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On Territoriality and International Investment Law: Applying China's Investment Treaties To Hong Kong And Macao

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ON TERRITORIALITY AND INTERNATIONAL INVESTMENT LAW: APPLYING CHINA'S INVESTMENT TREATIES TO HONG KONG AND MACAO

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Introduction

To date, investor-state tribunals have been preoccupied with a range of issues revolving around the territorial application (territoriality) of international investment agreements (IIAs). The importance, as well as the various forms such issues take, has recently been highlighted in the decision of the Singapore High Court (SGHC) in *Laos v. Sanum*.[1] In this case,

1. Government of the Lao People's Democratic Republic v. Sanum Investments Ltd., Judgment, High Court of the Republic of Singapore [SGHC] (Jan. 20, 2015), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-lao-people-rsquo-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15.

the SGHC was asked by Laos to set aside an earlier arbitral award (in *Sanum v. Laos*), filed by a Macanese legal entity and rendered under the China-Laos bilateral investment treaty (BIT).[2] In approaching the matter, the SGHC set aside the award on the grounds that the China-Laos BIT did not extend to Macao.[3] This decision has provoked mixed feelings, as it may weigh heavily against the territorial application of Chinese IIAs to Hong Kong and Macao.[4] At the same time, from an academic perspective, the decision provides an opportunity to delve deeper into the territorial elements inherent to jurisdiction *ratione personae* as this pertains to international investment law. Within this setting, this article seeks to provide a conceptual framework for analyzing future investor-state arbitration disputes under IIAs where similar territorial application issues may arise. This article is nevertheless limited to issues of jurisdiction *ratione personae*.[5] Therefore, the territorial nexus of investments, particularly as it pertains to cases involving sovereign bonds, is not addressed in this article.[6] In addition, this article does not intend to address territorial issues connected to the so-called nationality planning and treaty shopping techniques[7] as well as the various approaches followed in piercing the corpo-

2. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Laos, Jan. 31, 1993, 1849 U.N.T.S. 109 [hereinafter China-Laos BIT]; *Laos v. Sanum*, ¶ 2; Sanum Inv. Ltd. v. Lao People's Democratic Republic, PCA Case No. 2013-13, Award on Jurisdiction (Perm. Ct. Arb. 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf.

3. *Laos v. Sanum*, ¶¶ 110-11.

4. For earlier comments proposing the application of Chinese IIAs to Hong Kong and Macao, *see* Norah Gallagher & Wenhua Shan, Chinese Investment Treaties: Policies And Practice 77 (2009); Nils Eliasson, *Investment Treaty Arbitration and Hong Kong*, *in* Arbitration In Hong Kong: A Practical Guide 903, 911-15 (Geoffrey Ma & Dennis Brock eds., 2014).

5. *See generally* Zachary Douglas, The International Law Of Investment Claims 284-327 (2009).

6. The issue of the territorial nexus of investments arises as one of jurisdiction *ratione materiae*. *See* Abaclat et al. v. Argentine Republic (formerly Giovanna a Beccara et al. v. Argentine Republic), ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 372-80, (Aug. 4, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf; Abaclat et al. v. Argentine Republic (formerly Giovanna a Beccara et al. v. Argentine Republic), ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab, ¶¶ 73-119 (Oct. 28, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0237.pdf. *See generally* Jeswald W. Salacuse, The Law Of Investment Treaties 169-72 (2010); Michael Waibel, Sovereign Defaults Before International Courts and Tribunals 209-251 (2011); Christina Knahr, *Investments 'In the Territory' of the Host State*, *in* International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer (Christina Binder et al. eds., 2009) (seeking to determine the relevance of the territorial nexus in investment arbitration); Michail Dekastros, *Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention*, 14 J. World Inv. & Trade 286, 317-18 (2013); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Int'l L. 711, 730-45 (2007).

7. *See, e.g.*, Douglas, *supra* note 5, at 313-17; Luiz Eduardo Salles, Forum Shopping in International Adjudication: The Role of Preliminary Objections 16-46 (2014); Piero Bernandini, *Nationality Requirements under BITS and Related Case Law*, *in* Investment Treaty Law: Current Issues 2 at 17, 22-23 (Federico Ortino et al. eds., 2007);

rate veil of foreign investors.[8] To be more precise, while this article deals with issues of jurisdiction *ratione personae* in general, it mainly focuses on the nationality of legal entities to the extent it relates to the notion of *territory*.[9]

IIAs typically protect natural or legal persons of one contracting party ("nationals") when investing in the territory of the other contracting party.[10] While the nationality of natural persons is governed "primarily by the law of the country whose nationality is at issue",[11] the nationality of legal entities is "more complex"[12] with the most commonly used criteria being those of incorporation, *siège social* (the main seat of business), and effective control or a combination thereof.[13] Depending on the case, the

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Paul M. Blyschak, *Yukos Universal v. Russia: Shell Companies and Treaty Shopping in International Energy Disputes*, 10 RICH. J. GLOBAL L. & BUS. 179, 187-200 (2011).

8. *See, e.g.*, TSA Spectrum de Arg. S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶¶ 140-47 (Dec. 19, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0874.pdf; Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶¶ 328-33 (Oct. 21, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0020_0.pdf; Tokios Tokelés v. Ukr., ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 21-71 (Apr. 29, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf; ALBERT BADIA, PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION 133-61 (2014); Markus Burgstaller, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7 J. WORLD INV. & TRADE 857, 871-77 (2006).

9. Particularly for natural persons, *see, e.g.*, RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 45-47 (2012); RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 31-33 (1995); CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION? 295-304 (2008); Maurice Mendelson, *Issues Relating to the Identity of the Investor*, *in* 4 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 at 22, 22-32 (Arthur W. Rovine ed., 2011); Katia Yannaca-Small, *Who is Entitled to Claim? Nationality Challenges*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 211, 211-9 (Katia Yannaca-Small ed., 2010).

10. *See, e.g.*, Agreement Between the Gov't of the People's Republic of China and the Gov't of the Republic of Korea on the Promotion and Protection of Investments, China-S. Kor., Sept. 7, 2007, art. 1(2) [hereinafter China-Korea BIT] ("The term 'investor' means any natural person or legal entity of one Contracting Party who invests in the territory of the other Contracting Party").

11. DOLZER & SCHREUER, *supra* note 9, at 45. For dual nationals, *see, e.g.,* Nottebohm Case (Liechtenstein v. Guatemala), Preliminary Objection (Second phase), (Judgment of Apr. 6, 1955) I.C.J. REP. 1955, 4; Saba Fakes v. Republic of Turk., ICSID Case No. ARB/07/20, July 14, 2010, Award, ¶¶ 54-81; Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, July 7, 2004, Award, ¶¶ 25-84; *see also* Mendelson, *supra* note 9, at 27-28.

12. Mendelson, *supra* note 9, at 47.

13. *See, e.g.*, Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venez., ICSID Case No. ARB/00/5, Decision on Jurisdiction, ¶¶ 107-09 (Sept. 27, 2001) 6 ICSID Rep. 419 (2004) ("According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration."); DUGAN ET AL., *supra* note 9, at 306-08; CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 142 (2007); SALACUSE, *supra* note 6, at 187-90; JESWALD W.

International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is also relevant in defining the nationality of legal entities.[14] In any case, territory becomes vital; in fact a *conditio sine qua non* nationality cannot be established at least for the cases of incorporation and/or main business activities.[15] In this regard, it can be legally unclear when the word "territory" is

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SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 375-76 (2013); NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE 137-39 (2005); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 168-72 (2010); Pia Acconci, *Determining the Internationally Relevant Link Between a State and a Corporate Investor: Recent Trends Concerning the Application of the "Genuine Link" Test*, 5 J. WORLD INV. & TRADE 139, 146-60 (2004); Bernandini, *supra* note 7, at 20-21; Engela C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 49, 75-79 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Yannaca-Small, *supra* note 9, at 224-42.

14. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(2), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]; ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award, ¶¶ 332-62 (Oct. 2, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf (declaring the claimants nationals of Cyprus and determining that the finding does not contradict the Cyprus-Hungary BIT); Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶¶ 214-24, 264-323 (Oct. 21, 2005) http://www.italaw.com/sites/default/files/case-documents/ita0020_0 (considering whether the ICSID has jurisdiction over a corporation that is not a national of a particular country, and interpreting what it means to be a national); Autopista v. Venezuela, ¶¶ 102-26 (discussing the meaning of nationality under the ICSID Convention and what jurisdiction involves); Nat'l Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Award, ¶¶ 122-49 (Apr. 3, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4043.pdf (considering the issue of nationality under the ICSID treaty, the objective test of nationality, and whether the ICSID has jurisdiction); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kaz., ICSID Case No. ARB/05/16, Award, ¶¶ 326-31 (July 29, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0728.pdf (discussing the meaning of nationality under ICSID Art. 25); Tokios Tokelés v. Ukr., ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 21-52, 57-71 (Apr. 29, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf (discussing nationality under the ICSID award and ICSID jurisprudence with respect to nationality issues); TSA Spectrum de Arg. S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶¶ 140-47 (Dec. 19, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0874.pdf (discussing nationality under the ICSID award); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Summary Minutes of the Session of the Tribunal held in Paris, 886-89 (May 25, 1999) 41 ILM 881 (2002). *See also* CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 474-85 (2009); Yaraslau Kryvoi, *Piercing the Corporate Veil in International Arbitration*, 1 GLOBAL BUS. L. REV. 169, 178-86 (2011) (looking at various cases and jurisprudence under the ICSID Convention regarding the nationalities of corporations).

15. This, however, may be different in cases of shareholding, which should not be confused with these cases. For the issues stemming from shareholder claims, *see generally* DOUGLAS, *supra* note 5, at 397-457; DUGAN ET AL., *supra* note 9, at 315-39; MCLACHLAN ET AL., *supra* note 13, at 184-89; SALACUSE, *supra* note 6, at 181-84; KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS 154-64 (2013); VANDEVELDE, *supra* note 13, at 174-75.

not adequately defined, as is exactly the case under China's IIAs. In fact, Chinese IIAs generally cover legal entities that are "established in accordance with the laws of the People's Republic of China and *domiciled* in the territory of the People's Republic of China,"[16] "incorporated or constituted under the laws and regulations of the People's Republic of China and have their *seats* in the People's Republic of China,"[17] or "incorporated or constituted in accordance with the laws and regulations of" China.[18] These references arguably create uncertainty as to whether they

16. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Peru, art. 1(2), June 6, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/767 [hereinafter China-Peru BIT] (emphasis added). *See, e.g.*, Agreement Concerning the Reciprocal Promotion and Protection of Investments, China-Syrian Arab Republic, art. 1(2), Dec. 9, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/785 [hereinafter China-Syria BIT]; Agreement for the Promotion and Protection of Investments (with Protocol), China-U.A.E., art. 1(2)(a), July 1, 1993, 1849 U.N.T.S. 254 [hereinafter China-U.A.E. BIT]; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Viet., art. 1(2), Dec. 2, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/795 [hereinafter China-Vietnam BIT]; Agreement for the Encouragement and Reciprocal Protection of Investments, China-Greece, art. 1(3)(a), June 25, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/738 [hereinafter China-Greece BIT].

17. Agreement on the Reciprocal Promotion and Protection of Investments, China-Belg.-Lux. Econ. Union, art. 1(1)(b)(ii), June 6, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/338 [hereinafter China-Belgium-Luxembourg Economic Union BIT] (emphasis added). *See, e.g.*, Agreement for the Promotion and Protection of Investments, China-India, art. 1(a)(ii), Nov. 21, 2006, http://investmentpolicyhub.unctad.org/Download/TreatyFile/742 [hereinafter China-India BIT]; Agreement on the Promotion and Reciprocal Protection of Investments, China-Russ., art. 1(2)(b), Nov. 9, 2006, http://investmentpolicyhub.unctad.org/Download/TreatyFile/774 [hereinafter China-Russia BIT]; Agreement on the Promotion and Reciprocal Protection of Investments, China-Spain, art. 1(2)(b), Nov. 14, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/780 [hereinafter China-Spain BIT]; Agreement on the Encouragement and Reciprocal Protection of Investments, China-Ger., art. 1(2), Dec. 1, 2003, http://investmentpolicyhub.unctad.org/Download/TreatyFile/736 [hereinafter China-Germany BIT]; Agreement on the Promotion and Protection of Investments, China-Djib., art. 1(2)(b), Aug. 18, 2003, http://investmentpolicyhub.unctad.org/Download/TreatyFile/728 [China-Djibouti BIT]; Agreement on the Promotion and Protection of Investments, China- Côte d'Ivoire, art. 1(2)(a)(2), Sept. 30, 2002, http://investmentpolicyhub.unctad.org/Download/TreatyFile/722; Agreement on the Reciprocal Promotion and Protection of Investments, China-Trin. & Tobago, art. 1(2)(b), July 22, 2002, http://investmentpolicyhub.unctad.org/Download/TreatyFile/787 [hereinafter China-Trinidad & Tobago BIT]; Agreement on the Promotion and Protection of Investments, China-Myan., art. 1(2)(b), Dec. 12, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/762 [hereinafter China-Myanmar BIT]; Agreement on Encouragement and Reciprocal Protection of Investments, China-Neth., art. 1(2)(b), Nov. 26, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/763 [hereinafter China-Netherlands BIT]. *But see* Agreement on the Promotion and Reciprocal Protection of Investments, China-Switz., art. 1(2)(b), Jan. 27, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/783 [hereinafter China-Switzerland BIT] ("[L]es entités juridiques, y compris les sociétés, les sociétés enregistrées, les sociétés de personnes et autres organisations, qui sont constituées ou organisées de toute autre manière conformément à la législation de cette Partie contractante, et qui ont leur siège, en même temps que des activités économiques réelles, sur le territoire de cette même Partie contractante.").

18. *See* China-Korea BIT, *supra* note 10, art. 1(2). *See also* China-Djibouti BIT, *supra* note 17, art. 1(2)(b); Agreement on the Encouragement and Reciprocal Protection of Invest-

refer to the *siège social*, the place of incorporation, or both.[19] But most of all, they reveal the direct bearing of territory to the nationality of "Chinese" legal entities.[20] Nevertheless, as this article shows, territory is not adequately defined in the majority of China's IIAs, thus creating doubts regarding the application of IIAs to legal entities established, incorporated, and/or having their seat in Hong Kong and Macao.[21]

This article addresses the application of China's IIAs to Hong Kong and Macao, first, by examining the territorial application of China's IIAs, be they BITs, free trade agreements (FTAs) or multilateral investment treaties (Part I). The article then proceeds by analyzing IIAs entered into by Hong Kong and Macao (Part II). With this analysis in place, a clearer picture develops of how territory is defined under the IIAs of China, Hong Kong and Macao. At the same time, the uncertainty arising from the territorial application of China's IIAs will be fully documented, thus paving the way for Part III, which examines certain aspects of treaty interpretation and other relevant considerations that will help clarify the notion of "territory" under China's IIAs. Such aspects of treaty interpretation are

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ments, Alg.-China, art. 1(2)(b), Oct. 17, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3288 [hereinafter Algeria-China BIT]; China-Laos BIT, *supra* note 2, art. 1(2)(b); Agreement Concerning the Promotion and Reciprocal Protection of Investments with the Exchange of Notes, China-Gr. Brit., art. 1(1)(d)(ii), May 15, 1986, 1462 U.N.T.S. 256 ("[C]ompanies means . . . in respect of the People's Republic of China: corporations, firms, or associations incorporated or constituted under the law in force in any part of the People's Republic of China."). *But see* Agreement on the Mutual Protection of Investments, China-Mex. art. 1, July 11, 2008, 2626 U.N.T.S. 32 [hereinafter China-Mexico BIT] ("[i]nvestor of a Contracting Party" means: . . . (b) an enterprise which is either constituted or otherwise organized under the law of a Contracting Party, and is engaged in substantive business operations in the territory of that Contracting Party; having an investment in the territory of the other Contracting Party"); Agreement on the Mutual Protection of Investments, China-Swed. art. 1(2), Mar. 29, 1982, 1350 U.N.T.S. 256 [hereinafter China-Sweden BIT] ("The term "investor" shall mean: . . . In respect of the People's Republic of China, any company, other legal person or citizen of China authorized by the Chinese Government to make an investment."). For Chinese BITs that include the element of "control" alternatively or in combination with the criteria of incorporation or seat of main business, *see, e.g.*, Agreement on the Reciprocal Promotion and Protection of Investments, China-Fr. art. 1(2)(b), Nov. 26, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3342; Agreement for the Promotion and Protection of Investments, China-Kuwait, art. 1(2), 1(4), Nov. 23, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/752 [hereinafter China-Kuwait BIT].

19. *See, e.g.,* Yukos Universal Ltd. v. The Russian Federation, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, ¶ 411 (Nov. 30, 2009):

> [A]ccording to Article 31 of the VCLT, a treaty must be interpreted first on the basis of its plain language. On its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party . . . The Treaty imposes no further requirements with respect to shareholding, management, *siège social* or location of its business activities . . . Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management.

20. GALLAGHER & SHAN, *supra* note 4, at 77; Bernandini, *supra* note 7, at 20-21.

21. GALLAGHER & SHAN, *supra* note 4, at 81-82, 92-93.

drawn from the Vienna Convention on the Law of Treaties (VCLT)[22] and the Vienna Convention on Succession of States in Respect of Treaties (VCST).[23] Guidance is also sought from the China-UK and China-Portugal Joint Declarations, the Hong Kong and Macao Basic Laws, the ICSID Convention and the World Trade Organization (WTO) law as well as China's Notifications to the United Nations Secretary General (UNSG). Parts I to III therefore set the foundational elements of the issue discussed in this article. On the same time, they allow for an appraisal of the elements relevant in defining the territorial application of IIAs in general and the territorial application of China's IIAs to Hong Kong and Macao in particular.

Part IV then touches upon the *Sanum* case at length. By way of introduction, the article first briefly examines the *Tza Yap Shum* case, because it is the first case that dealt with the application of China's IIAs to Hong Kong, albeit through the perspective of natural persons.[24] Thereafter, the remainder of this Part explains the *Sanum* case as it unfolded before the United Nations Commission on International Trade Law (UNCITRAL) tribunal and the SGHC. The UNCITRAL tribunal and the SGHC came to different findings, with the first opting in favor and the second against the application of the China-Laos BIT to Macao. This disagreement in how to apply territoriality in the China-Laos BIT allows for an objective and in depth analysis of the unprecedented case before the SGHC and presents an image of present day developments in connection with the application of China's IIAs to Hong Kong and Macao.

Furthering the discussion, Part V revisits the findings of the SGHC to analyze its potential weaknesses. First, this is done through the examination of state practice on the territorial extension of IIAs. Secondly, and in the same vein, this Part touches upon cases filed under pre-succession or secession IIAs against successor or seceding states.[25] Such cases mainly involve Czechoslovakia, the Federal Republic of Yugoslavia (FRY), and the Union of Soviet Socialist Republics (USSR). The relevant treaty practice of successor and seceding states supports the inapplicability of Chinese IIAs to Hong Kong and Macao. Furthermore, the examination of cases filed under pre-succession or secession IIAs is of great practical importance given that, at the time of writing of this article, two cases have

22. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, (entered into force Jan. 7, 1980) (hereinafter VCLT).

23. Vienna Convention on Succession of States in Respect of Treaties, August 23, 1978, 1946 U.N.T.S. 3 (1996) (entered into force on Nov. 6, 1996) (hereinafter VCST).

24. *See* Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009).

25. For the distinct issue of succession to responsibility, *see* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 181-87 (2013); PATRICK DUMBERRY, STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY (2007). *See also Lighthouses Case* (Fr. v. Greece), Judgment, 1934 P.C.I.J. (ser. A/B) No. 62 (Mar. 17); Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. Rep. 3 (Sept. 25); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. Rep. 47 (Feb. 26).

been filed against Montenegro and one against Kosovo under Yugoslavian BITs[26] and another case has been filed against Kazakhstan under the Canada-USSR BIT.[27] Third, this Part revisits the reasoning of the SGHC with regard to the temporal effect of the Exchange of Letters between the Laotian Ministry of Foreign Affairs and the Chinese Embassy in Laos, which was crucial to the court's determination that the China-Laos BIT was inapplicable to Macao. Fourth, Part V revisits the legal nature and effect on third parties of China's Joint Declarations with respect to Hong Kong and Macao, which has been utterly overlooked by the SGHC. Last, this Part reverts to the burgeoning parallelism existent among Chinese IIAs as well as between Chinese IIAs and IIAs concluded by Hong Kong and Macao. Again, several aspects of this parallelism appear to have been overlooked by the SGHC.

Finally, the conclusion discusses the implications that arise from the pervasive ambiguity surrounding the application of China's IIAs to Hong Kong and Macao, and summarizes the findings of this article. On balance, this article establishes that (in light of currently available data) the application of China's IIAs to Hong Kong and Macao is still not conclusively determined, even after the ruling of the SGHC.

I. Territorial Application Of China's International Investment Agreements (IIAs)

China's IIAs can roughly be broken into three categories, namely bilateral investment agreements (BITs), bilateral free trade agreements (FTAs) with investment chapters, and multilateral investment treaties. The characteristics of these treaties differ depending on the timeframe they fall into. In particular, Chinese BITs have been concluded from 1982 onwards, and have undergone three main phases that in literature are commonly described as the three generations of China's BITs.[28] This three-genera-

26. *See* CEAC Holdings Limited v. Montenegro, ICSID Case No. ARB/14/8 (registered on Mar. 20, 2014); MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8 (registered on Dec. 6, 2012); ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22 (registered on June 4, 2015); *see also Montenegro Rebuffs Investor Allegations, After Two Claims are Lodged in Relation to Aluminium Venture*, Investment Arbitration Reporter, (Mar. 25, 2015), http://www.iareporter.com/articles/20140325_1.

27. *See* World Wide Minerals v. Republic of Kazakhstan, Dec. 16, 2013, Notice of Arbitration of Dec. 16, 2013 (not public).

28. *See* Gallagher & Shan, *supra* note 4, at 35-42; Norah Gallagher, *China's BITs and Arbitration Practice: Progress and Problems*, *in* China and International Investment Law: Twenty Years Of ICSID Membership 180, 185 (Wenhua Shan & Jinyuan Su eds., 2015); Monika C. E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 11 J. Int'l Econ. L. 507 (2008); Lars Markert, *Arbitration Under China's Investment Treaties – Does It Really Work?*, 5 Contemp. Asia Arb. J. 205 (2009); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 Cardozo J. Int'l & Comp. L. 73 (2007); Wei Shen, *The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in* Tza Yap Shum v. The Republic of Peru, 10 Chinese J. Int'l L. 55 (2011); Jie Wang, *Investor-State Arbitration: Where Does China Stand?*, 32 Suffolk Transnat'l L. Rev. 493 (2009); J.

tion categorization is generally drawn based on China's initial conservative model (1982-1989), China's accession to the ICSID Convention (1990-1997) and on the "Going Abroad" strategy implemented from 1998 onwards, that granted access to investor-state arbitration (ICSID and non-ICSID) for all kinds of disputes. On the other hand, China's FTAs with investment chapters first appeared in 2006, almost two decades after the emergence of China's third generation BITs. Likewise, China's first multilateral investment treaty was signed in 2009.[29] These phases of China's investment treaty practice have greatly altered the form and substance of Chinese IIAs and have also influenced the linguistic stipulations employed for the notion of territory. Nevertheless, the following sections show that the prevailing model or generation of China's IIAs does not necessarily determine the approach adopted in defining the notion of territory. The matter is rather determined on an *ad hoc* and treaty-by-treaty basis.

A. *China's Bilateral Investment Treaties (BITs)*

As of today, China has concluded 130 BITs, making it one of the most active states in the field of international investment lawmaking.[30] A review of the provisions pertinent to the territorial application of these BITs reveals that there is no uniform approach to this issue. Generally speaking, there are four main tendencies revolving around the treatment of territoriality in Chinese BITs:

- BITs that do not define the notion of territory;
- BITs that define territory but do not include any reference for their application to Hong Kong and Macao;
- BITs that include a reference to Hong Kong and Macao without specifically excluding their application to these territories; and
- BITs that specifically carve out Hong Kong and Macao from their application.

The following sub-sections address each of these categories.

1. BITs that Do Not Define "Territory"

Although the majority of BITs that do not provide a definition of territory can be traced back to the first generation of China's BITs,[31] it is

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Romesh Weeramantry, *Investor–State Dispute Settlement Provisions in China's Investment Treaties*, 27 ICSID REV. 192 (2012).

29. Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, Aug. 15, 2009, http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf [hereinafter China-ASEAN Agreement on Investment].

30. Eliasson, *supra* note 28, at 90-91; Nils Eliasson, *Investor-State Arbitration and Chinese Investors: Recent Developments in Light of the Decision on Jurisdiction in the Case* Mr. Tza Yap Shum v. The Republic of Peru, 2 CONTEMP. ASIA ARB. J. 347, 349-50 (2009); Shen, *supra* note 28, at 56.

31. *See* China-Djibouti BIT, *supra* note 17, art. 1; China-Syria BIT, *supra* note 16, art. 1; China-Peru BIT (1994), *supra* note 16, art. 1(2); China-Laos BIT, *supra* note 2, arts. 1-2;

vital to note that even some recent BITs concluded by China remain silent in this regard. One prominent example is the China-Korea BIT of 2007.[32] As it is later explained, this lack of clarity raises questions as to the interpretation of the notion of territory in light of the definitions included in other Chinese BITs.

