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COMENTARIO DE JURISPRUDENCIA

A "narrow" interpretation of the Most-Favored-Nation clause. Comments on *Beijing Everyway Traffic & Lighting Tech. Ltd. v. Ghana*

Una interpretación «restrictiva» de la cláusula de la nación más favorecida. Comentarios sobre Beijing Everyway Traffic & Lighting Tech. Co., Ltd. contra Ghana

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ABSTRACT The Most-Favored-Nation (MFN) clause is a contentious issue in investment arbitration, particularly regarding its scope. The question of whether MFN protection is substantive or procedural has been a subject of ongoing debate, as evidenced by the case of *Beijing Everyway Traffic & Lighting Tech. Ltd. v. Ghana*. In this case, the Tribunal opted for a restrictive interpretation of the MFN clause, ruling that Investor-State Dispute Settlement can only be triggered if the dispute pertains to the amount of compensation. This decision deviates from the conventional broad interpretation of the Most-Favored-Nation clause that prevailed at the beginning of this century. Notably, this investment dispute arises from a series of loans facilitated by the China Development Bank, aimed at promoting infrastructure development projects on the African continent. In this context, the objective of this commentary is to assess this award from three distinct perspectives: First, the restrictive interpretation of the Most-Favored-Nation clause is examined, followed by an analysis of the *effet utile* of restrictive Investor-State Dispute Settlement clauses. Finally, the role of Chinese companies as foreign investors is discussed. The arbitral award is then critically analyzed, leading to the following conclusions: Firstly, the award represents another example of the jurisprudential back-and-forth on the Most-Favored-Nation clause. Second, the principle of effectiveness or effective interpretation cannot exceed the terms agreed upon by the Contracting States. Third, Chinese companies play an important role in investment projects in Africa, and this award invites the strengthening of the State-State Dispute Settlement.

KEYWORDS Investment arbitration, Most-Favored-Nation clause, international investment law, foreign direct investment.

RESUMEN La interpretación de la cláusula de nación más favorecida es un tema que suscita un debate constante en el arbitraje de inversiones. La pregunta clásica es si esta protección es solo sustantiva o también procedimental. Esta misma cuestión tuvieron que decidir los árbitros en el caso *Beijing Everyway Traffic & Lighting Tech. Co. Ltd. v. Ghana*, donde el Tribunal se decantó por una interpretación restrictiva de la cláusula, ya que solo admite la solución de controversias entre inversor y Estado si estas controversias giran en torno a la cuantía de una indemnización. Esta decisión difiere de la interpretación amplia de la cláusula de la nación más favorecida que se realizaba tradicionalmente al principio del siglo XXI. Este conflicto de inversiones tiene lugar entre una empresa china y un estado africano, en el marco de una serie de préstamos concedidos por el Banco de Desarrollo de China para potenciar el desarrollo de proyectos de infraestructura en el continente. En este escenario, el presente comentario tiene por objeto analizar este laudo arbitral desde tres perspectivas: la interpretación restrictiva de la cláusula de nación más favorecida, el *effet utile* de las cláusulas restrictivas de resolución de controversias entre inversor y Estado y el papel de las empresas chinas como inversoras extranjeras. Para ello, se analiza críticamente el laudo arbitral y se concluye lo siguiente. En primer lugar, el laudo es un ejemplo más de los vaivenes jurisprudenciales en materia de cláusula de nación más favorecida. Segundo, el principio de efectividad en la interpretación no puede exceder lo pactado por los Estados contratantes. Tercero, las empresas chinas desempeñan un papel importante en los proyectos de inversión en África y la decisión del Tribunal Arbitral invita a potenciar el mecanismo de solución de controversias de inversión entre Estados.

PALABRAS CLAVE Arbitraje de inversiones, cláusula de nación más favorecida, derecho internacional de la inversión extranjera, inversión extranjera directa.

Introduction

The broad or restrictive interpretation of the provisions of an international treaty is a subject of considerable debate in the realm of international law. This discourse finds resonance in the international investment law regime, particularly in the examination of the admissibility of Investor-State Dispute Settlement (ISDS). While Bilateral Investment Treaties (BITs) tend to employ similar formulations to incorporate this dispute resolution mechanism, it is not uncommon for BITs to impose limitations on its scope, either due to the nature of the dispute or the formal requirements necessary to initiate the ISDS. Investors have attempted to expand the scope of the admissibility hypothesis by invoking the Most-Favored-Nation (MFN) clause, thereby persuading arbitral tribunals that the protection afforded by this clause is both substantive and procedural. In the context of this jurisprudential discourse, the analysis of the award rendered in Beijing Everyway Traffic & Lighting Tech. Ltd. v. Ghana is of particular interest, as the Arbitral Tribunal employs a "narrow" interpretation of the ISDS and the MFN clause.

From the perspective of economic integration, this case is also particularly noteworthy as it is part of the China Development Bank's lending to African countries. It is well-documented that China has been engaged in an ambitious project to finance and develop various projects abroad. This endeavor has involved Chinese state-owned enterprises (SOEs) and private companies at various levels, encompassing the development of large-scale infrastructure projects and the exploitation of natural resources on the African continent. The legal framework utilized to safeguard these economic endeavors abroad is that of foreign investment, which is enshrined in BITs.

