Queries to the Recent ICSID Decision on Jurisdiction Upon the Case of Tza Yap Shum v. Republic of Peru: Should China-Peru BIT 1994 Be Applied to Hong Kong SAR under the ‘One Country Two Systems’ Policy?1

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I INTRODUCTION: SUMMARY OF THE DISPUTE3

This dispute arose from alleged violations of the “Agreement between the Government of the Republic of Peru and the Government of the P.R.C. concerning the Encouragement and Reciprocal Protection of Investments” (“Peru-China BIT 1994” or “Treaty”), which has affected the investment made by Mr. Tza Yap Shum (or “Claimant”) in TSG Peru S.A.C. (or “TSG”), a Peruvian Company in the business of producing fish-based food products and export to Asian markets.

In 2004, the Peruvian Tax Administration started a number of actions which, according to Claimant, ended up destroying TSG business operations and economic viability. Claimant alleged that the immediate cause of such impact on the company was the unlawful and arbitrary tax lien on the company’s bank accounts which precluded the company from operating without disruption. Based on such circumstances, Claimant said that his rights had been violated according to the following articles of the Peru-China BIT 1994:

1 “Requirement of fair and equitable treatment to investments”;
2 “Requirement of protection to investments”;
3 “Requirement of compensating in case of expropriatory or similar measures”; 
4 “Requirement of allowing the transfer of capital and earnings.”

The Republic of Peru denied Claimant’s allegation and objected the jurisdiction of the ICSID and the competence of the Tribunal. Respondent presented the following objections:

a. Claimant is not protected under the Peru-China BIT 1994;
b. The dispute does not relate to an investment qualifying as such;
c. The Government of Peru did not give its consent to submit the dispute to ICSID’s arbitration; and
d. Claimant has failed to assert an expropriation claim.

According to the official record of ICSID, Mr. Tza Yap Shum probably has become the first Chinese investor to file a dispute against a state at the Washington-based International Centre for Settlement of Investment Disputes (ICSID). Unusual about this claim is that there were few known investor-state arbitrations in the past based on China-Foreign BITs, and no such case has been brought by a Chinese investor to ICSID. As reported previously by ITN, older China-Foreign BITs tended to have limited dispute resolution provisions which did not offer foreign investors wide latitude to take the host state to international arbitration. For instance, the China-Finland BIT signed in 1984 only allowed investors to seek international arbitration to settle disputes relating to the amount of compensation they have been awarded as a result of an expropriation.

The China-Peru BIT 1994 has a similarly circumscribed dispute resolution provision. Mr. Tza Yap Shum’s claim was registered by ICSID on February 12, 2007.

The author and his academic team have devoted in research of international investment law, including the issues on ICSID mechanism and BIT conclusion. As known to the international arbitration community, the said case contains a lot of newly emerging complicated questions which have firstly happened relating to a Chinese national with the right of abode in the Hong Kong Special Administrative Region (“HKSAR”), under the very specific situation of China’s “One country, two systems”. Naturally, the dispute has attracted serious attention of the author’s academic team. Besides, the author has been required by domestic and foreign friends to explain and answer many complicated questions from an academic perspective under international law and Chinese Law.

