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INTERNATIONAL LAW AND PRACTICE

Procedural Models to Upgrade BITs: China's Experience

JIE (JEANNE) HUANG*

Abstract
With the rise of a new generation of investment policies, upgrading existing bilateral investment treaties (BITs) is of significant interest to states. China has upgraded 28 per cent of its investment treaties in various ways. Two investment arbitration tribunals and one highest court at the seat of arbitration have recently rendered decisions favouring the application of old Chinese BITs over the upgraded ones. China's experience with upgrading BITs may provide general policy discourse and direction for other countries planning to upgrade their BITs. Using China's experience, this article categorizes different methods of upgrading BITs into the Coexistence Model (parties to an old BIT join existing or new free trade agreements or a regional investment agreement), the Replacement Model (replace an old BIT with a new one), the Amendment Model (amend an old BIT by a protocol) and the Joint Interpretation Model (make a diplomatic announcement to interpret a BIT). This article also discusses the benefits and challenges of each model and concludes with directions for future BIT upgrading.

Keywords
China; bilateral investment treaty; free trade agreement; One Belt and One Road; procedure model

1. INTRODUCTION

Upgrading existing BITs is of significant interest to states[1] with the rise of a new generation of investment policies.[2] Treaty-making power is shifting from the bilateral to the regional level.[3] For example, the European Commission can negotiate investment treaties on behalf of its member states.[4] The rise of new investment policies is also embodied in the shift from BITs to free trade agreements (FTAs) and investment

* Senior Lecturer, Member of China International Business and Economic Law Initiative, University of New South Wales, Faculty of Law, Sydney, Australia [Jeanne.huang@unsw.edu.au]. This article is made possible partly through the China National Social Science Fund Project (16BFX202). The author is very grateful for the anonymous reviewers' comments. All errors remain my own.

1 Eighty-six countries were involved in BIT renegotiations; see T. Broude, Y.Z. Haftel and A. Thompson, 'Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?', *Hebrew University of Jerusalem Legal Research Paper* 6, available at ssrn.com/abstract=2845297 (accessed 27 October 2017).

2 UN Conference on Trade and Development (UNCTAD), World Investment Report 2012: Towards a New Generation of Investment Policies, at 84, available at unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (accessed 27 October 2017).

3 Ibid.

4 W. Shan and L. Wang, 'The China–EU BIT and the Emerging "Global BIT 2.0"', (2015) 30 *ICSID Review: Foreign Investment Law Journal* 260.

regulations becoming increasingly intertwined with other areas of law.[5] The new investment policies are driven by the drastic economic changes experienced by states in recent decades that have resulted in multiple generations of different investment agreements, the first of which now seems outdated.[6] Like many countries, China[7] is also impacted by these new investment policies, especially in the context of the 'One Belt and One Road' initiative.[8] In the past decades, China has upgraded 32 BITs, making up 28 per cent of its investment treaties.[9] China has attempted a whole range of different methods of upgrade, including concluding FTAs or regional investment agreements, replacing old BITs with new ones, enacting amendments, and making diplomatic announcements regarding BITs.[10] Recently, two investment arbitration tribunals and one highest court at the seat of arbitration have rendered decisions favouring the application of old Chinese BITs over the upgraded ones.[11] China's experience with upgrading BITs may provide general policy discourse and direction for other countries that plan to upgrade their BITs.

This article categorizes methods of upgrading BITs into the Coexistence Model (parties to an old BIT join existing or new FTAs or a regional investment agreement), the Replacement Model (replace an old BIT with a new one), the Amendment Model (amend an old BIT by a protocol), and the Joint Interpretation Model (make a diplomatic announcement to interpret a BIT). Denunciation of a BIT is excluded from the models, as denunciation terminates rather than upgrades a BIT, thus it is considered an alternative strategy to upgrading.[12] This article adopts an empirical approach to examine the benefits and challenges of each model and provide directions for future BIT upgrading.

This article has five main sections. Section 2 focuses on the most popular model, the Coexistence Model, which has been adopted by 18 Chinese BITs. However, this model creates serious vertical treaty overlaps in China's investment treaty

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[5] See, e.g., M. Chi, 'The "Greenization" of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making', (2015) 18 *Journal of International Economic Law* 511; Q.J. Kong, 'The "State-Led-Economy" Issue in the BIT Negotiations and Its Policy Implications for China', (2016) 5 *China-EU Law Journal* 13.

[6] K. Rooney, 'ICSID and BIT Arbitrations and China', (2007) 24 *Journal of International Arbitration* 689, at 701–3; G.G. Wang, 'Trade, Investment and Dispute Settlement: China's Practice in International Investment Law: From Participation to Leadership in the World Economy', (2009) 34 *Yale J. Int'l L.* 575, at 577.

