Chinese Bilateral Investment Treaties: Restrictions on International Arbitration

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Reprinted from
(2010) 76 *Arbitration* 58-69

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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1. INTRODUCTION

China has entered into more bilateral investment treaties (BITs) than any other country, having signed a total of 115, of which 85 have come into force. The majority of these are treaties with developing countries but a number are with China's western trading partners, such as the United Kingdom, Germany, Netherlands, Italy, Sweden, Australia and New Zealand. China's willingness to enter into BITs over the past 20 years to protect foreign investors' interests has been partially responsible for the significant growth in foreign direct investment into China over that period.

Prior to 1998, in common with other communist countries, China, by the terms of the relevant BIT, either did not provide for disputes to be settled by international arbitration,[1] or restricted an investor's right to refer disputes to international arbitration only to those disputes concerning the amount of compensation payable under the protection from expropriation or nationalisation provision.[2] Foreign investors are required to bring all other disputes in the national courts of China, which does not provide an effective remedy. An example is art.12(3) of the Singapore–China BIT[3]:

> "If a dispute involving the amount of compensation resulting from expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation... cannot be settled within six months after resort to negotiation..., it may be submitted to an international arbitral tribunal established by both parties."[4]

Since 1998 however, China has relaxed this policy and entered into a number of BITs where investors enjoy an unrestricted right to bring any dispute concerning a potential breach of the BIT to international arbitration. An example is art.9 of the Germany–China BIT,[5] which allows investors to commence international arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), unless the parties agree on ad hoc arbitration under the UNCITRAL Rules, with respect to "any dispute concerning investments" after a six month negotiation period.[6]

Notwithstanding the restrictions on dispute resolution contained in the first generation of Chinese BITs, most contain comprehensive substantive protection measures for foreign investors, including rights to "fair and equitable treatment" of investments, "protection and

[1] See for example, the dispute resolution provisions in the Thailand–China BIT, and the Sweden–China BIT (more recently supplemented by a protocol providing for an investor-state dispute resolution mechanism).

[2] Exceptions to this policy include the Netherlands–China, which came into force on February 1, 1987, and the UK–China BIT, which came into force on May 15, 1986, both of which allow an investor to refer any dispute to international arbitration.

[3] The Singapore–China BIT came into force on February 7, 1986.

[4] Other examples include the Australia–China BIT (art.XII(2)), and the New Zealand–China BIT (art.13(3)).

[5] The Germany–China BIT came into force on December 11, 2005.

[6] Pursuant to the Protocol to the BIT, subject also to the investor having referred the issue to an administrative review procedure according to Chinese law, and the dispute still existing three months after the investor has brought the issue to the review procedure.

security" of investments, and protection of investments from "expropriation or nationalisation". In addition, most of the second generation of Chinese BITs contain "umbrella clauses"—arguably providing an investor with a wide scope of protection—typically specifying:

> "Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party."[7]

These two generations of Chinese BITs give rise to two controversial issues in investor-state disputes: first, the effect of a restriction on the types of dispute that can be referred to international arbitration in similar terms to art.12(3); secondly, whether a national of a state party to the first generation can apply the unrestricted arbitration provisions in the new generation by invoking a most favoured nations (MFN) clause contained in the relevant basic treaty. This article discusses recent investor-state awards as they apply to these two issues.

2. THE EFFECT OF CHINESE BILATERAL INVESTMENT TREATY RESTRICTIONS ON INTERNATIONAL ARBITRATION

Earlier tribunal decisions on restrictions on international arbitration

Prior to recent decisions discussed later in this paper, restrictions similar to those in art.12(3) were considered to mean that there must first be a determination as to whether a state has expropriated an investment before any dispute concerning "the amount of compensation resulting" from such expropriation under art.12(3) could be referred to an arbitral tribunal. If this principle is correct, then in practice the scope of application of provisions such as art.12(3) is limited, since it is likely that China, like most states, would argue that there had been no breach of the expropriation provision of the Singapore–China BIT in the first place, and therefore a tribunal had no jurisdiction.