In this context, the final award of January 30, 2023, which resolved the dispute brought by the Chinese investor Beijing Everyway Traffic & Lighting Tech, is an interesting case for analysis. This award presents a valuable opportunity to explore the implications of a restricted reading of the MFN clause. Furthermore, the question arises as to the effect of an ISDS clause that exclusively addresses the compensation for expropriation. Likewise, the potential impact of this arbitration award on investment projects in Africa merits examination. To address these inquiries, this commentary is structured as follows. First, the basic facts and major claims alleged by both the Chinese investor and the host State are analyzed. Secondly, the reasoning and final decision of the three-member Arbitral Tribunal is critically reviewed. Thirdly, based on the exposition of the case, its relevance will be analyzed from three perspectives, namely: The interpretation of the MFN clause, the principle of effectiveness or *effet utile* in ISDS clauses, and the role of Chinese companies as foreign investors. Finally, the analysis will be concluded with the drawing of some conclusions.

Basic facts and major claims

The development of investment projects financed and operated by Chinese companies is not an uncommon situation on the African continent. Ghana is a paradigmatic example of this phenomenon. In 1989, China and Ghana signed and ratified the 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 (China-Ghana BIT). This BIT, characterized by its first-generation scheme, does not prioritize aspects of sustainable development as extensively as the subsequent "balanced treaties". Rather, it underscores the commitment of the Contracting States to enhance economic cooperation between nations (Sornarajah, 2021: 410, 465). In this context, it is noteworthy that on December 16, 2011, the Government of Ghana entered into a Master Facility Agreement and associated financial documents with the China Development Bank. The objective of the agreement was to obtain a term loan facility to develop a dozen infrastructure projects in Ghana.

Among the projects covered by the aforementioned agreement is the Accra Metropolitan Area Traffic Management Project (AITMS Project), which aims to develop an intelligent traffic management system in Accra, the capital of Ghana. Following an extensive evaluation process, the Chinese company Beijing Everyway Traffic & Lighting Tech. Co (Everyway) won the tender for the AITMS Project. Thereafter, on September 17, 2012, Everyway and the Ghanaian Ministry of Roads and Highways entered into a contract known as an Engineering, Procurement, Installation, and Commissioning (EPIC) contract. This contract stipulated Everyway's obligation to supply equipment and furnish technical services to the Ghanaian Government for the AITMS Project's planning, design, construction, supervision, operation, and training. On December 22, 2018, the Parliament of Ghana formally endorsed the EPIC Contract through a resolution. The contracting parties established a contract price of USD 100 million and agreed to a 30 % advance payment.

The execution of the EPIC Contract commenced as stipulated, and in November 2019, a delegation from the Ministry of Roads and Highways of Ghana conducted an inspection of Everyway's manufacturing facilities and warehouses in China, with the purpose of evaluating the production and inventory of equipment designated for the AITMS Project. However, as the decade changed, tensions began to arise between the parties. On November 19, 2020, the Parliament of Ghana opted to terminate the EPIC Contract that had been established with the Chinese investor. The host state contended that this decision was made in the interest of Ghana's national security.[1] Subsequently, Everyway provided the Government of Ghana with a notice that purported to terminate the EPIC Contract.

In 2021, the Chinese investor initiated an arbitration process in accordance with the China-Ghana BIT. Specifically, on May 17, 2021, Everyway initiated arbitration proceedings under the Rules of the London Court of International Arbitration, citing Sub-Clause 20.8 of the General Conditions of the EPIC Contract. The purpose of the arbitration was to seek payment for the Interim Payment Certificates and other financial compensations arising from alleged breaches of the EPIC Contract. The positions of the parties were as follows. The Chinese investor claimed that Ghana has "either directly or indirectly, unlawfully expropriated" the AITMS Project due to the rescinding of the EPIC Contract by the Parliament of Ghana. Ghana's actions, as alleged, constituted a breach of Article 4.1 of the China-Ghana BIT. Furthermore, it alleged that Ghana breached Article 3.1, which obliges the host state to "provide equitable treatment and protection to Everyway's investments". Lastly, the claimant alleged a breach of the Umbrella Clause set out in Article 3.2 of the China-Ghana BIT.

1. It is possible to associate this justification with the China-Ghana BIT. Article 4.1 establishes that "either Contracting State may, for the national security and public interest, expropriate, nationalize, or take similar measures against investments of investors of the other Contracting State in its territory". However, these measures must be subject to the following conditions: they must be carried out under domestic legal procedure, without discrimination, and with payment of compensation.

The total compensation demanded by the Chinese company is no less than USD 55 million. In contrast, Ghana's position was clear: It has not breached the treaty since the Parliament's decision to rescind the EPIC Contract was made in the national interest of Ghana. The arbitration was governed by the 2013 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and the hearing took place in London.