[7] For the purpose of this article, China refers to Mainland China, excluding the Hong Kong Special Administrative Region (SAR), the Macau SAR, and Taiwan.

[8] See C.Y. Cai, 'China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications', (2009) 12 *Journal of International Economic Law* 457, at 461.

[9] As of November 2016, China has signed 144 BITs and a trilateral investment treaty (104 in force) and 14 FTAs (all in force) containing investment chapters. For China's BIT list, see tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml and investmentpolicyhub.unctad.org/IIA/CountryOtherIias/42#iiaInnerMenu. For China's FTA list, see fta.mofcom.gov.cn/english/fta_qianshu.shtml and investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu (all accessed 14 August 2017).

[10] The list of 32 upgraded BITs is on file with the author.

[11] *Ping An Life Insurance Company of China, Limited et al. v. Belgium*, Decision on Jurisdiction, ICSID Case No. ARB/12/29 (hereinafter, *Ping An v. Belgium*); *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic*, UNCITRAL Award on Jurisdiction, PCA Case No. 2013-13 (hereinafter, *Sanum v. Laos*); proceedings at Singapore High Court and Court of Appeal as seat of arbitration, *Sanum v. Laos*, [2015] SGHC 15, and *Sanum v. Laos*, [2016] SGCA 57.

[12] For termination of treaties, see T. Voon, A. Mitchell and J. Munro, 'Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties', (2014) 29 *ICSID Review: Foreign Investment Law Journal* 451, at 463.

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regime and may lead to treaty shopping in dispute resolution. Section 3 analyzes the Replacement Model. China has used new BITs to replace 12 BITs. Although vertical treaty overlap is avoided, most of China's BITs adopting this model suffer from vague transition clauses. As *Ping An* v. *Belgium*[13] demonstrates, these clauses may create gaps of jurisdiction *ratione temporis* and cause unpredictability in investment protection. Section 4 focuses on the Amendment Model. This model has been adopted by four Chinese BITs. Amendments to the jurisdiction of a BIT, and amendments to the substantive rights and obligations of contracting states may have different jurisdiction *ratione temporis*. Section 5 outlines the Joint Interpretation Model, which is used only in the China-Laos BIT. *Sanum* v. *Laos*[14] demonstrates that China should clarify the application of its BITs to its special administrative regions (SARs). The final section proposes a direction for upgrading BITs: in the future, states may begin to move from the Coexistence Model to the Replacement Model and more states may adopt multiple models to upgrade their BITs consecutively.

2. Coexistence Model

In the Coexistence Model, states under an old BIT join an existing or new FTA or a regional investment agreement. The commencement of the new FTA or regional investment agreement does not affect the validity of the old BIT and, in fact, they coexist. China has frequently adopted the Coexistence Model in recent years. Currently, China has 18 BITs that coexist with FTAs or regional investment agreements, concluded between the same states. When an FTA contains a substantial investment chapter, the Coexistence Model creates complex issues of vertical treaty overlap and the potential for treaty shopping.[15]

2.1. Disputes crystallize after the commencement of a later agreement

China and Pakistan concluded a BIT in 1989[16] and an FTA in 2006.[17] The FTA contains an investment chapter that provides a higher level of protection to investors and investments than the 1989 BIT. Article 3 of the China-Pakistan FTA provides that the contracting parties affirm the existing rights and obligations under the WTO Agreement and other agreements to which both parties are members. There are two possible interpretations of Article 3. The first view is that, either the FTA is subject to the BIT, or the FTA is simply considered to be incompatible with the BIT.[18] The

[13] *Ping An v. Belgium*, *supra* note 11.
[14] *Sanum v. Laos*, *supra* note 11.
[15] W. Alschner, 'Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction', (2014) 17 *Journal of International Economic Law* 271, at 271–98; R. Adlung and M. Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?', (2008) 11 *Journal of International Economic Law* 365, at 370.
[16] The China-Pakistan 1989 BIT, signed on 12 February 1989 and effective on 30 September 1990.
[17] The China-Pakistan FTA, signed in November 2006 and effective in July 2007.
[18] 'Incompatible' means 'two treaties are not capable of being applied at the same time'. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 59.1 (hereinafter, VCLT). J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2004), 283.