Not surprisingly, given the limited scope of the right to refer disputes to international arbitration in the first generation of Chinese BITs, and the limited practical application of provisions such as art.12(3), there is no evidence that any investor commenced an investor-state arbitration against China. Support for the restricted scope of provisions such as art.12(3) stems from the decisions of the investor-state tribunals in *Vladimir and Moise Berschader v Russian Federation*,[8] which involved a claim by Belgian nationals under the Belgium-Luxembourg Economic Union-Soviet Union BIT, and *RosInvestCo UK Ltd v The Russian Federation*,[9] which involved a claim by UK nationals under the UK–Soviet Union BIT.

In *Berschader*[10] the tribunal held that art.10 of the BIT, which gave investors the right to arbitrate disputes only "concerning the amount or mode of compensation paid under Article 5" (being the protection from expropriation provision), excluded "disputes concerning whether or not an act of expropriation actually occurred under Article 5", and therefore, the tribunal had no jurisdiction under the BIT to hear such disputes.

In *RosInvestCo*[11] the tribunal considered a similarly worded provision in art.8 of the UK–Soviet Union BIT, which provides (emphasis added):

[7] Germany–China BIT art.10(2).

[8] *Vladimir and Moise Berschader v Russian Federation,* award in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, April 21, 2006.

[9] *RosInvestCo UK Ltd v The Russian Federation*, award in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, October 2007.

[10] *Berschader*, award of the Arbitration Institute of the Stockholm Chamber of Commerce, April 21, 2006.

[11] *RosInvestCo* award of the Arbitration Institute of the Stockholm Chamber of Commerce, October 2007.

"(1) This Article shall apply to any legal disputes between an investor of one Contracting Party in relation to an investment of the former either concerning *the amount or payment of compensation under Articles 4 or 5 of this Agreement* [art.4 provides for compensation to investors arising from armed conflict, etc. and art.5 is the protection from expropriation provision], or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement. . .

(2) Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes."

The tribunal considered that the reference in art.8(1) to "the amount or payment of compensation under Articles 4 or 5 of this Agreement", in its ordinary meaning, contained "a limitation of the jurisdiction conferred by that clause". The tribunal considered the terms of art.5 itself, which the tribunal noted specified payment of compensation only as the third exception to the requirement that investments shall not be expropriated, and interpreted this to mean that the terms of art.8(1) could only apply to this third exception. The tribunal concluded therefore that the terms of art.8(1) did not extend to the tribunal's jurisdiction over questions of whether an expropriation has occurred and was legal. Note however that the tribunal held that it had jurisdiction to decide this issue by applying the MFN clause, as discussed in s.3 below.

Recent tribunal decisions on restrictions on international arbitration

As at the end of 2006, the position under *Berschader* and *RosInvestCo* was that investors covered by the first generation of Chinese BITs could only refer quantum of expropriation to arbitration, with the question of whether expropriation actually occurred to be decided by Chinese national courts. However, this situation may have changed following the investor-State awards in *Renta 4 S.V.S.A. v The Russian Federation*,[12] and *Tza Yap Shum v The Republic of Peru*,[13] and the English High Court decision in *The Czech Republic v European Media Ventures SA*,[14] dismissing an application by the Czech Republic to set aside an investor-State award on jurisdiction. All three tribunals held that similarly worded restrictions in the respective BITs gave the tribunal jurisdiction not only to hear disputes concerning the amount of compensation arising from expropriation by the state but also whether expropriation had occurred in the first place, directly contrary to the decisions in *Berschader* and *RosInvestCo*.

In *Renta 4*, seven Spanish entities claimed that the Russian government had expropriated their investments in Yukos American Depository Receipts as a consequence of measures taken by the government against the Yukos Oil Company, in breach of arts 4 to 6 of the Spain–Soviet Union BIT. Article 10(1) refers to any dispute between Russia and an investor "relating to the amount or method of payment of the compensation due under Article 6" (being the expropriation provision). Russia objected to the tribunal's jurisdiction, arguing that only disputes concerning the amount or method of payment of compensation due under art.6 are subject to arbitration under art.10(1). Russia argued that there was a continuing disagreement between the parties as to whether expropriation of the investment had taken place, which must be resolved in some other proper forum (in this case, the Russian national courts) before matters of quantum could go to international arbitration under art.10.

The tribunal analysed the award in *Berschader* and noted that the decision on expropriation was obiter dicta since the tribunal's conclusion on the effect of the restriction on arbitration

[12] *Renta 4 S.V.S.A. v The Russian Federation*, award on jurisdiction in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, March 20, 2009.

[13] *Tza Yap Shum v The Republic of Peru* ICSID Case No.ARB/07/6, June 19, 2009.