Prior to adjudicating the substantive claims of the parties, it is fundamental for every Arbitral Tribunal to determine whether it has the competence to hear the dispute. In this case, the legal foundation for the tribunal's competence was provided by the China-Ghana BIT, which, in its Article 10, establishes the well-known ISDS. In this analysis, the position of the Ghanaian State is key, since Article 10.1 of the Treaty itself limits the jurisdiction of a tribunal exclusively to the determination of the quantum of expropriation. Any dispute between the investor and the host state that is not related to the amount of the expropriation exceeds the ISDS established in the BIT and requires the tribunal to declare that it has no jurisdiction. As will be discussed below, this is the interpretation followed by the Arbitral Tribunal in this case.

The reasoning and decision of the Arbitral Tribunal

The Arbitral Tribunal declined to rule on the substance of the dispute, concluding that it lacked jurisdiction over the case brought by the Chinese company. The investor initially contended that the Tribunal had jurisdiction based on the joint application of two articles of the China-Ghana BIT, relying on Article 10.1 of the treaty establishing the ISDS. The investor acknowledged that Article 10.1 limits the scope of ISDS, but it argued that Article 3.2 of the China-Ghana BIT, which establishes the MFN clause, should be applied in conjunction. The investor claims that, by application of this clause, the broad ISDS provisions established in other treaties signed and ratified by Ghana with other states apply directly in this arbitration. As previously mentioned, the Ghana case theory is clear on this point: The limitation of the Article 10.1 hypothesis is absolute, especially since this limitation was expressly agreed upon by the states when signing the international treaty, so that it is not possible to interpret the provision broadly. In its reasoning, the Arbitral Tribunal recalls two key figures for the interpretation of international treaties on ISDS. First, the rules guiding the interpretation are those established in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) (Paragraph 142 of the award). Second, the Tribunal is clear in stating that in the investment arbitration regime, stare decisis does not apply (Paragraph 150 of the award). The first point is self-evident, as the legal relationship between a private party and a state does not negate its status as a matter of public international law. However, the latter point may be subject to debate. While precedent does not have a binding force in investment arbitration, certain case law has established a standard that investors may consider when conducting business abroad. In this regard, the analysis of the MFN clause is particularly relevant. Although this clause was developed by international trade to eliminate barriers in the exchange of goods and services, its application has not been without criticism in the field of foreign investment, primarily due to its abusive use to access the ISDS (Sornarajah, 2021: 434-435).

To determine the Arbitral Tribunal's jurisdiction over the legal dispute, the Tribunal conducted a two-part examination of the China-Ghana BIT. First, the Tribunal analyzed its jurisdiction over Article 10.1 of the treaty (Section IX.B of the award). Second, the Tribunal reviewed the interpretative force of Article 3.2 of the China-Ghana BIT, determining whether the MFN clause standard applies in both substantive and procedural terms (Section IX.C of the award). The following section provides a detailed explanation of the Arbitral Tribunal's reasoning for each of the aforementioned articles.

Regarding the analysis of Article 10.1[2] of the China-Ghana BIT, it is essential to note that this provision establishes the ISDS. In the award, the Arbitral Tribunal employs a reasoning scheme consistent with Article 31 of the VCLT. Accordingly, the Tribunal methodically examines the plain meaning of the provision, considering the context and the object and purpose of the China-Ghana BIT. First, regarding the ordinary meaning of the treaty provisions, the Tribunal acknowledges that while there are competing interpretations regarding the hypothesis of admissibility of the ISDS, it is only possible to uphold the Ghanaian interpretation that limits disputes only to the quantum of compensation. The Tribunal further asserts that the title of the article is a determining factor in its admissibility, stating that it is "Article 10. Settlement of Dispute on Quantum of Compensation" (Paragraphs 168 and 169 of the award). Secondly, regarding the contextual interpretative element, the Arbitral Tribunal recalls that the Chinese defense claims that there is an implicit fork-in-the-road clause in the BIT. The Chinese company indicates that if it first asserts the unlawfulness of the expropriation in domestic Ghanaian courts, in a subsequent arbitration, the State of Ghana would defend itself by claiming *res judicata*. The Tribunal has ruled against this argument, determining that there is no such clause, and that Article 10.1 should be interpreted strictly (see Paragraph 199 of the award). Third, from the perspective of the object and purpose, the Chinese investor noted that the preamble[3] of the trea-

2. Article 10.1 establishes: «Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal».

3. The preamble of the BIT states as it follows: «Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the

ty establishes the objective of creating favorable conditions for investment. In this regard, it is alleged that a key favorable condition is precisely the establishment of ISDS. The Arbitral Tribunal stated that the objective of the preamble does not require ISDS, as the State-State Dispute Settlement (SSDS) outlined in Article 9 of the treaty is sufficient to fulfil the promise of the preamble (Paragraph 253 of the award). In conclusion, the Tribunal finds that it lacks jurisdiction under Article 10.1 of the China-Ghana BIT.