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basis for this view is that, under Article 30.2 of the Vienna Convention on the Law of Treaties (VCLT),[19] the BIT takes precedence over the FTA. The second view is that, because Article 55 of the China-Pakistan FTA provides that the FTA will not affect more favourable treatment to investors in existing or future agreements, the FTA only confirms the existing rights and obligations under the other agreements which are more favourable to investors and investments than the FTA. In this view, the BIT takes precedence over the FTA only if the BIT gives more favourable treatment to investors and investments. The second view should be preferred because, according to Articles 30 and 31 of the VCLT generally, Articles 3 and 55 of the FTA must be construed together in light of the object and purpose of the FTA, parties' subsequent practice and special intention. The preamble of the FTA indicates that the FTA builds on existing treaties between parties and resolves to promote reciprocal trade, raise the standard of living and lower unemployment. After concluding the FTA, both states implemented the high standard of protection required under the FTA rather than staying with the low standard BIT.[20] Since 2015, China and Pakistan have negotiated to expand their FTA and further liberalize bilateral trade and investment.[21] It was not the parties' intention, despite Article 3, that the 1989 BIT should prevail over the FTA, so the investment regime between the two states remains as the 1989 version. Moreover, the first interpretation prioritizes the BIT over the FTA, which is a result manifestly absurd or unreasonable[22] under Article 32 of the VCLT. Article 73, paragraph 1 of the Vienna Convention on Consular Relations is a classic example of a Convention conceding priority to other treaties.[23] However, it is improper to conclude that, simply because Article 3 of the China-Pakistan FTA is similarly worded to Article 73, paragraph 1 of the Vienna Convention on Consular Relations, the *lex prior* rule should be applied to the FTA without qualification. Article 30.2 of the VCLT 'concerns solely … the conflict clause in a treaty which aims at granting priority to another treaty'.[24] Article 3 of the China-Pakistan FTA does not aim to give priority to less favourable investment treatments, as this would be against the parties' intention.[25]

[19] VCLT, *supra* note 18.

[20] For the subsequent practice of the parties as a means of interpretation, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, paras. 75–6.

[21] For news reports regarding parties' implementation and further expansion of the FTA, see fta.mofcom.gov.cn/pakistan/pakistan_special.shtml (accessed 16 February 2017). For interpreting of subsequent practice, see H. Fox, 'Article 31 (3) (A) and (B) of the Vienna Convention and the Kasikili/Sedudu Island Case', in M. Fitzmaurice et al. (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), 69.

[22] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 447 (indicating that recourse may be had to Art. 32 in the unlikely event that Art. 31 leads to a result which is manifestly absurd or unreasonable).

[23] Art. 73.1 of the Vienna Convention on Consular Relations provides that '[t]he provisions of the present Convention shall not affect other international agreements in force as between States Parties to them'. O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2011), 512.

[24] See Villiger, *supra* note 22, at 405.

[25] Art. 31.4 of the VCLT provides that a special meaning shall be given to a term if it is established that the parties so intended.

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Serious vertical treaty overlap also exists between China and South Korea. The China-South Korea FTA was concluded in 2015, the China-Japan-South Korea Investment Agreement in 2012, and the China-South Korea BIT in 2007.[26] Article 25 of the China-Japan-South Korea Investment Agreement and Article 1.3 of the China-South Korea FTA are similar to Articles 3 and 55 of the China-Pakistan FTA. The above arguments apply here as well. These articles should not be construed so that earlier treaties, which are less favourable to investment, should prevail

[26] The contents of the China-South Korea FTA Investment Chapter, the China-Japan-South Korea Investment Agreement, and the China-South Korea BIT (2007) differ in nine important aspects. The first difference is the definition of investment. The definition of investment in the China-South Korea FTA is the same as the China-Japan-South Korea Investment Agreement, which does not require that the investment shall comply with the laws and regulations of the host state. However, the China-South Korea BIT (2007) imposes such requirement. The second is fair and equitable treatment. The China-South Korea BIT (2007) contains an unqualified fair and equitable treatment clause, while the China-Japan-South Korea Investment Agreement adopts the generally accepted rules of international law to determine fair and equitable treatment. The China-South Korea FTA takes a step further: it not only provides that fair and equitable treatment shall comply with the customary international law minimum standard of treatment of aliens but also indicates that the treatment includes 'the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law'. Third, the MFN clause in the China-South Korea BIT (2007) does not specify whether a party can invoke the most-favoured nation (MFN) clause to incorporate the dispute resolution clause in another BIT. However, the China-Japan-South Korea Investment Agreement and the China-South Korea FTA specify that the MFN clause does not apply to the settlement of investment disputes. Fourth, the transparency and prohibition of performance requirements clauses in the China-Japan-South Korea Investment Agreement and the China-South Korea FTA are very similar, while this clause does not exist in the China-South Korea BIT (2007). The fifth difference is in the entry of personnel and the intellectual property protection clauses. The China-Japan-South Korea Investment Agreement contains clauses for entry of personnel and the protection of intellectual property. The investment chapter of the China-South Korea FTA does not include these clauses, but its chapters on movement of people and intellectual property have similar contents. The China-South Korea BIT (2007) has no provision for the entry of personnel and the protection of intellectual property. Sixth, the expropriation and compensation clause in the China-South Korea BIT (2007) is almost the same as that in the China-Japan-South Korea Investment Agreement, except that the former provides that the compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred, while the latter indicates that the compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The China-South Korea FTA adopts the same expropriation and compensation clause as the China-Japan-South Korea Investment Agreement, but it adds an annex to clarify the criteria to determine direct and indirect expropriation. The seventh aspect of differences is the clause of transfers. The China-South Korea FTA, the China-Japan-South Korea Investment Agreement, and the China-South Korea BIT (2007) all provide that a party can adopt or maintain temporary safeguard measures with regard to payments and capital movements in exceptional circumstances. Exceptional circumstances refer to macroeconomic management, such as serious balance-of-payments or external financial difficulties or threat thereof, capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either party. However, the China-South Korea FTA provides more specified rules for implementing the temporary safeguard measures. For instance, the implementation shall not exceed one year and interfere with investors' ability to earn a market rate of return in the territory of the party on any restricted assets. These specified rules intend to balance the host state's regulatory authority and the investor's right to freely transfer capital. Eighth, the China-Japan-South Korea Investment Agreement contains a clause for prudential measures relating to financial services, authorizing a party to take measures to protect investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise supplying financial services, or to ensure the integrity and stability of the financial system. This clause does not exist in the China-South Korea BIT (2007) and the China-South Korea FTA. Ninth, unlike the China-South Korea BIT (2007) and the China-South Korea FTA, the China-Japan-South Korea Investment Agreement contains a tax clause. Except the national treatment, the MFN treatment and the minimum standard treatment, the China-Japan-South Korea Investment Agreement does not apply to taxation measures. Therefore, three different investment protection regimes exist between China and South Korea.