2. BITs that Define "Territory" But Do Not Refer to Hong Kong and Macao

Unlike the previous category, there exists a considerable number of Chinese BITs that define the notion of territory but do not explicitly refer to Hong Kong and Macao. However, even when defining territory, China's BITs treat the notion inconsistently. For example, the China-UK BIT of 1986 provides that it "shall also apply to investments made by nationals or companies of one Contracting Party in the territorial sea or maritime zone or on the Continental Shelf where the other Contracting Party exercises its sovereignty or sovereign rights or jurisdiction."[33] Similarly, but with direct reference to international law, the China-U.A.E. BIT of 1993 provides that "[t]he term 'territory' shall be construed to mean, in addition to the zones contained within the land boundaries, the maritime zones. The latter

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China-Vietnam BIT, *supra* note 16, art. 1; China-Greece BIT, *supra* note 16, art. 1; Agreement on the Promotion and Reciprocal Protection of Investments, China-Malay., art. 1, Nov. 21, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3369 [hereinafter China-Malaysia BIT]; China-Sweden BIT, *supra* note 18, art. 1. *See also* China-Myanmar BIT, *supra* note 17; Agreement Concerning Encouragement and Reciprocal Protection of Investments, China-Phil, July 20, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/769 [hereinafter China-Philippines BIT]; Agreement on the Reciprocal Encouragement and Protection of Investments, China-Pak., Feb. 12, 1989, http://investmentpolicyhub.unctad.org/Download/TreatyFile/766 [hereinafter China-Pakistan BIT]; Agreement on the Promotion and Exchange of Investments (with Exchange of Notes), China-N.Z., Nov. 22, 1988, 1787 U.N.T.S. 186 [hereinafter China-New Zealand BIT]; Agreement Concerning the Encouragement and Reciprocal Protection of Investment, China-Japan, Aug. 27, 1988, 1555 U.N.T.S. 197 [hereinafter China-Japan BIT]; Agreement on the Promotion and Protection of Investments, China-Sing., Nov. 21, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/776 [hereinafter China-Singapore BIT]; Agreement Concerning the Promotion and Reciprocal Protection of Investments (with Protocol), Austria-China, Sept. 12, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/179 [hereinafter Austria-China BIT]; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Den., Apr. 29, 1985, 1443 U.N.T.S. 84 [hereinafter China-Denmark BIT]; Agreement for the Promotion and Protection of Investments, China-Thai., Mar. 12, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/786 [hereinafter China-Thailand BIT]; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-It., Jan. 28, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3370 [hereinafter China-Italy BIT]; Agreement on Mutual Protection of Investments, China-Nor., Nov. 21, 1984, http://investmentpolicyhub.unctad.org/Download/TreatyFile/765 [hereinafter China-Norway BIT].

32. *See* China-Korea BIT, *supra* note 10, art. 1.

33. Agreement Between the Gov't of the United Kingdom of Great Britain and Northern Ireland and the Gov't of the People's Republic of China, China-UK, May 15, 1986, art. 1(2) [hereinafter China-UK BIT]; *see also* Agreement on the Reciprocal Encouragement and Protection of Investments, China-Austl., art. 1(g), July 11, 1988, http://investmentpolicyhub.unctad.org/Download/TreatyFile/148 [hereinafter China-Australia BIT].

also comprise the marine and submarine zones over which the Contracting States exercise sovereignty, sovereign rights, or jurisdiction under international law."[34]

Slightly more evolved, the China-Netherlands BIT of 2001 stipulates that:

> [T]he term "territory" means respectively: - for the People's Republic of China, the territory of the People's Republic of China (including the territorial sea and air space above it) as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese law and international law.[35]

Still other BITs directly refer to the exclusive economic zone. For instance, the China-India BIT of 2006 specifically provides that:

> "[T]erritory" means the territory of each Contracting Party including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Contracting Party has sovereignty, sovereign rights or exclusive jurisdiction in accordance with its

34. China-U.A.E. BIT, *supra* note 16, art. 1(6). *See also* Algeria-China BIT, *supra* note 18, art. 1(4). *Cf.* China-Kuwait BIT (1985), *supra* note 18, art. 1(6-7) ("The term 'host government' shall mean the government of the Contracting State in whose territory and maritime zones the relevant investment is made or is to be made . . . Maritime zones mean the marine and submarine zones over which the Contracting States exercise, under international law, sovereignty, sovereign rights or jurisdiction.").

35. China-Netherlands BIT, *supra* note 17, art. 1(4); *see also* Agreement for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 1(22), Sept. 9, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476 ("the territory of China, including land territory, internal waters, territorial sea, territorial air space, and any maritime areas beyond the territorial sea over which, in accordance with international law and its domestic law, China exercises sovereign rights or jurisdiction with respect to the waters, seabed and subsoil and natural resources thereof."); China-Switzerland BIT, *supra* note 17, art. 1(4); Agreement for the Promotion and Protection of Investments, China-Colom., art. 1(4), Nov. 22, 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/720; Agreement on the Encouragement and Reciprocal Protection of Investments, China-Port., art. 1(4), Dec. 9, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3363 [hereinafter China-Portugal BIT] (replacing the 1992 China-Portugal BIT); Agreement for the Promotion and Reciprocal Protection of Investments, China-Madag., art. 1(4), Nov. 21, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/758 [hereinafter China-Madagascar BIT]; China-Belgium-Luxembourg Economic Union BIT, *supra* note 17, art. 1(4); Agreement on the Encouragement and Reciprocal Protection of Investments, China-Fin., art. 1(4), Nov. 15, 2004, http://investmentpolicyhub.unctad.org/Download/TreatyFile/733 [hereinafter China-Finland BIT]; China-Trinidad & Tobago BIT, *supra* note 17, 145. 1(5); Agreement on the Reciprocal Promotion and Protection of Investments, China-Jordan, art. 1(6), Nov. 5, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/748 ("The term 'territory' means the territory of [Jordan] or the territory of the People's Republic of China respectively, as well as those maritime areas adjacent to the outer limit of the territorial sea, including the seabed and subsoil of either of the above territories, over which the State concerned exercises, in accordance with international law, sovereign rights and jurisdiction.").

> laws in force and International Law including the l982 United Nations Convention on the Law of the Sea.[36]

Finally, another definition that is found in BITs predating the latter two, stipulates as follows: "The term 'territory' means the territory of each Contracting Party as defined in its laws and the adjacent areas over which each Contracting Party exercises sovereign rights or jurisdiction in accordance with international law."[37]

These definitions show a tendency towards a direct reference to international law when carving out the notion of territory. In addition, they also capture the evolution of international law standards that took place with United Nations Convention on the Law of the Sea (UNCLOS)'s entry into force.[38] Indeed, Chinese BITs concluded after China's ratification of the UNCLOS make it explicit that the "term territory is not limited to the areas which fall within the State's sovereign domain," i.e., not only its land territory, internal waters, territorial sea and continental shelf, but also "functional economic zones in which the coastal State is permitted to exercise sovereign rights in accordance with international law."[39] This means that territory also extends to the exclusive economic zone and in certain cases to an extended continental shelf.[40] Regardless, such functional economic zones should be "established in conformity with international law."[41] This point is particularly relevant for China's maritime boundaries

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36. China-India BIT, *supra* note 17, art. 1(d); *see also* China-Spain BIT *supra* note 17, art. 1(4); China-Germany BIT, *supra* note 17, at Protocol ad. art. 2.

37. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Maced., art. 1(5), June 9, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/757; *see also* Agreement Concerning the Encouragement and Reciprocal Protection of Investment, Brunei-China, art. 1(1)(b), Nov. 11, 2000, http://investmentpolicyhub.unctad.org/Download/TreatyFile/514 [hereinafter China-Brunei BIT]; Agreement for the Promotion and Protection of Investment, Cambodia-China, art. 1(4), July 19, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/571 [hereinafter Cambodia-China BIT]; Agreement on the Promotion and Protection of Investments, China-Indon., art. 1(6), Nov. 18, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/743 [hereinafter China-Indonesia BIT]; Agreement Concerning the Promotion and Reciprocal Protection of Investments, China-Ice., art. 1(4), Mar. 31, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/741 [hereinafter China-Iceland BIT]; Agreement for the Protection and Reciprocal Protection of Investments, China-Czechoslovakia, art. 1(4), Dec. 4, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/726 [hereinafter China-Czechoslovakia BIT] ("The term 'territory' means territory over which the Contracting Party has sovereignty and exercises its jurisdiction.").

38. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. China ratified UNCLOS on June 7, 1996.

39. Nico Schrijver & Vid Prislan, *The Netherlands*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 535, 558 (Chester Brown ed., 2013); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 108 (7th ed. 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 487-90 (6th ed., 2008).

40. UNCLOS, *supra* note 38, arts. 55-85.

41. Schrijver & Prislan, *supra* note 39, at 558.

in light of the ongoing South China Sea disputes.[42] In any case, the above definitions of territory remain silent with regard to Hong Kong and Macao.

3. BITs that Refer to Hong Kong and Macao Without an Explicit Carve Out

There exists only one Chinese BIT that makes an express reference to Hong Kong and Macao without explicitly carving out these territories from its application: the China-Mexico BIT. While defining territory similarly to the majority of the BITs referred to in sub-section 2,[43] the China-Mexico BIT also includes a footnote stating that, "[a]uthorized by the Central Government of the People's Republic of China, the Governments of Hong Kong and Macao Special Administrative Regions can separately negotiate and sign the Agreement on the Promotion and Reciprocal Protection of Investments with the Government of United Mexican States by themselves."[44]

This provision raises a wide array of questions. First of all, is it merely an indication of Hong Kong and Macao's ability to enter into their own IIAs? Second, is the reference to separate negotiation and signature meant to refer to the China-Mexico BIT and an extension thereof, or to a potential Hong Kong-Mexico BIT or Macao-Mexico BIT? And how would the latter option of a separate BIT be in conformity with the singular "the Agreement" used to describe the treaty after the verbs "negotiate and sign"? Third, is the verb "can" indicative of an *ipso facto* application of the China-Mexico BIT to Hong Kong and Macao absent separate BITs between Mexico and the latter territories? Fourth, would the conclusion of BITs between Mexico and these two regions—which to this date has not taken place—exclude the application of the China-Mexico BIT, or would this BIT still be applied in parallel? All the above questions merely pro-

42. *See generally* NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA (2012); MARK J. VALENCIA, CHINA AND THE SOUTH CHINA SEA DISPUTES (1995); Donald R. Rothwell, *The 1982 Convention on the Law of the Sea and its relevance to maritime disputes in the South China Sea*, *in* THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES 46 (Leszek Buszynski & Christopher B. Roberts eds., 2014); Mark J. Valencia, *The South China Sea Disputes: Recent Developments*, *in* RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA DISPUTE: THE PROSPECT OF A JOINT DEVELOPMENT REGIME 3, 3-16 (Wu Shicun & Nong Hong eds., 2014); James D. Fry & Melissa H. Loja, *The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes*, 27 LEIDEN J. INT'L L. 727, 750-53 (2014).

43. China-Mexico BIT, *supra* note 18, art. 1:

> "[T]erritory" means: . . . (b) in respect of the People's Republic of China, the territory of the People's Republic of China including the territorial sea and air space above it, as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of explorations and exploitations of resources of the seabed and its subsoil and superjacent water resources in accordance with Chinese law and international law.

44. *Id.* art. 1, n.1.

vide a snapshot of the potential interpretative debates the footnote inserted in the China-Mexico BIT could provoke.

4. BITs that Specifically Carve Out Hong Kong and Macao

Only one BIT concluded by China explicitly carves out Hong Kong and Macao from its application[45]: the China-Russia BIT of 2006.[46] In more detail, this treaty defines territory as follows:

> The term "territory of the Contracting Party" means: - the territory of the Russian Federation and the territory of the People's Republic of China respectively; - maritime areas, beyond the external boundaries of the territorial sea of each of the above territories over which the respective Contracting Party exercises in accordance with international law its sovereign rights or jurisdiction for the purpose of exploration, extraction, exploitation and preservation of natural resources of such areas.[47]

This definition certainly does not refer to Hong Kong and Macao, but a relevant protocol to the treaty, reads as follows: "Unless otherwise agreed by both Contracting Parties, the Agreement does not apply to the Hong Kong Special Administrative Region of the People's Republic of China and the Macao Special Administrative Region of People's Republic of China."[48]

The above provision makes it clear that the China-Russia BIT does not apply to Hong Kong and Macao. This is different from the China-Mexico BIT discussed in the previous section. However, the inclusion of such an explicit carve out in only one Chinese BIT does not create certainty as to China's intent to include Hong Kong and Macao within the application of all its other BITs. In fact, as is later explained in the context of the *Sanum* case, the China-Russia BIT could be used to argue both for and against the application of China's IIAs to Hong Kong and Macao.

B. *China's Free Trade Agreements (FTAs)*

China has already concluded ten bilateral FTAs, an FTA with the Association of Southeast Asian Nations (ASEAN), and two agreements with Hong Kong and Macao, known as Closer Economic and Partnership Agreements (CEPAs).[49] From these treaties, only five include an investment chapter. In particular, apart from the CEPAs with Hong Kong and Macao, which do not contain investment chapters, China concluded its

45. *See* GALLAGHER & SHAN, *supra* note 4, at 94.

46. China-Russia BIT, *supra* note 17.

47. *Id.* art. 1(5).

48. Id. at Protocol.

49. The text of these agreements can be found online: http://fta.mofcom.gov.cn/english/index.shtml (last visited May 9, 2015).

first FTA with the ASEAN in 2004[50] and has since entered into bilateral FTAs with Chile,[51] Pakistan,[52] New Zealand,[53] Singapore,[54] Peru,[55] Costa Rica,[56] Iceland,[57] Switzerland,[58] Korea[59] and Australia.[60] From these FTAs, only the FTAs with Pakistan, New Zealand, Peru, Korea and Australia contain an investment chapter that also provides for investor-state arbitration. The China-ASEAN FTA does not regulate investment, but China and ASEAN have also entered into the China-ASEAN Agreement on Investment, which is an eleven-party investment treaty discussed below in Section C. With regard to the remaining agreements, the China-Chile and China-Switzerland FTAs contain general references to investment,[61]

50. Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, Nov. 29, 2004, http://fta.mofcom.gov.cn/dongmeng/annex/xieyi2004en.pdf. *See also* Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, Jan. 14, 2007, http://www.asean.org/news/item/agreement-on-trade-in-services-of-the-framework-agreement-on-comprehensive-economic-co-operation-between-the-association-of-southeast-asian-nations-and-the-people-s-republic-of-china-2; China-ASEAN Agreement on Investment, *supra* note 29. These treaties established the China-ASEAN Free Trade Area that came into effect on Jan. 1, 2010. For an overview of the agreements and their specific provisions, *see* http://fta.mofcom.gov.cn/topic/chinaasean.shtml (last visited May 9, 2015). ASEAN is a regional organization comprised of the following Southeast Asian countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

51. Free Trade Agreement, Chile-China, Nov. 18, 2005, http://fta.mofcom.gov.cn/chile/xieyi/freetradexieding2.pdf [hereinafter Chile-China FTA].

52. Free Trade Agreement, China-Pak., Nov. 24, 2006, http://fta.mofcom.gov.cn/pakistan/xieyi/fta_xieyi_en.pdf [hereinafter China-Pakistan FTA].

53. Free Trade Agreement, China-N.Z., Apr. 7, 2008, http://images.mofcom.gov.cn/gjs/accessory/200804/1208158780064.pdf [hereinafter China-New Zealand FTA].

54. Free Trade Agreement, China-Sing., Oct. 23, 2008, http://fta.mofcom.gov.cn/topic/ensingapore.shtml [hereinafter China-Singapore FTA].

55. Free Trade Agreement, China-Peru, Apr. 28, 2009, http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf [hereinafter China-Peru FTA].

56. Free Trade Agreement, China-Costa Rica, Apr. 8, 2010, http://www.sice.oas.org/Trade/CRI_CHN_FTA/Texts_Apr2010_e/CRI_CHN_Core_text_en.pdf?bcsi_scan_7823DFCE46415F3E=0&bcsi_scan_filename=CRI_CHN_Core_text_en.pdf [hereinafter China-Costa Rica FTA].

57. Free Trade Agreement, China-Ice., Apr. 15, 2013, http://fta.mofcom.gov.cn/iceland/xieyi/2013-4-17-en.pdf [hereinafter China-Iceland FTA].

58. Free Trade Agreement, China-Switz., July 6, 2013, http://fta.mofcom.gov.cn/topic/enswiss.shtml [hereinafter China-Switzerland FTA].

59. Free Trade Agreement, China-S. Kor., June 1, 2015, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf [hereinafter China-Korea FTA].

60. Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, June 17, 2015, https://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf [hereinafter China-Australia FTA].

61. *See* China-Switzerland FTA, *supra* note 58, arts. 9.1-9.2; Chile-China FTA, *supra* note 51, art. 112:

> Promoting Investment: 1. The aim of cooperation shall be to help the Parties to promote, within the bounds of their own competence, an attractive and stable reciprocal investment climate. 2. The Parties will promote the establishment of infor-

the China-Singapore FTA stipulates that investment disputes will be governed by the China-ASEAN Agreement on Investment, to which Singapore is party,[62] and the FTAs with Costa Rica and Iceland stipulate that investment will be governed by the BITs China has also concluded with these countries.[63] In fact, China has concluded BITs with each country it has now entered into free trade relations with.[64] Specifically, China has entered into BITs with Chile,[65] Pakistan,[66] New Zealand,[67] Singapore,[68] Peru,[69] Costa Rica,[70] Iceland,[71] Switzerland,[72] Korea[73] and Australia[74] and also has entered into BITs with all the ASEAN states.[75] In this regard, it is of particular importance to note that the parallel existence of a BIT and a FTA may also impact the territorial application of these treaties, depending on the particular stipulations employed therein. This issue is discussed later in Part V.

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mation exchange channels and facilitate full communication and exchange in the following aspects: (a) communication on investment policy laws, as well as, economic trade and commercial information; (b) exploring the possibility of establishing investment promotion mechanisms; and (c) providing national information for the potential investors and on investment cooperative parties.

62. *See* China-Singapore FTA, *supra* note 54, art. 84.

63. *See* China-Iceland FTA, *supra* note 57, art. 92; China-Costa Rica FTA, *supra* note 56, art. 89 ("The Parties reaffirm their commitments under the Agreement between the Government of the People's Republic of China and the Government of the Republic of Costa Rica on the Promotion and Protection of Investments, signed in Beijing, on 24th October 2007.").

64. Through a chronological perspective it must be noted that while these FTAs were signed from 2004 to 2015, the corresponding BITs were signed from 1985 to 2001. However, the China-Switzerland BIT of 1986 was replaced by the China-Switzerland BIT of 2009 and the China-Korea BIT of 1992 by the China-Korea BIT of 2007. In 2007, China and Costa Rica also signed a new BIT, but given that this has not yet entered into force, the applicable treaty remains the China-Costa Rica BIT of 1999.

65. Agreement Concerning the Encouragement and the Reciprocal Protection of Investment, Chile-China, Mar. 23, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/664.

66. China-Pakistan BIT, *supra* note 31.

67. China-New Zealand BIT, *supra* note 31.

68. China-Singapore BIT, *supra* note 31.

69. China-Peru BIT, *supra* note 16.

70. Agreement on the Promotion and Protection of Investments, China-Costa Rica, Mar. 25, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/842; *see also* Agreement on the Promotion and Protection of Investments, Oct. 24, 2007, http://investmentpolicyhub.unctad.org/IIA/country/49/treaty/884 (has not entered into force).

71. China-Iceland BIT, *supra* note 37.

72. China-Switzerland BIT, *supra* note 17 (replacing the 1986 China-Switzerland BIT).

73. China-Korea BIT, *supra* note 10 (replacing the 1992 China-Korea BIT).

74. China-Australia BIT, *supra* note 33.

75. China-Myanmar BIT, *supra* note 17; China-Brunei BIT, *supra* note 37; Cambodia-China BIT, *supra* note 37; China-Indonesia BIT, *supra* note 37; China-Laos BIT, *supra* note 2; China-Vietnam BIT, *supra* note 16; China-Philippines BIT, *supra* note 31; China-Malaysia BIT, *supra* note 31; China-Singapore BIT, *supra* note 31; China-Thailand BIT, *supra* note 31.

Having therefore identified those FTAs that contain an investment chapter,[76] the following lines focus on their stipulations with regard to the notion of territory. First, the China-Pakistan FTA provides that it applies:

> with respect to China, [to] the territory of the People's Republic of China, including land territory, internal waters, territorial sea and any maritime areas beyond the territorial sea that, in accordance with international law and its domestic law, China may exercise sovereign rights or jurisdiction with respect to the sea, seabed and subsoil and their natural resources.[77]

This provision does not appear to differ from those referred to in subsection 2 above and therefore cannot provide guidance with regard to its application to Hong Kong and Macao.

Turning to the China-Peru FTA, it is noted that this treaty also defines territory almost identically but for one distinct difference. The China-Peru FTA makes an explicit reference to the "customs territory" of China. In more detail, the relevant provision reads as follows: "territory means: (a) with respect to China, the *entire customs territory* of [the] People's Republic of China, including land, maritime and air space, and the exclusive economic zone and the continental shelf within which it exercises sovereign rights and jurisdiction in accordance with international law and its domestic law."[78] This reference to the "entire customs territory" of China is significant, since it refers the matter of this treaty's territorial application to WTO law. And as discussed in Part III, under the WTO, the customs territory of China does not include Hong Kong and Macao. In this regard, a legitimate question could be whether this reference to the customs territory of China should not *ipso facto* be applicable to the investment chapter of this FTA, given that investment appears to be somewhat distinct from the main bulk of the provisions included in a FTA. Regardless, the China-Peru FTA appears to carve out Hong Kong and Macao from its application. Nevertheless, the China-Peru FTA's treatment of Hong Kong and Macao is not conclusive for the China-Peru BIT, which does not even define the term "territory".[79]

In the same vein, the China-New Zealand, China-Korea, and China-Australia FTAs refer to China's "customs territory" by providing that

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76. *See* China-Australia FTA, *supra* note 60; China-Korea FTA; *supra* note 59; China-Peru FTA, *supra* note 55; China-New Zealand FTA, *supra* note 53; China-Pakistan FTA, *supra* note 52.

77. China-Pakistan FTA, *supra* note 52, art. 5(a). For qualified investors, Art. 46(3)(b) covers "legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Party and have their seats in that Party."

78. China-Peru FTA, *supra* note 55, art. 5 (emphasis added). For qualified investors, Art. 126(a) covers, among others, "economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China".

79. *See* China-Peru BIT, *supra* note 16, art. 1.

these agreements "shall apply to the entire customs territory of China."[80] Again, the China-New Zealand and China-Korea BITs do not define the notion of territory,[81] while the China-Australia BIT provides a definition that does not make any reference to Hong Kong and Macao.[82] However, the China-Korea and China-Australia FTAs contain two further references that are somewhat confusing. First, Article 12.4 of the China-Korea FTA, includes a most-favored-nation clause (MFN) that reads as follows:

> Each Party shall accord to investors of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment no less favourable than that it accords, in like circumstances, to investors and investments in its territory of investors of any non-Party.[83]

Nevertheless, a note to this Article provides that "the term 'non-Party' shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement."[84] There is no denying that this note is meant to refer to Hong Kong and Macao, as under the WTO regime both Hong Kong and Macao are separate members of this organization, where they retain membership as customs territories. The latter becomes apparent when examining the note inserted in the MFN clause of the China-Australia FTA. While the MFN clause is identical to that of the China-Korea FTA, the note inserted to the China-Australia FTA provides that "the term 'non-Party' shall not include the following WTO members within the meaning of the General Agreement on Tariffs and Trade and the WTO Agreement: 1) Hong Kong, China; 2) Macao, China; and 3) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)."[85] The above notes therefore appear to provide that, for the application of the MFN clause, Hong Kong and Macao cannot be regarded as non-Contracting Parties. However, this does not necessarily mean that Hong Kong and Macao are to be regarded as parts of China, which undoubtedly qualifies as a "Party". In fact, the China-Korea and the China-Australia FTAs define territory as China's "customs territory," which arguably does not

80. China-Korea FTA, *supra* note 59, art. 1.5; China-New Zealand FTA, *supra* note 53, art. 209(1). As to qualified investors, Art. 135 provides that "investor of a Party means a natural person or enterprise of a Party who seeks to make, is making, or has made an investment in the territory of the other Party".

81. *See* China-Korea BIT, *supra* note 10, art. 1; China-New Zealand BIT, *supra* note 31, art. 1.

82. *See* China-Australia BIT, *supra* note 33, art. 1(g) ("'Territory' in relation to a Contracting Party includes the territorial sea, maritime zone or continental shelf where that Contracting Party exercises its sovereignty, sovereign rights or jurisdiction.").

83. *See* China-Korea FTA, *supra* note 59, art. 1.3(i).

84. *Id.* n. to Art. 12.4; *see also* art. 12.15, n. to art. 12.15.

85. China-Australia FTA, *supra* note 60, art. 9.4, n. to art. 9.4.

include Hong Kong and Macao (a default rule). In this regard, the notes inserted to the MFN clause are most likely derogations of this default rule. The matter is nevertheless far from clear.

In any case, the stipulations employed in the above five FTAs indicate that, with the exception of the China-Pakistan FTA which does not directly refer to China's "customs territory", these treaties do not appear to apply to Hong Kong and Macao. However, this does not conclusively inform the interpretation of the respective BITs that China has also concluded with its free trade partners.

C. *China's Multilateral Investment Treaties*

This section touches upon the third category of China's IIAs, namely multilateral investment treaties. This category basically comprises two treaties: the China-ASEAN Agreement on Investment and the China-Japan-Korea Trilateral Investment Agreement. The China-ASEAN Agreement on Investment is an eleven-party investment treaty that was concluded in 2009 between China and the ASEAN,[86] while the China-Japan-Korea Trilateral Investment Agreement was concluded in 2012.[87] China has also concluded BITs with each and every ASEAN state[88] as well as with Japan and Korea.[89] As shown above, China has recently also entered into a FTA with Korea that contains an investment chapter.[90]

1. The China-Japan-Korea Trilateral Investment Agreement

The China-Japan-Korea Trilateral Investment Agreement does not provide for a definition of territory. Remarkably, neither the China-Korea nor the China-Japan BITs define this notion.[91] However, the China-Korea FTA defines territory as China's "customs territory". In other words, the China-Japan-Korea Trilateral Investment Agreement defines a covered investor as "a natural person or an enterprise of a Contracting Party that makes investments in the territory of another Contracting Party" without elaborating any further on the notion of territory.[92] There are, however, some other provisions of this treaty that are of particular importance. Most notably, Article 4, which may be regarded as a classic stipulation of a most-favored-nation clause (MFN) reads as follows:

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86. China-ASEAN Agreement on Investment, *supra* note 29.