[14] *Czech Republic v European Media Ventures SA* [2007] EWHC 2851, December 5, 2007.

was superfluous to its primary finding that the investor had no standing with respect to its indirect investment.[15] The tribunal stated:

> "It cannot be adopted by the present arbitrators because it does not do justice to the extensive and refined debate which has emerged in the present case. There is no way of knowing from their award how the *Berschader* arbitrators would have reacted to the points raised here."[16]

The tribunal described the tribunal's treatment of this issue in *Berschader* as "essentially to endorse an assumption. That simply cannot be decisive either way."[17]

The tribunal also referred to the recent decision of the English High Court in *European Media Ventures*. The tribunal had interpreted a limitation on arbitration in art.8(1) of the Czech Republic–Belgian Luxembourg Economic Union BIT, which referred to disputes "concerning compensation due by virtue of Article 3 paragraphs (1) and (3)" (being the expropriation provisions), as being an exclusion from jurisdiction only of any claim for relief other than compensation (such as restitution or a declaration that a contract was still in force), thereby allowing jurisdiction as to whether expropriation had in fact taken place.

Simon J. upheld the award: the word "compensation" in art.8(1) limits the scope of arbitration, but the word "concerning" is broad and similar to other common expressions in arbitration clauses such as "relating to" and "arising out of". As a matter of ordinary meaning, the word "concerning" covers every aspect of its subject, including issues of entitlement as well as quantification. He concluded:

> "As the Tribunal noted, the effect of the Czech Republic's argument is that a tribunal is precluded from considering or making any determination on any of the elements of Article 3(1) or (3), despite what may be the need for a close examination of the nature of the conduct in question and the circumstances when considering the question of the amount of compensation. This favours an interpretation in favour of determination by the tribunal and against parallel or duplicative proceedings."

The tribunal in *Renta 4* noted that the presence of the word "due" in art.10(1) did not dissuade the High Court from finding that the tribunal had jurisdiction to determine entitlement (contrary to Russia's argument on this wording). It considered that the wording of art.10(1) "entrains the power to determine whether there has been a compensable event in the first place".[18] It also considered various extraneous materials, including other BITs signed by Russia, concluding:

> "It is moreover implausible that States would want to provide for inter-State arbitration of controversies as to whether an expropriation had occurred at the same time as they carve out the possibility of separate investor-State arbitration with respect to the amount and method of compensation. Such pointless and unprecedented complications would be absurd. The notion of actions before the courts of the host country are problematic in principle. Courts are on the international level equivalent to other organs of the State. This means that the predicate of obtaining any amount of compensation according to any method would be hostage to the host State's self-determination as to whether it is due at all."[19]

The most recent award on jurisdiction in *Tza Yap Shun* is notable because it is the first reported case in which a Chinese investor has claimed under a Chinese BIT, the Peru–China BIT. Tza alleged that Peru's violations of the Peru–China BIT adversely affected his

[15] *Renta 4* March 20, 2009 at [23].
[16] *Renta 4* March 20, 2009 at [23].
[17] *Renta 4* March 20, 2009 at [53].
[18] *Renta 4* March 20, 2009 at [39].
[19] *Renta 4* March 20, 2009 at [58].

investment in a Peruvian company in the business of producing fish-based food products and the export of these to Asian markets. Peru denied Tza's allegations and objected to the jurisdiction of ICSID and the tribunal on a number of grounds.

The Peru–China BIT came into force in February 1995, and is therefore an example of the first generation of Chinese BITs. Article 8(3), the arbitration provision, is similarly drafted to the equivalent provision considered in *Renta 4*:

> "If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of [ICSID]."

The respondent argued that art.8(3) provides for international arbitration of limited scope, namely, that it is only after the domestic courts determine that the investment was in fact expropriated and that there has been no agreement between the parties on the amount of compensation, that the investor may submit to international arbitration any dispute involving the amount of compensation owed to the investor.

The tribunal held that the terms of art.8(3) includes not only the determination of the amount of compensation but also,

> "any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements".[20]

In support of its argument, the respondent adduced evidence from a Chinese expert witness regarding the terms of numerous BITs signed by China between 1993 and 1998, and the evidence of senior government officials from both China and Peru who were involved in negotiating the Peru–China BIT between 1992 and 1994. The tribunal considered that this evidence indicated China was not willing to accept the Peruvian proposal on ICSID arbitration with regard to all the issues that could arise between an investor and the Government of China, but that it did not clearly establish if China's consent under art.8(3) was limited only to disputes involving the amount of compensation for expropriation, or if it would also include disputes involving other issues.