over later treaties.[27] One issue with this interpretation is, if all three treaties are applicable to an investment dispute, can investors select favourable clauses from each treaty and combine them for the most effective protection? This is possible. *Ioannis Kardassopoulos* v. *Georgia* demonstrates that an investor can combine favourable substantive and jurisdictional clauses from different treaties concluded by the same states in investment arbitration. Both Greece and Georgia are members of the Energy Charter Treaty (ECT) and a BIT. Mr. Kardassopoulos was a Greek national who invested in Georgia. His claim utilized both the ECT and the Greece-Georgia BIT. The tribunal, after deciding it had jurisdiction *ratione materiae* under both the ECT and the BIT,[28] held that it also had jurisdiction *ratione temporis* under the ECT.[29] However, since the tribunal eventually found that Georgia had violated the ECT by expropriating Mr. Kardassopoulos' investment, determining the question of jurisdiction *ratione temporis* under the Georgia-Greece BIT was unnecessary.[30]

If contracting states' purpose for the upgrade is to improve investment protection, an FTA easily achieves this goal without the need to maintain the old one. In domestic law, old laws are repealed when a new law applicable to the same subject matter is enacted. The underlying policy to this approach is to consolidate laws, facilitate their implementation and assist lawyers and judicial bodies with application of the law. In sharp contrast, the international investment regime norm is that new FTAs neither replace old BITs nor contain clear application clauses; yet states complain that investment arbitration tribunals have too much discretion in interpreting and applying treaties.[31] Good practice would be to terminate an old BIT when signing a new FTA with a comprehensive investment protection regime. For example, Australia plans to terminate its BITs with Mexico, Peru and Vietnam in due course after the Trans-Pacific Partnership Agreement (TPP) comes into effect.[32] Although the US withdrawal makes the future of the TPP uncertain,[33] the Australian plan should be applauded because it avoids the uncertainty in applicable law.

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[27] Note of Art. 3 of the China-Japan-South Korea Investment Agreement indicates that Art. 3.2 (national treatment) should not be inconsistent with Arts. 3.2 and 3.3 of the China-Japan BIT (1988). Therefore, Arts. 3.2 and 3.3 of the China-Japan BIT (1988) prevail against Art. 3.2 of the China-Japan-South Korea Investment Agreement. This is because parties especially indicate so.

[28] *Ioannis Kardassopoulos v. Georgia*, Award on Jurisdiction, ICSID Case No. ARB/05/18, para. 107 (hereinafter, *Kardassopoulos*).

[29] Ibid, para. 66.

[30] *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, Award on the Merits, ICSID Case Nos. ARB/05/18 and ARB/07/15, para. 241.

[31] C. Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', (2013) 4 *Journal of International Dispute Settlement* 197, at 201–3.

[32] Exchange of letters between Andrew Robb, Minister for Trade and Investment (Australia), and Ildefonso Guajardo Villarreal, Minister of Economy (Mexico) (6 November 2015). Exchange of letters between Andrew Robb, Minister for Trade and Investment (Australia), and Ana Maria Sánchez De Ríos, Minister of Foreign Affairs (Peru) (6 November 2015). Exchange of letters between Andrew Robb, Minister for Trade and Investment (Australia), and Vu Huy Hoang, Minister of Trade and Industry (Vietnam) (6 November 2015).