87. Agreement for the Promotion, Facilitation and Protection of Investment, China-Japan-S. Kor. May 13, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2633 [hereinafter China-Japan-Korea Trilateral Investment Agreement].

88. *See* China-Myanmar BIT, *supra* note 17; China-Brunei BIT, *supra* note 37; Cambodia-China BIT, *supra* note 37; China-Indonesia BIT, *supra* note 37; China-Laos BIT, *supra* note 2; China-Vietnam BIT, *supra* note 16; China-Philippines BIT, *supra* note 31; China-Malaysia BIT, *supra* note 31; China-Singapore BIT, *supra* note 31; China-Thailand BIT, *supra* note 31.

89. China-Korea BIT, *supra* note 10; China-Japan BIT, *supra* note 31.

90. China-Korea FTA, *supra* note 59.

91. *See* China-Korea BIT, *supra* note 10, art. 1; China-Japan BIT, *supra* note 31, art. 1.

92. China-Japan-Korea Trilateral Investment Agreement, *supra* note 87, art. 1(2).

> Each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to investors of the third Contracting Party or of a non-Contracting Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of Article 2.[93]

Similarly, however, to the China-Korea and China-Australia FTAs, a note to this Article provides that "the term 'non-Contracting Parties' shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement."[94] Again, the arguments advanced in the context of the China-Korea and China-Australia FTAs should be applied *mutatis mutandis*. That is, for the application of the MFN clause, Hong Kong and Macao cannot be regarded as non-Contracting Parties, without this necessarily meaning that Hong Kong and Macao are parts of China, which undoubtedly qualifies as a "Contracting Party" or otherwise "the third Party." In any case, unlike the China-Korea and China-Australia FTAs which provide for a default definition of territory, that of China's "customs territory", the China-Japan-Korea Trilateral Investment Agreement does not provide for a definition of territory. Thus, the note to the MFN clause could be interpreted as an expression of the treaty's territorial inclusion of Hong Kong and Macao.

Similarly, the note inserted in Article 22, which contains a "denial of benefits" clause,[95] provides that "'non-Contracting Parties' shall not include any separate customs territory".[96] However, given the interpretative issues that have arisen regarding the denial of benefits clause,[97] as well as

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93. *Id.* art. 4(1).

94. *Id.* n.art. 4.

95. *Id.* art. 22:

> 1. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party and the denying Contracting Party: (a) does not maintain normal economic relations with the non-Contracting Party; or (b) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments. 2. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party or of the denying Contracting Party, and the enterprise has no substantial business activities in the territory of the latter Contracting Party.

96. *Id.* n.art. 22.

97. *See, e.g.*, Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, ¶¶ 4.6-4.9 (June 1, 2012), http://www.italaw.com/sites/default/files/case-documents/ita0935.pdf; Plama Consortium Ltd. v. Re-

the lack of a definition of territory in the China-Japan-Korea Trilateral Investment Agreement, the note to this provision can also be regarded as extending the application of this treaty to Hong Kong and Macao.

Regardless, perhaps another decisive provision is Article 25, which refers to the relations of the China-Japan-Korea Trilateral Investment Agreement with other investment treaties in the following terms:

> Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement, so long as such a bilateral agreement is in force.[98]

In addition, a note inserted to this Article, confirms that:

> when an issue arises between an investor of a Contracting Party and another Contracting Party, nothing in this Agreement shall be construed so as to prevent the investor from relying on the bilateral investment agreement between those two Contracting Parties which is considered by the investor to be more favorable than this Agreement.[99]

As already noted, China has concluded BITs with Japan and Korea that remain in force, but similar to the China-Japan-Korea Trilateral Investment Agreement, they do not define the notion of "territory".[100] At the same time, as the next part indicates, Hong Kong also has concluded BITs with Japan and Korea. Could the above provision therefore be seen as also referring to these treaties, in light of the note to Articles 4 and 22 on the term of "non-Contracting Parties"? Or rather, does the combination of Articles 4, 22, and 25 reveal the intent of the parties not to extend the application of the China-Japan-Korea Trilateral Investment Agreement to Hong Kong and Macao? Additionally, do the above provisions conclusively exclude Hong Kong and Macao from the treaty or do they simply deal with other issues, such as for the case of Article 25 with the parallel application of at least the China-Japan and China-Korea BITs?

These and many other questions reveal that the territorial application of the present multilateral investment treaty is not clear. The next subsection turns to the China-ASEAN Agreement on Investment and examines the approach followed therein.

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public of Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 146-51 (Feb. 8, 2005), 20 ICSID Rep. 262 (2005); Ulysseas, Inc. v. Republic of Ecuador, UNCITRAL, Interim Award, ¶¶ 164-92 (Sep. 28, 2010), http://www.italaw.com/sites/default/files/case-documents/ita1045.pdf.

98. China-Japan-Korea Trilateral Investment Agreement, *supra* note 87, art. 25.

99. *Id.* art. 25.

100. *See* China-Korea BIT, *supra* note 10, art. 1; China-Japan BIT, *supra* note 31, art. 1.

2. The China-ASEAN Agreement on Investment

As noted above, the China-ASEAN Agreement on Investment was concluded prior to the conclusion of the China-Japan-Korea Trilateral Investment Agreement and is an eleven-party investment treaty between China and the ASEAN states.[101] This multilateral investment treaty, however, is distinct from the one examined above, as it appears to provide for a clear definition of its territorial application. Indeed, Article 3, titled "Scope of Application," provides that this treaty:

> [S]hall apply to measures adopted or maintained by a Party relating to: (a) investors of another Party; and (b) investments of investors of another Party in its territory, which shall be: (i) in respect of China, the entire customs territory according to the WTO definition at the time of her accession to the WTO on the 11th day of December 2001. For this purpose, for China, "territory" in this Agreement refers to the customs territory of China; and (ii) in respect of ASEAN Member States, their respective territories.[102]

This provision connects the territorial application of this treaty to the territorial application of the WTO Covered Agreements and the WTO Agreement to China, much like the FTAs with Peru, New Zealand, Korea and Australia. And while the issue is touched upon in Part III, it suffices to say that, under the WTO regime, Hong Kong and Macao are separate members. Therefore, it appears that the China-ASEAN Agreement on Investment does not apply to Hong Kong and Macao.

In conclusion, this Part has indicated the approaches followed in China's IIAs, be they BITs, FTAs or multilateral investment treaties, with regard to the notion of territory. The next Part now turns to IIAs concluded by Hong Kong and Macao.

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101. China-ASEAN Agreement on Investment, *supra* note 29. *See generally* Diane A. Desierto, *Investment Treaties: ASEAN*, *in* Asia Rising: Growth And Resilience in an Uncertain Global Economy 184, 199-202 (Hal Hill & Maria Socorro Gochoco-Bautista eds., 2013); Yap Lai Peng, *The ASEAN Comprehensive Investment Agreement 2009: Its Objectives, Plans and Progress*, *in* ASEAN: Life After The Charter 100, 100-12 (S. Tiwari ed., 2010); Lin Chun Hung, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 Chinese J. Int'l L. 821, 822-29 (2010); Wei Shen, *Is this a Great Leap Forward? A Comparative Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty: From BIT Jurisprudential and Practical Perspectives*, 27 J. Int'l Arb. 379, 380-82 (2010).

102. China-ASEAN Agreement on Investment, *supra* note 29, art. 3(1). For covered investors, *see id.* art. 1:

> (e) 'investor of a Party' means a natural person of a Party or a juridical person of a Party that is making or has made an investment in the territories of the other Parties; (f) 'juridical person of a Party' means any legal entity duly constituted or otherwise organised under the applicable law of a Party, whether for profit or otherwise, and whether privately-owned or governmentally-owned, and engaged in substantive business operations in the territory of that Party, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

II. Territorial Application of Hong Kong and Macao IIAs

While both Hong Kong and Macao are Special Administrative Regions (SARs) of China, they nevertheless can enter into some international treaties, including international trade and investment agreements.[103] Both Hong Kong and Macao have entered into binding IIAs, independently of China.

In particular, Hong Kong has concluded 17 BITs and has entered into three FTAs, in addition to the CEPA it retains with China.[104] Of these FTAs, only the Hong Kong-EFTA FTA contains investment provisions,

103. *See* Antony Aust, Modern Treaty Law and Practice 64-88 (3d ed. 2013).

104. *See* Free Trade Agreement, Chile-China-Hong Kong, Sept. 7, 2012, https://www.tid.gov.hk/english/trade_relations/hkclfta/text_agreement.html; Agreement for the Promotion and Protection of Investments, H.K.-Kuwait, May 13, 2010 [hereinafter Hong Kong-Kuwait BIT]; Closer Economic Partnership Agreement, H.K.-N.Z., Mar. 29, 2010, http://www.mfat.govt.nz/downloads/trade-agreement/hongkong/NZ-HK%20CEP-final-copy1.pdf; Agreement for the Promotion and Protection of Investments, Fin.-H.K., July 2, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3177 [hereinafter Finland-Hong Kong BIT]; Agreement for the Promotion and Protection of Investments, H.K.-Thai., Nov. 19, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1521 [hereinafter Hong Kong-Thailand BIT]; Agreement for the Promotion and Protection of Investments, H.K.-U.K., July 30, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1522 [hereinafter Hong Kong-U.K. BIT]; Agreement for the Promotion and Protection of Investments, H.K.-S. Kor., June 30, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1516 [hereinafter Hong Kong-Korea BIT]; Agreement for the Promotion and Protection of Investment, H.K.-Japan, May 15, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1515 [hereinafter Hong Kong-Japan BIT]; Agreement for the Promotion and Protection of Investments, Austria-H.K., Oct. 11, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/190 [hereinafter Austria-Hong Kong BIT]; Agreement for the Promotion and Protection of Investments, Belg.-H.K.-Lux., Oct. 7, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/367 [hereinafter Belgium-Luxembourg-Hong Kong BIT]; Agreement for the Encouragement and Reciprocal Protection of Investments, Ger.-H.K., Jan. 31, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1339 [hereinafter Germany-Hong Kong BIT]; Agreement for the Reciprocal Promotion and Protection of Investments, Fr.-H.K., Nov. 30, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1229 [hereinafter France-Hong Kong BIT]; Agreement for the Promotion and Protection of Investments, H.K.-It., Nov. 28, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1514 [hereinafter Hong Kong-Italy BIT]; Agreement on the Promotion and Protection of Investments, H.K.-N.Z., July 6, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1518 [hereinafter Hong Kong-New Zealand BIT]; Agreement on the Promotion and Reciprocal Protection of Investment, H.K.-Switz., Sept. 22, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1520 [hereinafter Hong Kong-Switzerland BIT]; Agreement on the Promotion and Protection of Investments, H.K.-Swed., May 27, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1519 [hereinafter Hong Kong-Sweden BIT]; Agreement for the Promotion and Protection of Investments, Den.-H.K., Feb. 2, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1007 [hereinafter Denmark-Hong Kong BIT]; Agreement for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/152 [hereinafter Australia-Hong Kong BIT]; Agreement on the Encouragement and Protection of Investments, H.K.-Neth., Nov. 19, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1517 [hereinafter Hong Kong-Netherlands BIT]. *See also* Free Trade Agreement, EFTA-H.K., June 21, 2011 (entered into force Oct. 1, 2012 for Hong Kong, Iceland, Liechtenstein and Switzerland, and entered into force Nov. 1, 2012 for Norway) [hereinafter EFTA-Hong Kong FTA].

although it does not provide for an investor-state arbitration mechanism.[105] It is nevertheless important to examine this treaty due to the fact that it addresses issues of territorial application. Macao, by contrast, has only concluded two BITs, with Portugal and the Netherlands.[106]

The next sections focus on these treaties but before that, it remains important to note two issues. First, China has concluded IIAs with each and every state with which both Hong Kong and Macao have entered into IIAs.[107] Second, as it is later underscored, the majority of Hong Kong's BITs have been negotiated and concluded by the Sino-British Joint Liaison Group that was set up by the 1984 China-UK Joint Declaration leading to the 1997 handover.[108]

A. *Hong Kong IIAs*

1. Hong Kong BITs

Hong Kong BITs typically employ the term "area" instead of "territory" but there appears to be no significant difference between these two terms. Therefore, covered investors are typically physical persons or companies,[109] with the latter being conceived "in respect of Hong Kong" as

> corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in its *area* or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by physical persons who have the right of abode in its area, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability.[110]

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105. *See* EFTA-Hong Kong FTA, Ch. 4.

106. Agreement on the Promotion and Reciprocal Protection of Investments, Mac.-Port., May 17, 2000, B.O. n.°: 31, Ser. 1, 2000/7/24, 2453 (Port.) (entered into force May 2, 2002) [hereinafter Macao-Portugal BIT; Agreement on Encouragement and Reciprocal Protection of Investment, Mac.-Neth., May 22, 2008, 2609 U.N.T.S. 49 (entered into force May 1, 2009) [hereinafter Macao-Netherlands BIT].

107. *See* China-Australia FTA, *supra* note 60; China-Korea FTA, *supra* note 59; China-Switzerland BIT, *supra* note 17; China-New Zealand FTA, *supra* note 53; China-Korea BIT, *supra* note 10; China-Belgium-Luxembourg Economic Union BIT, *supra* 17; China-Finland BIT, *supra* note 35; China-Germany BIT, *supra* note 17; China-Netherlands BIT, *supra* note 17; China-New Zealand BIT, *supra* note 31; China-Japan BIT, *supra* note 31; China-Australia BIT, *supra* note 33; China-Denmark BIT, *supra* note 31; China-Thailand BIT, *supra* note 31; China-Italy BIT, *supra* note 31; China-Sweden BIT, *supra* note 18; *see also* China-Portugal BIT, *supra* note 35.

108. In fact, eleven out of seventeen BITs concluded by Hong Kong have been negotiated by the Sino-British Liaison Group. *See* China-UK Joint Declaration, ¶ 5, and Ann. II; *Laos v. Sanum*, ¶¶ 104-5; Affidavit of Sir Daniel Bethlehem (Oct. 3, 2014), ¶¶ 119-20, http://www.italaw.com/sites/default/files/case-documents/italaw4408_Part1.pdf

109. Australia-Hong Kong BIT, *supra* note 104, art. 1(f)(i).

110. *Id.* art. 1(b)(i) (emphasis added). *See also* Hong Kong-Kuwait BIT, *supra* note 104, art. 1(f); Finland-Hong Kong BIT, *supra* note 104, art. 1(d); Hong Kong-Thailand BIT, *supra*

In turn, the term "area" is defined as follows: "'area': (i) in respect of Hong Kong includes Hong Kong Island, Kowloon and the New Territories[.]"[111] It thus seems abundantly clear that the territorial application of Hong Kong BITs only covers the aforementioned territories and therefore does not extend to the territory of the People's Republic of China. This fact, however, does not answer whether China's IIAs can—or do—apply to Hong Kong.

2. The EFTA-Hong Kong FTA

The EFTA-Hong Kong FTA is a five-party agreement among Hong Kong, Iceland, Liechtenstein, Switzerland, and Norway. While this treaty does not provide for investor-state arbitration, it nevertheless includes investment protection and promotion provisions, such as those typically found in IIAs.[112] In terms of its territorial scope, Article 1 provides that it shall apply: "for Hong Kong, China: to the land and sea comprised within the boundary of the Hong Kong Special Administrative Region only, including Hong Kong Island, Kowloon, the New Territories, and the waters of Hong Kong."[113] This provision is essentially identical to that found in Hong Kong BITs. However, in Chapter 4, which deals with Investment, it is provided that this "Chapter shall be without prejudice to the interpretation or application of other international agreements relating to investment and taxation to which one or several EFTA States and Hong Kong, China are parties."[114] A footnote at the end of this provision also states that "[i]t is understood that any dispute settlement mechanism in an investment protection agreement to which one or several EFTA States and

note 104, art. 1(4); Hong Kong-U.K. BIT, *supra* note 104, art. 1(f); Hong Kong-Korea BIT, *supra* note 104, art. 1(5); Hong Kong-Japan BIT, *supra* note 104, art. 1(4); Austria-Hong Kong BIT, *supra* note 104, art. 1(d) ("'investors' means: (i) in respect of Hong Kong: –physical persons who have the right of abode in its area; –corporations, partnerships and associations incorporated or constituted and registered where applicable under the law in force in its area."); Belgium-Luxembourg-Hong Kong BIT, *supra* note 104, arts. 1(2) & 5; Germany-Hong Kong, *supra* note 104, art. 1(4); Hong Kong-Italy BIT, *supra* note 104, art. 1(6); Hong Kong-New Zealand BIT, *supra* note 104, art. 1(2); Hong Kong-Switzerland BIT, *supra* note 104, art. 1(2); Hong Kong-Sweden BIT, *supra* note 104, art. 1(2); Denmark-Hong Kong BIT, *supra* note 104, art. 1(2); Hong Kong-Netherlands BIT, *supra* note 104, art. 1(2).

111. Australia-Hong Kong BIT, *supra* note 104, art. 1(a); *see also* Hong Kong-Kuwait BIT, *supra* note 104, art. 1(a); Finland-Hong Kong BIT, *supra* note 104, art. 1(a); Hong Kong-Thailand BIT, *supra* note 104, art. 1(1); Hong Kong-U.K. BIT, *supra* note 104, art. 1(a); Hong Kong-Korea BIT, *supra* note 104, art. 1(1); Hong Kong-Japan BIT, *supra* note 104, art. 1(1); Austria-Hong Kong BIT, *supra* note 104, art. 1(a); Belgium-Luxembourg-Hong Kong BIT, *supra* note 104, art. 1(1); Germany-Hong Kong BIT, *supra* note 104, art. 1(1); France-Hong Kong BIT, *supra* note 104, art. 1(1); Hong Kong-Italy BIT, *supra* note 104, art. 1(1); Hong Kong-New Zealand BIT, *supra* note 104, art. 1(1); Hong Kong-Switzerland BIT, *supra* note 104, art. 1(1); Hong Kong-Sweden BIT, *supra* note 104, art. 1(1); Denmark-Hong Kong BIT, *supra* note 104, art. 1(a); Hong Kong-Netherlands BIT, *supra* note 104, art. 1(1).

112. *See* EFTA-Hong Kong FTA, *supra* note 104, ch. 4.

113. *Id.* art. 1.2(1)(b).

114. *Id.* art. 4.1(2).

Hong Kong, China are parties is not applicable to alleged breaches of this Chapter."[115]

In this regard, two points should be raised. First, the above provisions clearly refer to other IIAs between EFTA states and Hong Kong, and not other IIAs between EFTA states and China. Second, the only EFTA state that retains a BIT with Hong Kong is Switzerland.[116] In light of these remarks, it becomes evident that this treaty does not provide much guidance with regard to the application of China's IIAs to Hong Kong. The case is similar to the two BITs concluded by Macao that are briefly discussed in the next section.

B. *Macao BITs*

The two BITs concluded by Macao with Portugal and the Netherlands define Macanese investors as "natural persons entitled to the Resident Identity Card and legal persons constituted under the law of the Macao Special Administrative Region."[117] Furthermore, the BITs also employ the term "area" instead of "territory" and define "area" as including "in respect of the Macao Special Administrative Region of the People's Republic of China, is the peninsula of Macao and the islands of Taipa and Coloane."[118] Similarly to Hong Kong's BITs, these provisions do not provide any conclusive evidence on the non-application of China's IIAs to Macao.

Parts I and II have therefore established that the IIAs concluded by China, Hong Kong, and Macao provide little guidance with regard to the issue here examined. While it remains true, that a limited number of China's IIAs exclude, or at least appear to exclude, Hong Kong and Macao from their application, the issue remains moot for the majority of these treaties. For this reason, the next Part sets out to examine whether treaty interpretation and reference to other relevant considerations can provide further guidance with regard to the application of China's IIAs to Hong Kong and Macao.

III. Treaty Interpretation and Relevant Considerations

This part is broken into six sections. The first two focus on the Vienna Conventions, and the others address, in turn, the China-U.K. and China-Portugal Joint Declarations, the Hong Kong and Macao Basic Laws, the definition of China's territory under WTO law, the Notes of China to the United Nations Secretary General (UNSG), and the territorial application of the ICSID Convention.

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115. *Id.* art. 4.1(2), n.16.

116. *See* Hong Kong-Switzerland BIT, *supra* note 104.

117. Macao-Netherlands BIT, *supra* note 106, art. 1(b)(ii). *See also* Macao-Portugal BIT, *supra* note 106, art. 1(3).

118. Macao-Netherlands BIT, *supra* note 106, art. 1(c)(ii); Macao-Portugal BIT, *supra* note 106, art. 1(2)(b).

A. *The Vienna Convention on the Law of Treaties (VCLT)*

It is unanimously accepted that IIAs are international treaties. For this reason, the relevance of the VCLT and the VCST discussed in the next section is self-evident.[119] However, what remains to be seen is whether these codifying instruments can provide guidance with regard to the application of China's IIAs to Hong Kong and Macao.

1. Territorial Application Generally and with Respect to State-Succession

The general approach of the VCLT with regard to the territorial application of treaties is found in Article 29 and reads as follows: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[120] That is, under Article 29, the default position would be to apply China's IIAs to Hong Kong and Macao unless contrary evidence appeared "from the treaty" (limb a) or "is otherwise established" (limb b).

> However, as the *Commentary* and drafting history of the VCLT reveal, the Commission decided not to deal with the impact of state succession on "the territorial scope of a treaty" in light of the separate study dealing with cases of succession of States, that eventually produced the VCST.[121] Article 42 likewise does not address the issue of state succession on territoriality of treaties, even though it addresses the validity and continuance in force of treaties.[122] Nevertheless, the Commission acknowledged "a change in the legal personality of a party resulting in its disappearance as a separate international person may be a factual cause of the termination of a bilateral treaty."[123] Although state succession

119. *See* J. Romesh Weeramantry, Treaty Interpretation in Investment Arbitration 4-12 (Loukas Mistelis ed., 2012); José Enrique Alvarez, *The Public International Law Regime Governing International Investment*, 344 Rec. Des Cours 195, 217-18 (2011).

120. VCLT, *supra* note 22, art. 29; Mark E. Villiger, Commentary On The 1969 Vienna Convention On The Law Of Treaties 387-95 (2009). *See* Peter Malanczuk, Akehurst's Modern Introduction to International Law 137 (7th rev. ed. 1997); Paul Reuter, Introduction to the Law of Treaties 99 (José Mico & Peter Haggenmacher trans., 1995); Ian Sinclair, The Vienna Convention on the Law of Treaties 87-92 (2d ed., 1984); 1 The Vienna Conventions on the Law of Treaties: A Commentary 731-63 (Olivier Corten & Pierre Klein eds., 2011); Aust, *supra* note 103, at 178-91; Brownlie, *supra* note 39, at 626-8; Shaw, *supra* note 39, at 925-26.

121. Int'l Law Comm'n, *Draft Articles on the Law of Treaties with Commentaries*, 2 Y. B.Int'l.L.Comm'n., art. 25, ¶6 (1996) [hereinafter VCLT Commentary].

122. VCLT, *supra* note 22, art. 42:

> 1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention. 2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

123. VCLT Commentary, *supra* note 121, art. 39, ¶ 5.

> constitutes a factual cause for termination of a treaty, it is not considered a distinct legal ground for terminating.[124]

In light of this, there is little that can be inferred from the treaties examined in Parts I and II by utilizing Article 29. The first limb of Article 29 that refers to a different intention appearing "from the treaty" is only satisfied for those Chinese IIAs that specifically carve out Hong Kong and Macao from their application, as is exactly the case in the China-Russia BIT. It thus remains to be seen whether the second limb of Article 29 that refers to what may otherwise be established can be of any further guidance. Therefore, the next step is to look to Article 31, which provides a toolbox for treaty interpretation.[125] From this provision, it becomes clear that an investor-state tribunal dealing with the territorial application of China's IIAs should take into account a subsequent agreement or practice between China and the other state involved.[126] This is particularly relevant for the *Laos v. Sanum* case, where the SGHC had to determine the bearing of an Exchange of Letters between the Laotian Ministry of Foreign Affairs and the Chinese Embassy in Laos over the non-application of the Laos-China BIT to Macao. As is later explained, the SGHC treated these Letters as a subsequent agreement. However, it did so without adequately explaining whether they constituted a subsequent amendment or interpretation. For this reason, it is necessary to examine Chinese practice relevant to subsequent modifications of IIAs.

2. Interpreting and/or Modifying the Territorial Application of Chinese IIAs

At the outset, it is noted that a subsequent agreement under Article 31 of the VCLT may well be a joint interpretation of the contracting parties to an IIA as well as a modification (amendment) thereof. In practice, interpretation might be hard to distinguish from modification, especially when the former is realized through the adoption of a separate instrument. In theory, however, the distinction is important since an "interpretation illuminates the meaning of the original text" and is "retroactive in effect, whereas modification only has an effect for the future."[127] Of course, the

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124. VCLT, *supra* note 22, art. 73; *see also* VCLT Commentary, *supra* note 121, art. 69, ¶ 3.

125. *See generally* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005); Panos Merkouris, *Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)*, 9 INT'L COMM. L. REV. 1 (2007).

126. *See* VLCT, *supra* note 22, art. 31(3) ("There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.").