The tribunal's approach was to apply art.31 of the Vienna Convention, to interpret the provision in accordance with its "ordinary meaning". The tribunal referred to the term "involving" in art.8(3) and considered that the only requirement is that the dispute must "include" the determination of the amount of compensation, and not that the dispute must be restricted solely to this issue. The tribunal noted that art.4, the protection from expropriation provision, contained a number of elements of potential dispute, including the amount of compensation payable, thereby indicating that art.8(3) could have wider scope. The tribunal referred with approval to the similar reasoning of the English High Court in *European Media Ventures* discussed above, describing the decision as "the most thorough and detailed" of the previous decisions on the issue.

The tribunal was also of the view that, if it accepted the respondent's interpretation of art.8(3), it would lead to "an incoherent conclusion",[21] that the investor would never have access to arbitration. The tribunal also considered the decisions in *Berschader* and *RosInvestCo*, and was critical of the reasoning of the tribunals in both cases.

3. APPLICATION OF MFN CLAUSES TO ESTABLISH A TRIBUNAL'S JURISDICTION

The question of whether an investor can extend a tribunal's jurisdiction by an MFN clause in a basic treaty to a type of dispute not falling within the scope of the dispute resolution

[20] *Renta 4* March 20, 2009 at [188].
[21] *Renta 4* March 20, 2009 at [154].

clause contained in the basic treaty has been controversial and has given rise to a number of conflicting awards. This is of importance to foreign investors, since investors bound by the first generation of Chinese BITs have the potential to enhance their protection by applying MFN clauses in their basic treaty to import the broader dispute resolution provisions contained in the second generation.

Most BITs contain provisions commonly referred to as MFN clauses. The beneficiary of an MFN clause is entitled to the more favourable treatment accorded by the state party to nationals of a third country. The more favourable treatment is found in a "third-party treaty", which is then incorporated by reference into the basic treaty without any additional act of transformation and governs the rights of the beneficiary of the MFN clause. The rationale for the MFN standard in the context of BITs is to prevent discrimination against nationals of different countries and to ensure equality of treatment by the host state regardless of the nationality of investors. A typical example of an MFN clause is in art.4 of the Singapore–China BIT:

> "[N]either Contracting Party shall in its territory subject investments admitted in accordance with the provisions of Article 2 or returns of nationals and companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of nationals and companies of any third State."

MFN clauses depend for their scope upon the conduct of the state signatories, since as soon as a state signatory grants more favourable treatment to investors from a third state, the benefits are automatically extended to the nationals of a state that benefits from the MFN clause. MFN clauses therefore allow investors a potentially wide ranging protection by allowing them to "treaty shop" for provisions in third-party treaties that may be more favourable than those contained in the basic treaty. As China has entered into some 115 BITs, often providing for substantive protection of investments in different terms, there is ample scope for investors to seek wider protection in third-party treaties, including provisions giving unrestricted rights to refer disputes to international arbitration.

It is now well established that the beneficiary of an MFN clause can invoke the substantive rights of a third-party treaty.[22] However, the question of whether an MFN clause can have the effect of widening the scope of jurisdiction by means of third-party dispute resolution provisions is more difficult, and has given rise to conflicting investor-state decisions. In these cases either an investor has failed to comply with a condition precedent to arbitration contained in the relevant BIT, and has sought to invoke a less restrictive arbitration clause contained in a third-party BIT in order to commence arbitration proceedings, or alternatively, seeks to extend the jurisdiction of the tribunal by reference to disputes that the investor has no right to refer to international arbitration under the basic treaty.

The tribunal in *Emilio Agustin Maffezini v Kingdom of Spain*[23] applied the MFN clause in the Argentina–Spain BIT to provide the claimant with the more favourable dispute resolution provisions contained in the Chile–Spain BIT, which provided for a direct right to international arbitration,[24] as part of the substantive protection extended to the beneficiary of the clause. The Argentina–Spain BIT dispute provisions provided for a six-month negotiation phase before the dispute could be submitted to the competent courts of the host state and, failing settlement of the dispute after the expiry of 18 months, to international arbitration under the auspices of ICSID or an ad-hoc tribunal under the UNCITRAL Rules. Maffezini, an

[22] See *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case No.ARB/01/07, Award, May 25, 2004.