Regarding the assessment of Article 3.2,[4] the Arbitral Tribunal is more concise. First, the Tribunal poses the question of whether, despite the article's establishment of a MFN clause, the focal point is determining the scope or normative effect the clause considers. The Tribunal's analysis explores whether the clause's normative effect is intended to enhance protection from a substantive or procedural standpoint, with the latter referring to the broadening of the admissibility criteria for the ISDS. Secondly, the Tribunal states that the leading case on the matter is *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7) (*Maffezini v. Spain*) (Paragraph 268 of the award). However, as previously mentioned, the Tribunal notes that *stare decisis* does not apply in investment arbitration (Paragraph 273 of the award). In this regard, it argues that the wording of the China-Ghana BIT does not allow for the same interpretative exercise, since the Contracting States themselves limited the application of the ISDS clause (Paragraph 289 of the award). Third, the Tribunal concludes that for the purposes of more robust procedural protection regarding the MFN clause, Article 9 of the treaty provides such protection by means of the SSDS (Paragraph 297 of the award).

In conclusion, the three-member Arbitral Tribunal decided that it does not have jurisdiction to hear the dispute brought by the Chinese investor against the Republic of Ghana. This determination was based on the Tribunal's interpretation of Article 10.1 and the "narrow" interpretation of Article 3.2, which establishes the MFN clause in the China-Ghana BIT. Consequently, the Tribunal did not rule on China's primary claim that the alleged expropriation by Ghana was unlawful. The analysis of the present award is noteworthy for its novel interpretation of the MFN clause, which departs from the prevailing cases on this issue.

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purpose of the development of economic cooperation between both States».

4. Article 3 is titled «Protection of Investments and Most Favoured Nation Treatment». In particular, Article 3.2 indicates: «The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State. Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State».

Comments on the final award

The final award in Beijing Everyway Traffic & Lighting Tech. Ltd. v. Ghana is an outlier in at least three respects. First, the Arbitral Tribunal adopts a restrictive interpretation of the MFN clause, limiting its application exclusively to substantive protection. Secondly, the efficacy of the ISDS clause may be questioned, given its limited application, which only allows for claims related to the amount of expropriation. Finally, this award provides a basis for discussion of the role of Chinese companies as investors on the African continent. It is noteworthy that SOEs utilize the legal framework of the investor, originally intended for private parties, to protect their investment abroad. The subsequent analysis will provide a detailed examination of each of these reasons.

The "narrow" interpretation of the Most-Favored Nation clause

The Everyway v. Ghana award is remarkable for its restrictive interpretation of the MFN clause contained in Article 3.2 of the BIT. This section aims to identify the aspects of this ruling that are particularly significant, in order to determine whether this award presents a novel interpretation of the MFN clause or whether it is simply another case in an extensive jurisprudential back-and-forth on the scope of this type of clause.

The MFN clause is a standard provision in international investment treaties, found in both first-generation and "balanced" treaties. Generally, this clause allows an investor to claim more favorable treatment that the host state provides to investors who are nationals of a third state (Schill, 2009: 501-502). However, it is crucial to recognize that the genesis of these provisions can be traced back to the rules of international trade (Paparinskis, 2011: 44-45). Some authors have even traced their origins to the medieval trade practices between Mediterranean cities in the 11th century (Vesel, 2007: 129). It is important to note that the MFN does not originate from customary international law; rather, it is a provision agreed upon by states, akin to any other obligation derived from an international treaty (Paparinskis, 2011: 17). This is significant because it demonstrates that the MFN clause functions as *ius dispositivum*, meaning that the contracting parties have the discretion to limit its application (Paparinskis, 2011: 25). Despite the perception that the application and interpretation of these clauses has been peaceful, there has been a surprising level of dispute surrounding their role in accessing ISDS (Lim, Ho, and Paparinskis, 2021: 718). The Arbitral Tribunal has stated that the case that initiated this discussion was *Maffezini v. Spain* (Paragraph 268 of the award). Since then, the debate has centred on the question of whether the MFN clause extends investor protection only in substantive terms or also in procedural terms (Whitsitt, 2015: 529-530). Although the issue of interpreting the MFN clause was first raised *in Maffezini v. Spain* two decades ago, there is still debate regarding the consistency of this case law. The central legal question is whether the MFN clause provides protection only in substantive matters or also in procedural terms, allowing access to the ISDS (Whitsitt, 2015: 536). In *Maffezini v. Spain*, the Tribunal interpreted the MFN clause to extend its protection to procedural aspects. Specifically, the arbitrators ruled that an investor could initiate the ISDS without first filing a claim in Spanish domestic courts, a practice permitted by other BITs signed by Spain with third countries (Paragraphs 55 and 56 of the Tribunal's Decision on Objections to Jurisdiction). This ruling was achieved through a teleological interpretation of the MFN clause (Whitsitt, 2015: 534).