127. 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 971 (Olivier Corten & Pierre Klein eds., 2011); *see also* Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse*

contracting parties could also agree to impute retroactive effect to a modification of an IIA, but this is something that rarely occurs.[128] In particular, in *Laos v. Sanum*, the SGHC had to examine an Exchange of Letters between the Laotian Ministry of Foreign Affairs and China's Embassy in Vientiane, Laos. Thus, a question of great practical importance was whether such Exchange of Letters constituted an interpretation or an amendment of the China-Laos BIT. The issue becomes of even greater importance when considering that neither Laos nor China imputed retroactive application to their Exchange of Letters. In fact, neither made any indication of its temporal effects whatsoever.

This case brings to mind the 2001 interpretation of the NAFTA Free Trade Commission (FTC), which involved the interpretation of the "fair and equitable treatment standard" (FET).[129] This interpretation prompted a fierce debate over its temporal effect. First, the crux of that debate was the proper interpretation of the FET standard under customary international law prior to and after the FTC's interpretation.[130] The precise content of customary international law, however, was not defined in the FTC's interpretation.[131] This left space for NAFTA tribunals to maneuver and examine the evolution of the FET standard under customary international law.[132] Second, NAFTA tribunals did not find it difficult to identify the interpretation of the FTC as a subsequent interpretation. But NAFTA explicitly referred to an interpretation rather than a modification.[133]

Consequences, 9 LAW & PRAC. INT'L CTS & TRIBUNALS 443, 459-65 (2010); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 213 (2010).

128. *See* VCLT, *supra* note 22, arts. 28 & 39; AUST, *supra* note 103, at 157-58; Shabtai Rosenne, *The Temporal Application of the Vienna Convention on the Law of Treaties*, 4 CORNELL INT'L L.J. 1, 4 (1971); *see also* Nordzucker AG v. The Republic of Poland, Partial Award, §§ 101-12 (Dec. 10, 2008); Treaty Concerning the Encouragement and Reciprocal Protection of Investments (with Protocol), Ger.-Pol., Nov. 10, 1989, 1708 U.N.T.S. 323.

129. For the 2001 interpretation of the NAFTA Free Trade Commission, *see* Arato, *supra* note 127, at 462, n.66; WEERAMANTRY, *supra* note 119, at 140-43; Sergio Puig & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration*, 25 I.C.S.I.D. REV. 258-59 (2010).

130. That mainly revolved around the evolution of the FET standard from the 1920s whereupon the *Neer* standard was pronounced. *See* United States (LF and PE Neer) v. Mexico, Docket No. 136, U.S.-Mex. Gen. Claims Comm'n, ¶¶ 4-5 (Oct. 15, 1926), 21 AM. J. INT'L L. 555, 556-57 (1927).

131. *See* North American Free Trade Agreement (NAFTA) Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions at B (July 31, 2001), www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

132. *See, e.g.*, ADF Group Inc. v. United States, ICSID Case No. ARB (AF)/00/1, Award, ¶¶ 179-83 (Jan. 9, 2003); Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Ch. B, ¶ 14 (Aug. 3, 2005), 44 ILM 1345; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 123-25 (Oct. 11, 2002); Pope & Talbot Inc. v. The Government of Canada, Award in Respect of Damages, ¶¶ 52-66 (May 31, 2002), 41 ILM 1347 (2002). *But see* Glamis Gold, Ltd. v. United States, Award, ¶ 614 (June 8, 2009).

133. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1131(2), Dec. 17, 1992, 32 I.L.M. 289 (1993) ("An interpretation by the Commission of a provision of this

Reverting to the Exchange of Letters between China and Laos, this article finds that it certainly constitutes a subsequent agreement under Article 31(3) of the VCLT. The crucial point, however, is whether it constituted a subsequent interpretation or a modification of the China-Laos BIT. Note that unlike NAFTA, the China-Laos BIT does not explicitly provide for joint interpretations, not to mention modifications. In this regard, guidance can be sought in the practice of China when modifying its IIAs. Especially for BITs, China typically concludes Protocols on the signing of the agreement. Such Protocols form an integral part of the agreement and are usually signed by the same plenipotentiaries that concluded the main agreement.[134] There are also cases where such Protocols are signed through an Exchange of Notes, but in those cases, heads of state or competent ministers sign the Exchanges.[135]

Finally, similar official procedures are followed for Additional Protocols that amend BITs well after their conclusion.[136] These are nevertheless different from the Exchange of Letters in *Laos v. Sanum*. At first sight, the Exchange of Letters between the Laotian Ministry of Foreign Affairs and the Chinese Embassy in Laos suggests a departure from China's practice on the amendment of IIAs, thus making it more likely that the Exchange of Letters is a case of joint interpretation. Such a conclusion, however, requires the further clarification of two points. The first has to do with the temporal effect of this interpretation, given that it took place after the rendering of the decision in *Sanum v. Laos*. The second refers to the possibility of treating the position of the Chinese Embassy in Laos as expressing China's general approach to the territorial application of its IIAs.

B. *The Vienna Convention on Succession of States in Respect of Treaties (VCST)*

As noted earlier, the study of the ILC Commission on the succession of states culminated in the production of the VCST.[137] While this instru-

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Agreement shall be binding on a Tribunal established under this Section."); *see ADF v. United States*, Award at ¶ 177; *Methanex v. United States*, Final Award at ¶ 21; Methanex Corp. v. United States, Partial Award, ¶ 101, 44 I.L.M. 1345 (2005). *But see* Charles H. Brower II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of Article 1105 NAFTA*, 46 VA. J. INT'L L. 347, 349 (2006).

134. *See e.g.*, China-Belgium-Luxembourg Economic Union BIT, *supra* note 17; China-Germany BIT, *supra* note 17; China-Netherlands BIT, *supra* note 17; China-Norway BIT, *supra* note 31; China-Sweden BIT, *supra* note 18.

135. China-New Zealand BIT, *supra* note 31 (with the Exchange of Notes being signed by the Prime Minister and Premier of State Council PRC); China-UK BIT, *supra* note 33 (with the Exchange of Notes being signed by the Secretary of State for Foreign and Commonwealth Affairs and the Minister for Foreign Economic Relations and Trade of the PRC).

136. *See, e.g.*, Additional Protocol to the Agreement Concerning the Reciprocal Encouragement and Protection of Investors, Bulg.-China, June 26, 2007, http://tfs.mofcom.gov.cn/aarticle/Nocategory/201002/20100206774607.html%3Cbr/%3E.

137. *See* Sari T. Korman, *The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession*, 16 SUFFOLK TRANSNAT'L L. REV. 174, 184-89 (1993); N. S. Rembe, *The Vienna Convention on State Succession in Respect of Treaties: An African Perspective on its Applicability and Limitations*, 17

ment did not receive the widespread acceptance of the VCLT,[138] it is nevertheless an important codifying enterprise that is relevant to the issue discussed here.[139] However, prior to examining the most pertinent provisions of the VCST, it is important to first refer to the cardinal concepts of this "treaty on succession to treaties."[140] In particular, Article 2 provides that:

> (b) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;
> (c) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;
> (d) "successor State" means the State which has replaced another State on the occurrence of a succession of States;
> (e) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;
> (f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of

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COMP. & INT'L L. J. S. AFR. 131, 131-32 (1984); James B. Stewart, Jr., *Draft Articles on the Succession of States in Respect of Treaties: The Pragmatic Development of International Law*, 16 HARV. INT'L. L. J. 638 (1975); Renata Szafarz, *Succession of States in Respect of Treaties in Contemporary International Law* 12 POLISH Y.B. INT'L L 119, 119-30 (1983); Renata Szafarz, *Vienna Convention on Succession of States in Respect of Treaties: A General Analysis*, 10 POLISH Y.B. INT'L L. 77, 77-78 (1980). *See generally* MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES 64-79 (2009); STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION 80-117 (Jan Klabbers et al. eds., 1999); Giandonato Caggiano, *The ILC Draft On The Succession Of States In Respect Of Treaties: A Critical Appraisal*, 1 ITALIAN Y.B. INT'L L. 69 (1975); Mustafa Kamil Yasseen, *La Convention de Vienne sur la succession d'Etats en matière de traités*, 24 Annuaire français de droit international 59 (1978). For works pre-dating the VCST, *see generally* Thomas E. Atkinson, *Succession*, 29 N.Y.U. L. REV. 867 (1954); J. Mervyn Jones, *State Succession in the Matter of Treaties*, 24 BRIT. Y.B. INT'L L. 360 (1947); D. P. O'Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT'L L. 84 (1962); *Revolutions, Treaties, and State Succession*, 76 YALE L.J. 1669 (1967).

138. *Compare* UNITED NATIONS TREATY COLLECTION, Vienna Convention on Succession of States in Respect of Treaties, (1978), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=EN (indicating the 22 states that have ratified the 22 VCST), *with* UNITED NATIONS TREATY COLLECTION, Vienna Convention on the Law of Treaties (1969), https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=EN (indicating the 114 states that have ratified the VCLT).

139. Matthew G. Maloney, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 VA. J. INT'L L. 885 (1978-1979), 900-3; Photini Pazartzis, *State Succession to Multilateral Treaties: Recent Developments*, 3 AUSTRIAN REV. INT'L & EUR. L. 397, 398-99 (1998); Szafarz, *Succession*, *supra* note 137, at 130-32; Giandonato Caggiano, *The ILC Draft on the Succession of States in Respect of Treaties: A Critical Appraisal*, 1 ITALIAN Y.B. INT'L L. 69, 77-79 (1975).

140. *Cf.* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

> States was a dependent territory for the international relations of which the predecessor State was responsible;[141]

From these provisions it becomes clear that when referring to the VCST a distinction must be drawn, on one hand, between the *successor state* and the *predecessor state*, and, on the other hand, between the *predecessor state* and a *newly independent state*. This distinction might at first sight seem delicate, given that a newly independent state is, in fact, a successor state. Yet, the distinction entails considerable practical implications. In fact, a newly independent state is a term coined to refer to all those states emerging from the decolonization period.[142] Thus, a distinction was drawn between states that used to be dependent territories—be they colonies, trusteeships, mandates, protectorates or the like—and other cases of state dissolution or secession.[143] The practical implications arising from this divide are cardinal and are delineated below under subsections 2 and 3. It suffices to say, however, that for the purposes of the VCST, the independence of (among others) Malta and Mauritius, nations which used to be dependent territories of the UK, is governed by the provisions relevant to newly independent States.

On the other hand, cases of state dissolution or secession, such as those of Czechoslovakia, the FRY and the USSR, are governed by alternative provisions. As is more fully shown below, Hong Kong and Macao do not fall under either of these categories of states emerging from the decolonization wave and other cases of state dissolution and secession. For this reason, before delineating the divide between newly independent states and not, subsection 1 touches upon the approach of the VCST with regard to succession with respect to part of a state's territory. That is precisely what happened with Hong Kong and Macao, to which China succeeded by virtue of its Joint Declarations with the UK and Portugal.

1. Territorial Application as per Succession in Part of Territory

Article 15 of the VCST is fundamental to the extent that it outlines the default position to be followed in cases like the "handover" of Hong Kong and Macao. In particular, Article 15 can be regarded as a special expression of Article 29 VCLT, and provides as follows:

> When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

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141. VCST, *supra* note 23, art. 2(1).

142. International Law Commission, *Draft Articles on Succession of States in Respect of Treaties with Commentaries*, art. 2, ¶¶ 6-7, YILC, Vol. II (1974) [hereinafter VCST Commentary]; *see also* CRAVEN, *supra* note 137, at 131-46.

143. VCST Commentary, *supra* note 142, art. 2, ¶¶ 7-8.

> (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
>
> (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.[144]

The above provision encapsulates the so-called "moving treaty-frontiers" rule, which refers to cases "where territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State."[145] However, a question that arises is whether the moving treaty-frontiers rule applies *ipso facto,* or whether an agreement should be reached between the newly acquired territory and the states that the successor state retains treaties with. In this regard, the Commentary opts for an "automatic process," providing that:

> Even if in some cases the application of the treaty regime of the successor State to the newly acquired territory may be said to result from an agreement, tacit or otherwise, between it and the other States parties to the treaties concerned, *in most cases* the moving of the treaty frontier is an *automatic process*. The change in the treaty regime applied to the territory is rather the *natural consequence* of its having become part of the territory of the State now responsible for its international relations.[146]

While the phrase "in most cases" before the almost disarming "automatic process" and "natural consequence" might prompt doubt, it appears that through the prism of Article 15 of the VCST, China's IIAs would apply, by default, to Hong Kong and Macao. Pursuant to this position, on the date of succession, the British and Portuguese IIAs would cease to be in force, and thus, China's IIAs would apply to the territories of Hong Kong and Macao. Moreover, the exact date of succession should be that of the handover, as provided for in the Joint Declarations (discussed in the next Section). In other words, the combination of Article 29 of the VCLT and Article 15 of the VCST would as a default lead to the following:

- China's IIAs, concluded prior to the succession of China to the territory of Hong Kong and Macao, apply to these territories pursuant to Article 15 VCST.

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144. VCST, *supra* note 23, art. 15.

145. VCST Commentary, *supra* note 142, art. 14, ¶¶ 1-2.

146. *Id.* ¶ 12 (emphasis added).

- China's IIAs, concluded after the succession of China to the territory of Hong Kong and Macao, apply to these territories pursuant to Article 29 VCLT.[147]

Nevertheless, the default position articulated above may be rebutted if it appears from the treaty or is otherwise established that the application of China's IIAs to the territory of Hong Kong and Macao would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. In this regard, recalling the findings of Parts I and II, it appears that there is indeed a limited number of China's IIAs where "it appears from the treaty" that they are not applicable to Hong Kong and Macao. In addition, a strict reading of Article 15 of the VCST would also require proof that an application of such IIAs to Hong Kong and Macao would be incompatible with their object and purpose or would radically change the conditions of their operation. In any case, the majority of China's IIAs do not provide any guidance whatsoever. Therefore, it would need to be "otherwise established" that applying such IIAs to Hong Kong and Macao would be contrary to the agreements' object and purpose or contrary to the conditions of their operation. In turn, as already discussed, the term "otherwise established" points to Article 31 of the VCLT, which provides the general toolbox for the interpretation of treaties.[148]

Focusing now on the Chinese IIAs concluded after the succession of China to the territory of Hong Kong and Macao, Article 29 of the VCLT provides that "a treaty is binding upon each party in respect of its entire territory" unless a different intention appears from the treaty or is otherwise established.[149] This provision appears to set a different threshold than the one found in Article 15 of the VCST, since Article 29 of the VCLT makes no reference to the object and purpose or to the conditions of operation. Again, as later discussed, this point has not been adequately addressed by the SGHC. Regardless, this *prima facie* difference can be alleviated by reference to Article 31 of the VCLT, which, among other things, refers to the ordinary meaning and the object and purpose of a treaty.[150] Such criteria run through the interpretation of treaties in general, and the interpretation of the VCLT in particular, and are therefore applicable to Article 29 of the VCLT. Thus, reference to Article 31 of the VCLT alleviates the otherwise textual differences between Article 29 of the VCLT and Article 15 of the VCST. In any case, under Article 29 of the VCLT, the default position would be to apply China's IIAs to Hong Kong and Macao.

147. A third case are those IIAs signed by China prior to the succession but which entered into force after that stage. The case is not dealt with by the VCST but guidance could be perhaps drawn by VCST, *supra* note 23, art. 32. Perhaps more accurate in this case is the application of VCLT, *supra* note 22, art. 29 in this case.

148. VCLT, *supra* note 22, art. 31.

149. *Id.* art. 29.

150. *Id.* art. 31(1).

Thus, a finding that China's IIAs did not apply to Hong Kong and Macao would require evidence that the agreements were not intended to extend to these territories. Such evidence could appear from the treaty, as is the case with the China-Russia BIT, or could otherwise be established by, among other things, a subsequent agreement or practice. The latter case, and most importantly the temporal effect of a subsequent agreement or practice, will be discussed in more detail in Part V. For now, the remaining subsections delineate the distinction the VCST makes between newly independent states and other cases of dissolution or secession, which may be analogized to the cases of Hong Kong and Macao.

2. Newly Independent States

The VCST encapsulates a divide between those states that emerged from the decolonization process (newly independent states) and other cases of state dissolution and secession that fall outside the ambit of decolonization. In particular, with regard to newly independent states, the VCST pronounces the *tabula rasa* (clean slate) principle,[151] according to which such states are not "bound to maintain in force, or to become a party to, any treaty" of the predecessor state.[152] In this line, with regard to bilateral treaties (which makes up the majority of IIAs) and newly independent states, Article 24 provides that:

> A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when: (a) they expressly so agree; or (b) by reason of their conduct they are to be considered as having so agreed.[153]

The default approach for newly independent states is that bilateral treaties of the predecessor state do not apply in principle, unless there is an agreement, expressly or by reason of conduct, that provides otherwise. However, in light of the completely opposite approach adopted by the Commission with regard to state dissolution and secession, insofar as it is outside the ambit of decolonization, the rationale underpinning the position taken in Article 24 becomes interesting. In relevant space, the Commentary to the VCST states that:

> succession in respect of bilateral treaties has an essentially voluntary character: voluntary, that is, on the part not only of the newly independent State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties

151. P. K. Menon, *The Newly Independent States and Succession in Respect of Treaties*, 18 KOREAN J. COMP. L. 139, 140-45 (1990); Stewart, *supra* note 137, at 639-45; Szafarz, *Vienna Convention*, *supra* note 137, at 83, 89-90; *see also* Kenneth J. Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. INT'L L. 521, 521-22 (1967).

152. VCST, *supra* note 23, art. 16.

153. *Id.* Art. 24(1); *see id.* art. 17 for multilateral treaties.

> appears to be that their continuance in force after independence is a matter of agreement, express or tacit, between the newly independent State and the other State party to the predecessor State's treaty.[154]

This note, along with the very body of Article 24 raises considerable doubts as to the justification of an alternative approach for cases not involving decolonization.[155]

3. Dissolution and Secession of States

The practical implications stemming from the divide between newly independent states and other successor states not falling within this category culminates in Part IV of the VCST, which deals with the unification and separation of states. In particular, Articles 34 and 35 deal with separation and are fundamental in understanding the completely opposite approach adopted for cases such as that of Czechoslovakia's dissolution. In more detail, Article 34 reads as follows:

> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (*a*) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; . . .
>
> 2. Paragraph 1 does not apply if: (*a*) the States concerned otherwise agree; or (*b*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.[156]

The above provisions adopt the rule of continuity, which is opposite to the clean slate doctrine found in Article 24. It is nevertheless closer to the approach of Article 15, which deals with succession in part of territory, as is exactly the case of Hong Kong and Macao. In more detail, Article 34 provides that the IIAs (bilateral or not) of the predecessor state would automatically apply to successor or seceding states unless one of the conditions of paragraph two are met.

Patrick Dumberry has recently opposed this position by demonstrating that, at least in the context of BITs, state practice does not support Article 34 of the VCST.[157] The issue is referred to again in Part V, *infra*,

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154. VCST Commentary, *supra* note 142, art. 23, ¶ 12. *See also id.* ¶¶ 14-15.

155. *See infra at III.B.3.*

156. VCST, *supra* note 23, art. 34; *see also* VCST Commentary, *supra* note 142, arts. 33-34, ¶¶ 2-11.

157. Patrick Dumberry, *An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?*, 6 J.

with the view of drawing an analogy with the case of Hong Kong and Macao, but it suffices to note that Dumberry has characterized the divide between newly independent states and cases of dissolution and secession as "incoherent and unjustifiable."[158]

Lastly, when the predecessor state continues to exist, as is the case with the BITs concluded by USSR, also referred to in Part V, the VCST provides in Article 35 that:

> When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless: (a) the States concerned otherwise agree; (b) it is established that the treaty related only to the territory which has separated from the predecessor State; or (c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.[159]

In other words, this provision suggests that, for example, the Canada-USSR BIT is automatically applicable to the Russian Federation and to (among others) Kazakhstan, unless one of the above conditions is met.[160] This outcome is also heavily criticized by Patrick Dumberry.[161]

In summary, Article 15 of the VCST is directly relevant for the issue here discussed, as is Article 29 of the VCLT. However, due regard should be given to the "fine" textual differences of these Articles, as well as to the exact scope of their application because the former is applicable to China's IIAs concluded prior to the succession of Hong Kong and Macao, as well as the China-Laos BIT of 1993, and the latter to China's IIAs concluded after the succession of China to these territories. Certainly, the default provision of the above Articles in favor of the application of China's IIAs to Hong Kong and Macao can be rebutted if it appears from the treaty or is otherwise established. And while the first case is only applicable to a handful of China's IIAs, it still remains open, for the majority of China's IIAs, to examine whether it could otherwise be established that they do not apply to Hong Kong and Macao.

INT'L DISP. SETTLEMENT 74, 81-82 (2015); *see also* Milenko Kreca, *Towards a New Perception of Succession of States in Respect of Multilateral Treaties*, 61 ANNALS FAC. L. BELGRADE INT'L EDITION 5, 17-18 (2013) (discussing state practice regarding human rights treaties and successor states).

158. *See* Patrick Dumberry, *State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention*, 28 LEIDEN J. INT'L L. 13, 22 (2015).

159. VCST, *supra* note 23, art. 35; *see also* VCST Commentary, *supra* note 142, arts. 33-34, ¶¶ 12-18.

160. *See* VCST Commentary, *supra* note 142, arts. 33-34, ¶¶ 19-33.

161. Dumberry, *supra* note 158, at 22, 89-93.

C. *Of "Handover" Joint Declarations and Basic Laws*

Another important part of the discourse on the application of China's IIAs to Hong Kong and Macao are the China-U.K. and China-Portugal Joint Declarations as well as the Hong Kong and Macao Basic Laws that all demonstrate the one country, two systems principle. In particular, the China-U.K. Joint Declaration for Hong Kong was signed in 1984 and paved the way for the "handover" of Hong Kong to China on July 1, 1997.[162] In relevant part, the Declaration provides:

> The Hong Kong Special Administrative Region may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with states, regions and relevant international organisations in the appropriate fields, including the *economic*, *trade*, financial and monetary, shipping, communications, touristic, cultural and sporting fields.[163]

This provision has also found its way in the Hong Kong Basic Law along with the main bulk of the provisions of the China-U.K. Joint Declaration.[164] In addition, the Declaration, and subsequently the Hong Kong Basic Law in substantially the same manner, provides that:

> The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after

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162. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong with Annexes, China-U.K., Dec. 19, 1984, 26 U.K.T.S. (1985) [hereinafter China-U.K. Joint Declaration].

163. *Id.*, Annex 1, art. XI (emphasis added).

164. *See* The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art. 151 (adopted at the Third Session of the Seventh National People's Congress on Apr. 4, 1990, promulgated by Order No. 26 of the President of the People's Republic of China on Apr. 4, 1990, and effective as of July 1, 1997) [hereinafter Hong Kong Basic Law]. For Hong Kong's Basic Law, *see generally* Man-Mun Chan (Johannes) & Chin L. Lim, Law Of The Hong Kong Constitution (2011); Ming K. Chan & David J. Clark, The Hong Kong Basic Law: Blueprint For "Stability And Prosperity" Under Chinese Sovereignty? (1991); Hualing Fu, Lison Harris & Simon N. M. Young, Interpreting Hong Kong's Basic Law: The Struggle For Coherence (2007); Danny Gittings, Introduction To The Hong Kong Basic Law (2013); Hong Kong's Court Of Final Appeal: The Development Of The Law In China's Hong Kong (Simon N. M. Young & Yash Ghai eds., 2013); Berry Fong-Chung Hsu, The Common Law System In Chinese Context: Hong Kong In Transition (1992); Hsin-Chi Kuan, Hong Kong After The Basic Law (1990); Johannes Chan, *Hong Kong's Constitutional Journey: 1997-2011*, *in* Constitutionalism In Asia In The Early Twenty-First Century 169, 170-93 (Albert Chen ed., 2011); Frank Ching, *From the Joint Declaration to the Basic Law*, *in* The Other Hong Kong Report 1996 33, 33-50 (Nyaw Mee Kau & Li Si-ming eds., 1996).

> seeking the views of the Hong Kong Special Administrative Region Government.[165]

The above provisions dictate that China's IIAs are not applicable to Hong Kong unless a relevant territorial extension has taken place. The practice of the Sino-British Joint Liaison Group, set up by the 1984 Joint Declaration, could likewise support this interpretation.[166] This Group negotiated and concluded a considerable number of international treaties, including the majority of Hong Kong's BITs prior to the 1997 handover.[167] Arguably, had the Sino-British Joint Liaison Group been of the view that China's IIAs applied to Hong Kong, it would have logically abstained from negotiating and concluding BITs.

Nearly identical wording has also been employed in the China-Portugal Joint Declaration of 1987, which paved the way for Macao's handover on December 20, 1999.[168] Likewise, the Macao Basic Law reproduces the wording of the Joint Declaration.[169] However, unlike the Sino-British

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165. China-U.K. Joint Declaration, *supra* note 162; *see also* Hong Kong Basic Law, *supra* note 164, art. 153. *But see* Hong Kong Basic Law, *supra* note 164, Annex 3(8) ("Names or expressions in the laws previously in force in Hong Kong that are adopted as the laws of the Hong Kong Special Administrative Region shall generally be construed or applied in accordance with the following principles of substitution . . . In the case of any provision in which any reference is made to 'the People's Republic of China' or 'China' or to a similar name or expression, such reference shall be construed as a reference to the People's Republic of China as including Taiwan, Hong Kong and Macau.").

166. *See* China-U.K. Joint Declaration, *supra* note 162, Annex 2 (establishing the Sino-British Liaison Group).

167. This is based on a chronology of events: Compare the eleven out of the seventeen BITs concluded by Hong Kong, which were negotiated by the Sino-British Liaison Group, to the treaties that have been signed up until the handover.