[23] *Emilio Agustin Maffezini v Kingdom of Spain* ICSID Case No.ARB/97/7, Decision on Jurisdiction, January 25, 2000.

[24] Chile–Spain BIT art.10(2), which provides for the investor's right to refer disputes to international arbitration after a six month period allowed for negotiations has expired.

Argentina national, did not comply with the requirement to submit the dispute to the Spanish courts and Spain objected to the tribunal's jurisdiction. Maffezini, in his defence, relied on the terms of the MFN clause in the Argentina–Spain BIT. The tribunal accepted Maffezini's argument and held that it had jurisdiction over his claims by means of the MFN clause. It saw no distinction between applying MFN clauses to substantive rights and dispute provisions:

> "The Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors... International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded... if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause."[25]

But the tribunal indicated that there were limits arising from public policy to the application of MFN clauses to dispute provisions, including, where the parties had agreed for a particular arbitration forum, such as ICSID, that this forum could not be changed by application of the MFN clause. This was the first time that an MFN clause had been construed in this way, and commentators and subsequent tribunals have been critical of these restrictions.

This principle set out by the tribunal in *Maffezini* was subsequently followed in *Siemens AG v The Republic of Argentine*,[26] where the tribunal allowed Siemens to apply the more favourable dispute resolution provision in the Chile–Argentina BIT by commencing arbitration after a six-month negotiation phase, rather than the more restrictive requirements in the Germany–Argentina BIT, to exhaust local Argentine remedies during an 18-month period. The tribunal accepted that the reference in the MFN clause to "treatment" was narrower than the reference in the MFN clause considered by the tribunal in *Maffezini*, which referred to "all matters subject to this agreement", but nevertheless considered that the term was sufficiently wide to include settlement of disputes.[27]

The decisions in *Maffezini* and *Siemens* are consistent with the view that dispute resolution provisions are part of the substantive protection to be accorded investors and their investments. However, in *Plama Consortium Ltd v Republic of Bulgaria*,[28] the tribunal rejected the approach in *Maffezini* and *Siemens* and considered that the wording of an MFN clause should be "clear and unambiguous" in its reference to arbitration.

In *Plama*, unlike *Maffezini* and *Siemens*, the investor sought to expand the tribunal's jurisdiction and was not simply attempting to overcome a failure to comply with a condition precedent to international arbitration. Plama purchased a majority interest in an oil refinery in Bulgaria and alleged that the Bulgarian Government had materially damaged the operations of the refinery. The Bulgaria–Cyprus BIT only provided for disputes relating to "the amount of compensation" arising from expropriation to be settled by international arbitration, and did not provide for ICSID arbitration as a forum. The investor invoked the MFN clause to import the dispute resolution provisions contained in art.8 of the Bulgaria–Finland BIT, which allows an investor to refer "any dispute" to either ICSID or ad hoc arbitration under the UNCITRAL Rules after a three-month negotiation period. Plama alleged that Bulgaria had breached a number of the substantive protection provisions of the BIT. The MFN clause provided:

[25] *Emilio Agustin Maffezini* ICSID Case No.ARB/97/7 at [54]–[56].
[26] *Siemens AG v The Republic of Argentine* ICSID Case No.ARB/02/8, Decision on Jurisdiction, August 3, 2004.
[27] *Siemens AG* ICSID Case No.ARB/02/8 at [103].
[28] *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No.ARB/03/24, Decision on Jurisdiction, February 8, 2005.

> "Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is no less favourable than that accorded to investments by investors of third states."[29]

The tribunal rejected Plama's argument that the term "a treatment. . . accorded to investments by investors" applied to dispute provisions and rejected the approach in *Maffezini*, reasoning that an agreement to arbitrate must be in clear and unambiguous terms:

> "A clause reading *'a treatment which is not less favourable than that accorded to investments by investors of third states'* as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other documents (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs."[30]

If the *Plama* reasoning is correct, there would be little scope for importing arbitration provisions from third party treaties by means of an MFN clause, because MFN clauses by their nature are drafted in general terms and it would be unlikely that any such provision would satisfy the degree of clarity required by the tribunal in *Plama*.

