedural rights, MFN treatment has been granted by arbitral tribunals to circumvent procedural requirements of the basic treaty such as the observance of a cooling off period²⁴² or the exhaustion of local remedies.²⁴³ The great leap forward consisted for foreign investors in seeking the use of MFN clauses in order to gain access to international arbitration, when the basic treaty provided for *ad-hoc* arbitration only or included a limited consent clause.

Ten years ago, when China was renegotiating its older form BITs (in particular the new Netherlands and German BITs) the question arose among commentators on the use of the MFN clauses to incorporate better dispute resolution clauses in order to circumvent the

²⁴¹ See DUGAN ET AL., *supra* note 79, at 413-25; Schreuer, *Consent to Arbitration*, *supra* note 81, at 851-61; Yas Banifatemi, *The Emerging Jurisprudence on the Most Favored Nation Treatment in Investment Arbitration*, INVESTMENT TREATY LAW: CURRENT ISSUES III, REMEDIES IN INTERNATIONAL INVESTMENT LAW, EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW (British Institute of International and Comparative Law ed., 2009) (R 15.5.1); Claire Crepet Daigremont, *L'Extension Jurisprudentielle de la Competence des Tribunaux Arbitraux*, LESASPECTS NOUVEAUX DU DROIT DES INVESTISSEMENTS INTERNATIONAUX (2007)(R. 15.5.1); Julie A. Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?*, 14 J. INT'L ECON. L. 157, 157-90 (2011).

²⁴² *Maffezini v. Kingdom of Spain*, ICISD Case No. ARB/97/7, Award, ¶ 21 (Nov. 13, 2000), 5 ICSID Rep. 419 (2002) (R. 21.6). See LOWENFELD, *supra* note 2, at 572-77; BANIFATEMI, *supra* note 241.

²⁴³ See *Siemens v. Republic of Arg.*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004) (the scope of the MFN limits' to "treatment" and "activities" in the basic BIT was sufficiently wide to include settlement of disputes (i.e. circumvent waiting periods)).

narrow consent clauses imposed by China.²⁴⁴ As noted above, oddly enough, the first time this mechanism was tested before arbitrators was the *Tza* case, for the benefit of a Chinese investment abroad. The use of the MFN clause in *Tza* will be examined in light of the solutions found in four other awards before which the issue was also raised: *Berschader*, *Rosinvest*, *Renta4* and *Austrian Airlines* tribunals. The applicability of the MFN clause to procedural rights depends first on its scope and second on its interaction with the consent clause.

1. SCOPE OF THE MFN CLAUSE

Access to international arbitration by use of the MFN clause initially resides in the interpretation of the scope of the MFN clause in the basic treaty. Authors differentiate between clauses that cover “matters” or “treatments” under the BIT, or if the MFN protection is granted to investments or to investors.²⁴⁵ In *Berschader*, *RosInvest* and *Austria Airline*, the MFN clauses were broad, while in *Tza* and *Renta4*, the MFN protection was limited to the fair and equitable treatment.

Therefore, in *Tza* and *Renta4*, the issue was whether the right to international arbitration is within the ambit of FET. The diversity of answers by tribunals based on their quite separate interpretations of similar language does not allow a definitive answer to predict the outcome of future disputes on this important issue. Some authors speak of ‘incoherent decisions.’ For instance, in *Plama Consortium v. Bulgaria*, where the investor claimed access to ICSID arbitration in lieu of *ad-hoc* arbitration specified in the basic treaty, the arbitral tribunal held that the MFN protection covering “all matters” did not create access to ICSID arbitration.²⁴⁶ It concluded the MFN clause of the basic treaty must explicitly refer to investor-state dispute settlement. In contrast, in *Siemens v Argentina*, which dealt with a MFN clause limited to FET, the tribunal held that such MFN protection allowed the

²⁴⁴ See Turner, *supra* note 101, at 233-58 (R.15.5.1, R 4); Heymann, *supra* note 64, at 507-26(R4); Rooney, *supra* note 66, at 707; Schill, *supra* note 102, at 73-118; Aaron Chandler, *BIT's, MFN Treatment and the PRC: The Impact of China's Ever Evolving Bilateral Investment Treaty Practice*, 43 INT'L LAW 1301, 1301-10 (2009)(R 16.4); Mark A. Cymrot, *Investment Disputes with China*, 61(3) DISP.RESOL J. 80, 80-7 (2006) (R 16.4).