168. *See* Joint Declaration of the Government of the People's Republic of China and The Government of the Republic of Portugal on the Question of Macao, China-Port., Apr. 13, 1987, 1498 UNTS 229 Annex 1, art. VIII, [hereinafter China-Portugal Joint Declaration] ("Subject to the principle that foreign affairs are the responsibility of the Central People's Government, the Macao Special Administrative Region may on it's own, using the name 'Macao, China', maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organizations in the appropriate fields, such as the economy, trade, finance, shipping, communications, tourism, culture, science and technology and sports . . . The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances of each case and the needs of the Macao Special Administrative Region and after seeking the views the People's Republic of China.").

169. *See* The Basic Law of the Macau Special Administrative Region of the People's Republic of China, *adopted* Mar. 31, 1993, arts. 136, 138 (effective Dec. 22, 1999) [hereinafter Macao Basic Law]. *See generally* Jie Huang, Interregional Recognition And Enforcement Of Civil And Commercial Judgments: Lessons For China From US And EU Law 77 (2014); Paulo Cardinal, *The Judicial Guarantees of Fundamental Rights in the Macau Legal System*, *in* One Country, Two Systems, Three Legal Orders - Perspectives Of Evolution 252, 252-58 (Jorge Oliveira & Paulo Cardinal eds., 2009); Yash Ghai, *The Basic Law of the Special Administrative Region of Macau: Some Reflections*, 49 Int'l & Comp. L. Quarterly 183 (2000).

Joint Liaison Group, the Sino-Portuguese Joint Group did not conclude any BITs.[170]

In a nutshell, the above instruments seem to disfavor an automatic application of China's IIAs to Hong Kong and Macao. In that sense they appear to depart from the default provision under Articles 29 of the VCLT and 15 of the VCST. However, two remarks should be made. First, the China-U.K. and the China-Portugal Joint Declarations are nothing more than two bilateral treaties, which, in principle, do not bind third parties, such as Laos. Second, the Hong Kong and Macao Basic Laws that duplicate the provisions found in the Joint Declarations remain nothing more than national laws, i.e. part of China's internal law.[171] In this regard, Article 27 of the VCLT would suggest that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[172]

D. *The WTO Approach*

The territorial application of the WTO Agreement and the Covered Agreements to China is yet another important aspect of the issue here discussed. In fact, the separate membership of Hong Kong and Macao to the WTO could *ab initio* be treated as evidence against the application of China's IIAs to Hong Kong and Macao. In addition, China's "customs territory"—as per the WTO—has been employed in some of its IIAs in defining their territorial scope.[173] To understand the significance of this approach, recall that, under the WTO regime, both Hong Kong and Macao are separate members, independent from China, since the WTO Agreement enables both states and customs territories to become contracting parties.[174] Furthermore, upon the accession of China to the WTO, the status of Hong Kong and Macao's separate membership has not been altered. Therefore, China's "customs territory" does not extend to either Hong Kong or Macao.[175] This means that China's IIAs that explicitly ex-

170. *See* China-Portugal Joint Declaration, *supra* note 168, Annex 2 (establishing the Sino-Portuguese Joint Group). Note that before the handover, Macao did not conclude any BITs.

171. For the international and domestic dimension of Hong Kong's Basic Law, *see* GITTINGS, *supra* note 164, at 37-46.

172. VCLT, *supra* note 22, art. 27.

173. *See e.g.*, China-Australia FTA, *supra* note 60; China-Korea FTA, *supra* note 59; China-Peru FTA, *supra* note 55; China-New Zealand FTA, *supra* note 53.

174. *See* Marrakesh Agreement Establishing the World Trade Organization, arts. XI, XII, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994); *see also* General Agreement on Tariffs and Trade, art. XXVI(5)(c), Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1154 (1994); PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 104-13 (3d. ed. 2013); Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39 J. WORLD TRADE 1195, 1200-01 (2005).

175. *See* Accession of the People's Republic of China, Decision of 10 November 2001 and Protocol on the Accession of the People's Republic of China attached thereto, WTO Doc. WT/L/432, at Part I (2)(A) (2001); *see also* Press Release/243, World Trade Organiza-

tend to China's "customs territory" do not apply to Hong Kong and Macao. Nevertheless, this is not conclusive for China's IIAs that do not refer to China's "customs territory".

E. *The 1997 and 1999 Notes to the United Nations Secretary General (UNSG)*

China's Notes to the UNSG could also be of relevance for the territorial application of its IIAs. These Notes were delivered in 1997 and 1999 for Hong Kong and Macao, respectively.[176] The purpose of these Notes was to extend certain multilateral treaties to which China was a party at that time to Hong Kong and Macao. Therefore, these Notes did not deal with any of China's BITs, given that these treaties are bilateral and not multilateral.[177] In particular, these Notes provide:

> With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application.[178]

To this provision, the Note for Hong Kong also states that:

> For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within in [sic] the category of foreign affairs or defence [sic] or which, owing to their nature and provisions, must apply to the entire territory of a State.[179]

This provision was nonetheless not inserted into the Note for Macao. Finally, both Notes mention that:

> . . . . with regard to treaty actions undertaken by China [after 1 July 1997 for Hong Kong and after 13 December 1999 for Macao], the Chinese Government confirmed that the territorial scope of each treaty action would be specified. As such, declarations concerning the territorial scope of the relevant treaties with regard to [the Hong Kong Special Administrative Region and the Macao Special Administrative Region] can be found in the footnotes to

tion, WTO Successfully Concludes Negotiations on China's Entry, ¶¶ 3-4 (Sept. 17, 2001), https://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

176. *See* China's Note to the UNSG of June 20, 1997 with Respect to Hong Kong [hereinafter Hong Kong 1997 Note]; *see also* China's Note to the UNSG of Dec. 13, 1999 with respect to Macao [hereinafter Macao 1999 Note], https://treaties.un.org/Pages/Historicalinfo.aspx (last visited May 10, 2015).

177. At that stage China had not concluded FTAs and multilateral investment treaties.

178. Hong Kong 1997 Note, *supra* note 176, ¶ IV; *see also* Macao 1999 Note, *supra* note 176, ¶ IV (containing substantially similar language pertaining to Macao).

179. Hong Kong 1997 Note, *supra* note 176, ¶ IV.

> the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.[180]

The latter provision on the territorial scope of each treaty merely refers to those multilateral treaties deposited with the UNSG. Nevertheless, the issue is not entirely clear as to the provisions referred to above, which could potentially be read to refer to both bilateral and multilateral treaties. In addition, the provision that has only been inserted to the Note with respect to Hong Kong, is of great ambiguity since it does not clarify which are those treaties that "owing to their nature and provisions, must apply to the entire territory of a State."[181] In this regard, it is important to highlight that the UNSG acts as depositary of "open multilateral treaties of worldwide interest" or "treaties negotiated under the auspices of the United Nations regional commissions" but not of bilateral treaties.[182]

On the contrary, the UN Secretariat maintains a registry for "[e]very treaty and every international agreement" that undisputedly includes both multilateral and bilateral treaties.[183] In light of the above, it appears that the territorial status of China's bilateral treaties was not dealt with in the Notes addressed to the UNSG. In any case, the ability of China to apply multilateral treaties to Hong Kong and Macao only if relevant formalities have taken place should not go unnoticed. Whether the latter approach also applies to bilateral treaties, such as China's BITs, is another issue. In any event, the position taken by China in the above Notes could be significant for China's multilateral investment treaties and in particular the China-Japan-Korea Trilateral Investment Agreement and the China-ASEAN Agreement on Investment. In connection to that, however, it should not be forgotten that the UNSG does not act as depositary of such treaties, although they certainly are multilateral.

F. *The Territorial Application of the ICSID Convention*

Finally, evidence supportive of the application of China's IIAs to Hong Kong and Macao can be found in the ICSID Convention. Article 70 provides:

> This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.[184]

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180. *Id.* ¶ 13; Macao 1999 Note, *supra* note 176, ¶ IV.

181. Hong Kong 1997 Note, *supra* note 176, ¶ IV.

182. UNITED NATIONS, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK, at 6-7, U.N. Sales No. E.04.V.3 (2002).

183. U.N. Charter art. 102, ¶ 4.

184. ICSID Convention, *supra* note 14, at ¶ 70.

Pursuant to this Article, the UK excluded the Channel Islands and the Isle of Man from the application of the ICSID Convention but subsequently extended its application to these territories.[185] Relevant extensions were also made for other overseas territories.[186] Similarly, the Netherlands extended the ICSID Convention to the former Netherlands Antilles and Suriname, and Denmark extended it to the Faroe Islands.[187] However, China has neither excluded nor extended the application of the ICSID Convention to any territories. Therefore, the default position is that the Convention applies in respect of both Hong Kong and Macao.[188] Nonetheless, even if it can be established that under the ICSID Convention, Hong Kong and Macao are regarded Chinese territory, this does not necessarily affect the territorial application of China's IIAs. That is why, the jurisdiction of ICSID is not established by the mere ratification of the Convention, but additionally requires the parties to consent "in writing."[189] Therefore, the territorial application of China's IIAs is crucial in this respect.

185. *See* Arbitration (International Investment Disputes) (Guernsey) Order 1968; Arbitration (International Investment Disputes) (Jersey) Order 1979; Arbitration (International Investment Disputes) Act 1983 (extending the Convention to the Isle of Man). The UK signed the Convention on May 26, 1965, and ratified it on Dec. 19, 1966, and it entered into force on Jan. 18, 1967. *See* "Database of Member States," INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=utoZ&rdo=BOTH.

186. *See* Arbitration (International Investment Disputes) Act 1966 (Application to Colonies Etc.) Order 1967 (extending the Convention to numerous other U.K. territories, including Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, South Georgia and South Sandwich Islands, St. Helena, Turks and Caicos Islands). For relevant arbitral practice *see generally* Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, Decision on Jurisdiction, ¶ 54, ICSID Case No. ARB/84/3 (Apr. 14, 1988), 3 ICSID REP. 131 (1995).

187. *See Designations and Notifications: Netherlands*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=st98 (indicating the Netherlands' extensions); *see also Designations and Notifications: Denmark*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST40 (indicating Denmark's extension); *Signatory and Contracting States: A-E*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=atoE&rdo=BOTH (indicating that Denmark signed the Convention on October 11, 1965, ratified it on April 24, 1968, and it entered into force on May 24, 1968); *Signatory and Contracting States: K-O*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=ktoO&rdo=BOTH (indicating The Netherlands signed the Convention on May 25, 1966 and ratified it on September 14, 1966, and it entered into force on October 14, 1966).

188. CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1276, n. 7 (2009) ("Hong Kong became a special administrative region of China on 1 July 1997 and is now covered by China's ratification of the Convention. Macao, which was covered by Portugal's participation in the Convention, is covered by China's ratification since 19 December 1999.").

189. ICSID Convention, *supra* note 14, art. 25(1); *see also* SCHREUER ET AL., *supra* note 188, at 85-87.

IV. The Sanum Case Explained

This Part deals specifically with the *Sanum* case. The first Section of this Part delineates rulings prior to the *Sanum* case, and particularly the *Tza Yap Shum v. Peru* case. Thereafter, Sections B and C discuss the findings of both the UNCITRAL tribunal in *Sanum v. Laos* and the decision of the SGHC in the subsequent set aside proceedings.

A. *Previous Rulings: Tza Yap Shum v. Peru*

Tza Yap Shum v. Peru is the first investor-state arbitration filed by a Chinese investor,[190] and additionally the first ICSID claim brought about under Chinese IIAs.[191] While this case is not directly concerned with the territorial application of China's IIAs, it nevertheless is significant for the issue under discussion. In particular, claimant was not a legal entity but a natural person, who was a Hong Kong resident of Chinese descent and born in China.[192] Note that the nationality test for natural persons, unlike that for legal entities, is somewhat detached from the notion of territory. For example, the China-Peru BIT covers "natural persons who have the nationality of the People's Republic of China in accordance with its laws."[193] This definition does not contain the territorial element found

190. *See* Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009); Eliasson, *China's Investment Treaties*, *supra* note 30, at 94-96; *see also Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (July 7, 2011); *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment (Feb. 12, 2015). For the main highlights of the case, *see generally* Eliasson, *Investor-State Arbitration*, *supra* note 30, at 367-70; Luke Nottage & J. Romesh Weeramantry, *Investment Arbitration in Asia: Five Perspectives on Law and Practice,* 28 Arb. Int'l 19, 35 (2012); Wei Shen, *supra* note 28, at 59-63; Jane Y. Willems, *The Settlement of Investor-State Disputes and China: New Developments on ICSID Jurisdiction*, 8 S. C. J. Int'l L. & Bus. 1, 5-11 (2012).

191. Other cases under China's IIAs include: *China Heilongjiang International & Technical Cooperative Corp*, *Qinhangdaoshi Qinlong International Industrial, and Beijing Shougang Mining Investment v. Republic of Mongolia*, UNCITRAL, PCA (China-Mongolia BIT); *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29 (China-Belgium-Luxembourg BIT); *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30 (China-Yemen BIT); *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15 which was suspended pursuant to the parties' agreement on July 22, 2011 (China-Malaysia BIT); *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 (China-Korea BIT). *See also Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 (Hong Kong-Australia BIT).

192. *See Tza Yap Shum v. Peru*, ¶60; *see also* Hong Kong Basic Law, *supra* note 164, art. 24 (discussing who is considered a resident of Hong Kong); The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999), http://www.legislation.gov.hk/blis_ind.nsf/CurEngOrd/77E7FBB936DE3D71482575EE000DF62E?OpenDocument [hereinafter Interpretation of Articles].

193. China-Peru BIT, *supra* note 16, art. 1(2).

with regard to legal entities, namely "economic entities established in accordance with the laws of the People's Republic of China and domiciled in the *territory* of the People's Republic of China."[194] Additionally, the nationality law of China is applicable to Hong Kong and Macao and also covers cases such as those of Mr. Tza Yap Shum, the claimant in the case under discussion.[195]

In deciding the matter, the tribunal found that the nationality requirements for Mr. Tza Yap Shum had been met.[196] However, this ruling did not settle the territorial application of China's IIAs, since it was concerned with the nationality test of natural persons, which, as shown, does not include a territorial link similar to the one necessary in determining the nationality of legal entities. In particular, the tribunal opined that:

> Hong Kong's ability to conclude its own treaties for the promotion and protection of investments with countries with which China also has entered into a BIT is not necessarily redundant. Historically, Hong Kong has hosted people from multiple nationalities. It may be for this reason that the regional government has developed a policy that seeks to promote and protect investments in third countries for the benefit of all its residents, regardless of their nationality.[197]

Thus, the conclusion of a certain number of BITs by Hong Kong is by no means conclusive as to its intention to carve out the application of China's IIAs. On the contrary, it is indicative of Hong Kong's will to protect other investors residing in Hong Kong and not falling under the scope of China's IIAs, i.e. non-Chinese investors. This ruling is significant, but does not necessarily mean that it could be transposed to legal persons.

B. *Sanum v. Laos: The Case Before the UNCITRAL Tribunal*

The *Sanum* case unfolded in two phases, the first before the UNCITRAL tribunal and the second in the subsequent set aside proceedings before the SGHC. In brief, the *Sanum v. Laos* tribunal was the first investor-state tribunal asked to determine the application of Chinese IIAs to legal entities incorporated and established in Macao. The cause of action was the China-Laos BIT and the claim was filed by a Macanese legal entity, Sanum Investments Limited.[198] As noted above, the China-Laos BIT does not contain a definition of "territory" but covers instead "natural

194. *Id.* (emphasis added).

195. *See* Hong Kong Basic Law, *supra* note 164, art. 24; Interpretation of Articles, *supra* note 192; *see also Tza Yap Shum v. Peru*, ¶ 60.

196. *See Tza Yap Shum v. Peru*, ¶ 77.

197. *Tza Yap Shum v. Peru*, ¶ 76.

198. *See* Government of the Lao People's Democratic Republic v. Sanum Investments Ltd., Judgment, High Court of the Republic of Singapore [SGHC] ¶ 20 (Jan. 20, 2015), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-law-people-rsquo-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15.

persons who have nationality of each Contracting State" and "economic entities established in accordance with the laws and regulations of each contracting State."[199] As Norah Gallagher and Wenhua Shan have suggested, the use of the plural "laws" instead of "law" suggests that legal entities established in China's SARs are also covered investors.[200] However, the tribunal did not adopt this approach, but instead went on to examine the major issues that were discussed in Parts I to III.

The tribunal first addressed China's Note to the UNSG, second the VCLT, the VCST, the China-Portugal Joint Declaration and the Macao Basic Law and third the provisions of Chinese and Macanese BITs.[201] With regard to China's Note to the UNSG, the tribunal found that it merely referred to multilateral treaties, and thus was not relevant for the territorial scope of the China-Laos BIT.[202] Having found so, the tribunal then focused on Articles 29 of the VCLT and 15 of the VCST.[203] However, unlike the SGHC, this tribunal was not equipped with any factual elements that could help determine the application or non-application of the China-Laos BIT to Macao, since "there were no affidavits from the PRC, Laos or the Macao SAR, which could probably have been obtained from the respective authorities."[204] In light of this remark, the tribunal emphasized that the default position under customary international law would be to apply the China-Laos BIT to Macao unless it could be established that the BIT's application would be incompatible with its object and purpose[205] or would radically change the conditions for its operation.[206]

As seen, these conditions are employed in Article 15 of the VCST and are in line with the discussion advanced in Part III. At the same time, the approach of the tribunal reveals the careful attention it has paid to the fine textual difference of Articles 29 of the VCLT and 15 of the VCST. In connection to that, it should be recalled that since the China-Laos BIT had been concluded prior to the succession of China to Macao's territory, then Article 15 of the VCST is applicable instead of Article 29 of the VCLT. This fine distinction appears not to have been considered by the SGHC.[207] In any case, the UNCITRAL tribunal had to determine whether any of the conditions referred to in Article 15 of the VCST were met. It thus went on to examine the bearing of the China-Portugal Joint Declaration and the Macao Basic Law. Eventually the tribunal ruled in favor of the

199. China-Laos BIT, *supra* note 2, art. 1(2).

200. *See* GALLAGHER & SHAN, *supra* note 4, at 92.

201. *Sanum v. Laos*, ¶¶ 205-300.

202. *Id.* ¶ 210.

203. *Id.* ¶ 231.

204. *Id.* ¶ 232.

205. *Id.* ¶¶ 238-39.

206. *Id.* ¶ 243.

207. *Cf. id.* ¶ 269 ("This provisional conclusion [the application of the China-Laos BIT to Macao] has to be verified and confirmed by the analysis of the application to the situation of Article 29 of the VCLT which has broader exceptions than the ones included in Article 15 of the VCST").

application of the China-Laos BIT to Macao but to determine so, it first discerned the legal nature of the Basic Law and the China-Portugal Joint Declaration, finding:

> [T]he Basic Law of the Macao SAR in and of itself, as an internal law, cannot be considered as legally capable of modifying the international rule set out in Article 15. It is well known that "the binding character of treaties is determined by international law, which on this point takes precedence over internal law.
>
> The Tribunal, however, considers that the same is not true of the Joint Declaration, which can be considered an international treaty and, more precisely, a devolution treaty, by which the two States involved in a process of succession decide the modalities of such succession.[208]

Nevertheless, the tribunal questioned the binding effect of the China-Portugal Joint Declaration on third parties, in this case Laos.[209] Initially, it focused on the text of the Joint Declaration that also is reproduced in the Macao Basic Law and analyzed the diverging interpretations of the parties.[210] The relevant passage provides that "[t]he application to [Macao] of international agreements [. . .] shall be decided by the Central People's Government [. . .] after seeking the views of the government of the Region."[211]

For its part, Sanum claimed that this wording supported the application of the China-Laos BIT to Macao, given that China had not made explicit representations to the contrary.[212] To put it differently, Sanum alleged that the China-Laos BIT "is to be presumed applicable" to Macao "until the PRC Government decides, after consulting [Macao] that it does not apply."[213] However, the tribunal did not agree with this approach. On the contrary, it found that an interpretation in conformity with Article 31 of the VCLT reveals that the above provision "is to the effect that the treaties will be applied *when* the PRC Government so decides and not that they will be applied *unless* the PRC Government so decides."[214]

Regardless, the tribunal went on to examine the legal nature of the Joint Declaration and particularly its effect on third parties. In this regard, the tribunal noted that the Joint Declaration could be regarded as a devolution treaty, by which China and Portugal decided the modalities of China's succession to Macao.[215] However, according to the tribunal, devo-

208. *Id.* ¶¶ 257-8 (internal footnote omitted).

209. *Id.* ¶¶ 265-6.

210. *Id.* ¶ 259.

211. China-Portugal Joint Declaration, *supra* note 168, Annex 1, art. I; Macao Basic Law, *supra* note 169, art. 138.

212. *Sanum v. Laos*, ¶¶ 261-2.

213. *Id.* ¶ 262.

214. *Id.* ¶ 263.

215. *Id.* ¶¶ 258-9, 264.

lution treaties "can only bind third parties if they apply the customary principles of international law," which "simply means that if devolution treaties adopt different solutions to those foreseen by the rules of State succession, those solutions do not bind third States."[216] In line with this argument, the tribunal stretched the otherwise relative effect of treaties,[217] suggesting:

> Laos, having not been informed that its treaty with the PRC [the China-Laos BIT] would only be extended after a procedure of consultation -which in fact never seems to have been enforced-, cannot claim that such an agreement between the PRC and Laos could set aside the international rule applicable to a bilateral treaty between itself and the PRC.[218]

Thus, the tribunal found that pursuant to Article 15 of the VCST—and otherwise under Article 29 of the VCLT—the China-Laos BIT should be "deemed to have been extended" to Macao.[219] The crucial therefore point in the tribunal's analysis was the effect of the China-Portugal Joint Declaration on third parties such as Laos. The nature of the Joint Declaration and its effect on third parties is discussed again in Part V but it suffices to say that the SGHC has overlooked this matter.

Finally, the tribunal examined China's BITs as well as the two BITs concluded by Macao without however finding evidence supporting the non-application to Macao of the China-Laos BIT.[220] Furthermore, this tribunal, similar to that in *Tza Yap Shum v. Peru*, did not regard parallelism as evidence dictating the non-application of the latter treaty to Macao. In relevant part, the decision of the tribunal reads as follows:

> 290. The Tribunal does not accept this conclusion. It can indeed also mean, with as much if not more logic, that the PRC-BIT applies to the whole territory including the Macao SAR, while the Macao SAR-BIT is confined to the territory of Macao but cannot extend to Mainland China.
>
> 291. Another argument put forward by the Respondent is that the overlapping of the PRC and Macao BITs with the same third State would bring about "legal chaos for foreign investors."
>
> 292. In the Tribunal's view, the superposition of instruments of protection does not bring about chaos, but rather better protection to foreign investors. The Tribunal agrees with the Claimant

216. *Id.* ¶ 265 (citing Brigitte Stern, *La succession d'Etats*, 262 REC. DES COURS 9 (1996), at 169).

217. *See* VCLT, *supra* note 22, art. 57.

218. *Sanum v. Laos*, ¶¶ 268. In light of the tribunal's analysis, the reference to "an agreement between the PRC and Laos" should instead be read as "between the PRC and Portugal."

219. *Id.* ¶ 269.

220. *Id.* ¶¶ 270-300.

> when it states that "[t]he fact that the PRC authorized Macau to enter into the bilateral investment treaties at issue does not otherwise establish an intention that its own BITs should not extend to the territory of Macau; it is equally consistent with a *supplemental* regime of protection for Macanese investors, above and beyond that provided by the PRC treaties . . . "
>
> 294. The Tribunal does not consider that the concomitant application of these two BITs would lead to "legal chaos". The more dispute settlement options an investor has, the better it is protected, and the more enhanced the economic cooperation will be between the concerned States.
>
> 295. In the Tribunal's view, the existence of two treaties facilitates rather than hinders the fulfillment of the goals of the BITs, which are the protection of the foreign investors and the economic development of the host State.[221]

Considering the above analysis, the next Section examines the contradictory ruling of the SGHC in the subsequent set-aside proceedings.

C. *Laos v. Sanum: Set Aside Proceedings Before the Singapore High Court (SGHC)*

At the outset, two remarks are of particular relevance to this case. First, prior to the judgment of the SGHC, the *Sanum* case had been settled along with a parallel claim under the Laos-Netherlands BIT filed by Lao Holdings, the one hundred percent shareholder of Sanum.[222] Shortly after the settlement, Lao Holdings pursued claims over the alleged breach of the settlement agreement.[223] Eventually, however, an ICSID tribunal found that Laos had not breached the settlement agreement thus rejecting the claims of Lao Holdings.[224] This meant that the *Sanum* case remained the only avenue for the investor's ability to directly sue the Government of Laos. For this reason, soon after the decision of the SGHC, Sanum filed a petition for leave to appeal.[225] This development reveals the topical character of the issues discussed in this article. On the same time, it is interest-

221. *Id.* ¶¶ 290-92 and 294-95 (internal footnotes omitted).

222. *See* Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, Settlement Agreement (June 15, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3235_0.pdf; Sanum Investments Ltd. v. Lao People's Democratic Republic, PCA Case No. 2013-13, Settlement Agreement (June 15, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3235.pdf.

223. *See* Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, Interim Ruling on Issues Arising Under the Deed of Settlement (Dec. 19, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4103.pdf.

224. *See* Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, Decision on the Merits (June 10, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4333.pdf; *see also* Sebastian Perry, *Casino Investor Fails to Revive Laos Claim*, GLOBAL ARBITRATION REVIEW, June 16, 2015.

225. The hearing on Sanum's petition for leave to appeal took place on July 13, 2015.

ing to see whether leave to appeal will be granted and in this case whether the Court of Appeal will eventually reverse the decision of the SGHC.