The *Plama* decision was followed by a line of decisions following the reasoning in *Maffezini*, all of which involved situations similar to *Maffezini* where an investor was trying to overcome pre-conditions, such as a requirement to have recourse to local courts prior to referring the dispute to international arbitration, as provided for in the basic treaty.[31]

Consistent with the stricter approach in *Plama*, the tribunal in *Wintershall Aktiengesellschaft v Argentine Republic*[32] declined jurisdiction over a claim by a German investor, refusing to permit the investor to invoke the MFN clause in the Germany–Argentina BIT in order to dispense with an 18-month period in which investors must pursue their claims before local courts. This decision was directly contrary to the earlier decision of the tribunal in *Siemens AG v Argentine Republic*[33] involving the same provision.

This leads to a discussion of the three most recent cases, *RosInvestCo*, *Renta 4* and *Tza Yap Shun*, where tribunals considered expansion of their jurisdiction to disputes that they would not otherwise have jurisdiction to determine by application of an MFN clause, rather than a claimant simply attempting to overcome pre-conditions to arbitration in the basic treaty.

In *RosInvestCo* the claimant's right to refer a dispute to international arbitration under the UK–Soviet Union BIT was limited in art.8(1) to those disputes concerning the amount or payment of compensation arising from expropriation. As an alternative to the claimant's arguments on interpretation of art.8(1), the claimant sought to invoke the MFN clause in art.3(2) of the BIT to apply the more favourable dispute resolution provisions in art.8 of the Denmark–Russia BIT. The tribunal did not expressly refer to the approach in *Maffezini*, but rather emphasised the wording of the MFN provision, which granted protection for

[29] MFN clause art.3(1).

[30] *Plama Consortium* ICSID Case No.ARB/03/24 at [200].

[31] *Camuzzi International SA v The Argentine Republic* ICSID Case No.ARB/03/2, Decision on Jurisdiction, May 11, 2005; *Gas Natural SDG SA v The Argentine Republic*, ICSID Case No.ARB/03/10, Decision on Jurisdiction, June 17, 2005; *National Grid Plc v The Argentine Republic*, ad hoc Award, UNCITRAL, Decision on Jurisdiction, June 20, 2006; *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* ICSID Case No.ARB/03/19, Decision on Jurisdiction, August 3, 2006.

[32] *Wintershall Aktiengesellschaft v Argentine Republic* ICSID Case No.ARB/04/14, Decision on Jurisdiction, December 8, 2008.

[33] *Siemens AG v Argentine Republic* ICSID Case No.ARB/02/8, Decision on Jurisdiction, August 3, 2004.

"investors" regarding "their management, maintenance, use, enjoyment or disposal of their investments". But it is clear, from its equating an investor's right to refer disputes to international arbitration with substantive rights, that the tribunal's approach is consistent with the reasoning in *Maffezini*:

> "[I]t is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his *'use'* and *'enjoyment'*, procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state."[34]

The tribunal noted that the restriction in art.8 of the BIT was widened by means of art.3(2), and considered this to be a normal result of the application of the MFN clause:

> "While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another."[35]

One of the factors that influenced the tribunal's reasoning was that the parties to the UK–Soviet Union BIT had expressly excluded specific areas that the parties did not wish to be subject to the protection of the MFN clause, which the tribunal considered showed that the parties had considered the question of which issue should not benefit from the MFN protection.[36]

In *Renta 4*, the claimants sought to overcome the restriction on referring disputes to international arbitration contained in art.10(1) of the Spain–Soviet Union BIT by arguing in the alternative that the MFN clause contained in art.5 of the BIT allowed them to submit the dispute to international arbitration. The claimant argued that Russia is a party to BITs with third states containing liberal arbitration clauses and, like the claimant in *RosInvestCo*, invoked art.8(1) of the Denmark-Russia BIT, which gives an investor unrestricted right to submit "any dispute" to international arbitration. The MFN clause contained in art.5(2) of the BIT provides:

> "The treatment referred to in paragraph 1 [the fair and equitable treatment guarantee] shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State."

