
Conceptuality or Textuality? Understanding the Notion of Expropriation in the Context of *Tza Yap Shum v. The Republic of Peru*

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*Although China has been an active ‘treaty-maker’ in the realm of international investment arbitration as evidenced by its more than 120 bilateral investment treaties, the utility of these BITs has been very limited. Substantive standards such as expropriation and compensation have never been comprehensively tested with respect to these BITs. This article scrutinizes the concept of expropriation by reference to Chinese investment treaty jurisprudence, in particular, the final award of *Tza Yap Shum v. The Republic of Peru* and China’s free trade agreement with Peru, the only Chinese BIT-related ICSID case. This article critically examines, in a comparative context, the treaty interpretation methodologies employed by the tribunal in interpreting expropriation under the China-Peru BIT, which is one of the earlier Chinese BITs. A thorough study of this subject is of great significance to interpreting the terms of indirect expropriation and compensation in Chinese BITs, thereby offering more concrete foreign investment protections based on investment treaties.*

Keywords

Chinese BITs, Expropriation, Compensation, Treaty Interpretation, Bilateral Investment Treaties

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I. Introduction

The doctrine and case law on expropriation in international investment law is not fully settled even though a large amount of literature has been written on this topic in the past several decades. A variety of factors have led to uncertainty such as the diversity of interest between capital importing and exporting States, divergence in legal, economic and cultural concepts of property rights and, importantly, the regulatory role and function of the State in cross-border investment activities. 'Expropriation' is a critically important issue in Chinese Bilateral Investment Treaties ("BITs").¹ However, the utility of expropriation clauses in China's 129 BITs and 12 free trade agreements ("FTAs"), including the Peru-China Free Trade Agreement of 2009² (hereinafter Peru-China FTA), is unclear considering that extremely few BIT disputes brought before ICSID have involved Chinese BITs. In this sense, the Final Award issued by the tribunal in *Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6)³ is of great value to understanding how a large number of expropriation clauses in Chinese BITs may be interpreted, applied and eventually utilized for the purpose of foreign investment protection.

The primary purpose of this article is to understand expropriation clauses in China's BITs with special reference to the Award.⁴ This article is composed of five parts including a short Introduction and Conclusion. Part two will review what constitutes an 'indirect expropriation.' Part three will examine the lawful conditions for expropriation. Part four will discuss how to calculate compensation in the event of expropriation, which was heavily disputed by *Tza Yap Shum* (hereinafter *Tza*) and Peru during the hearing. In conclusion, Part five will analyze the Tribunal's methods of interpreting the concept of expropriation in investment treaties.

¹ All the BITs cited herein are available at <http://ita.law.uvic.ca/investmenttreaties.htm>; http://www.unctadxi.org/templates/DocSearch___779.aspx; or <http://www.kluwerarbitration.com/BITs-countries.aspx> (all last visited on Oct. 15, 2014).

² Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru, available at http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf (last visited on Sept. 22, 2014) [hereinafter Peru-China FTA].

³ *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6 [Sr. *Tza Yap Shum c. República del Perú*] <available only in Spanish>, available at [http://opil.ouplaw.com/view/10.1093/law/iic/382-2009.case.1/IC382\(2009\)DF.pdf](http://opil.ouplaw.com/view/10.1093/law/iic/382-2009.case.1/IC382(2009)DF.pdf). For the full version of the Award, see the official website of ICSID, available at <http://www.worldbank.org/icsid> (all last visited on Oct. 15, 2014) [hereinafter *The Award*].

⁴ Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru Concerning the Encouragement and Reciprocal Protection of Investments, available at <http://tfs.mofcom.gov.cn/aarticle/h/bk/201002/20100206785109.html> (last visited on Sept. 22, 2014). [hereinafter Peru-China BIT].