Second, in reviewing the case, the SGHC, unlike the UNCITRAL tribunal, was equipped with an Exchange of Letters between the Laotian Ministry of Foreign Affairs and the Chinese Embassy in Vientiane.[226] More specifically, the Laotian Ministry of Foreign Affairs sent a letter to China's Embassy in Vientiane on January 7, 2014, seeking the view of "the Government of the People's Republic of China regarding the status of the [China-Lao BIT] in relation to [Macau]." In this letter the Laotian Ministry took the view that

> the Agreement does not extend to [Macau] for the reasons based on the People's Republic of China's policy of one *country*, two systems, its constitutional and legal framework, the Basic Law of [Macau] as well as the fact that the Agreement itself is silent on its extension to [Macau], which returned to the sovereignty of the People's Republic of China in 1999, six years after the signing of the Agreement.[227]

In a reply dated January 9, 2014, China's Embassy in Vientiane stated:

> In accordance with the <<Basic Law of [Macau]>>, the Government of [Macau] may, with the authorization of the Central People's Government conclude and implement investment agreements on its own with foreign states and regions; in principle the bilateral investment agreements concluded by the Central People's Government are not applicable to [Macau], unless the opinion of the Special Administrative Region Government has been sought, and separate arrangements have been made after consultation with the contracting party. In view of the foregoing, [the PRC-Laos BIT] concluded in Vientiane on 31 January 1993 is not applicable to [Macau] unless both China and Laos make separate arrangements in the future.[228]

This Exchange of Letters expressly provides for the non-application of the China-Laos BIT to Macao and as already noted took place well after the rendering of the decision on jurisdiction of the UNCITRAL tribunal.[229] The case, however, still remains open for the temporal effects of such an Exchange of Letters.

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226. Government of the Lao People's Democratic Republic v. Sanum Investments Ltd., Judgment, High Court of the Republic of Singapore [SGHC] ¶ 15 (Jan. 20, 2015), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-lao-people-rsquo-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15.

227. *Id.* ¶ 39.

228. *Id.* ¶ 40.

229. *Id.* ¶¶ 39, 57-58, 67-88.

The SGHC, in deciding the application of the China-Laos BIT to Macao, proceeded in first analyzing the matter through the prism of Articles 29 of the VCLT and 15 of the VCST.[230] In this regard, the SGHC noted that while both China and Laos are parties to the VCLT but not to the VCST, Laos and Sanum have both agreed that these provisions enshrine rules of customary international law.[231] In conformity with these provisions, the SGHC opined that the China-Laos BIT should be deemed applicable to Macao unless the contrary appears from the treaty or is otherwise established.[232] This reading does not stretch out the textual differences between Articles 29 and 15 of the VCST.[233] Indeed, the latter Article provides for a departure from the default rule of continuity if it appears from the treaty or is otherwise established that this would be incompatible with the object and purpose of the treaty or would radically change the conditions for the treaty's operation.[234] In any case, the SGHC went on to examine whether it appeared from the treaty or could otherwise be established that the China-Laos BIT did not apply to Macao. In this regard, the SGHC first found that the China-Laos BIT did not provide guidance with respect to the matter under examination and, similar to the UNCITRAL tribunal, did not discuss the use of the plural "laws" instead of "law" employed by this treaty.[235] For this reason, it went on to examine whether it could otherwise be established that this BIT did not apply to Macao. To do so, it examined the Exchange of Letters referred to above, other BITs concluded by China, but not the FTAs and multilateral investment treaties examined in Part I, the China-Portugal Joint Declaration, the 1999 Note to the UNSG, and the WTO Trade Policy Report. It also drew an analogy with the case of Hong Kong.[236]

Setting out from the Exchange of Letters, the SGHC focused on Article 31 of the VCLT, which in relevant part refers to "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[237] For its part, Sanum argued that the critical date of admitting such evidence was August 14, 2012, whereupon the proceedings before the UNCITRAL tribunal had commenced, as well as that China's intent that was of relevance was that which existed at the moment of the handover, and not its present day intent.[238] The SGHC disagreed with this approach finding that the Exchange of Letters constitutes a subsequent agreement under Article 31 of the VCLT for the non-

230. *Id.* ¶¶ 57-59.

231. *Id.* ¶ 60.

232. *Id.* ¶¶ 61-62.

233. *Id.*

234. VCST, *supra* note 23, art. 15.

235. *Lao v. Sanum*, ¶ 63; *see also supra* Section 2.1.

236. *See Lao v. Sanum*, ¶ 65.

237. VCLT, *supra* note 22, art. 31(3)(a); *see also Lao v. Sanum*, ¶ 69-70.

238. *Lao v. Sanum*, ¶ 68.

application of the China-Laos BIT to Macao.[239] To corroborate its findings, the SGHC also referred to another case of the High Court, where a letter from the Singaporean Ministry of Foreign Affairs was regarded as embodying an agreement for the non-application to Hong Kong of the China-Singapore bilateral judicial assistance treaty (JAT).[240] However, the SGHC failed to clarify whether the Exchange of Letters was a subsequent interpretation or modification. This point becomes relevant when considering the approach of the SGHC with regard to the temporal effect of the above Exchange of Letters. In more detail, the SGHC noted:

> If Art 31(3)(a) is of general application to most treaties, then parties relying on the provisions of BITs would be forewarned that subsequent agreements could potentially affect the interpretation of the treaty provisions. In any case, the PRC government would have been fully aware of the implications of their opinion as stated in the PRC Letter especially since it was worded in *general* terms. This categorical approach suggests to me that the position adopted in the letter was a confirmation of the status quo rather than a dramatic upheaval of the current expectations held by states which have treaties with PRC.[241]

While this would suggest that the SGHC leaned toward identifying the Exchange of Letters as a subsequent interpretation, the SGHC nevertheless noted that the exchange "did not amount to a *retroactive* agreement that altered the positions and expectations of third parties such as the defendant" since:

> [f]rom the way that the PRC Letter was worded, it appears that the non-applicability of the PRC-Laos BIT to Macau was not a dramatic change of position but was rather an affirmation of the common understanding between the states that the treaty from its inception did not apply to Macau.[242]

This article finds that the analysis of the SGHC is not adequate in this regard. However, with regard to all the other elements that the SGHC examined, it is *first* noted that other BITs concluded by China were found of "limited utility"[243] and the parallelism existent between Chinese BITs and those BITs concluded by Macao was found incapable of drawing "any

239. *Id.* ¶¶ 69-70, 74-78.

240. *Id.* ¶¶ 71-72 (citing *Lee Hsien Loong v. Review Publishing Co. Ltd. and Another and Another Suit*, 2 SLR 453, Judgment (Feb. 21, 2007)). In fact, in the *Lee Hsien Loong v. Review Publishing* decision the SHC relied on a letter from the Singaporean Ministry of Foreign Affairs, stating that the Hong Kong Department of Justice had confirmed that the China-Singapore JAT was not applicable to Hong Kong. This is different than the Exchange of Letters referenced in *Lao v. Sanum*.

241. *Lao v. Sanum*, ¶ 76.

242. *Id.* ¶ 77.

243. *Id.* ¶ 88. *See also id.* ¶¶ 79-87.

definite conclusions."[244] In addition, the SGHC adopted the view that Macao's capacity to enter into its own BITs "does not automatically lead to the conclusion that [China's] BITs do not apply to Macau," but "tends to suggest to a limited extent that [China's] treaties do not apply to Macau."[245] As later discussed, this article finds that the burgeoning parallelism of China's IIAs does not necessarily support the conclusions of the SGHC.

Second, the 1987 China-Portugal Joint Declaration was found to support the non-application of the China-Laos BIT to Macao.[246] In particular, Laos pointed to the Declaration in order to show that for China's international treaties to apply to Macao, a relevant territorial extension ought to have taken place.[247] On the contrary, Sanum claimed that the Declaration was a treaty between China and Portugal that was only binding between them, did not "create rights or duties for other states such as Laos," and was concerned with China's "internal constitutional arrangements with Macau."[248] However, the SGHC did not accept such arguments.[249] Nevertheless, it is striking that the SGHC did not enter into a discussion of the legal nature of the Joint Declaration and its effect of third parties, such as Laos.

Third, the 1999 Note to the UNSG was found to provide no guidance to the present issue. This was because, as earlier explained, it referred to multilateral treaties alone.[250]

Fourth, the analogy drawn with Hong Kong was found very similar to that of Macao, and while both the Joint Declaration for Macao and that for Hong Kong were not regarded "conclusive,"[251] the SGHC noted that they nevertheless showed that China "was likely to have been of the view that" its treaties "would not automatically apply to Macau" and Hong Kong after the respective handover.[252]

Finally, excerpts from the WTO Trade Policy Report, and especially from the 2001 issue that referred to Macao's BIT with Portugal indicating that Macao at that stage had "no other" BITs,[253] were found of having "some bearing on the issue" but were nevertheless inconclusive.[254] Therefore, in weighing these findings along with the Exchange of Letters, the SGHC opined that the China-Laos BIT did not apply to Macao.

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244. *Id.* ¶ 86.

245. *Id.* ¶ 87.

246. *Id.* ¶¶ 90-93.

247. *Id.* ¶ 90.

248. *Id.* ¶ 91.

249. *Id.* ¶¶ 92-93.

250. *Id.* ¶¶ 94-98.

251. *Id.* ¶ 105; *see also* ¶¶ 99-104.

252. *Id.* ¶ 106.

253. *Id.* ¶ 107.

254. *Id.* ¶¶ 108-09.

In brief, the above summary clearly indicates that the SGHC's reasoning diverges from that of the UNCITRAL tribunal. However, it should not be forgotten that unlike the UNCITRAL tribunal, the SGHC was also in possession of the Exchange of Letters and the WTO Trade Policy Report of 2001. Nevertheless, the SGHC was of the view that its predecessor (the UNCITRAL tribunal) also had sufficient evidence to rebut the general assumption on the application to Macao of the China-Laos BIT.[255] However, what is remarkable is that the analysis that preceded in Parts I to III and in the summaries of the cases above makes it abundantly clear that the application of China's IIAs to Hong Kong and Macao is unsettled, even after the ruling of the SGHC. The reasoning of both the UNCITRAL tribunal and the SGHC is inescapably trapped in the pervasive uncertainty over the territorial application of China's IIAs. And while the Exchange of Letters between the Laotian Ministry of Foreign Affairs and China's Embassy in Laos is significant, it still remains unclear whether it can be regarded as a position of general application for both Hong Kong and Macao.

Seeking to further clarify the issue as well as to refine the findings of the SGHC, the next Part examines relevant treaty and arbitral practice on the territorial application and extension of IIAs, draws an analogy with cases of state dissolution and secession and revisits the temporal effects of the Exchange of Letters, the legal nature of the Joint Declarations, and the bearing of the pervasive parallelism in China's investment "treatification."[256]

V. The Sanum Case in New Light

The aim of this part is to further the discussion of the application of China's IIAs to Hong Kong and Macao. Thus, the first Section examines the practice of the U.K., as well as other countries, such as Denmark and the U.S., with regard to the territorial extension of their IIAs. Then, Section B focuses on succession in part of territory through the prism of an analogy with cases of state dissolution and secession, and particularly in connection to the BITs concluded by Czechoslovakia, the FRY, and the USSR. Section C revisits the temporal effects of subsequent interpretations and underscores the weaknesses of the SGHC's reasoning with regard to the Exchange of Letters. Section D focuses on the legal nature of the Joint Declarations and criticizes the SGHC for not dealing with the matter. Finally, Section E assesses the impact of parallelism to the territorial application of China's IIAs.

255. *Id.* ¶ 111.

256. *See* Salacuse, *supra* note 6, at 78 (introducing the term "treatification").

A. *State Practice on the Territorial Extension of IIAs*

1. Bilateral Treaties

As it is well known, certain states, such as Denmark and the Netherlands, are comprised of both metropolitan areas and overseas territories. For the U.K., the case is more complex, with territory comprising its metropolitan area (Great Britain and Northern Ireland), the Crown dependencies (Isle of Man, Guernsey and Jersey) and the overseas territories (such as Gibraltar, Bermuda, and the Turks and Caicos Islands). Recall that, prior to the 1997 "handover," Hong Kong was also one of U.K.'s overseas territories. In light of the above, the territorial application of BITs becomes crucial, especially when considering that the majority of overseas territories (along with the Crown dependencies for the U.K.) form separate jurisdictions and have promulgated their own company laws, while also retaining separate commercial registries.[257] Although relevant state practice is not always uniform, it nevertheless militates in favor of a presumption of territorial extension, especially when a state does not wish to equip its BITs with application in the entirety of its territory.

In particular, the U.K., Denmark, and the Netherlands appear to be the most consistent in terms of the territorial application of their BITs. The UK consistently defines its territory as comprising Great Britain and Northern Ireland (the United Kingdom),[258] but additionally includes a provision that allows for the territorial extension of its BITs through subsequent Exchange of Notes.[259] Pursuant to the latter provision, the territo-

257. *See generally* SINCLAIR, *supra* note 120, at 90-92.

258. *See e.g.*, Agreement for the Promotion and Protection of Investments, El Sal.-U.K., art. 1(d), Oct. 14, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1138; Agreement for the Promotion and Protection of Investments, Leb.-U.K., art. 1(4), Feb. 16, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1904; Agreement for the Promotion and Reciprocal Protection of Investments, Bulg.-U.K., art. 1(d), Dec. 11, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/555 [hereinafter Bulgaria-U.K. BIT]; Agreement for the Promotion and Protection of Investments, Burundi-U.K., art. 1(e), Sept. 13, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3223; Agreement for the Promotion and Protection of Investments, U.K.-U.S.S.R., art. 1(e), Apr. 6, 1989, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2235; Agreement for the Promotion and Protection of Investments, Benin-U.K., art. 1(e), Nov. 27, 1987, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3221; Agreement for the Promotion and Protection of Investments, Belize-U.K., art. 1(e), Apr. 30, 1982, http://investmentpolicyhub.unctad.org/Download/TreatyFile/436; Agreement for the Promotion and Protection of Investments, Phil.-U.K., art. 1(2)(b), Dec. 3, 1980, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2178; Agreement for the Promotion and Protection of Investments, Sri Lanka-U.K., art. 1(e), Feb. 13, 1980, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2293; Agreement for the Promotion of the Investment of Capital and for the Protection of Investments, Thai.-U.K., art. 2(5), Nov. 23, 1978, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2344; Agreement for the Promotion and Protection of Investments, Egypt-U.K., art. 1(e), June 11, 1975, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1122. For British investment treaties, *see generally* Francis A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 The BRIT. Y.B. OF INT'L L. 241 (1981).

259. *See, e.g.*, Bulgaria-U.K. BIT, *supra* note 258, art. 12; Egypt-U.K. BIT, *supra* note 258, art. 11; *see also Bilateral Agreement for the Promotion and Protection of Investments*,

rial scope of UK BITs has been extended from time to time to various overseas territories and the Crown dependencies.[260] Prior to the "handover," the U.K. also had extended the application of some BITs to Hong Kong.[261] Given the consistency of the U.K. in territorially extending its BITs, notice that the China-U.K. BIT only includes a territorial extension provision for the part of the U.K. This arguably creates a strong presumption that China was aware of this practice, and had it wanted to territorially extend the treaty to Hong Kong and Macao at a later stage, it would have stated so explicitly. In fact, the China-U.K. BIT not only was concluded in 1986—two years after the U.K.-China Joint Declaration of 1984—but also covers "corporations, firms or associations incorporated or constituted under the law in force in any part of the People's Republic of

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Colom.-U.K., art. I(4), XIV, Mar. 17, 2010, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3253; Agreement for the Promotion and Protection of Investments, Gam.-U.K., art. 1(e), July 2, 2002, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1316; Agreement for the Promotion and Protection of Investments, Morocco-U.K., art. 1(d), Oct. 30, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2051. One exception to the U.K's widespread use of the territorial extension provision is Malaysia. *See* Agreement for the Promotion and Protection of Investments, Malay.-U.K., May 21, 1981, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1972; *see also* Chester Brown & Audley Sheppard, *United Kingdom*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 697, 718 (Chester Brown ed., 2013).

260. *See, e.g.*, Gr. Brit. T.S. No. 72 (1993) (Cm. 2365) at 8 (Exchange of Notes entered into force on Sept. 22, 1992 extending the Guy.-U.K. BIT to the Isle of Man, Gibraltar, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey); Gr. Brit. T.S. No. 16 (2002) (Cm. 5489) (Exchange of Notes entered into force on Nov. 12, 1999 extending the U.K.-Uzb. BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey); Gr. Brit. T.S. No. 37 (2000) (Cm. 4665) (Exchange of Notes entered into force on Oct. 11, 1999 extending Pak.-U.K. BIT to the Isle of Man and the Bailiwick of Guernsey and Jersey); Gr. Brit. T.S. No. 72 (1993) (Cm. 2365) at 7 (Exchange of Notes entered into force on July 20, 1992 extending the Gren.-U.K. BIT to the Isle of Man, Gibraltar, the Turks and Caicos Islands, Bermuda and the Bailiwicks of Guernsey and Jersey); Gr. Brit. T.S. No. 109 (1996) (Cm. 3650) at 26 (Exchange of Notes extending the Mauritius-U.K. BIT to Gibraltar, Isle of Man, and the Bailiwicks of Guernsey and Jersey); Gr. Brit. T.S. No. 30 (1986) (Cd. 9787) (Exchange of Notes entered into force on Dec. 10, 1985 extending the Belize-U.K. BIT to the Turks and Caicos Islands); Gr. Brit. T.S. No. 32 (1986) (Cd. 9812) (Exchange of Notes entered into force on Feb. 4, 1986 extending the Belize-U.K. BIT to the Cayman Islands); Gr. Brit. T.S. No. 54 (1999) (Cm. 4438) (Exchange of Notes entered into force on Mar. 22, 1999 extending the Rom.-U.K. BIT to the Isle of Man and the Bailiwicks of Guernsey and Jersey). For relevant case law, *see, e.g.*, British Caribbean Bank Ltd. v. Belize, UNCITRAL, PCA Case No. 2010-18, Award, ¶ 3 (Dec. 19, 2014); S. Am. Silver Ltd. v. Bol., UNCITRAL, PCA Case No. 2013-15, Claimant's Notice of Arbitration, §§ 62-64 (Apr. 30, 2013); EDF (Serv.) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶¶ 1, 64 (Oct. 8, 2009).

261. *See, e.g.*, Exchange of Notes extending the Jordan-U.K. BIT to Hong Kong (May 14, 1986); Exchange of Notes extending the Belize-U.K. BIT to Hong Kong, the Bailiwicks of Jersey and Guernsey and the Isle of Man (Mar. 14, 1983); Exchange of Notes extending the Korea-U.K. BIT to Hong Kong (Mar. 4, 1976). Such extensions should now be regarded ineffective. This is abundantly clear when taking into account the China-U.K. Joint Declaration as well as the Hong Kong-U.K. BIT (1998).

China."[262] On the other hand, the conclusion of the U.K.-Hong Kong BIT in 1998 could suggest that in U.K.'s view, the U.K.-China BIT did not apply to Hong Kong. But first, this is not conclusive for China, and second, it remains to be examined whether these treaties would apply in parallel.

In the same vein, Denmark consistently excludes Greenland and the Faroe Islands from the application of its IIAs,[263] although it provides for the extension to these territories through an Exchange of Notes.[264] This practice is similar to that of the U.K., with the exception that an extension provision is not always inserted in Danish BITs.[265] However, this does not mean that the contracting parties cannot agree to a relevant territorial extension absent such provision. It merely indicates that Danish treaty practice is not as coherent as that of the UK. Likewise, the China-Denmark BIT of 1985 does not contain a territorial extension provision, but nevertheless excludes Greenland and the Faroe islands from its application.[266]

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262. Agreement Concerning the Promotion and Reciprocal Protection of Investments, China-U.K., art. 1(1)(d), May 15, 1986, http://investmentpolicyhub.unctad.org/Download/TreatyFile/793 (emphasis added).

263. *See e.g.*, Agreement Concerning the Promotion and Reciprocal Protection of Investments, Alg.-Den., art. 1(4), Jan. 25, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/43 [hereinafter Algeria-Denmark BIT]; Agreement Concerning the Promotion and Reciprocal Protection of Investments, Arg.-Den., art. 1(6), Nov. 6, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/84 [hereinafter Argentina-Denmark BIT].

264. *See e.g.*, Agreement on the Promotion and Protection of Investments, Bos. & Herz.-Den., art. 13, Mar. 24, 2004, http://investmentpolicyhub.unctad.org/Download/TreatyFile/468; Agreement Concerning the Promotion and Reciprocal Protection of Investments, Croat.-Den., art. 13, July 5, 2000, http://investmentpolicyhub.unctad.org/Download/TreatyFile/854; Algeria-Denmark BIT, *supra* note 263, art. 14; Agreement on the Promotion and Reciprocal Protection of Investments, Den.-Russ., art. 11(2), Nov. 4, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1028; Agreement Concerning the Promotion and Reciprocal Protection of Investments, Bulg.-Den., art. 14, Apr. 14, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/524; Argentina-Denmark BIT, *supra* note 263, art. 14.

265. *See* Agreement for the Promotion and Reciprocal Protection of Investments, Den.-Kuwait, art. 1(8), June 1, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1012; Agreement for the Mutual Promotion and Protection of Investments, Den.-Malay., art. 1(5), Jan. 6, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1017; Agreement Concerning the Reciprocal Promotion and Protection of Investments, Den.-Turk., art. 1(4), Feb. 7, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1032; Agreement Concerning the Encouragement and the Reciprocal Protection of Investments, Den.-S. Kor., art. 1(5), June 2, 1988, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1011; Agreement for the Encouragement and the Reciprocal Protection of Investments, Den.-Hung., art. 1(4), May 2, 1988, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1008; Agreement Concerning the Encouragement and the Reciprocal Protection of Investments, Den.-Sri Lanka, art. 1(5-6), June 4, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1030; China-Denmark BIT, *supra* note 31, art. 1(5), http://investmentpolicyhub.unctad.org/Download/TreatyFile/727; Agreement on the Mutual Promotion and Guarantee of Investments, Den.-Rom., arts. 3, 9(3), Nov. 12, 1980, 1257 U.N.T.S. 138; Agreement Concerning the Encouragement and the Reciprocal Protection of Investments (with Protocol), Den.-Indon., arts. II, IX, Jan. 30, 1968 720 U.N.T.S. 223.

266. *See* China-Denmark BIT, *supra* note 31, art. 1(5).

However, no reference is made to Hong Kong and Macao, although, again, the presumption is that China was aware of Denmark's territorial extension practice.

Similar to the U.K. and Denmark, the Netherlands consistently includes a territorial application provision that in principle either extends or carves out the non-European part of the Kingdom, i.e. the ex-Netherlands Antilles.[267] Again, the presumption is against China since it had also concluded a BIT with the Netherlands.[268] Furthermore, the US had only recently started to explicitly define the territorial scope of its BITs, although the issue remains important for such territories as American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands.[269] According to a new provision, also found in U.S. FTAs that contain investment promotion and protection provisions, such overseas territories should generally be regarded as falling within the territorial ambit of U.S. IIAs.[270]

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267. *See, e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments, Arm.-Neth., art. 13, June 10, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/140; China-Netherlands BIT, *supra* note 17, art. 14; Agreement on Reciprocal Encouragement and Protection of Investments, Neth.-Turk., art. 11, March 27, 1986, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090 (extending its application only to Aruba); Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Yemen, art. 12, Mar. 18, 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2097 (extending its application only to the part of the Kingdom in Europe). Prior to the independence of Surinam, relevant extensions to this territory also had been made. *See Agreement on Economic Co-operation,* Malay.-Neth., art. 16, June 15, 1971, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1959 (extending its application to Surinam and the Netherlands Antilles).

268. *See* China-Netherlands BIT, *supra* note 17, art. 14.

269. *See* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 169-72 (2009); *see, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Croat.-U.S., art. 1(1), July 13, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/897; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. 1(f), Nov. 14, 1991), http://investmentpolicyhub.unctad.org/Download/TreatyFile/127.

> '[T]erritory' means the territory of the United States or the Argentine Republic, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

Id. See also Lee M. Caplan & Jeremy K. Sharpe, *United States*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 771-72 (Chester Brown ed., 2013).

270. *See* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 1, Nov. 4, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2380 (defining territory as "(i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico; (ii) the foreign trade zones located in the United States and Puerto Rico; and (iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural

On the contrary, Spanish and French BITs do not include any reference whatsoever to their territorial application to overseas territories. While the case could be less ambiguous with respect to the Canary Islands that constitute an autonomous community of Spain or the French overseas departments such as Guiana, Guadeloupe, and Martinique, the same might not be true for the French overseas collectivities of New Caledonia and French Polynesia. Lastly, Portugal's BITs generally remain silent with regard to their application to Madeira and the Azores,[271] except for one of

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resources"); *see also* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., art. 1, Feb. 19, 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241; S. Korea-U.S. Free Trade Agreement, art. 1.4, June 30, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; Colom.-U.S. Free Trade Agreement, Annex 1.3, Nov. 22, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text; Peru-U.S. Free Trade Agreement, Annex 1.3, Apr. 12, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; Central America-Dom. Rep.-U.S. Free Trade Agreement, Annex 2.1, Aug. 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text; Morocco-U.S. Free Trade Agreement, art. 1.3, June 15, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text; Australia-U.S. Free Trade Agreement, Annex 1-A, May 18, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; Chile-U.S. Free Trade Agreement, Annex 2.1, June 6, 2003, https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text; Singapore-U.S. Free Trade Agreement, Annex 1A(2), May 6, 2003, https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.