The tribunal noted that various awards dealing with the jurisdictional implications of an MFN clause have taken divergent views, and that a *jurisprudence constante* of general applicability is not yet firmly established. It accepted the general proposition that MFN clauses should apply to arbitration provisions, referring with approval to *RosInvestCo*,[37] and the International Court of Justice decision in *Ambatelios*.[38] It stressed that there is no significant distinction between "procedural" investor protection and "substantive" investor protection, and "no textual basis or legal rule to say that 'treatment' does not encompass the host state's acceptance of international arbitration".[39] However, in interpreting art.5(2),

[34] *RosInvestCo UK Ltd v The Russian Federation* SCC Case No.ARB V079/2005 at [130].
[35] At [131].
[36] At [135].
[37] *RosInvestCo* award in Stockholm under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, October 2007.
[38] *Ambatelios* 23 I.L.R. 306.
[39] *Renta 4 S.V.S.A. v The Russian Federation* SCC Case No.ARB V024/2007 at [101].

the majority was of the view that the MFN clause was unusually worded and only provided investors a no-less favourable level of fair and equitable treatment, and did not apply to arbitration provisions contained in third party BITs. In a dissenting opinion, Judge Brower went further than the majority and considered that Russia's broader consent to arbitration contained in a third party treaty can be considered an "aspect of fair and equitable treatment" within the terms of art.5 and was therefore applicable to the claimants' dispute.

The tribunal in *Renta 4* characterised as obiter dicta the majority decision in *Palma v Bulgaria* to the effect that there should be a presumption that an MFN provision does not incorporate by reference dispute settlement provisions in whole or in part set forth in a third treaty, on the basis that the tribunal in that case upheld jurisdiction under alternative grounds.[40] It did not discuss the earlier decision in *Wintershall* but there is a clear dichotomy in approach between the two tribunals, since *Wintershall* followed *Plama* and considered that there would need to be "clear and unambiguous wording" in the MFN clause for the provision to relate to an arbitration clause in a third party treaty.

In the latest decision, the claimant in *Tza Yap Shun*, as in *RosInvestCo*, as an alternative to establishing jurisdiction on expropriation based on the interpretation of art.8(3) of the Peru–China BIT, sought to invoke the MFN clause in art.3(2) of the BIT to apply the more favourable dispute resolution provision in art.12 of the Peru–Colombia BIT, which provides for ICSID arbitration of any dispute. The MFN clause in question is drafted in similar terms to the relevant provision considered in *Renta 4*:

> "The treatment and protection referred to in Paragraph 1 of this Article [the fair and equitable guarantee] shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State."

Consistent with its approach on the interpretation of art.8(3), the tribunal applied art.31 of the Vienna Convention to interpret art.3(2) of the BIT in accordance with its "ordinary meaning". The tribunal considered that the terms of art.8 reflect the contracting parties' agreement on two fundamental issues; first, that they agreed to submit expropriation disputes to ICSID arbitration; and secondly, in relation to submitting any other types of disputes to ICSID arbitration, they reserved the right to do so only "if the parties to the dispute so agree".[41] The tribunal then compared the terms of art.3(2) with the terms of art.8(3), and considered that the specific wording of art.8(3) concerning the scope of disputes to be referred to international arbitration should prevail over the general wording of the MFN clause in art.3(2).

The tribunal's reasoning on this issue is doubtful, since it reached its conclusion by considering whether a specific provision in the basic treaty should prevail over an MFN clause. The purpose of MFN clauses is to maintain equality of treatment among contracting states and therefore the tribunal should have simply considered whether the scope of the MFN clause is sufficiently wide to import third-party treaty dispute provisions, rather than interpret the MFN clause against other terms of the basic treaty. As noted by the tribunal in *RosInvestCo*, the application of the MFN clause may widen the scope of art.8 (the disputes provision), and this is the "normal result of the application of MFN clauses". The reasoning in *Renta 4* is to be preferred, that the MFN clause in art.3(2) is restricted in scope, only providing investors a no-less favourable level of fair and equitable treatment, and does not apply to arbitration provisions contained in third-party BITs. The tribunal did not discuss *Renta 4* but distinguished the *Maffezini* line of cases on the basis that there the applicable dispute resolution clause referred to "any dispute" in a broad sense and, unlike art.8(3), did not specify limitations on the categories of disputes included. Again, this reasoning is

[40] *Renta 4* March 20, 2009 at [95].

[41] Set out in the last sentence of the Peru–China BIT art.8(3).

doubtful, because it relies on interpretation of the dispute provisions rather than the scope of the MFN clause in question.