[33] Australia Senate Foreign Affairs, Defence and Trade References Committee TPP Report, available at dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx (accessed 16 February 2017).

2.2. Disputes crystallize before the commencement of a later agreement

The China-ASEAN Investment Agreement,[34] the China-New Zealand FTA,[35] the China-Australia FTA[36], and the China-Peru FTA[37] contain application clauses for jurisdiction over disputes that crystallized before the commencement of the Agreements. Of the four, the China-ASEAN Investment Agreement has the most comprehensive application clause.

China and the ASEAN members (Laos, Cambodia, Indonesia, Malaysia, Thailand, Myanmar, the Philippines, Singapore, and Viet Nam) all concluded BITs. Afterwards, in 2009, China and the ASEAN signed an Investment Agreement. According to Article 3.2 of the China-ASEAN Investment Agreement, although the Agreement applies to all investments made by investors of a party in the territory of the other party before or after the Agreement entered into force, it does not bind any party in relation to any act or fact that took place or any situation that did not exist before the date of its entry into force.[38] Article 14.2 provides that the investor-state dispute resolution mechanism does not apply to investment disputes arising out of events which occurred and investment disputes which were settled or already under judicial or arbitral process, prior to the entry into force of this agreement.[39] Article 23 outlines the Agreement's relationship with other agreements in that it shall not derogate from the existing rights and obligations of a member state under any other international agreements to which it is a party.[40] The three articles complement one another: Article 3.2 regulates the scope of application to investment, Article 14.2 specifies when the investor-state dispute resolution mechanism cannot be applied, and Article 23 provides that the China-ASEAN Investment Agreement coexists with the BITs that China concluded with individual ASEAN members.

The application clauses in the China-New Zealand FTA are different from those in the China-ASEAN Investment Agreement. The BIT between China and New Zealand came into force in 1989 and the FTA in 2008. Article 137 of the China-New Zealand FTA provides the scope of its investment chapter. Article 137.4 indicates that *the provisions of the investment chapter* do not bind either party in relation to any act or fact that took place or any situation that did not exist before the date of its entry into force.[41] Article 137.6 replicates Article 3.2 of the China-ASEAN Investment Agreement but adds that the investor-state dispute resolution regime does not apply to any investment dispute or claim already under judicial or arbitral process before

[34] 'ASEAN' refers to the Association of Southeast Asian Nations. Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between China and the ASEAN (China-ASEAN Investment Agreement) signed on 15 August 2009 and effective on 1 January 2010.
[35] The China-New Zealand FTA, signed in April 2008 and effective on 1 October 2008.
[36] The China-Australia FTA, signed in 17 June 2015 and effective on 20 December 2015.
[37] The Agreement between the Government of the PRC and the Government of Peru on the Reciprocal Encouragement and Protection of Investments (the China-Peru BIT (1994)), signed on 9 June 1994 and effective on 1 February 1995.
[38] Art. 3.2 of the China-ASEAN Investment Agreement. See also Art. 23 of the China-ASEAN Investment Agreement.
[39] Ibid, Art. 14.2.
[40] Ibid, Art. 23.
[41] Art. 137.4 of the China-New Zealand FTA.

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the entry into force of the Agreement.[42] The second half of Article 137.6 is broader than Article 14.2 of the China-ASEAN Investment Agreement. Article 3 provides that the China-New Zealand FTA coexists with other agreements to which China and New Zealand are parties and, in the event of inconsistency, the parties shall immediately negotiate to find a mutually satisfactory solution.[43] Different from Article 23 of the China-ASEAN Investment, Article 3 of the China-New Zealand FTA provides a procedure in the event of inconsistency.

Suppose a Chinese investor made an investment in Laos in 2006 and the expropriation dispute between this investor and the Laos Government crystallized in 2007. In terms of jurisdiction *ratione temporis*, the investment is covered by the China-ASEAN Investment Agreement according to its Article 3.2. However, the investor cannot invoke the investor-state dispute resolution mechanism in the Agreement because of Article 14.2. The dispute must then be solved under the China-Laos BIT (1993).[44]

Suppose the same events transpired in New Zealand. In terms of jurisdiction *ratione temporis*, the investment is covered by Article 137.6 of the China-New Zealand FTA. However, Article 137.4 excludes the expropriation dispute because it is an act or fact that took place before the commencement of the China-New Zealand FTA. The China-New Zealand BIT (1988)[45] should be applied to this dispute.

Therefore, although the same result may be reached under the two FTAs, the reasoning is different. Article 3.2 of the China-ASEAN Investment Agreement and Article 137 of the China-New Zealand FTA are phrased similarly; however, the former applies to investment only while the latter applies to the whole investment chapter. The latter is applicable to expropriation measures but the former is not.