²⁴⁵ LOWENFELD, *supra* note 2, at 572.

²⁴⁶ See *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24. Decision on Jurisdiction, (Feb. 8, 2005), 44 ILM 721 (2005).

investor to circumvent a pre-arbitration cooling period by reference to a third party treaty without that requirement.²⁴⁷

As to the extension of the scope of the consent clause to create jurisdiction, the issue has been examined with respect to broad FMN clauses as well as narrow ones.

The *Rosinvest* tribunal had to examine a MFN clause covering both the treatment of “investments and returns” as well as “investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investors.”²⁴⁸ The tribunal distinguished between these two wordings and held that the former one did not include the protection by an arbitration clause covering expropriation:

[I]t is difficult to doubt that, first, an expropriation is indeed a ‘treatment’ of the investment by the Host State. However, secondly, while the protection by an arbitration clause covering expropriation is a highly relevant aspect of that ‘treatment,’ if compared with the alternative that the expropriation of an investment can only be challenged before the national courts of the Host State, it does not directly affect the ‘investment,’ but rather the procedural rights of the ‘investor’ for whom paragraph (2) of Article 3 provides a separate rule.²⁴⁹

The latter wording, which granted the MFN protection to investors’ included, according to the *Rosinvest* tribunal, recourse to arbitration. While expropriation may interfere with an investors “use” and “enjoyment,” the ability to submit to arbitration becomes a critical part of the investors corresponding protection. This allows the investor significant protection compared with the mere option of challenging the interference in the domestic courts of the host nation.²⁵⁰

In *Tza*, the Chinese investor sought to have recourse by the MFN clause of the Peru China BIT to the dispute resolution clause provided for in a third party treaty, namely the Peru-Columbian 2001 BIT which

²⁴⁷ See Siemens, ICSID Case No. ARB/02/8, Decision on Jurisdiction.

²⁴⁸ UK-Soviet BIT, art. 3(1) & (2).

²⁴⁹ RosInvest Co. UK Ltd. v. Russian Federation (RosInvest), Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 127 (Oct. 2007).

²⁵⁰ *Id.* ¶ 130.

covered “all legal disputes,”²⁵¹ to broaden the scope of the jurisdiction of the arbitral tribunal. The MFN Clause in the China-Peru BIT was limited to FET and provided:

1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
2. The treatment and protection referred to in para. 1 of this article shall not be less favorable than that accorded to investments and activities associated with such investment of investors of a third state.²⁵²

The *Tza* tribunal interpreted this MFN clause under Article 31 of the VCLT, “in accordance with its ordinary meaning and having considered it in the light of the purpose of the BIT, it does not seem to restrict the scope of the word ‘treatment’ to such significant commercial matters as exploitation and investment management.”²⁵³ The tribunal accepted that this wording covered access to international arbitration for violation of the fair and equitable treatment.²⁵⁴ They did not agree that it extended to disputes over expropriation.

The *Renta4* tribunal took the view that “treatment encompasses arbitration regardless of whether it relates to investments or investors” but, by a majority decision, found that the circumstance of that case did not allow the application of the MFN clause to enlarge the consent

²⁵¹ Agreement on Promotion and Reciprocal Protection of Investments, Peru-Colom., art. 12.1, 12.2, Apr. 26 1994, 2342 U.N.T.S. 181 (provided that any legal dispute between a Contracting Party and a national or company of the other Contracting Party in connection with the investments under this Agreement shall, as far as possible, be settled amicably between the parties to the dispute. If a dispute cannot be settled amicably between the parties to the dispute within three months from the date of written notice of the claim, the dispute may be submitted either to the competent court of the Contracting Party in whose the investment is located or to the international arbitration of the International Centre for Settlement of Investment Disputes (hereinafter referred to as the “Centre”).

²⁵² Peru-China BIT, *supra* note 12, at art.3.

²⁵³ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 213 (Feb. 12, 2007).

