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Bifurcation of legal obligations governing investment relations with Hong Kong and Macau SARs and implications for management of foreign investments

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Abstract— **Hong Kong and Macau are Special Administrative Regions (SARs) under the sovereignty of the People's Republic of China (PRC). By virtue of the one country two systems principle enshrined in their respective constitutional instruments (Basic Laws), the two SARs enjoy distinct legal, political, economic, and social systems. In addition, they are also conferred with greater autonomy in establishing international economic relations and hence capable of undertaking relevant international legal obligations independent of the PRC. Although the economic freedom of the two SARs has manifested concretely in international trade relations because of their independent membership status in the World Trade Organization (WTO), many doubts have surfaced about the investment relations involving the two SARs. As bilateralism mainly dictates international investment relations, legal disagreements regarding whether bilateral investment treaties (BITs) concluded by the PRC with other sovereign states also apply to Hong Kong and Macau raises formidable challenges for foreign investments. The paper aims to identify the key legal challenges facing investment management involving the two SARs regarding the scope and protection standards emanating from the bifurcation of the BITs concluded by Hong Kong and Macau, respectively the BITs of the PRC. The paper first demarcates the international investment obligations undertaken by the two SARs and identify the characteristics and distinctions of the normative framework governing investment relations. The questions of interpretation of the relevant international obligations of the SARs arising from certain legal disputes are analyzed to determine the limitations of the scope and ambit of the BITs concluded by the SARs. Based on the identified limitations, the next part of the paper examines the motivation and the need prompting the question of applying the PRC BITs and international obligations to the two SARs. The final part discusses some essential findings relating to the homogeneity and bifurcation of legal obligations governing foreign investments in the two SARs. The concluding part argues that the attempts to invoke the PRC BITs by both natural and legal person investors from the two SARs could go unabated given the limitations of the BITs of the SAR. The paper concludes with relevant suggestions to the SARs to consider adopting a model BIT to harmonize legal standards and address any related concerns of investment managers administering investments involving the two SARs.**

Keywords- investment management; BITs; legal diversity; China and SARs; investment obligations

I. INTRODUCTION[1]

Effective management of foreign investment is not limited to the economic decision making in choosing a suitable investment and high return portfolios. Investing in a foreign market involves legal challenges, which should be identified and addressed in any investment strategy to ensure that the fruits of the investments are derived as expected and the very capital is protected from risks expropriation. Although the instances of direct taking of the capital by a host state have reduced substantially, claims concerning indirect expropriation of foreign investments have augmented. Under such circumstances, a systematic assessment of the investment regimes governing foreign investments in a host market as well as the legal protection available through the international investment obligations entered by the home state of a foreign investor becomes an indispensable exercise for any investment manager seeking to exploit investment opportunities in foreign markets. Based on the above premise, the present paper investigates how specific legal obligations related to foreign investment manifest in two unique jurisdictions, namely Hong Kong and Macau SARs. It will help the identification of relevant implications for the management of foreign investments involving the two jurisdictions. The paper's findings will provide essential insights for the managers of foreign investments to develop appropriate preventive or remedial measures to effectively tackle the identified challenges to enhance the returns and protect the capital.

Hong Kong and Macau are special administrative regions (SARs) under the sovereignty of the PRC, which are distinct from its other provinces, as the two SARs enjoy greater autonomy in political, economic, legal, and social governance. The two SARs, which were under the erstwhile administration of Britain and Portugal respectively, even have their own currency and passports that are usually the hallmark of individual states. In terms of international legal personality, the two SARs are also independent members of some international organizations like the WTO and even enjoy the autonomy to conclude treaties with other states on various subject matters

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except those that pertain to political relations or defence matters. By virtue of this autonomy, both SARs have undertaken international obligations in matters like trade, investments, air traffic rights, taxation etc[2]. In addition, the SARs have also entered into bilateral trade and investment agreements with the PRC[3] and regional agreements seeking to enhance economic integration between the three jurisdictions[4]. In addition to the international legal instruments, host states typically have specific domestic law governing foreign investment and other general laws that may apply to both domestic and foreign investments alike. Although Hong Kong and Macau SARs do not have an exclusive foreign investment law, many of its general laws on forming a company, competition, merger, and acquisitions govern domestic and foreign investments. Finally, domestic law governing foreign investment contracts is also a crucial legal regime for foreign investments. In this regard, it is essential to note the distinct characteristics of the contract law in Hong Kong and Macau SARs. While the common law legal tradition influences the former, the latter adopts a comprehensive Civil Code governing contracts influenced by the continental legal tradition.