4. CONCLUSION

The jurisprudence on both of the issues relating to the first generation of Chinese BITs is in a state of development and a *jurisprudence constante* is yet to be established on either issue. However, the recent decisions will give investors into China governed by the first generation of Chinese BITs comfort that recourse to international arbitration may be more widely available than as indicated at first sight in the BITs, not only for a breach of the protection from expropriation provisions but also for breaches of other substantive protection provisions.

Restrictions on international arbitration

China, in agreeing provisions which limit investors' rights to arbitration to the amount of compensation resulting from expropriation, as in art.12(3) of the Singapore–China BIT, clearly intended at the relevant time to restrict investors' rights to refer disputes to international arbitration. However, such a provision would be otiose unless a tribunal also had the power to consider whether there had been expropriation in the first place, and whether it was legal or not. As pointed out in *Renta 4*, national courts at an international level are equivalent to other organs of the State and an investor's right to adequate compensation for expropriation of its investment would be held hostage to the state's determination as to whether it was due in the first place unless tribunals have jurisdiction to decide this issue.

Although the wording of the first generation of Chinese BITs differ and are generally different from the equivalent provisions considered by the tribunals in *Renta 4* or *European Media Ventures*, there is a good argument that references in these BITs, for example to the "amount of compensation resulting from expropriation",[42] or the "amount of compensation payable",[43] necessarily require tribunals to assess whether there has been expropriation or nationalisation of an investment in the first place, applying the reasoning in *Renta 4*, *European Media Ventures* and *Tza Yap Shun*. The tribunal's decision in *Tza Yap Shun* provides direct support for this in the context of an example of a first generation of Chinese BITs. The potential therefore for foreign investors in China governed by the first generation of China BITs to refer such disputes to international arbitrations has widened considerably.

Application of MFN clauses to establish jurisdiction of a tribunal

RosInvestCo and *Renta 4* on the application of MFN clauses to third-party treaty international arbitration provisions are even more favourable for investors into China, because they open up the possibility of investors subject to the first generation of Chinese BITs being able to refer to international arbitration any dispute concerning a potential breach of the substantive protection provisions of the BITs. For the first time, tribunals have been willing to expand their jurisdictions to disputes concerning breaches of the BIT in circumstances where they would have no such jurisdiction under the basic treaty by invoking MFN clauses to import international arbitration provisions from third-party treaties.

The decision in *Renta 4* is strictly obiter dicta, since the MFN clause in question was drafted in limited terms, and held to be inapplicable to dispute provisions. However, it is clear from the tribunal's strong support of the reasoning in *RosInvestCo* and *Ambatelios* that, had the MFN clause been drafted in more general terms, it would have extended its jurisdiction by application of the MFN clause.

[42] Singapore–China BIT art.12(3).
[43] Australia–China BIT art.XII(2).

In *RosInvestCo*, the tribunal was careful to confine its decision to whether the terms of the MFN clause applied to arbitration regarding expropriation, rather than the more general question of whether MFN clauses can be used to transfer arbitration clauses from one treaty to another. However, there is nothing in the tribunal's reasoning to indicate that it would not also apply to the more general proposition that MFN clauses can be invoked to import international arbitration provisions for determination of any dispute arising under the BIT.

In *Tza Yap Shun*, the tribunal's decision on the MFN clause was again obiter. Unlike in *RosInvestCo* and *Renta 4*, it did not discuss the general principles of the application of MFN clauses to third party international arbitration provisions but rather preferred to base its reasoning on the restricted scope of the international arbitration provision in the primary treaty. This reasoning is questionable on the interpretation of the MFN clause and its interaction with the disputes provision in the BIT, although arguably the tribunal reached the correct result.

Clearly, the wording of the MFN clause is critical as to whether a tribunal may be willing to invoke an MFN clause to import international arbitration provisions from a third-party treaty. The term "all matters subject to this agreement" (as in *Maffezini*) is acknowledged as wider than references only to "treatment" (as in *Siemens* and *Renta 4*), and express exclusions in the operation of MFN clauses may support an interpretation that the MFN extends to disputes provisions (as in *RosInvestCo*).

The alternative safer approach is for investors in China to arrange their investments through entities which can take advantage of the new generation of Chinese BITs, or place their investments under those few BITs within the first generation of Chinese BITs which have favourable international arbitration dispute mechanisms, such as the Netherlands–China and UK–China BITs.