The application clauses in an FTA can generally resolve jurisdiction for disputes which crystallized before its entry into force. However, overlap between the FTA and an old BIT between the same parties still exists for disputes crystallizing after the commencement of the FTA. Investors may bring arbitration under the International Centre for Settlement of Investment Disputes (ICSID) mechanism of the FTA and, if it fails, they can bring *ad hoc* arbitration by invoking the old BIT on the same facts, or vice versa. Thus, the Coexistence Model allows the investor to bite the same apple twice, creates uncertainty in treaty application, and the possibility of undesirable treaty shopping.

2.3. Incorporation

Incorporating the BIT into the FTA can avoid vertical treaty overlaps. For example, China concluded a BIT with Iceland in 1994 and an FTA in 2013. The latter incorporated the former into its investment chapter.[46] Thus, although the China-Iceland FTA

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[42] Ibid, Art. 137.6.
[43] Ibid, Art. 3.
[44] Agreement Between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments (the China-Laos BIT (1993)), signed on 31 January 1993 and effective on 1 June 1993.
[45] The Agreement between the Government of the PRC and the Government of New Zealand on the Reciprocal Encouragement and Protection of Investments (the China-New Zealand BIT (1998)), signed on 22 November 1988 and effective on 25 March 1989.
[46] Art. 92 of the China-Iceland FTA. See also Art. 4 of the China-Iceland FTA.

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and the China-Iceland BIT are both valid, there are no treaty applicability issues. Nevertheless, incorporation is like pouring old wine (BIT) into a new bottle (FTA). The level of investment protection and promotion between China and Iceland remains as it was in 1994.

The relationship between the China-Singapore BIT (1985), the China-Singapore FTA (2008), and the China-ASEAN Investment Agreement is a more complicated case. The China-Singapore FTA was signed before the conclusion of the China-ASEAN Investment Agreement. Taking into consideration that Singapore would be party to the, at the time, soon to be concluded China-ASEAN Investment Agreement, Article 84 of the China-Singapore FTA incorporated the China-ASEAN Investment Agreement into its investment chapter, with the latter prevailing in the event of conflict. This clause resolves the applicability issue between the China-Singapore FTA and the China-ASEAN Investment Agreement. However, the China-Singapore FTA did not replace the China-Singapore BIT (1985), because Article 112 of the FTA provides that it does not derogate existing obligations and rights under existing bilateral and multilateral agreements between the parties conclude.[47] In case of inconsistency the parties shall immediately consult with each other,[48] but the FTA does not provide which treaty prevails. As Article 14.2 of the China-ASEAN Investment Agreement was incorporated into the FTA,[49] the China-Singapore FTA does not apply to investment disputes arising out of events that occurred and investment disputes which had been settled or were already under judicial or arbitral process, prior to the entry into force of this agreement. However, this Article does not help resolve the treaty overlap between the China-Singapore FTA (2008) and the China-Singapore BIT (1985), if the event crystallizes after the FTA came into force.

3. Replacement Model

Under the Replacement Model, states replace an old BIT with a new BIT. China has used this model to upgrade twelve old BITs, making it the second most frequently adopted model. China's frequent use of the Replacement Model is also consistent with the global trend that, since the early 2000s, the BIT negotiations has more emphasized on replacing older BITs than creating new BITs with countries with which no previous treaty relation existed.[50] For the Replacement Model to function properly, a new BIT must clarify its jurisdiction *ratione temporis*.

China's BITs adopting the Replacement Model can be divided into two categories.[51] Firstly, BITs with a transition clause for jurisdiction *ratione temporis* over investment and secondly, BITs with transition clauses that demarcate jurisdiction *ratione temporis* over investment and investment disputes.

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47 Art. 112 of the China-Singapore FTA.
48 Ibid.
49 See Section 2.3, *supra*.
50 K. Gordon and J. Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World', (2015) OECD Working Papers on International Investment, at 36, available at dx.doi.org/10.1787/5js7rhd8sq7h-en (accessed 7 November 2017).
51 The exception is the China-Switzerland BIT (2009), replacing the China-Switzerland BIT (1986), which has no provision for jurisdiction *ratione temporis*.