II. Distinct Characteristics of the International Legal Obligations Governing Investments in the SARs

A close assessment of the international legal instruments pertaining to foreign investment in the two SARs reveals various distinctions regarding the scope and substance of the relevant obligations. Firstly, Hong Kong has concluded around twenty-one BITs with different countries, in which nineteen of them are active and in force[5]. In addition, some other bilateral agreements (that are not typical BITs) entered by Hong Kong also contain investment related provisions[6]. Finally, other multilateral instruments (like the WTO TRIMS and GATS) or some regional instruments[7] to which Hong Kong is a party contains obligations that would be pertinent to foreign investments involving the SAR. A quick comparison in this regard with Macau reveals a relatively modest picture. Unlike Hong Kong, Macau has just two BITs concluded with Portugal and Netherlands, and only a handful of other bilateral agreements that contain investment related provisions[8].

As an independent member of the WTO, Macau is also bound by the multilateral obligations arising from relevant international instruments like TRIMS and GATS that would be pertinent for investments involving the SAR. However, unlike Hong Kong, Macau has no multilateral agreements with specific regional organizations or regions that have relevance to investments involving the SAR. A cursory look at the number of international instruments entered by the two SARs, which directly or indirectly govern foreign investments, reveal a larger undertaking of related international obligations by

[2] See for the entire list of multilateral and bilateral agreements concluded by Hong Kong or extended to its territory, Department of Justice, Government of Hong Kong "External Affairs" 9 September 2020 available online at https://www.doj.gov.hk/en/external/treaties.html. Similarly for a list of bilateral agreements concluded by Macau under the authorization of the PRC see Office of the Commissioner of the Ministry of Foreign Affairs of the PRC in Macao SAR, "Macao SAR's Bilateral Agreements with Foreign States" 2 July 2007 available online at http://www.fmcoprc.gov.mo /eng/ytygjzz/tyyflsw/314/t241610.htm.

[3] Hong Kong has entered into agreements with the PRC for bilateral trade and investment liberalization as well as for enhancing economic and technical cooperation. See the list of agreements under the auspices of the Closer Economic Partnership Arrangement of Hong Kong (CEPA-HK), available online at https://www.tid.gov.hk/english/cepa /legaltext/cepa_legaltext.html. For the list of agreements pertaining to the similar arrangement (CEPA-Macau) entered by the Macau SAR, see https://www.cepa.gov.mo/front/eng /index_main.htm.

[4] For a brief introduction of the regional cooperation envisioned by the three jurisdictions to establish a greater bay area (GBA) and the relevant agreements see Constitutional and Mainland Affairs Bureau of Hong Kong "Greater Bay Area" https://www.bayarea.gov.hk/en/about/overview.html and Economic and Technological Development Bureau of Macau "Guangdong-Hong Kong-Macao Greater Bay Area" available online at https://www.dsedt.gov.mo/en_US/ web/public/pg_rc_ghmba?_ refresh=true

[5] While Hong Kong BITs with Austria, Belgium-Luxembourg Economic Union, Canada, Chile, Denmark, Finland, France, Germany, Italy, Japan, Kuwait, Netherlands, New Zealand, Republic of Korea, Sweden, Switzerland, Thailand, UAE, and United Kingdom are in force, the Australia-HK BIT 1993 has been terminated and the Mexico-HK BIT 2020 is yet to enter into force. See UNCTAD, "IIAs by economy-Hong Kong SAR" Investment Policy Hub available online at https://investmentpolicy.unctad.org/international-investment-agreements/countries/93/hong-kong-china-sar.

[6] Such agreements could be classified into investment agreements and free trade agreements. Hong Kong has three such investment agreements concluded with Australia, ASEAN and PRC respectively. Four free trade agreements concluded with Chile, European Free Trade Association, New Zealand and PRC also contain provisions relating to investments.

[7] The prominent instruments in this regard are the APEC Non-Binding Investment Principles 1994 and the Pacific Basin Investment Charter 1995.

