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Are the PRC BITs Applicable to China's Special Administrative Regions? In Consideration of the *Sanum v. Laos* case

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After Tza Yap Shum v. Peru, the case of Sanum v. Laos, brought by a Macanese investor, re-attracted public attention to the critical issue of the applicability of the People's Republic of China Bilateral Investment Treaties in China's Special Administrative Regions. The Permanent Court of Arbitration held the PRC-Laos BIT extends to Macao according to the purpose and context of the BIT, but its reasoning is not tenable as its logic is flawed. In comparison, in the appeal, the conclusion reached by the Singapore High Court seems plausible, but there are still queries to the Court's admission of further evidence. The author argues that the PRC BITs are not applicable to Macao and Hong Kong, on the basis of analyzing the treaty interpretation methodologies of this case. Notwithstanding the fact that the final award has not been rendered as of now, the Sanum v. Laos Case carries significant meaning to investment protection in China's SARs.

Keywords: Sanum v. Laos, BITs, China's SAR, International Investment Arbitration, Territory, Treaty Application

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1. Introduction

Most bilateral investment treaties ("BITs") are applicable to an investor who "attempts to make, is making, or has made an investment in the territory of the other Party."[1] In this regard, 'territory' is essentially a geographical area as to the applicability of BITs. The 'territory' may be defined for the protection of investment, which is, in particular, located in maritime areas beyond territorial waters of the party.[2]

Clear definition of the term, 'territory' should be included in any investment treaty. Some BITs, however, either define it obscurely or do not define it at all. Such obscure or non-definition of the term 'territory' may lead to investment dispute before the International Center for Settlement of Investment Disputes ("ICSID") and other fora. In *Philippe Gruslin v. Malaysia, e.g.*, the tribunal pointed out that qualified investment of another Party (investors) has to be made "in the territory of the Party" in accordance with Chapter Eleven of North America Free Trade Agreement ("NAFTA").[3] Another case is *Canadian Cattlemen for Fair Trade v. United States*; which dealt with the relationship between the 'investor' and 'territory.' Although there is no such requirement in the text of the NAFTA, the concept of an 'investor' only exists based on the 'investment' made. It is thus a tacit requirement for a qualified investor to be "in the territory of the Party."[4] A similar conclusion was drawn in the subsequent cases such as *Bayview v. Mexico*[5] and *Apotex Inc. v. The United States*.[6] Various investment forums also raise question whether the investment is "in the territory of other party." In *Bayview v. Mexico*, *e.g.*, the tribunal deals with the definition of 'territory' in relation to the investment of water resource.[7] Also, in *Fedax v. Venezuela*, the tribunal referred to the rules to decide whether electronic commerce is in the territory of a State.[8] In recent, it is more difficult to define 'territory' because commercial transactions by internet or electronic measures have transcended conventional national borders.

State administration of China is another contentious factor in defining the territorial limits of BITs. *E.g.*, China is composed of four customs areas - Mainland, Taiwan and two Special Administrative Regions ("SARs") being Hong Kong and Macao enjoying a high degree of autonomy with a distinctive set of laws and practices.[9] They are working together under the "one country, two systems" formula. As most PRC BITs do not explicitly express whether they are applicable