3.1. Jurisdiction *ratione temporis* over investment

China and Nigeria concluded a BIT in 2001 to replace the BIT signed in 1997. Article 11 of the 2001 BIT states: '[t]his Agreement shall apply to investments, which are made prior to or after its entry into force by investors of either Contracting Party ...'. The 2001 BIT is silent on jurisdiction *ratione temporis* over investment disputes. Jurisdiction *ratione temporis* over investment made before the commencement of the new BIT does not necessarily connote jurisdiction *ratione temporis* for arbitral tribunals to hear disputes which occurred before the commencement date of the BIT. For example, *Walter Bau AG* v. *Thailand* involved two successive BITs which adopted the Replacement Model. Germany and Thailand concluded a BIT in 1961. Later in 2002, they signed a new BIT, which took effect in 2004 and terminated the 1961 BIT. The 1961 BIT did not permit investor-state claims and provided only for state-to-state claims. The 2002 BIT does not expressly restrict claims that arose before its commencement. The survival clause in the 1961 BIT provided that it continues to apply for ten years after termination over investment made prior to its termination. This case concerns the 2002 BIT, which provides for ICSID arbitration. The *Walter Bau* tribunal held that, although the 2002 BIT could apply to investment made before its entry into force, the dispute resolution clause in the 2002 BIT did not provide the tribunal jurisdiction *ratione temporis* to consider disputes that had arisen before the commencement of the 2002 BIT.[52] Essentially, this award demonstrates that if a later BIT allows for investor-state arbitration when the earlier BIT does not, the dispute resolution settlement provision of the former will not displace the presumption against retroactivity under Article 28 of the VCLT.[53]

3.2. Jurisdiction *ratione temporis* over investment and investment disputes

Ten of China's BITs contain transition clauses that provide jurisdiction *ratione temporis* over investment and investment disputes.[54] A typical example is Article 10 of the China-Belgium BIT, which was signed in 2005 and entered into force in 2009 (the China-Belgium BIT (2009)). Article 10 has two paragraphs. The first paragraph provides that the China-Belgium BIT (2009) substitutes and replaces the old BIT that came into force in 1986 (the China-Belgium BIT (1986)). The second paragraph indicates that the China-Belgium BIT (2009):

> [S]hall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but *shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force.* Such disputes and claims shall continue to be settled according to the provisions of the Agreement of 1984 mentioned in paragraph 1 of this Article.[55]

Similar articles have been adopted by many of China's BITs, such as Article 16 of the China-Germany BIT (2003) (replacing the China-Germany BIT(1983)), Article 11 of

[52] *Walter Bau AG v. Thailand*, Award, UNCITRAL, 1 July 2009, at 9.67–9.68, 9.72–9.73.
[53] Art. 28 of the VCLT will be further discussed in Section 4.1, *infra*. For cases, see *Blečić v. Croatia*, Decision of 29 July 2004, [2004] ECHR 397.
[54] The list of Chinese BITs is on file with the author.
[55] Art. 10 of the China-Belgium BIT (2009) (emphasis added).

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the China-France BIT (2005) (replacing the China-France BIT(1984)), Article 10 of the China-Finland BIT (2004) (replacing the China-Finland BIT (1984)), Article 10 of China-Holland BIT (2001) (replacing the China-Holland BIT (1985)), and Article 12 of the China-Spain BIT (2005) (replacing the China-Spain BIT (1992)).

Ping An v. *Belgium* shows that this widely-adopted article may create controversies in jurisdiction *ratione temporis* over investment disputes.[56] In *Ping An*, the dispute arose under the 1986 BIT, before the 2009 BIT came into force. The claimants relied on the 1986 BIT for the substance of their claim and on the 2009 BIT for jurisdiction to utilize the ICSID tribunal, rather than resolve the dispute by *ad hoc* arbitration as prescribed by the 1986 BIT. The claimants argued that the dispute was not under judicial or arbitral process before the commencement of the 2009 BIT, so the 2009 BIT should be applied. The tribunal held that Article 10.2 does not necessarily imply this.[57] Firstly, the tribunal considered the wording of the notification procedure under the 2009 BIT, which states '[w]hen a legal *dispute arises* between an investor of one Contracting Party and the other Contracting Party, either party to the dispute shall notify the other party to the dispute in writing'.[58] The tribunal held that use of 'arises' and 'notify', instead of 'arises or has arisen' and 'notify or shall have notified', means that the notification procedure of the 2009 BIT is not applicable to disputes that have arisen and been notified of before its entry into force.[59] Article 10.2 should be read together with the notification procedure to refer to disputes arising after the 2009 BIT came into force. Secondly, it cannot be inferred from the preamble and Article 10 of the 2009 BIT that it applies to pre-2009 disputes notified under the earlier BIT but not under judicial or arbitral process. Thirdly, an expansive interpretation of the 2009 BIT would apply its wider dispute resolution clause to a dispute already notified under the 1986 BIT, which has a more restrictive dispute resolution clause. The tribunal holds that if this were the contracting states' true intention, it would have been expressly stated in the treaty.

The tribunal concluded that neither express or implied language in the 2009 BIT can justify the application of more extensive remedies from the 2009 BIT to pre-existing disputes that were notified under the 1986 BIT but not yet subject to arbitral or judicial process.[60] Such disputes should be resolved under the 1986 BIT.[61]

If contracting states intend to apply the expansive investor-state dispute resolution under a new BIT to disputes not yet under judicial or arbitral process before

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[56] For criticism and comment of the *Ping An* case, see Q. Ren, 'Ping An v Belgium Temporal Jurisdiction of Successive BITs', (2016) 31 *ICSID Review: Foreign Investment Law Journal* 129, at 130; G. Andriotis, 'Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (Ping An v. Belgium)', (2016) 15 *World Trade Review* 532, at 532–4.