[8] Like Hong Kong, Macau has also concluded a Closer Economic Partnership Arrangement (CEPA-Macau) with the PRC, which is primarily a bilateral free trade agreement that also comprehends trade in services. Under the auspices of CEPA Macau and PRC have also signed a separate investment agreement in 2017. For the details of the CEPA-Macau related free trade and investment agreements see Economic and Technological Development Bureau of Macao SAR, Legal Texts of CEPA, available online at https://www.cepa.gov.mo/front/eng/itemI_2.htm. In addition, Macau has also concluded a trade and cooperation agreement with the European Economic Community (EEC) in 1992 that contains specific provisions governing investments.

Hong Kong SAR. However, a further comparison with the PRC or other major host states in the world reveals that even Hong Kong's undertaking of investment-related obligations is relatively small. For example, the total number of BITs concluded by the PRC outstrips Hong Kong's by manifold.

The PRC has one hundred and forty-five concluded BITs, in which more than one hundred are in force[9]. Moreover, the PRC has also signed various bilateral and regional agreements focused on investments exclusively or in combination with the promotion of free trade[10]. The total of BITs and related agreements and the other related multilateral instruments concluded by the PRC make it one of the most bound jurisdictions committed to international legal obligations governing foreign investments. This very feature of the PRC international investment regime has prompted certain investors oriented with the two SARs to seek protection under the PRC regime, emphasizing the 'one country' feature of the 'one country two systems' principle, which will be analyzed later in this paper. However, before reverting to the attempts to extend the PRC obligations to the SARs, it is essential to examine the scope and ambit of specific international legal obligations of the SARs governing investments.

For our analysis, the BITs of Hong Kong could be classified into two generations, namely the BITs before it became a SAR in July 1997 (pre-HKSAR BITs) and BITs after July 1997 when it became a SAR (post-HKSAR BITs). One distinctive characteristic visible in these two sets of BITs is the more comprehensive nature of the BITs entered after 1997. Especially, the Chile-HK BIT 2016, Canada-HK BIT 2016, and the most recent Mexico-HK BIT 2020 are some of the most comprehensive instruments (three comprehensive HK BITs) in comparison with the other BITs entered by Hong Kong. As these are some of the recent BITs, Hong Kong's interest in concluding expansive BITs could be noted. Moreover, the nature of the obligations governing investments in these instruments could be indicative of the legal standards of investment treatment Hong Kong is willing to accept. Although a comprehensive analysis of all the major obligations arising from these and other BITs is beyond this paper's scope, some of the key provisions deserve the attention of the investment managers. For an effective comprehension of numerous obligations and the diversity of legal issues arising from BITs, investment managers could categorize them into different layers. Based on the findings resulting from the analysis of the recent comprehensive BITs concluded by Hong Kong, it is possible to discern these layers into provisions prescribing key definitions, substantive obligations, investment dispute settlement and special annexes. Although it is common for BITs to contain definitions, typical BITs tend to define some critical common terms like 'investors' and 'investments' that fall within the scope of the BIT in question. However, the more recent comprehensive BITs entered by Hong Kong tend to have a long definitional part with many terms. As official definitions in the BIT could be determinative of the scope of the obligations it imposes, business managers cannot afford to ignore the preliminary part of BITs prescribing the definitions.

Specific attention to the definition of critical terms like investors and investment is highly crucial to ensure that the natural or legal person investing and the capital they invest fall within the scope of the BIT in question. Often investment disputes face preliminary challenges regarding the entitlement of an investor or an investment to be protected under a BIT on the grounds of not satisfying the relevant definitions in that BIT. Although such terms as investors and investment are invariably defined in all BIT, investment managers should be mindful of the caveat that striking differences could exist between different BITs. Such differences could be noticed even among the latest BITs concluded by Hong Kong. For example, the term investment is defined relatively broad in the Chile-HK BIT 2016 and UAE-HK BIT 2019. It is defined to include 'every asset an investor owns or controls' or 'every kind of asset invested directly or indirectly' followed by a non-exhaustive list of specific types of assets. In contrast, the Canada-HK BIT 2016 and the Mexico-HK BIT 2020 have a conspicuous absence of a broad narrative and mainly contains a specific list of assets that qualify as investments. Moreover, while intellectual property is included as a specific asset that is eligible to be protected as an investment under three of the above BITs, the same is not included as a specific asset qualifying as an investment under the Mexico-HK BIT 2020.