271. *See, e.g.*, Accord Entre la Republique Du Congo Et La Republique Portugaise Relatif a la Promotion et la Protection Reciproques des Investissements, Congo-Port., art. 3(e) June 4, 2010, http://investmentpolicyhub.unctad.org/Download/TreatyFile/815; Acordo Entre a Republica Portuguesa e o Governo da Republica Democratica e Popular da Argelia Sobre a Pormocao e a Proteccao Reciproca de Investimentos, Alg.-Port., art. 1(4), Sept. 15, 2004, http://investmentpolicyhub.unctad.org/Download/TreatyFile/56; Acordo Entre a Republica Portuguesa e a Grande Jamahiriya Arabe Libia Popular SocialistaSobre a Promocao e a Proteccao Reciprocas de Investimentos, Libya-Port., art. 1(3), June 14, 2003, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1912; Agreement on the Promotion and Protection of Investments, Phil.-Port., art. 1, Nov. 8, 2002, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2170; Agreement on the Mutual Promotion and Protection of Investments, Bosn. & Herz.-Port., art. 1(4), Mar. 13, 2002, http://investmentpolicyhub.unctad.org/Download/TreatyFile/485; Accord Entre la Republique Portugaise et la Republique Gabonaise Relatif a la Promotion et la Protection Reciproques des Investissements, Gabon-Port., art. 1(4), Dec. 17, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1304; Agreement on the Mutual Promotion and Protection of Investments, India-Port., art. 1(4), June 28, 2000, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1588; Acuerdo Entre la Republica Portuguesa y la Republica del Paraguay Sobre Promocion y Proteccion Reci Proca de Inversiones, Para.-Port., art. 1(4), Nov. 24, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2149; Agreement on the Reciprocol Promotion and Protection of Investments, Mex.-Port., art. 1(4), Nov. 11, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2000; Agreement on the Mutual Promotion and Protection of Investments, Egypt-Port., art. 1(4), Apr. 28, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1102; Agreement on the Mutual Promotion and Protection of Investments, Alb.-Port., art. 1(4), Sept. 11, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/27; Acuerdo Entre la Republica Portuguesa y la Republica de Cuba Sobre la Promocion y Proteccion Reciprocas de Inversiones, Cuba-Port., art. 1(4), July 8, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/912; Agreement on the Mutual Promotion and Protection of Investments, Lith.-Port., art. 1(4), May 27, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1919; Acordo En-

its BITs, which explicitly refers to Madeira and the Azores.[272] This could potentially create concerns, similar to those expressed with regard to the

tre a Republica Portuguesa e a Repbulica de Angola Sobre a Promocao e a Proteccao Reciproca de Investimentos, Angl.-Port., art. 1(4), Oct. 24, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2974; Agreement on the Mutual Promotion and Protection of Investments, Pak.-Port., art. 1(4), Oct. 11, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2124; Acordo Entre a Republica Portuguesa e a Republica de Mocambique Sobre a Promocao e a Proteccao Reciproca de Investimentos, Mozam.-Port., art. 1(4), May 28, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2056; Agreement on the Mutual Promotion and Protection of Investments, Lat.-Port., art. 1, Sept. 27, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1875; Agreement on the Promotion and Reciprocal Protection of Investments, Croat.-Port., art. 1(4), May 9, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/882; Agreement on the Mutual Promotion and Protection of Investments, S. Kor.-Port., art. 1(4), May 3, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1823; Acuerdo Entre la Republica de Chile y la Republica Portuguesa Sobre la Promocion y Proteccion Reciproca de Inversiones, Chile-Port., art. 1(3), Apr. 28, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/703; Acuerdo Entre la Republica del Peru y la Republica Portuguesa Sobre Promocion y Proteccion Reciproca de Inversiones, Peru-Port., art. 1(5), Nov. 22, 1994; Acordo Entre a Republica Portuguesa e a Republica Argentina Sobre a Promocao e a Proteccao Reciproca de Investimentos, Arg.-Port., art. 1(5), Oct. 6, 1994; Acordo Entre o Governo da Republica Portugues e o Governo da Federacao da Russia Sobre a Promocao e Proteccao Reciproca de Investimentos, Port.-Russ., art. 1, Nov. 21, 1994; Acordo Entre a Republica Portuguesa e a Republica Argentina Sobre a Promocao e a Proteccao Reciproca de Investimentos, Arg.-Port., art. 1(5), Oct. 6, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/114; Acordo Para a Promocao e a Proteccao Reciproca de Investimentos Entre o Governo da Republica Portuguesa e o Governo da Republica Federativa do Brasil, Braz.-Port., art. 1(V), Feb. 9, 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/511; Agreement for the Promotion and Mutual Protection of Investments, Port.-Rom., art. 1, Nov. 17, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2192; Agreement for the Promotion and Mutual Protection of Investments, Bulg.-Port., art. 1(5), May 27, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/544; Acordo Entre o Governo da Republica Portuguesa e o Governo da Republica da Polonia Sobre a Promocao e Proteccao Mutuas de Investimentos, Pol.-Port., art. 1, May 11, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2181; Acordo Sobre Promocao e Proteccao de Investimentos Entre a Republica Portuguesa e a Republica da Guine-Bissau, Guinea-Bissau-Port., art. 2(6), June 24, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1502; Acordo Sobre Promocao e Proteccao de Investimentos Entre a Republica Portuguesa e a Republica de Cabo Verde, Cape Verde-Port., art. 2(6), Oct. 26, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/648; Accord Entre la Republique Portugaise et le Royaume du Maroc Concernant la Promotion et la Protection Reciproques des Investissements, Morocco-Port., art. 1, Oct. 18, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2984; Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik uber die Forderung und den gegenseitigen Schutz von Kapitalanlagen, Ger.-Port., art. 1(4), Sept. 16, 1980, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1394.

272. Agreement for the Mutual Promotion and Protection of Investments, Mauritius-Port., art. 1(4), Dec. 12, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1988.

> The term 'territory' means: (a) for the Portuguese Republic, the territory of the Portuguese Republic situated in the European Continent, the archipelagoes of Azores and Madeira, the respective [sic] territorial sea and any other zone in which, in accordance with the laws of Portugal and international law, the Portuguese Republic has its jurisdiction or sovereign rights with respect to the explora-

China-Russia BIT, since only one IIA expressly carves out Hong Kong and Macao from its application. However, the China-Portugal BIT of 1992, concluded well after the China-Portugal Joint Declaration of 1987, did not contain any reference to Macao (or Hong Kong) and, additionally, did not include a definition of "territory."[273] The Portugal-China BIT of 2005 that replaced the latter treaty also does not make any reference to Hong Kong and Macao, but nevertheless includes a definition of "territory."[274] Finally, the Portugal-Macao BIT of 2000 is neither supportive nor exclusive of the non-application of the Portugal-China BIT to Macao.[275]

2. Multilateral Treaties

Similar state practice is also encountered in the context of multilateral investment treaties. Given that the case of the ICSID Convention has already been discussed, this sub-section examines the ECT that is a sectoral multilateral investment treaty that contains both substantive and procedural provisions.[276] This treaty includes a definition on territory[277] but also a provision on territorial application providing that any state:

> may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depository, declare that the Treaty shall be binding upon it *with respect to all the territories* for the international relations of which it is responsible, or to one or more of them.[278]

This provision certainly does not outline what will happen if a state fails to provide this declaration. But the use of the verb "may" indicates that the parties to the ECT decided to depart from the default rule of Article 29 of

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> tion and exploitation of the natural resources of the sea bed and subsoil, and of the superjacent waters.

Id.

273. *See* Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Port., art. 1, Feb. 3, 1992, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3362.

274. *See* Agreement on the Encouragement and Reciprocal Protection of Investments, China-Port., art. 1(4), Dec. 9, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3363.

275. *See* Acordo Entre a Republica Portuguesa e a Regiao Administrativa Especial de Macau da Republica Popular da China Sobre a Promocao e Proteccao Reciproca de Investimentos, Mac.-Port., art. 1, May 17, 2000, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1931.

276. *See* Energy Charter Treaty, Dec. 17, 1994, art. 1(10), 34 ILM 373 (1995) [hereinafter ECT]. *See generally* CRINA BALTAG, THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR 9-13 (2012); SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 195-224 (Thomas Roe & Matthew Happold eds., 2011); THOMAS W. WÄLDE, THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 1-33 (1996).

277. *See* ECT, *supra* note 276, art. 1(10).

278. *Id.* art. 40(1) (emphasis added).

the VCLT, to the extent the default rule here appears to be the non-application to *all the territories* unless so declared.[279] In any case, it should be noted that contracting parties to the ECT that fall within the ambit of the above provision have made relevant territorial declarations. This includes Denmark, which made a relevant declaration for Greenland and the Faroe Islands,[280] and the U.K., which, upon ratification, extended the ECT to Jersey and the Isle of Man[281] and shortly thereafter to Guernsey.[282] Before the entry into force of the ECT, whereby it was applied provisionally,[283] the U.K. had also extended the provisional application to Gibraltar,[284] but whether the treaty still applies to this territory is not entirely clear.[285] In any case, the issue remains similar to that of the territorial extension of BITs–that is, states that do not want certain IIAs to apply to their territory make relevant territorial declarations. In addition, the soundness of this presumption is evident when taking into account that, under the ECT, the parties have explicitly agreed to reverse the default rule under Article 29 of the VCLT. Nonetheless, states proceeded with relevant territorial declarations that mandate the importance and universal acceptance of customary international law, as is captured by Article 29 of the VCLT.

On balance, it can be established that treaty practice on the territorial application and extension of IIAs creates a presumption against China, in an alleged non-application of its IIAs to Hong Kong and Macao.

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279. *Cf.* VCLT, *supra* note 22, art. 29.

280. *See* Final Act of the European Energy Charter Conference, Declaration 6(6), *opened for signature* Dec. 17, 1994.

281. *See* Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, 78 UK TREATY SERIES (2000) at 72 (U.K. ratified the ECT on Dec. 16, 1997 and the ECT entered into force on Apr. 16, 1998.

282. *See* ECT, Declaration of Aug. 11, 1998, http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=3609 (last visited May 11, 2015).

283. ECT, *supra* note 276, art. 45(1-3). *See generally* Ulrich Klaus, *The Gate to Arbitration – The Yukos Case the Provisional Application of the Energy Charter Treaty in the Russian Federation*, 2(3) TRANSNA'L DISP. MGMT. (2005); Peter C. Laidlaw, Comment, *Provisional Application of the Energy Charter as Seen in the Yukos Dispute*, 52 SANTA CLARA L. REV. 655 (2012); Alex M. Niebruegge, *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, 8 CHI. J. INT'L L. 355, 357 (2007).

284. *See* ECT, Declaration of Dec. 17, 1994, http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=3609 (last visited May 11, 2015).

285. *See* Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, ¶ 535 (Nov. 30, 2009); Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 536 (Nov. 30, 2009); Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, ¶ 521 (Nov. 30, 2009); Petrobart Limited v. The Kyrgyz Republic (U.K.-Gibraltar), SCC Case No. 126/2003, Arbitral Award, at VIII ¶¶ 2-3 (Mar. 29, 2005), and Supplementary Opinion of Adnan Amkhan, ¶¶ 5-18 (Dec. 14, 2004); Stati v. Kazakhstan, SCC Case No. 116/2010, Award, ¶¶ 733-36, 746 (Dec. 19, 2013).

B. *Guidance from Investor-State Cases under Pre-Succession or Secession IIAs*

The discussion on the VCST in Part III revealed that this treaty draws a tripartite distinction, among: *first*, newly independent states, i.e. states emerging from the wave of decolonization; *second*, cases of state dissolution and secession not falling in the first category; and *third*, cases of succession in part of territory. For newly independent states, the *tabula rasa* approach is enshrined as the default option, while for other state dissolution and secession cases the default approach is that of the automatic application of pre-succession or secession IIAs. Lastly, for succession in part of a territory, as occurred in the cases of Hong Kong and Macao, the default option is the automatic application of the successor state's IIAs. As already noted, the above three cases are distinct under the VCST. Nevertheless, this article finds that due to the similar approach adopted for cases of state dissolution and secession and succession in part of territory, it would be constructive to analogize the former cases with the latter ones.[286] For this reason, the following lines examine the application of BITs concluded by Czechoslovakia, the FRY and the USSR in order to seek relevant guidance for the issue under examination.[287]

1. Czechoslovakia

On January 1, 1993, Czechoslovakia was separated into the independent states of the Czech Republic and Slovakia.[288] At this stage, both states acceded to the VCST and also decided to apply its provisions retroactively.[289] In addition, apart from acceding to the VCST, the Czech Republic and Slovakia made a series of official declarations and notifications, including parliamentary and constitutional declarations expressing their will to adhere to the obligations undertaken by Czechoslovakia, in bilateral and multilateral treaties.[290] A series of Exchange of Notes also took place with parties that previously retained BITs with Czechoslovakia.[291]

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286. *See* VCST, *supra* note 23, arts. 15, 34.

287. For Kosovo and South Sudan, *see* Justin A. Fraterman, *Secession, State Succession and International Arbitration* (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313401; Alexandre Genest, *Sudan Bilateral Investment Treaties and South Sudan: Musings on State Succession to Bilateral Treaties in the Wake of Yugoslavia's Breakup*, PROVISIONAL TRADITIONAL DISP. MGMT. (Apr. 2014).

288. JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 402 (2007).

289. *See* Declarations of the Czech Republic and Slovakia, https://treaties.un.org/ (last visited May 20, 2015).

290. Gerhard Hafner & Elisabeth Kornfeind, *The Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist?*, 1 AUSTRIAN REV. INT'L & EUR. L. 1, 13 (1996); Dumberry, *supra* note 158, at 83, nn.54-60.

291. *See e.g.* Exchange of Notes between Austria and Slovakia (Aug. 4 and Nov. 25, 1994, entered into force on Jan. 1, 1995); Exchange of Letters between the Netherlands and the Czech Republic (Dec. 8, 1994), 27 TRACTATENBLAD VAN HET KONINKRIJ DER NEDERLANDEN (1995), Annex I, at 11; Exchange of Letters between the Netherlands and Slovakia

This practice generally seems to depart from the "automatic process" enshrined in Article 34 of the VCST and has led Patrick Dumberry note that:

> the very fact that such negotiation took place and that the continuation of bilateral treaties was agreed by the parties in exchanges of diplomatic notes suggest that the principle of automatic succession was actually not adopted by these States in their practice. [. . .] While it is true that the parties seem to have been guided by a general presumption of continuity whereby bilateral treaties should remain in force, they (generally) did not believe that such continuation was automatic.[292]

However, this approach has not created problems in relevant arbitral practice, since the binding force of pre-dissolution BITs were not challenged in any of the cases filed against the Czech Republic or Slovakia under BITs concluded by Czechoslovakia.[293] Meanwhile, the Czech Republic and Slovakia have either continued to apply BITs concluded by Czechoslovakia[294] or have entered into new BITs, thus replacing older ones concluded

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(Dec. 9, 1994), 27 TRACTATENBLAD VAN HET KONINKRIJ DER NEDERLANDEN (1995), Annex I, at 12.

292. Dumberry, *supra* note 158, at 84.

293. *See* Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic), PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 48, Oct. 26, 2010, http://www.italaw.com/sites/default/files/case-documents/ita0309.pdf; Achmea B.V. v. The Slovak Republic, PCA Case No. 2013-12 (Number 2), Award on Jurisdiction and Admissibility, ¶ 1, May 20, 2014, http://www.italaw.com/sites/default/files/case-documents/italaw3207.pdf; Alps Finance and Trade AG v. The Slovak Republic, Award, ¶ 1, Mar. 5, 2011, http://www.italaw.com/sites/default/files/case-documents/ita0027.pdf; Austrian Airlines v. The Slovak Republic, Final Award, ¶ 8, Oct. 9, 2009, http://www.italaw.com/sites/default/files/case-documents/ita0048_0.pdf; CME Czech Republic B.V. v. The Czech Republic, Partial Award, ¶ 3, Sept. 13, 2001, http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf; Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004, Partial Award, ¶ 153 (Mar. 27, 2007, http://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf; European American Investment Bank AG (EURAM) v. Slovak Republic, Award on Jurisdiction, ¶ 40, Oct. 22, 2012, http://www.italaw.com/sites/default/files/case-documents/italaw4226.pdf; Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award, ¶ 3 (Nov. 12, 2010); HICEE B.V. v. The Slovak Republic, PCA Case No. 2009-11, Partial Award, ¶ 3, May 23, 2011, http://www.italaw.com/sites/default/files/case-documents/ita0404_0.pdf; Oostergetel v. The Slovak Republic, ¶ 56, Apr. 30, 2010; Ronald S. Lauder v. The Czech Republic, Final Award, ¶ 2, Sep. 3, 2001; Saluka Investments B.V. v. The Czech Republic, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶ 2, May 7, 2004; William Nagel v. The Czech Republic, SCC Case No. 049/2002, Award, ¶ 266, Sept. 9, 2003.

294. *See generally* Agreement for the Promotion and Reciprocal Protection of Investments, Czechoslovakia-Gr., June 3, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/936; Agreement on the Mutual Promotion and Protection of Investments, Czechoslovakia-Nor., May 21, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/970; Agreement on Encouragement and Reciprocal Protection of Investments, Czechoslovakia-Neth., Apr. 29, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/968; Agreement Concerning the Protection and Reciprocal Encouragement of Investments, Czechoslovakia-Spain, Dec. 12, 1990, 1669 U.N.T.S. 276; Agreement on the Promotion and Reciprocal Protection of Investments (with Protocol), Czechoslovakia-Swed., Nov. 13, 1990, 1692 U.N.T.S. 461; Agreement for the Promotion and Protection of Investments, Czechoslo-

by Czechoslovakia.[295] All the above indicates that, for those treaties concluded by Czechoslovakia, a smooth transition took place, despite departing from the default "automatic" approach of Article 34 of the VCST.

2. The Federal Republic of Yugoslavia (FRY)

The FRY was a state that emerged after the dissolution of the Former Socialist Federal Republic of Yugoslavia (SFRY) in 1992.[296] In 2003, the FRY was reconstituted as the State Union of Serbia and Montenegro (SUSM).[297] Eventually, this entity ceased to exist in 2006, when Montenegro declared its independence, and Serbia continued its legal personality.[298] This has also been affirmed in the *Mytilineos* case that was filed

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vakia-Fin., Nov. 6, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/933; Agreement Concerning the Promotion and Protection of Investments, Austria-Czechoslovakia, Oct. 15, 1990, 1653 U.N.T.S. 27; Agreement on the Promotion and Reciprocal Protection of Investments, Czechoslovakia-Switz., Oct. 5, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/985; Dohoda medzi Ceskou a Slovenskou Federativnou Republikou a Spolkovou republikou Nemecko o podpore a vzajomenej ochrane investicii, Czechoslovakia-Ger., Oct. 2, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3015; Accorde Entre la Republique francaise et la Republique Federative Tcheque et Slovaque sur l'encouragement et la Protection Reciproques des Investissements, Czechoslovakia-Fr., Sept. 13, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/934; Agreement for the Promotion and Protection of Investments, Czechoslovakia-U.K., July 10, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/993; Agreement for the Promotion and Reciprocal Protection of Investments, Czechoslovakia-Den., Mar. 6, 1990 http://investmentpolicyhub.unctad.org/Download/TreatyFile/929 (terminated Nov. 18, 2009); Agreement Concerning the Reciprocal Promotion and Protection of Investments, Belg.-Czechoslovakia-Lux., Apr. 24, 1989, 1957 U.N.T.S. 482.

295. *See generally* Agreement for the Promotion and Protection of Investments, Can.-Slovk., July 20, 2010, http://investmentpolicyhub.unctad.org/Download/TreatyFile/634; Agreement for the Promotion and Protection of Investments, Can.-Czech., May 6, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/606; Agreement on the Promotion and Protection of Investments, China-Czech., Dec. 8, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/725; Agreement for the Promotion and Protection of Investments, Can.-Slovk., Feb. 3, 1997, http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/800 (terminated Jan. 30, 2001); Agreement on the Reciprocal Promotion and Protection of Investments, Austl.-Czech., Sept. 30, 1993, http://investmentpolicyhub.unctad.org/Download/TreatyFile/149; Agreement for the Promotion and Protection of Investments, Can.-Czechoslovakia, Nov. 15, 1990, http://investmentpolicyhub.unctad.org/Download/TreatyFile/607 (terminated Mar. 9, 1992); China-Czechoslovakia BIT, *supra* note 37; Agreement on the Reciprocal Promotion and Protection of Investments, Austl.-Czechoslovakia, July 29, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/150.

296. *See* CRAWFORD, *supra* note 288, at 187-89; *see also* Declaration on a New Yugoslavia, Adopted by the Participants on the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, Apr. 27, 1992, UN Doc. S/23877.

297. *See* Agreement on Principles of Relations Between Serbia and Montenegro Within the Framework of a Union of States (Mar. 14, 2002).

298. CRAWFORD, *supra* note 288, at 712.

under the Greece-FRY BIT[299] against both the SUSM and Serbia.[300] Interestingly enough, this claim was submitted in 2004, but by the time the award was rendered, Montenegro had declared its independence and Serbia had undertaken to continue the legal personality of the SUSM. However, the tribunal, adhering to the *Arrest Warrant* case,[301] found that the critical date was that of the institution of arbitration proceedings, i.e. April 8, 2005.[302] At that stage, the SUSM still existed. Therefore, adopting the above approach, the tribunal denied jurisdiction on the part of Serbia, opining that:

> Since by the treaty's plain wording Serbia, as a constituent part of the Federal Republic of Yugoslavia (Serbia and Montenegro), is not a Contracting Party, it cannot be made the subject of arbitration proceedings under the BIT.[303]

However, this case did not deal with the application of pre-succession or secession IIAs against successor or seceding states.[304] This issue is of vital importance for the application of BITs concluded by the FRY or the SUSM to Montenegro. In this regard, both Serbia and Montenegro ratified the VCST but did not apply it retroactively as the Czech Republic and Slovakia chose to.[305] Nevertheless, while Article 34 of the VCST adopts the approach of automatic continuity, as applicable to Montenegro's secession, the treaty practice of Serbia and Montenegro departed from this approach, without however being always entirely clear.

For Serbia, by continuing the legal personality of the SUSM, explicitly accepted the binding character of BITs concluded by the FRY or the SUSM, but made no representations for the part of Montenegro. For example, an Exchange of Notes between the U.K. and the Republic of Serbia has amended the U.K.-FRY BIT to refer to the Serbia alone but nevertheless does not provide any guidance for its application to Montenegro.[306]

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299. *See generally* Agreement on the Reciprocal Promotion and Protection of Investments, Gr.-Serb., June 25, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1478.

300. Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia, Partial Award on Jurisdiction, ¶ 158 (Sept. 8, 2006).

301. *Id.* ¶ 159 (referring to Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Feb. 14, 2002, ICJ REP. 1, ¶ 26 (2002)).

302. *Mytilineos v. SUSM & Serbia*, ¶ 163.

303. *Id.* ¶ 172.

304. The case will most likely be dealt with in the second case filed by Mytilineos against Serbia alone. *See* Mytilineos Holdings SA v. Republic of Serbia, Notice of Arbitration, Sept. 18, 2013.

305. *See* UNITED NATIONS TREATY COLLECTION, Vienna Convention on Succession of States in Respect of Treaties, (1978), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=EN (last accessed on May 20, 2015).

306. *See* Agreement for the Reciprocal Promotion and Protection of Investment (with the Exchange of Notes), Serb.-U.K., May 13, 2010.

Montenegro is currently facing two investment claims, one under the Cyprus-Serbia and Montenegro BIT of 2005 and another under the Netherlands-FRY BIT of 2002.[307] In connection to these proceedings, it is crucial to note that Montenegro has accepted the application of the Cyprus-Serbia and Montenegro BITs through an Exchange of Notes with Cyprus.[308] The same has occurred for the Netherlands-FRY BIT.[309] While this may dispel any doubts regarding the application of the above treaties to Montenegro, it still remains the case that such treaty practice departs from the otherwise automatic process of Article 34 of the VCST. Thus, similar to the case of Czechoslovakia, Montenegro's practice opts for an explicit agreement, detached from the approach adopted in the VCST. Such approach can also prove of crucial importance for a claim currently filed against Kosovo under the Germany-FRY BIT.[310]

3. The Union of Soviet Socialist Republics (USSR)

At the outset, it should be noted that, with the dissolution of the USSR on December 26, 1991, the USSR ceased to exist, and the Commonwealth of Independent States (CIS) was established.[311] However, while both the Declaration of Alma Ata and the Minsk Agreement provide that the USSR ceases to exist,[312] the international community accepted that Russia would be the successor state of the USSR.[313] Subsequent investor-state tribunals dealing with claims against Russia

307. CEAC Holdings Limited v. Montenegro, ICSID Case No. ARB/14/8 (registered on Mar. 20, 2014); MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8 (registered on Dec. 6, 2012).

308. Exchange of Notes between the Government of the Republic of Cyprus and the Government of the Republic of Montenegro on the application of the Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, July 21, 2005 (Oct. 3 and 15, 2008, entered into force on Nov. 5, 2008), COG S.VII 4036, Nov. 30, 2005, at 573.

309. *See* Exchange of Notes between the Kingdom of the Netherlands and the Republic of Montenegro Regarding the Continuation of Bilateral Treaties (Nov. 15, 2006 and Jan. 18, 2007), 51 TRACTATENBLAD VAN HET KONINKRIJ DER NEDERLANDEN (2007), Nr. I, at 8.

310. *ACP Axos Capital GmbH v. Republic of Kosovo.*

311. Declaration of Alma Ata, Dec. 21, 1991, UN Doc. A/46/60, 31 ILM 147 (1992) [hereinafter Declaration of Alma Ata]; The Agreement Establishing the Commonwealth of Independent States, Dec. 13, 1991, UN Doc. A/46/771, 31 ILM 138 (1992) [hereinafter Minsk Agreement].

312. *See* Minsk Agreement, *supra* note 311 ("[T]he Union of Soviet Socialist Republics as a subject of international law and as a geopolitical reality no longer exists."); Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nation*, 3 EUROPEAN J. INT'L L. 354, 355 (1992) ("With the formation of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist.").