This broad interpretation of the MFN clause, established in *Maffezini v. Spain*, has been adopted in other cases, including *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) and *National Grid plc v. The Argentine Republic* (UNCITRAL) (Whitsitt, 2015: 538–540). While the *Maffezini v. Spain* case has been recognized as a leading case in arbitral jurisprudence, it is important to note that this interpretation has not been universally accepted. Various arbitral proceedings have explicitly rejected this interpretation (Whitsitt, 2015: 541). Of particular interest is the case of *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15) (*Telenor v. Hungary*). In this case, the Norwegian investor attempted to follow the case law of *Maffezini v. Spain*, which was rejected by the Tribunal. While acknowledging the existence of this case law, the Tribunal noted that the legal framework of the ISDS is subject to limitations imposed by the states themselves (Paragraphs 89 and 90 of the award). In this regard, the Tribunal placed greater emphasis on the provisions of the international treaty itself, disregarding the implications of parity with third states (Whitsitt, 2015: 538 and 545). Some authors argue that this is consistent with the principle of consent to jurisdiction in public international law (Pérez-Anzar, 2017: 795-796). While there is a consensus on the necessity of interpreting MFN clauses in the context of Article 31 of the VCLT, the conclusions derived from such interpretations vary among Arbitral Tribunals, and at times, even present contradictory results (Vesel, 2007: 137-138).

The fragmentation of public international law is a well-known critique of the discipline's studies (Peters, 2017: 672, 673 and 674). However, some scholars point out that the interpretation of MFN clauses in investment arbitration aligns with the decisions of the International Court of Justice, functioning as a kind of "general theory" of MFN clauses (Tams and Methymaki, 2022: 46). It is noteworthy that some authors attribute a unifying function to MFN clauses, aiming to equalize economic treatment between states, overcome the bilateralism of BITs, and limit the hegemony of larger economies (Schill, 2009: 508-509). Notwithstanding this alleged unifying function, two comments regarding the application of MFN clauses are in order. On the one hand, their nature as *ius dispositivum* and, on the other, their analysis in the light of the principle of consent to jurisdiction.

Firstly, MFN clauses constitute *ius dispositivum*, so it is perfectly plausible that states agree to limit their scope of application by means of the wording of the international treaty (Paparinskis, 2011: 17 and 25). It is crucial to recognize that the primary objective of these clauses is to provide more favorable terms, not to revise the provisions established in a treaty or to supersede the intentions of the contracting states (Douglas, 2011: 105). Consequently, when assessing the impact of MFN in general terms, it is imperative to adhere to the terms mutually agreed upon by the parties to the international treaty. The scope of MFN's application is defined by the agreement's specific wording (Noh, 2012: 299). For instance, extending procedural protection through the MFN clause in the *Telenor v. Hungary* case would have meant disregarding the limitation included by the states in the ratified BIT (Noh, 2012: 310-311). Therefore, the arbitrators' conclusion in the commented award appears to be plausible.

Second, the scope of the principle of consent to jurisdiction in investment arbitration should be considered. This principle is key in public international law, and in the ISDS, it is configured through the advanced consent that the state provides in the corresponding BIT (Pérez-Anzar, 2017: 795 and 796). In this regard, some scholars recall that the consent given by the host state is specific, i.e. it relates to the specific forum and the specific dispute agreed (Vesel, 2007: 185 - 186). The principle of consent is pivotal, as it serves as the foundation and limit of the Arbitral Tribunal's jurisdiction. Attempting to surpass this consent through a broad interpretation of the MFN clause is incompatible with this principle (Vesel, 2007: 185 and 186). In response, some authors argue that limiting the application of the MFN clause to purely substantive, and not procedural, effects necessarily implies that certain investors will have a more favorable regime, which deprives the system of effectiveness (Schill, 2009: 555, 556, 558, and 560). While this argument is compelling, it is challenging to defend an interpretation that disregards the principle of consent to jurisdiction, as it raises concerns about the very adjudication of the Arbitral Tribunal.

The question of the broad or "narrow" interpretation of the MFN clauses is ultimately a matter of jurisprudential nuances, and the decision of the Arbitral Tribunal will depend on the specific wording of each international treaty. Notwithstanding the above, two clear conclusions can be drawn regarding the application of these clauses. First, while the content of the MFN clause is open to debate, it is generally agreed that its core element is to extend the investor protection enjoyed at the national level. This aspect aligns with its origins in international trade. Second, the principle of consent to jurisdiction is a cornerstone of public international law, providing the foundation and standard for international courts to adjudicate. The involvement of a private party and a host state in investment arbitration does not negate the public international law nature of the legal relationship. Additionally, while the function of BITs is to protect the investor, which may be interpreted by some as enhancing access to ISDS through an expansive interpretation of the MFN clause, this clause alone should not be sufficient to create consent for the host state.

The effet utile of the Investor-State Dispute Settlement clause

The Chinese investor raised an interesting argument regarding the interpretation of Article 10.1 of the China-Ghana BIT. The company alleged the existence of an implicit fork-in-the-road clause, noting that if the Chinese enterprise had first claimed the unlawfulness of the expropriation in Ghanaian domestic courts, then in an investment arbitration the host state would have raised a plea of res judicata. This line of thinking aligns with the argument that if the treaty limits the application of ISDS to the amount of compensation, ISDS cases would be very limited. While the Arbitral Tribunal dismissed these arguments and ruled out the existence of an implicit fork-in-the-road clause in the treaty, it is interesting to analyze the Chinese defense and question what the scope of ISDS is considering the principle of effectiveness or effective interpretation. In essence, it is worthwhile to explore the question of what the effet utile of the wording of the China-Ghana BIT is.