While more differences in the definition of the term investment could be noticed among the four BITs, the lack of similarity in defining the term investor is also discernable. In contrast with the other three BITs that define investor or investor of a party, the Chile-HK BIT 2016 also defines the term investor of a non-party. The UAE-HK BIT 2019 and Mexico-HK BIT 2020 define investors that refer to specific qualities of a natural or legal person. They are to be satisfied to bring them within the purview of the term. The other two BITs generally define the term without referring to a natural or legal person. The above differences noticeable even among the latest BITs of Hong Kong indicate that investment managers cannot assume a harmonious definition of the common terms. They should carefully note the differences and ensure that the investor and the investment they seek to protect indeed satisfy the relevant definitions and, consequently, fall within the scope of protection under the BIT.

Most of the BITs entered by Hong Kong contain substantive obligations governing typical issues of foreign investments like non-discrimination, investment promotion and protection, treatment of investments, rights of repatriation, the general prohibition of expropriation, compensation, settlement of disputes, etc. However, the comprehensive BITs also included obligations pertaining to contemporary issues emerging in investment regimes like corporate social responsibility, health, safety, and environmental measures, etc. For example, all the

[9] For the full list of BITs signed by the PRC see UNCTAD, "IIAs by economy-China" Investment Policy Hub available online at https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.

[10] Prominent among them includes the CEPA with Hong Kong and Macau, the recent Regional Comprehensive Economic Partnership (2020) with ASEAN and five other states, investment agreements with APTA and ASEAN in 2009, and several bilateral free trade agreements with different states.

three comprehensive HK BITs contain obligations on these emerging issues, demonstrating the growing significance attached to such issues by Hong Kong in defining its investment relations with other jurisdictions. Moreover, other unique obligations form part of specific BITs like the Chile-HK BIT, which establishes a special Committee on Investments (COI) constituted with the government representatives of both jurisdictions. Among other functions, the COI is also empowered to issue a joint interpretation of the BIT, which is interestingly binding on a tribunal established to settle disputes between an investor and the host jurisdiction or on any arbitration panel established to settle disputes between the parties two jurisdictions[11]. Unlike other BITs, the issue of dispute settlement between an investor and the host jurisdiction is extensively addressed by the Chile-HK BIT with elaborate provisions[12], which is reminiscent of a standalone system of investment dispute settlement.

Another important obligation that started to emerge in the recent BITs of Hong Kong pertains to transparency requirements. Although all four of them have transparency obligations, the UAE-HK BIT 2019 has a limited scope as the obligation is limited to the publicizing of relevant laws, regulations, procedures, and international agreements as well as prescribed judicial decisions and administrative rulings[13]. However, in addition to the above, the other three recent BITs of Hong Kong also mandates transparency in investment arbitration proceedings. This seems to be the influence of certain international legal developments just preceding the conclusion of these BITs, like the UNCITRAL Rules on Transparency and the Mauritius Convention Transparency in 2014[14]. Another important provision found in all the four recent BITs of Hong Kong, which investment managers should pay very keen attention is the denial of benefits clause. By virtue of this clause, which did not find a place in the BITs concluded by Hong Kong before, the benefits of a legal person investor and its investments guaranteed by the BIT could be denied under certain circumstances like, for example, the invested enterprise in question is owned or controlled by a person of a non-contracting party (i.e. a third state or jurisdiction)[15].

The final layer of the Chile-HK BIT, consisting of specific annexes, serves an important role to distinctively address specific concerns the two parties may have without hindering their agreement on the major obligations that form part of the main BIT. For example, by virtue of these annexes, both parties have agreed to carve out measures of the host jurisdiction, which will not constitute an expropriation, which should provide a clear picture to investment managers to avoid any unsustainable assertion of certain acts of the host jurisdiction as expropriation. In addition, the annexes also enable Chile and Hong Kong to express their respective reservations to specific obligations arising from the BIT as well as recognize certain exceptions to the principle of non-discriminatory treatment *vis-a-vis* investors from jurisdictions not a party to the BIT. Finally, the annexes also make it possible for Chile to reinforce the powers of some of its national regulatory bodies to impose restrictions on certain transfers in consonance with its domestic laws as well as to seek exceptions to its domestic voluntary investment programs from the purview of the BIT obligations. The layer of annexes has helped Chile and Hong Kong to carve out specific issues to reach an agreement on various obligations in the BIT smoothly. Moreover, the relevant reservations and exceptions arising from the annexes are of paramount importance for investment managers to note and qualify the specific obligations arising from the BIT.