²⁵⁴ *Id.*

clause.²⁵⁵ As in *Tza*, the MFN clause in the Spanish-Russian BIT was found to apply to FET only, but the tribunal found that FET did not extend to international arbitration as opposed to domestic courts.²⁵⁶

The question subsequently arose in *Austrian Airlines* where the applicable MFN of the basic treaty covered investors and “their investments treatment.”²⁵⁷ The Tribunal took the general view, in line with *Maffezini* and *RosInvest* and *Renta4*, that as a matter of principle MFN clauses may apply to dispute settlement clauses:

As a general matter, the tribunal observes that it sees no conceptual reason why an MFN clause should be limited to substantive guaranties and rule out procedural protections, the latter being a means to enforce the former. The tribunal notes, in this connection, that the potential application of an MFN clause to procedural protections is widely accepted by investment tribunals. This view has been held mostly with respect to the avoidance of procedural requirements prior to commence arbitration, but also, more recently, with respect to the import of a dispute settlement clause.²⁵⁸

2. INTERACTION OF THE MFN CLAUSE WITH THE DISPUTE RESOLUTION CLAUSE

Thus it appears that while recent decisions have acknowledged the principle that a MFN clause may extend to jurisdiction matters (*Tza* and *Austrian Airlines*), they nonetheless have refused its enforcement when interpreting this clause in the context of the wording of the dispute resolution clause.

²⁵⁵ *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007, ¶ 101 (Mar. 20, 2009).

²⁵⁶ Agreement Concerning the Promotion and Reciprocal Protection of Investments, Spain-Russ, art. 5, Oct. 26, 1990, 1662 U.N.T.S. 199 (“(1) Treatment of Investments” provided “each party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party. (2) The treatment and protection referred to in paragraph 1 above shall be not less favorable than that accorded by either Party to investments made its territory to investors of any third State”).

²⁵⁷ *Austrian-Slovak BIT*, art. 3.

²⁵⁸ *Austrian Airlines v. Slovak Republic (Austrian Airlines)*, UNCITRAL, Final Award, ¶ 124 (Oct. 9, 2009).

In *Tza*, the tribunal considered interpretation of the “general wording” of the MFN clause contrasted with the “specific wording” of the consent provision under Article 8(3) of the same BIT where the parties had “specifically established the possibility of submitting ‘other matters’ to ICSID arbitration” and “established specifically such occurrence in the wording of the BIT,” the clause prevented the incorporation of the more favorable clause found in the third party treaty.²⁵⁹ When referring to its “duty to give the BIT wording the meaning it was really intended,” the *Tza* tribunal held, “the specific wording of Article 8(3) should prevail over the general wording of the MFN clause in Article 3.5.”²⁶⁰

A similar approach was adopted by the *Austrian Airlines* tribunal, which held that the specific intent of a narrow consent prevailed over the unspecific intent in the MFN clause:

Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation due expropriation to the exclusion of disputes over the principles of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecified intent expressed in the MFN clause.... The restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.²⁶¹

A different view was adopted in *RosInvest*, where the tribunal found that the limitations to the mechanism of the MFN clause were not to be found in the restrictive wording of the dispute resolution clause, but instead in the exceptions to the MFN clause listed in that

²⁵⁹ Peru-China BIT, *supra* note 12, at art.8.3 (“If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations...[I]t may be submitted at the request of either party to the international arbitration of [...] ICSID. Any 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.” (emphasis added)).

²⁶⁰ *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶ 216 (Feb. 12, 2007).

²⁶¹ *Austrian Airlines v. Slovak Republic (Austrian Airlines)*, UNCITRAL, Final Award, ¶ 135 (Oct. 9, 2009).

very clause. The tribunal found the MFN clause applied to the dispute resolution clause.²⁶²

This view should be preferred to the dichotomy adopted in *Tza* and *Austrian Airlines* between specific and general consent wording. It is the wording of the MFN clause, which should contain its own limitations and exceptions. Thus the preferred view should be to limit the scope of the MFN clause (i) in view of its wording and whether FET would encompass access to international arbitration, and (ii) in view of its own exceptions listed in that clause.

IV. CONCLUSION

Future disputes involving China BITs are subject to uncertainty in outcome on the two major issues decided in *Tza*: (i) the scope of the consent clause in disputes over expropriation and (ii) the application of the MFN clauses on older generation BITs when the investor seeks the broader or more favorable procedural treatment of newer generation BITs.

²⁶² RosInvest Co. UK Ltd. v. Russian Federation (RosInvest), Arb. Inst. Of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 135 (Oct. 2007). “In view of the careful drafting of Article 8 [dispute resolution clause] and the limiting language therein, it can certainly not be presumed that the Parties “forgot” arbitration when drafting and agreeing on Article 7 [MFN clause]. Had the Parties intended that the MFN-clauses should also not apply to arbitration, it would indeed have been easy to add a subsection (c) [exceptions] to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.”