Although *stare decisis* does not apply in investment arbitration, it is important to consider that there is consistent case law on the application of the principle of effectiveness, at least with regard to the interpretation of an international investment treaty (Ishikawa, 2015: 274-275).[5] Although this principle originates from general public international law, its application in investment arbitration is not immune to criticism. Its conceptualization is broad, and its boundaries are unclear, which can result in contradictory decisions (Ishikawa, 2015: 275). To delineate its definition, some authors consider that this principle comprises three elements, consisting of: The provision of a sense and meaning to the norm, the interpretation of the rule in a broad sense, and the application of a teleological criterion in the interpretation of the international treaty disposition. Some argue that arbitrators have used the principle of effectiveness as an interpretative tool to justify the broad interpretation of some BITs provisions, particularly umbrella clauses (Ishikawa, 2015: 284 and 288). From a teleological perspective, the Chinese defense in the award under review sought to link this interpretative criterion to Article 10.1 of the China-Ghana BIT. The purpose was to demonstrate that this interpretation allows for the initiation of the ISDS not only to claim the amount of an expropriation, but also the unlawfulness of the expropriation itself.

5. By way of illustration, it is worth considering the case of *Renco Group Inc. v. Republic of Peru* (ICSID Case No. UNCT/13/1) (Paragraph 177 of the Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4) and the case *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11) (Paragraph 50 of the award).

The Chinese defense also invoked the principle of effectiveness, attempting to persuade the Arbitral Tribunal of the existence of an implicit fork-in-the-road clause in the BIT. This reasoning is based on a simple logic, albeit imprecise: The ISDS hypothesis is so narrow that any claim in the domestic Ghanaian courts would result in the Ghanaian defense claiming *res judicata* in a subsequent arbitration. To analyze this reasoning, it is first important to define the fork-in-the-road clause. This clause obliges the investor to choose in which forum to bring its claim and is intended to prohibit the investor from claiming a dispute in two parallel avenues, namely an investment arbitral proceeding and a domestic judicial or administrative proceeding (Petsche, 2019: 395). Furthermore, some scholars assert the existence of these clauses by implicit form, as was alleged by the Chinese defense in the case (Petsche, 2019: 395 and 397). Despite China's assertive stance, it is crucial to note that the state defense grounded in the fork-in-the-road clause has encountered limited success in arbitral practice (Lee and Phua, 2019: 204).[6]

This limited success is reflected in this award, since the Arbitral Tribunal did not accept this Chinese defense. In light of this, it is important to critically assess the effective *effet utile* of the ISDS clause established in the China-Ghana BIT. Are there circumstances in which this clause can be invoked? Or is this clause only a utility one, given its limited scope that renders it unlikely to be invoked in actual litigation? The answer to these questions is provided by arbitration practice itself, as evidenced by numerous investment arbitration cases where the sole dispute is the amount of expropriation, as outlined in Article 10.1 of the China-Ghana BIT. A notable example is the case *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), where the Costa Rican State expropriated a piece of land near the Santa Rosa National Park due to its natural value as a sea turtle nesting area. The U.S. investors contested the compensation amount and initiated the ISDS, ultimately obtaining a favorable award.

The principle of effectiveness and *effet utile* in the interpretation of international treaties has been a significant topic in investment arbitration, particularly in cases involving the ISDS. However, the Arbitral Tribunal's decision demonstrates that interpreting ISDS in the context of effectiveness does not inherently expand the scope of ISDS as established by the Contracting States. There are compelling reasons to the contrary, primarily stemming from arbitral practice, which often involves claims of only the quantum of an expropriation in investment arbitration. Consequently, the BIT's wording and the "narrow" interpretation of the MFN clause do not render the ISDS clause ineffective.

6. Some of the classic leading cases in the field are *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) and *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4).

The role of the Chinese company as foreign investor

The Chinese investor argued that the Arbitral Tribunal had jurisdiction based on the joint interpretation of Article 10.1 and Article 3.2 of the China-Ghana BIT. However, the arbitrators rejected this thesis. First, regarding the interpretation of Article 10.1 from the perspective of the object and purpose of the treaty, they ruled out that access to ISDS is a necessary condition for creating favorable conditions for investment (Paragraph 253 of the award). Second, the Arbitral Tribunal's analysis of Article 3.2 and the enhanced procedural safeguards offered by the MFN clause indicate that the SSDS established in Article 9 of the treaty provides the protective measures sought by the Chinese investor (Paragraph 297 of the award). The Arbitral Tribunal's reference to the SSDS as the dispute settlement mechanism for the claim brought by the Chinese investor is noteworthy, as it is an infrequent element in ISDS awards. In this regard, it is worthwhile to examine these arguments and attempt to discern any implicit statements made by the arbitrators. A critical aspect to consider is the role of Chinese companies, both private and state-owned, as foreign investors and the potential incentives they may have to utilize SSDS.