Unlike Hong Kong, Macau has not concluded many BITs and the only two BITs to which it is a party were signed after it had become a SAR. However, when Macau was under the Portuguese Administration, the treaty it had signed with EEC in 1992 to promote trade and cooperation indeed had some obligations relating to investment promotion as well. The relevant obligations aim to promote mutually beneficial investments, albeit subject to certain limitations. They also improve the investment climate under the principle of non-discrimination and reciprocity[16]. However, to get some relevant indications as to the BIT standards Macau is amenable, it will be relevant to closely assess some key obligations arising from the two recent BITs. In terms of the definitional layer, the Portugal-Macau BIT 2002 reveals the willingness of Macau to accept a broad definition of the term "investment". It comprehends all kinds of goods and rights invested under the auspices of the BIT, which is followed by a non-exhaustive list of indicative forms of investments.

The list of indicative forms includes direct and indirect investments (portfolio investments) and some specific forms of

[11] See Article 35 (3) (c), ibid.

[12] The Chile-Hong Kong BIT even comprehends sector specific investment disputes on financial services and mandates the exhaustion of remedy of consultation before the initiation of arbitration proceedings. See Articles 22 and 20, ibid.

[13] Although recently concluded in 2019, the limited transparency obligations in this BITs is comparable to the similar standard found it older BIT of Hong Kong namely Finland-HK BIT 2009 and is indicative of the fact that not all states concluding BITs with Hong Kong could be amenable to the inclusion of broader transparency obligations comprehending investment arbitration proceedings as well.

[14] Indeed, the Canada-HK BIT 2016 makes a specific reference to the provisions of the UNCITRAL Rules on Transparency in imposing relevant obligations. See also the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 (Mauritius Convention).

[15] See Mexico-HK BIT 2020, Article 10. It is also highly relevant for the investment managers to note that other BITs and investment agreements concluded by Hong Kong recognize additional grounds upon which benefits could be denied see Canada-HK BIT 2016, Article 18; Chile-HK BIT 2016, Article 19; UAE-HK BIT 2019, Article 11 as well as Australia-HK Investment Agreement 2020, Article 14.

[16] See the Agreement for Trade and Cooperation between EEC and Macao 1992, Article 7.

investments like intellectual property or investments in concessions granted by public authority[17]. Similarly, the Netherlands-Macau BIT 2008 also provides a broad definition. Interestingly, the specific indicative forms of investments while prescribing investment in concessions also include investment rights relating to natural resource exploration and extraction. In defining investors, the Portugal-Macau BIT specifies how to determine the home territory of a natural person when the said person by virtue of nationality or residency, fulfil the criteria of an investor from both territories[18]. However, the Netherland-Macau BIT categorical rejects that any natural person who possesses the nationality of Netherlands and is entitled for Macau residency the time of investment in Macau will not be considered an investor from the Netherlands eligible for protection under the BIT[19]. Despite some distinctions found in definitions, both BITs contain more are less similar categories of substantive obligations.

The layer of substantive obligations in both BITs contain provisions governing promotion, general treatment standards and protection of their mutual investments, along with the recognition of the right to repatriate capital and profits. Both BITs prohibit direct or indirect expropriation of investments except in recognized justifiable circumstances subject to the obligation to compensate. Regarding the third layer relating to the dispute settlement, both BITs contain obligations for disputes between the investor and a host jurisdiction as well as disputes between both jurisdictions that are the parties to the BIT. While the latter disputes are sought to be amicably settled or subjected to arbitration under both BITs, the settlement of the former disputes is governed by slightly different provisions. Negotiations, arbitration, and the possibility to initiate domestic judicial proceedings in the host jurisdiction are recognized in both BITs. The Netherland-Macau BIT interestingly refers to the possibility of explicitly using arbitration or conciliation or additional facility mechanism under the auspices of the International Center for Settlement of Investment Disputes (ICSID)[20]. As seen in the case of some recent Hong Kong BITs, there is no fourth layer of obligations containing annexes with carveout provisions or exceptions or reservations.