313. Letter of Russia's President Yeltsin to the United Nations Secretary-General, Dec. 24, 1991, 31 ILM 138 (1992); Decision by the Council of Heads of State of the Commonwealth of Independent States, Dec. 21, 1991, 31 ILM 151 (1992); *see also* Tarja Langstrom, *The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect of Treaties*, *in* STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 723, 723-79 (Pierre Michel Eisemann & Martti Koskenniemi eds., 2000); Hafner & Kornfeind, *supra* note 290, at 11-12; Paul R. Williams, *The Treaty Obligations of the Successor*

under USSR BITs have also confirmed this.[314] However, the question that arises is whether BITs concluded by the USSR could also apply to other former Soviet Socialist Republics. This is of particular importance when taking into account that Kazakhstan is currently facing a claim by World Wide Minerals under the Canada-USSR BIT.[315] In this regard, the VCST would again seem to suggest that, in principle, such application should be automatic. However, this can prove extremely controversial. The claim of World Wide Minerals against Kazakhstan could probably find support in the Alma Ata Declaration, which in relevant space provides: "Member states of the commonwealth guarantee, in accordance with their constitutional procedures, the fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R."[316] Additionally, the preamble of a trade agreement between Kazakhstan and Canada provides that the parties are *referring* to "the Agreement for the Promotion and Protection of Investments of November 20, 1989."[317] In any however case, the above issue does not make it entirely clear that USSR BITs will also apply to other former Soviet Socialist Republics "automatically."

As a general comment, this article finds that, in practice, there appears a huge divide between what is otherwise enshrined in the VCST and what states decide to do. Thus, treaty practice on the territorial application of pre-succession or secession IIAs should generally be found relevant to cases of succession to territory, to the extent the automaticity of the VCST is not followed in actual circumstances. Nevertheless, the above findings refer to cases of state dissolution or secession that should not be confused with cases of succession in part of territory. Perhaps more decisive is the examination of the Exchange of Letters discussed below.

States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?, 23 DENVER J. INT. LAW POL. 1, 3 (1994).

314. *See* Berschader v. The Russian Federation, SCC Case No. 080/2004, Award, ¶ 161 (Apr. 21, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0080_0.pdf; Renta 4 S.V.S.A v. The Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, ¶ 4 (Mar. 20, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0714.pdf; RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 31 (Oct. 7, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0719.pdf; Sedelmayer v. The Russian Federation, SCC, Award, 17-45 (July 7, 1998), http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf.

315. *See World Wide Minerals v. Kazakhstan*, *supra* note 27; *see also* Agreement on the Promotion and Reciprocal Protection of Investments, Can.-U.S.S.R., Nov. 20, 1989, http://investmentpolicyhub.unctad.org/Download/TreatyFile/632; Luke Eric Peterson, *After Failure of Claim Under Kazakh Statute, Canadian Miner Hopes that USSR-Canada Investment Treaty Permits Arbitration with Kazakhstan*, Dec. 18, 2013, http://www.iareporter.com/articles/20131218 (last visited May 25, 2015).

316. *See* Declaration of Alma Ata, *supra* note 312.

317. Trade Agreement, Can.-Kaz., E100670 - CTS 1997 No. 19, Mar. 29, 1995, http://www.treaty-accord.gc.ca/text-texte.aspx?id=100670.

C. *Between Treaty Interpretation and Subsequent Agreements or What the SGHC Missed*

It was earlier shown that the SGHC found that the Exchange of Letters between the Laotian Ministry of Foreign Affairs and China's Embassy in Vientiane constituted a subsequent agreement under Article 31 of the VCLT.[318] However, in referring to the temporal effects of this Exchange, the SGHC noted that it did not have a retroactive effect, and was merely "an affirmation of the common understanding,"[319] "a confirmation of the status quo rather than a dramatic upheaval of the current expectations held by states that have treaties with PRC."[320] This article finds that the justification of the SGHC is not adequate in this regard since, as already indicated, it fails to consider the temporal effect of such an Exchange of Letters. For, if the latter is a subsequent modification rather than a subsequent interpretation, it will not have a retroactive effect, as there were no stipulations to the contrary.[321]

However, even accepting that the Exchange of Letters was a subsequent interpretation, thus having *ipso facto* retroactive effect, it would not necessarily mean that this Exchange could affect pending and, as in the present case, concluded investor-state arbitrations. This can be explained by reference to the mechanism of investor-state arbitration, whereby an arbitration clause inserted in IIAs acts as an offer to consent to arbitrate that becomes perfected once accepted by the foreign investor.[322] In addition, once consent is perfected, neither the investor nor the respondent state can unilaterally withdraw it.[323] However, what is disputed is whether the investor's home state and the respondent state could agree to terminate pending or even concluded investor-state claims.[324] This then argua-

318. Government of the Lao People's Democratic Republic v. Sanum Investments Ltd., Judgment, High Court of the Republic of Singapore [SGHC] ¶¶ 69-70, 74-78 (Jan. 20, 2015), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-lao-people-rsquo-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15.

319. *Id.* ¶ 77.

320. *Id.* ¶ 76.

321. *See* Alvarez, *supra* note 119, at 217-18.

322. *See* Dolzer & Schreuer, *supra* note 9, at 254-64; Schreuer, *supra* note 189, at 211-14; Andrea Marco Steingruber, Consent in International Arbitration 202-03 (2012); Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, *in* The Backlash Against Investment Arbitration: Perceptions and Reality 353-68 (Michael Waibel et al. eds., 2010); Sadie Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration*, 10 Wash. U. Global Stud. L. Rev. 419, 424 (2011).

323. *See, e.g.*, ICSID Convention, *supra* note 14, art. 25(1); Report of the Executive Directors to the Convention, ¶ 23; *see also* James D. Fry & Odysseas G. Repousis, *Intertemporality and International Investment Arbitration: Protecting the Jurisdiction of Established Tribunals*, 31 Arb. Int'l 213, 233-57 (2015).

324. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 90-92 (2013); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 Am. J. Int'l L. 179 (2010); Anthea Roberts, *State-To-State Investment Treaty Arbitration: A Hybrid Theory of*

bly leads to the discussion of the nature of investor rights and the powers and limits of the contacting states to affect these rights.[325] Regardless, it is submitted that a subsequent modification as well as interpretation should generally not affect pending cases or even cases that have already been concluded, such as *Sanum*.[326]

Furthermore, a closer look at the SGHC's decision reveals that there also exists another aspect that is noteworthy and to a certain degree departs from the discussion on the nature of investor rights. This has to do with the approach of the SGHC. This approach neither distinguished between the temporal effects of a subsequent modification and interpretation nor discussed the issue of perfected consent, but it nevertheless employed the terms "affirmation" and "confirmation."[327] Reflecting upon this wording and the passage quoted above, it appears that the SGHC was of the view that the Exchange of Letters was a mere affirmation, "a confirmation of the status quo."[328] Thus, according to the SGHC, the status quo was that the China-Laos BIT never applied to Macao.

In connection to this issue, it is noteworthy to refer to the position adopted by Mahnoush H. Arsanjani and Professor W. Michael Reisman in connection to the preparatory work of a treaty in investment arbitration.[329] Certainly, the *travaux préparatoires* constitute a supplementary means of interpretation employed in order to confirm the meaning resulting from the application of Article 31 of the VCLT or when interpretation according to the latter Article "leaves the meaning ambiguous or obscure"

Interdependent Rights and Shared Interpretive Authority, 55 HARVARD INT'L L. J. 1 (2014); Tania Voon, Andrew Mitchell & James Munro, *Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties*, 29 ICSID REV. 451 (2014).

325. For a discussion of this issue, *see generally* Anastasios Gourgourinis, *Investors' Rights "qua" Human Rights?: Revisiting the "Direct"/"Derivative" Rights Debate*, *in* THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 155, 155-78 (Malgosia Fitzmaurice & Panos Merkouris eds., 2013); Francisco González de Cossío, *Investment Protection Rights: Substantive or Procedural?*, 26 ICSID REV. 107, 110-22 (2011); Bart L. Smit Duijzentkunst, *Treaty Rights as Tradable Assets: Can Investors Waive Investment Treaty Protection?*, 25 ICSID REV. 409, 412-19 (2010); Martin Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT. Y.B. INT'L L. 264, 268 (2008).

326. *See generally* Fry & Repousis, *supra* note 324, at 233-254; *see also* Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 31 BERKELEY J. INT'L L. 34, 76 (2013) ("States should still be permitted to agree, through their subsequent conduct, to an interpretation of treaty terms where third party rights are at issue; however, they should be precluded from doing so once a third party has relied on an interpretation that had been accepted previously.").

327. Government of the Lao People's Democratic Republic v. Sanum Investments Ltd., Judgment, High Court of the Republic of Singapore [SGHC] ¶¶ 76-77 (Jan. 20, 2015), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-lao-people-rsquo-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15.

328. *Id.* ¶ 76.

329. *See* Mahnoush H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT'L L. 597 (2010).

or leads "to a result which is manifestly absurd or unreasonable."[330] However, the above authors discuss a recent decision wherein it was stated that:

> [i]n any event, courts and tribunals interpreting treaties regularly review the *travaux preparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure.[331]

While the authors do not contest the veracity of this statement, they ask whether it is "appropriate to introduce 'intentions' of drafters that are not manifest in the agreement itself" when "the agreement is designed to induce reliance and good faith investment of values by third parties that took no part in its negotiation."[332] And they conclude their line of argument by further rhetorically asking:

> When treaties are designed to induce private parties that did not participate in the negotiations to rely upon their terms and to do specific things, fundamental principles of legality argue, even more, for fidelity to a method based on the text and on those post-text events that are available to the parties and are expressive of their agreement. When treaties are designed to influence the behavior of private entities -one thinks of the almost twenty-seven hundred bilateral investment treaties- will they achieve their purpose if those to whom they are directed believe that the rules of interpretation allow textual meanings to be challenged on the basis of internal documents that either are unavailable to them or, in the case of multilateral treaties, difficult to find?[333]

While the Exchange of Letters in the *Sanum* case is certainly not an internal document or a preparatory one, this article finds that the case discussed by Arsanjani and Reisman is very analogous. For if the contracting parties to an investment treaty could at any point challenge textual meanings by reference to their initial intent, this would arguably lead to the same inconsistency. Indeed, initial intent is, in itself, "internal" and premised on a certain understanding allegedly present at the time an investment treaty was negotiated and concluded.

At the same time, the reconstruction of such initial intent is fraught with difficulty, given that preparatory documents are either unavailable or unreachable to the investor, as is exactly the case with *Sanum*. This means that the investor has to determine the initial intent of the contracting par-

330. VCLT, *supra* note 22, art. 32.

331. Arsanjani & Reisman, *supra* note 330, at 597 (citing Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 57 (Apr. 16, 2009)).

332. Arsanjani & Reisman, *supra* note 330, at 602.

333. *Id.* at 604.

ties based on the plain text of the investment treaty. If the contracting parties decide to change the textual meanings of such treaty by reference to their alleged initial intent, this should not affect pending or concluded cases, as it directly goes against the predictability investment treaties should radiate, as well as the mechanism of perfected consent discussed above. These issues might seem subtle, but they are in fact crucial and merit discussion by the SGHC.

D. *A Note on Devolution*

In examining the legal nature of the China-Portugal Joint Declaration, the UNCITRAL tribunal found that this was a devolution treaty that had no binding effect on third parties such as Laos.[334] To underpin its reasoning, the tribunal referred to the relative effect of treaties and also expressed the view that an *inter partes* derogation from a customary international law rule, such as that enshrined in Article 15 of the VCST or 29 of the VCLT, cannot bind third parties, unless they so specifically consent to be bound by it.[335] Strikingly, the SGHC did not discuss the matter, although it was aware of the UNCITRAL tribunal's reasoning. This creates the need to further appraise the approach adopted by the UNCITRAL tribunal and to examine whether the SGHC's complete defiance of this resolution was justified.

At the outset, it should be noted that the matter of devolution treaties is dealt with in Article 8 of the VCST, which reads as follows:

> 1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States Parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.
>
> 2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention.[336]

In practice, devolution treaties are treaties designed to devolve (assign) obligations and rights of the predecessor state to the successor state, which obligations and rights stem from "treaties formerly applicable in respect of the territory concerned."[337] Such devolution treaties have gener-

334. Sanum Inv. Ltd. v. Lao People's Democratic Republic, PCA Case No. 2013-13, Award on Jurisdiction ¶¶ 258-59, 264-69 (Perm. Ct. Arb. 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf.

335. *Id.* ¶¶ 265-68.

336. VCST, *supra* note 23, art. 8. For the drafting history of Art. 8, *see* Szafarz, *Vienna Convention*, *supra* note 137, at 80-84.

337. VCST Commentary, *supra* note 142, art. 8, ¶ 1.

ally been used in connection with "newly independent states," to use the terminology of the VCST, i.e. between ex-colonial powers and states that emerged from the decolonization wave.[338] Therefore, what is apparent from Article 8 of the VCST is that devolution treaties do not *ipso facto* bind third parties, and regardless of their conclusion, issues of state succession with respect to treaties continue to be governed by the provisions of the VCST. As Renata Szafarz has eloquently put it,

> by attaching greater significance to devolution agreements and unilateral declarations than is the case in the Convention, one would, as a matter of fact, on the one hand, undermine the principle of *ipso jure* continuity of treaties as applied in the context of uniting and separation of States, and on the other hand, restrict the action of the so-called clean slate principle applicable in case of newly independent States.[339]

The same should arguably apply to the third distinct category of succession in respect of part of territory that is exactly the case with Hong Kong and Macao. In fact, Roda Mushkat has questioned the effect of the China-U.K. Joint Declaration on third parties as early as 1985.[340] In any case, what the VCST, its Commentary, state practice, and theory suggest is that devolution treaties do not bind third states unless they specifically agree to be bound by them.[341] Absent such express agreement, for third states, devolution treaties remain nothing more than *res inter alios acta*.[342]

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338. For the practice of the UK and France, *see generally* Okon Udokang, *Succession to Treaties in New States*, 8 CAN. Y.B. INT'L L. 123, 134-50 (1970).

339. Szafarz, *Vienna Convention*, *supra* note 137, at 82.

340. *See* Roda Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DENV. J. INT'L L. & POL'Y 171, 194 (1986). *See generally* Douglas W. Lee, *Hong Kong 1982-1984: Irredentism in the Chinese Practice of International Law*, 1 INT'L LEGAL PERSP. 3 (1988).

341. *See* VCST Commentary, *supra* note 142, art. 8, ¶¶ 5-6, 10, 18; D. J. Devine, *The Status of Rhodesia in International Law*, 1979 ACTA JURIDICA 321, 398-99 (1979); Thomas M. Franck, *Some Legal Problems of Becoming A New Nation*, 4 COLUM. J. TRANSNAT'L L. 13, 24-25 (1966); Hafner & Kornfeind, *supra* note 290, at 5; I. R. C. Kawaley, *How Useful Are Devolution Agreements? The Seychelles Experience*, 35 INT'L & COMP. L.Q. 717, 718-19 (1986); David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1. 39 (1987); N. S. Rembe, *The Vienna Convention on State Succession in Respect of Treaties: An African Perspective on its Applicability and Limitations*, 17 COMP. & INT'L L.J. S. AFR. 131, 134, 138 (1984); Rosalie Schaffer, *Succession To Treaties: South African Practice In The Light Of Current Developments In International Law*, 30 INT'L & COMP. L.Q. 593, 597, 599-601 (1981); Szafarz, *Succession*, *supra* note 137, at 130 ("[F]rom the time of the Vienna Conference it may be maintained that the following principles had gained the status of customary rules: the principle that devolution agreements do not prejudge the issue of succession to treaties (Art. 8)."); Szafarz, *Vienna Convention*, *supra* note 137, at 81-84; Udokang, *supra* note 338, at 136-39, 156; *see also* VCLT, *supra* note 22, art. 35 ("An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.").

342. *See* Udokang, *supra* note 338, at 137.

The Joint Declarations for Hong Kong and Macao certainly contain a devolution aspect to the extent that they novated the application of treaties concluded by the U.K. and Portugal to Hong Kong and Macao respectively on China's accession to these territories. While this devolution is somewhat different from those agreements "widely used by ex-British territories on attaining independence," there are no good reasons not to accept what has generally been stated above, namely that third parties will generally not be bound by devolution treaties unless otherwise agreed.[343] However, the crucial part in this discussion is not the application of U.K. and Portuguese treaties to third parties, but the application of China's treaties to Hong Kong and Macao. While traditional devolution treaties do not deal with these issues, since they mainly involve a predecessor state and a newly independent state, the Joint Declarations for Hong Kong and Macao deal with both the application of U.K. and Portuguese treaties (classic devolution aspect) and the application of Chinese treaties.

However, this does not suffice to alter the legal nature of the Joint Declarations as *res inter alios acta* that in principle do not bind third parties, such as Laos. This outcome is also supported by the Commentary to the VCST according to which the UNSG's practice with regard to multilateral treaties "begun by attributing largely automatic effects to devolution agreements" but has "evolved afterwards in the direction of regarding them rather as a general expression of intention"[344] and has also not attributed automatic effects to their publication in the UN Treaty Series.[345] The same is arguably applicable to bilateral treaties, such as the Joint Declarations for Hong Kong and Macao.[346]

The above analysis indicates that the legal nature and effect of the Joint Declarations is an issue that merited discussion and should not have been overlooked by the SGHC.

E. *Parallelism and Territoriality*

Finally, it has already been noted that the issue of parallelism is another factor that can potentially affect the territorial application of China's IIAs to Hong Kong and Macao. It was earlier shown that the tribunals in *Tza Yap Shum* and *Sanum* discussed the issue and expressed the view that the conclusion of BITs by Hong Kong and Macao does not necessarily preclude the application of Chinese IIAs since the former are also designed to cover non-Chinese investors.[347] On the other hand, while the SGHC did not find that Macao's capacity to enter into its own BITs auto-

343. Schaffer, *supra* note 341, at 597.

344. VCST Commentary, *supra* note 142, art. 8, ¶ 12.

345. *Id.* art. 8, ¶ 13.

346. For a different approach as the one adopted by the VCST Commentary, *see* Keith, *supra* note 151, at 540-41; Schaffer, *supra* note 341, at 599, 602.

347. Sanum Inv. Ltd. v. Lao People's Democratic Republic, PCA Case No. 2013-13, Award on Jurisdiction ¶ 290-95 (Perm. Ct. Arb. 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf; Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence ¶ 76 (June 19, 2009).

matically precludes the application of China's BITs it nevertheless found that parallelism "to a limited extent" tends to suggest so.[348] In light of these differing approaches, this section briefly summarizes parallelism in China's investment treaty practice in order to reveal that the approach of the SGHC is not supported by the facts.

Thus, by way of summary, with regard to China there exists parallelism in three specific cases. *First*, the FTAs, with Pakistan, Peru, New Zealand, Korea and Australia that include investment chapters with investor-state arbitration clauses exist in parallel with China's BITs with these countries.[349] *Second*, China's BITs with each of the ten ASEAN members exist in parallel with the China-ASEAN Agreement on Investment.[350] *Third*, the China-Japan-Korea Trilateral Investment Agreement exists in parallel with the China-Japan and China-Korea BITs as well as with the China-Korea FTA.[351] With regard to Hong Kong, parallelism exists between the EFTA-Hong Kong FTA and the Switzerland-Hong Kong BIT, but the former does not include an investor-state arbitration clause.[352]

Regarding the IIAs of China, Hong Kong and Macao, China has concluded BITs with each and every country with which these two SARs have entered into BITs.[353] In addition, the Hong Kong-New Zealand BIT can be examined in parallel with the China-New Zealand BIT and FTA,[354] and the Hong Kong-Japan and Hong Kong-Korea BITs, in parallel with the China-Japan BIT, the China-Korea BIT and FTA, but also the China-Japan-Korea Trilateral Investment Agreement.[355] In the same vein, the Thailand-Hong Kong BIT can be examined in parallel with the China-Thailand BIT and the China-ASEAN Agreement on Investment[356] and

348. Government of the Lao People's Democratic Republic v. Sanum Investments Ltd., Judgment, High Court of the Republic of Singapore [SGHC] ¶ 87 (Jan. 20, 2015), http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-lao-people-rsquo-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15.

349. *See* China-Australia FTA, *supra* note 60; China-Korea FTA, *supra* note 59; China-Peru FTA, *supra* note 55; China-New Zealand FTA, *supra* note 53; China-Pakistan FTA, *supra* note 52; China-Korea BIT, *supra* note 10; China-Peru BIT, *supra* note 16; China-Pakistan BIT, *supra* note 31; China-New Zealand BIT, *supra* note 31; China-Australia BIT, *supra* note 33.

350. *See* China-ASEAN Agreement on Investment, *supra* note 29.

351. *See* China-Korea FTA, *supra* note 59; China-Japan-Korea Trilateral Investment Agreement, *supra* note 87; China-Korea BIT, *supra* note 10; China-Japan BIT, *supra* note 31.

352. *See* EFTA-Hong Kong FTA, *supra* note 104; Hong Kong-Switzerland BIT, *supra* note 104.

353. *See supra* note 107.

354. China-New Zealand FTA, *supra* note 53; Hong Kong-New Zealand BIT *supra* note 104; China-New Zealand BIT, *supra* note 31.

355. China-Japan-Korea Trilateral Investment Agreement, *supra* note 87; China-Korea BIT, *supra* note 10; Korea-Hong Kong BIT, *supra* note 104; Hong Kong-Japan BIT, *supra* note 104; China-Japan BIT, *supra* note 31.

356. China-ASEAN Agreement on Investment, *supra* note 29; Hong Kong-Thailand BIT, *supra* note 104; China-Thailand BIT, *supra* note 31.

the EFTA-Hong Kong FTA with the Switzerland-Hong Kong BIT and the China-Iceland, China-Switzerland and China-Norway BITs.[357]

Therefore, what is the impact that the above parallelism can create in determining the application of China's IIAs to Hong Kong and Macao? The analysis of the "territorial" stipulations found in Hong Kong and Macao BITs do not appear to provide any conclusive evidence with regard to the application of China's IIAs. On the other hand, certain stipulations found in China's IIAs, could be interpreted in favor of their non-application to Hong Kong and Macao when examined in light of the above parallelism. For instance, that could be the case with the notes included in the China-Japan-Korea Trilateral Investment Agreement when read in conjunction with the texts of the China-Japan, China-Korea, Hong Kong-Japan, and Hong Kong-Korea BITs. Similarly, China's FTAs that include investment chapters, such as the China-Peru FTA that refers to China's "customs territory," could potentially impact the territorial scope of the China-Peru BIT.

In any case, parallelism should not be regarded as conclusive, but instead as another relevant element, bearing due regard to all other cases (the majority) in which a parallel investment treaty does not exist.[358] That is not to say that parallelism "tends to suggest" that China's IIAs do not apply to Macao, as the SGHC put it. On the contrary, it shows that China's treaty practice in many regards favors parallelism and does not seek to restrict it in any manner. Regardless, this pervasive parallelism should be approached with caution and should always be examined *in concreto* and on an *ad hoc* basis.

IMPLICATIONS AND PERSPECTIVES: A CONCLUSION

This article has examined the application of China's IIAs to Hong Kong and Macao having due regard to the rulings of the UNCITRAL tribunal and the SGHC in *Sanum*. In a nutshell, the examination of these rulings *vis-à-vis* a wide array of considerations reveals that the application of China's IIAs to Hong Kong and Macao is not settled, even after the decision of the SGHC. In summary, the following points can be made:

- A very small number of China's IIAs specifically carve out Hong Kong and Macao from their application.
- China's territory under WTO law is only relevant for those IIAs that specifically refer to China's "customs territory."
- The China-UK and China-Portugal Joint Declarations are bilateral (devolution) treaties that in principle do not bind third states.

357. *See* EFTA-Hong Kong FTA, *supra* note 104; China-Switzerland BIT, *supra* note 17; Hong Kong-Switzerland BIT, *supra* note 104; China-Iceland BIT, *supra* note 37; China-Norway BIT, *supra* note 31.

358. Another issue that deserves attention is that even though parallelism may be existent, the parallel IIAs might not provide guidance with regard to the notion of "territory." *See, e.g.*, Hong Kong-Thailand BIT, *supra* note 104; China-Thailand BIT, *supra* note 31.

- The Hong Kong and Macao Basic Laws belong to the sphere of China's internal laws.
- China's Notes to the UNSG in respect of Hong Kong and Macao can only provide guidance for those multilateral treaties the UNSG acts as Depositary and not for bilateral and multilateral investment treaties.
- The ICSID Convention applies to both Hong Kong and Macao.
- While China has entered into IIAs with states that have a coherent practice on territorial extensions, such as the UK, Netherlands and Denmark, it has consistently avoided adopting a similar practice.
- An analogy with the application of pre-succession or secession IIAs to cases of state dissolution and secession seems to suggest a divide between actual treaty practice and what is otherwise enshrined in the VCST. In this regard, this analogy can have an ambivalent effect.
- The Exchange of Letters between the Laotian Ministry of Foreign Affairs and China's Embassy in Laos appears to be restricted to the China-Laos BIT.
- The effect of such Exchange of Letters can be highly disputed especially when considering the mechanism of perfected consent in investor-state arbitration.
- China's IIAs have created a burgeoning parallelism that China has in no way sought to delimit in light also of the BITs concluded by Hong Kong and Macao.

These points illustrate that the application of China's IIAs to Hong Kong and Macao is an issue of great ambiguity and is therefore not susceptible of being expressed in terms of a fixed Procrustean rule. At the same time, they reveal that absent any further developments, providers of legal services will face a Sisyphean task in advising potential clients. Likewise, future investor-state tribunals will need to exercise extreme caution and seek clarifications in order to avoid repetition of the "*Sanum* effect."

Regardless, of these concerns and the pervasive uncertainty stemming from China's ambiguous treaty practice, this article has endeavored to fulfill a threefold task. First, it provides a roadmap for an objective appraisal and confrontation of the issue at hand, namely the application of China's IIAs to Hong Kong and Macao. Second, it stresses the importance of certain crucial issues, as is the case with the legal nature of the Joint Declarations. Finally, this article has sought to enrich this discussion by drawing analogies and inferences from relevant treaty practice.