It is well-established that China's economy has grown to be one of the largest in the world, and it has pursued ambitious investment projects beyond its borders. In this sense, Africa has emerged as a significant focus for China's foreign investment activities. For instance, Ghana was among the top five African countries receiving the most Chinese direct investment during the 2010s (Shen, 2015: 89). This rapid economic development has prompted questions from Western governments regarding the intentions behind Chinese investments in Africa, particularly the potential exploitation of natural resources (McLaughlin, 2020: 289-290). A common criticism is the potential for a company, particularly a state-owned entity, to monopolize a vital sector such as infrastructure or energy (McLaughlin, 2019: 599). However, it should be noted that this concern is not new, as the protection of foreign investment from its inception has been linked to the exploitation of natural resources by foreign entities (Shen, 2015: 84). While this response is valid, it is important to note that the Western critique delves deeper, highlighting that the investor is no longer a private individual, but rather a SOE that falls under the legal definition of a foreign investor. However, this criticism requires further clarification. On a first note, it is inaccurate to categorize Chinese investment exclusively as state-owned through SOEs, as the Chinese private sector has also made significant investments on the African continent (Shen, 2015: 84-85). Beijing Everyway Traffic & Lighting Tech. Co., Ltd. is a limited liability company incorporated under the laws of China. On a second note, conceptualizing Chinese SOEs as a unitary whole can be misleading, as Chinese SOEs can be organized in different ways (Du, 2016: 141).

It is not surprising that Chinese SOEs play an important role in the Chinese economy. However, given China's economic internationalization project, it is worth nothing that they are now mayor players in international trade and investment (Du, 2016: 119). In essence, a traditional Chinese SOE is under the oversight and administration of a state agency (Li, 2015: 387). However, some authors have noted that as China has liberalized its economy and sought foreign capital, these companies have reformed their corporate governance and pursued to achieve a higher level of accountability (Li, 2015: 390 and 393). While Chinese SOEs abroad behave like any other investor, i.e. they make primarily economic decisions to invest, it is not unusual for them to enter sectors motivated by strategic reasons of a different nature (Li, 2015: 396, 397, and 398). Thus, two primary criticisms of this investment strategy have emerged.

First, as noted, one criticism is that the investment of these companies is focused on areas that are not only commercial, but involve areas of risk for the host state, such as critical infrastructure and natural resources exploitation (Du, 2016: 122). Consequently, it is not surprising that some Western states have decided to re-evaluate their investment policies in the face of the power of Chinese SOEs as foreign investors (McLaughlin, 2020: 283–284). However, the assertion that foreign investment is inherently influenced by the investor's home state policy is a fundamental critique within the context of international investment law (McLaughlin, 2019: 599). Nevertheless, some scholars argue that the Chinese government in fact provides incentives to SOEs and private companies to develop projects abroad (Du, 2016: 123). These authors argue that the government's facilities and incentives make it difficult for local firms to compete with their Chinese peers, whether state-owned or privately owned (Du, 2016: 124).

In a similar vein, the second critique questions the relationship between SOEs and government authority. However, some scholars caution that conceptualizing Chinese SOEs is not a simple task, as the influence of political power on SOEs differs from the Western perspective (McLaughlin, 2019: 597-598). Therefore, it would be inaccurate to assume that an investor's actions on behalf of a SOE would necessarily align with the interests of its home state or that such investments would necessarily constitute acts of governmental authority. Investments are typically considered commercial and economic activities (Du, 2021: 806). In response, some authors argue that for an investment by a Chinese SOE to be effectively motivated by a government decision, the company must be evaluated according to the following parameters including: The relationship to the central government, the percentage and level of state ownership, the characteristics of the sector, and the leadership of the company (Li, 2015: 399). The authors also highlight a key distinction between SOEs and private enterprises, noting that SOEs, due to their size and dependence on their home state, often have greater capacity to assume business risks (Li, 2015: 381).

Given SOEs' significant impact on foreign investment, some raise concerns about the potential implications for the ISDS system. It is important to note that the ISDS system was originally designed as a forum for resolving disputes between private investors and host states (Li, 2015: 381). If the dispute is between sovereign states, they can bring the dispute before an international court, e,g. the International Court of Justice or the International Tribunal for the Law of the Sea . In turn, whether the dispute is between private parties, they have international commercial arbitration (Feldman, 2016: 33). In this sense, some have expressed concerns that SOEs utilizing ISDS may compromise the integrity of the system due to their association with public power. However, others consider these concerns to be overstated, given the limited political influence over these entities (Li, 2015: 401). It is crucial to acknowledge that the foundation and the criteria for investment arbitration are established through international treaties, which explicitly permit SOEs to be investors under BITs (Feldman, 2016: 26-27).[7] In this sense, a Chinese SOE has *locus standi* in an ISDS proceeding, considering that the BITs themselves include them (Du, 2021: 801). In conclusion, it appears that SOEs as investors do not challenge the ISDS system. However, regarding the analyzed award, the Arbitral Tribunal narrowly interpreted the applicability of ISDS and, in the alternative, indicated that a mechanism for resolving the dispute raised by the Chinese investor is the SSDS.