[17] As the economy of Macau SAR is predominantly dependent on gaming and tourism, public concession contracts have attracted some of the big investments in Macau and as this form of investment includes the biggest foreign investment stakes in Macau, it is natural that foreign markets would tend to seek the coverage of this form of investment specifically in the BITs concluded with Macau SAR.

[18] See Portugal-Macau BIT 2002, Article 1(4).

[19] See Netherlands-Macau BIT 2009, Article 1(b).

[20] See ICSID Convention 1966 and relevant rules and regulations governing different means to settle investment disputes available online at the World Bank Group, ICSID https://icsid.worldbank.org/resources/rules-and-regulations/ convention /overview.

III. Interpretation of Relevant International Obligations

A clear understanding of the practical implications of the obligations arising from the BITs cannot be achieved without analyzing the interpretations of the relevant instruments in actual cases. Due to limitations of space, some selective cases involving Hong Kong can be discussed to highlight certain key issues and challenges resulting from certain investment disputes. Only a few investment disputes have risen involving Hong Kong investors, and the relevant claims were not always based on the BITs. For example, the Standard Chartered Bank Hong Kong (SCB-HK), as a subsidiary of SCB-UK, initiated ICSID arbitration[21] proceedings against Tanzania. The claim was based on a legal assignment of rights it received as a security agent under a security deed entered with a joint venture (JV) investment project in Tanzania that included Malaysian and local investors.

SCB-HK's claim was based on the alleged violation of an Implementation Agreement (investment agreement) entered between the said joint venture and Tanzania. SCB's claim, in this case, was based on the investment contract and not any of Hong Kong BITs. Still, it argued that as an entity incorporated in Hong Kong, it should be considered a national of PRC and entitled to invoke the ICSID jurisdiction to decide the claim. Tanzania argued that ICSID lacked jurisdiction under Article 25 of the ICSID Convention as the claimant was not a national of another contracting state. However, it is essential to note that Tanzania's objection, in this case, was not based on the question of whether Hong Kong incorporated SCB-HK could be considered as a national of PRC. Or whether ICSID applies to Hong Kong for SCB-HK to seek its jurisdiction. Instead, Tanzania's objection was based on the argument that it did not consent to the assignment of the rights under the Implementation Agreement to SCB-HK; hence it cannot be considered a statutory assignee under Tanzanian domestic law. Tanzania further argued that the joint venture was a Tanzanian national, and the case did not involve a national of another contracting State as required by Article 25 of the ICSID. However, the ICSID tribunal refused to accept the arguments of Tanzania based on the above grounds and decided that SCB-HK satisfied the requirement of Article 25 as a national of China.

In comparison, another investment dispute raised by Philip Morris Asia Limited incorporated in Hong Kong (PMAL-HK) against Australia in 2011 was based on the obligations arising from the old Australia-HK BIT 1993. PMAL-HK argued that the legislative measures introduced by Australia mandating specific packaging requirements of its tobacco products violated the BIT and sought the order directing the host state to withdraw or not apply those measures to its investments or pay damages. Several questions about the obligations under the BIT arose in this dispute. Firstly, based on the definition of the term investment in the BIT, which included every kind of asset,

[21] See *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award dated 11th October 2019, pp.184.

owned or controlled by investors[22], a disagreement arose regarding the meaning of what will satisfy the control requirement. While PMAL-HK argued that oversight and management control are sufficient, Australia counter-argued that demonstration of legal and economic interest in the investment is essential.

Secondly, Australia also argued that it had not admitted the purported investment according to the admission requirements under the BIT. Thirdly, Australia objected that the claim was indeed outside the BIT scope as it pertained to a pre-existing dispute. Finally, it argued that the claim should be rejected on the grounds of abuse of rights as the PMAL-HK restructured its investment to gain protection under the BIT. For the first issue, the arbitration tribunal held that the PMAL-HK failed to prove that it had exercised control over the investment in question before the restructuring. For the second and third issues, the tribunal found in favour of PMAL. It held that Australia indeed admitted the investment. Therefore, the claim was not outside the BIT scope based on the finding that the claim was not about a pre-existing dispute. However, the claim of PMAL-HK ultimately failed because the tribunal held the last issue in favour of Australia as it concluded that the restructuring acts of PMAL-HK amounted to an abuse of rights.