While the ISDS is the best-known dispute settlement mechanism in investment treaties, the SSDS is present in the vast majority of international investment treaties and can be traced back to the Friendship, Commerce and Navigation Treaties of the 19th century (Potestà, 2015: 250). This origin is so significant that even the first BIT, signed between the Federal Republic of Germany and Pakistan, contemplates it (Hazarika, 2021: 21). Despite its traditional inclusion in such treaties, the SSDS has seen limited practical application (Potestà, 2015: 250). The first documented instance of its use was in a case between Italy and Cuba, where Italy initiated an arbitration proceeding against Cuba under the form of diplomatic protection (ad hoc State-State arbitration) (Potestà, 2015: 251). While the SSDS does not directly compete with the ISDS due to the distinct nature of the involved parties, there is a potential for conflicting decisions on interpretative matters (Potestà, 2015: 264). However, the primary concern regarding the use of SSDS is the prohibition of diplomatic protection established by Article 27 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Potestà, 2015: 268). Consequently, an investor's ability to effectively request their home state to initiate an SSDS may be hindered if this article is applicable. The Arbitral Tribunal's reasoning linking the dispute brought by the Chinese investor to the SSDS is therefore surprising. This is particular-

7. For instance, Article 1 of the Supplementary Agreement on Investment to the Chile-China Free Trade Agreement includes SOEs in the definition of investor.

ly noteworthy given that the interim award in the *Italy v. Cuba* case stipulates that the exhaustion of domestic remedies is a prerequisite for accessing the SSDS (Paragraph 89 of the interim award) (Hazarika, 2021: 43). It is likely that the Arbitral Tribunal's view is that if the dispute has not been settled, the investor must first exhaust domestic remedies and then activate the SSDS. Finally, if the ISDS is considered a forum for investor-State disputes, it is possible to question whether the Arbitral Tribunal in the award considered the Chinese company as part of the Chinese governmental power, directly or indirectly. This is particularly significant since the investor is a limited liability company incorporated under the laws of China. Consequently, the scenarios in which the Chinese company could trigger the SSDS would be very limited.

The commented award does not respond the question of the role of the Chinese company as a foreign investor. In turn, the award has prompted further questions regarding the role of the Chinese company as a foreign investor. Does this award mark the start of a restrictive interpretation of the clauses set forth in the BITs signed and ratified by China? It is also not clear what effect, if any, the award will have on investment projects in Africa. Any response to these inquiries must be considered premature. However, one point on which we can begin to theorize is that related to the use of the SSDS. The SSDS serves as a forum to discuss various points of interest for both investors and states (Hazarika, 2021: 103, 104, and 105). In this capacity, the SSDS can serve as a platform for deliberating matters not encompassed within the ISDS, such as the concern raised by the Chinese investor. However, this is only possible if the home state supports the investor's claim. The reasoning of the Arbitral Tribunal reflects the arbitrators' understanding of the relationship between the ISDS and the SSDS as complementary methods for resolving investment disputes.

Conclusions

Considering the present commentary, the Arbitral Tribunal has determined that it lacks jurisdiction over the dispute raised by the Chinese investor. The final award in Beijing Everyway Traffic & Lighting Tech. Ltd. v. Ghana is remarkable because it diverges from certain well-established interpretations of international investment law. There are at least three compelling reasons for this. Firstly, it offers a restrictive interpretation of MFN clauses. Secondly, it explores the effet utile of restrictive ISDS clauses. Thirdly, it analyzes the role of Chinese companies in foreign investment.

Firstly, although the interpretation of the MFN clause varies in case law, in this award the Arbitral Tribunal opted for a particularly "narrow" interpretation. This restrictive interpretation is not capricious, since it is based on an interpretation of the wording of the China-Ghana BIT, as outlined in Article 31 of the VCLT. Without prejudice to this jurisprudential debate, two issues can be considered regarding the application of the MFN clause. On a first note, the MFN clause's minimum effect is to increase the substantive protection of the investor. On a second note, the principle of consent to jurisdiction is a cornerstone of public international law, which is the foundation of investment arbitration. The involvement of a private party and a host state in investment arbitration does not negate the public international law nature of the legal relationship.

Secondly, the principle of effectiveness in interpreting and implementing international treaty provisions has been acknowledged in investment arbitration. However, the Arbitral Tribunal in the present dispute has clearly stated that a broad interpretation of an international treaty rule does not allow, or at least should not allow, to override the express wording of a BIT. Furthermore, the fact that the ISDS only authorizes discussions on the quantum of an expropriation does not render the dispute settlement process ineffective. Arbitral practice indicates otherwise.

Finally, this ruling invites reflection on the role of Chinese companies as foreign investors. While this award is not expected to alter China's decision to strengthen trade and investment relations in Africa, it underscores the efficacy of the SSDS. While this dispute settlement mechanism has a long history in international investment treaties, its use has been very limited. In the face of restrictive ISDS clauses and "narrow" interpretations of the MFN clause, the SSDS has the potential to become a forum for discussing investment disputes. However, it is important to note that the SSDS is subject to the same criticisms as other mechanisms, namely the requirement of the home state's willingness to initiate arbitration proceedings.

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