IV. The Question of Application of the PRC BITs and State Practice to the SARs

Before and after the creation of the SARs, investors from Hong Kong and Macau have made attempts to invoke the application of the PRC BITs to protect their investments, which is phenomena investment managers should note. In the case of *Tza Yap Shum v. Peru*[23], Tza, the claimant, an investor in Peru, brought a compensation claim before ICSID on the grounds that certain tax measures imposed by the taxation authorities of Peru amounted to indirect expropriation. Although the claimant was a resident of Hong Kong, he sought to invoke the PRC-Peru BIT to raise his claim on the ground that he held Chinese nationality. To decide whether the claimant (as a natural person investor from Hong Kong) could be protected under the BIT, the tribunal found in favour of the claimant. The tribunal's decision was supported by the findings that the nationality requirement of a natural person investor under the BIT did not require any other connections to the PRC. Therefore, the claimant's sheer possession of the PRC nationality seemed to have been enough to seek protection under the PRC BIT. It is also relevant to note that the PRC nationality law is one of the PRC domestic laws that applies to Hong Kong (and Macau). However, when Sanum (a legal person investor from Macau) made a similar attempt to invoke PRC-Laos BIT against Laos, Laos objected to the BIT extension to Macau, and the PRC categorically clarified that the BIT did not automatically apply to the SAR. However, the Singapore Court of Appeal, in deciding the case filed by Laos challenging the arbitration proceedings initiated by Sanum, came to the opposite conclusion that the PRC-Laos BIT applied to Macau and arbitration proceedings initiated under the BIT is legally sustainable[24].

The last case that deserves a brief analysis is related to enforcing arbitration awards in Hong Kong against Congo. In this case, the question of which standard of international obligation relating to sovereign immunity applies to Hong Kong arose. The applicant (FG Hemisphere) sought to enforce arbitration awards against money payable by the China Railway Group to Congo in Hong Kong. Congo argued that it enjoyed absolute state immunity in Hong Kong by virtue of the practice of the PRC that granted absolute immunity in such cases. Although the lower courts in Hong Kong did not accept that argument and were inclined to uphold a restrictive immunity standard for Hong Kong, the Court of Final Appeal agreed with Congo on the grounds that Hong Kong did not enjoy the autonomy on the matter and should follow the PRC practice. This approach was also later confirmed by the opinion of the Standing Committee of the National People's Congress (NPCSC) of PRC. This case is not an investment dispute involving Hong Kong BITs. However, it is significant because it clarifies that on matters arising from certain international obligations, Hong Kong may have to follow the state practice of PRC without the autonomy to follow different standards.

V. Conclusion

The close analysis of various international legal obligations governing investments related to the two SARs indicates important findings for investment managers to ponder. Key conclusions that could be drawn indicate homogeneity and bifurcation in relevant legal obligations. It is evident that both SARs have very limited BITs concluded, and it seems that attempts to invoke the protection of the PRC BITs by natural person investors from both jurisdictions seem inevitable. Although such attempts by legal person investors from the SARs seems to be not in accordance with relevant PRC BIT standards, the conclusions like the Sanum case and the possibility for the PRC to formally extend the application in the future should still make the investment managers wary of the potential legal consequences. In addition, the success of the SCB-HK in invoking the ICSID jurisdiction demonstrates its practical significance, albeit not formally extended to the SARs. Moreover, the confirmation that the SARs should follow the state practice of the PRC (on matters like those relevant to the state immunity seen in the Congo case) highlights the significance of the international obligations of the PRC for the two SARs. Finally, the bifurcation of legal standards visible between specific BITs of the SARs demonstrates the inevitable need for investment managers to assess their implications individually. To address any related concerns of investment managers and harmonize the international obligations across different BITs, the SARs should consider adopting a model BIT. Any such model should reflect the individual needs of the SARs in enhancing their regional and international investment relations.

[22] See Australia-Hong Kong Agreement for the Promotion and Protection of Investments 1993, Article 1(e).

[23] See *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, (June 19, 2009).

[24] See *Sanum Invest. Ltd v.Loas*, [2016] SGCA 57 para 152.