[57] *Ping An v. Belgium*, *supra* note 11, para. 207, the tribunal indicating that '... there is a real risk that disputes arising prior to the 2009 BIT but not the subject of judicial or arbitral process might fall into some "black hole" or "arbitration gap" between the two BITs'.

[58] Art. 8.1 of the China-Belgium BIT (2009) (emphasis added).

[59] Ibid.

[60] *Ping An v. Belgium*, *supra* note 11, para. 231.

[61] Even if the 2009 BIT terminates the 1986 BIT, the survival clause in the 1986 BIT can cover such disputes for ten years after the termination; see T. Voon and A. D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law', (2016) 31 *ICSID Review: Foreign Investment Law Journal* 413, at 429.

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its commencement, it must be explicitly stated in the transition clause or preamble of the new BIT. For example, transition clauses in the China-Portugal BIT (2005) (replacing the China-Portugal BIT (1992)) and the China-South Korea BIT (2007) (replacing the China-South Korea BIT (1992)) provide that if an investment dispute arose before the new BIT comes into effect, this dispute shall be bound by the old BIT regardless of whether it was already under judicial or arbitral process.[62]

4. Amendment Model

Article 39 of the VCLT provides that '[a] treaty may be amended by agreement between the parties'. Under the Amendment Model, states conclude protocols or other agreements to amend their BIT, these agreements become part of the BIT, and, except what has been removed by protocols, the BIT continues to be effective. China has used the Amendment Model to upgrade four BITs, which can be divided into two categories: amendment to the substantive rights and obligations of contracting states; and amendment to jurisdiction of a BIT.

4.1. Amendment to the substantive rights and obligations of contracting states

China concluded protocols to amend the China-Bulgaria BIT (1989), the China-Czechoslovakia BIT (1991), and the China-Romania BIT (1994).[63] The amendments cover the national treatment clause and the transfer clause of the old BITs.[64] National treatment and transfer concerns substantive rights and obligations of the states to protect investment and investors; for example, substantive rights and obligations in investor-state arbitration, as opposed to determining jurisdiction. Article 28 of VCLT provides:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

An amendment to the substantive rights and obligations of a BIT cannot be applied retroactively. For example, in *Liechtenstein* v. *Germany*, the European Court of Human Rights declined to hear a dispute on expropriation which took place prior to the entry into force of the European Convention on Human Rights.[65]

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[62] Art. 11 of the China-Portugal BIT (2005) and Art. 12 of the China-South Korea BIT (2007).

[63] Additional Protocol Between the Government of the People's Republic of China and the Government of the People's Republic of Bulgaria Concerning the Reciprocal Encouragement and Protection of Investments (the China-Bulgaria Protocol), signed on 26 June 2007 and effective on 10 November 2007. Additional Protocol between the Government of the People's Republic of China and the Government of the Slovak Republic to the BIT, signed in 2005, and Additional Protocol to the Agreement between the Government of the People's Republic of China and the Government of Romania on the Mutual Promotion and Protection of Investments, signed in 2010. Every protocol provides that it becomes an integral part of the old BIT. See, e.g., Art. 3 of the China-Bulgaria Protocol.

[64] Ibid.

[65] *Prince Hans-Adam II of Liechtenstein v. Germany* (*Liechtenstein v. Germany*), Merits, Judgment of 12 July 2001, [2001] ECHR 467, paras. H8–9.

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The three Chinese protocols mentioned above do not substantially amend old BITs. Consequently, the investment regime between China and Bulgaria, Czechoslovakia and Romania has not improved significantly. If China and its contracting states believe an old BIT has failed to serve their economic needs and they have the political will to significantly upgrade it, they should either follow the Modification concluded by China and Cuba to dramatically amend the old BIT (the Modification of the China-Cuba BIT, which will be discussed later),[66] or they should adopt the Replacement Model using a new BIT to replace the old one.

4.2. Amendment to jurisdiction of a BIT

China and Cuba concluded a BIT in 1995 and signed the Modification of the China-Cuba BIT in 2007. The Modification not only amends the substantive rights and obligations of the parties but also expands the jurisdiction of investor-state arbitration.[67] Prior to the amendment, investor-state arbitration only applied to disputes over the amount of compensation paid for expropriation.[68] After the amendment, arbitration could be applied to all disputes.[69] Like the protocols between China and Bulgaria, Czechoslovakia and Romania, respectively, the Modification of the China-Cuba BIT only indicates the date of its entry into force: '[t]hese modifications shall enter into force the first day of the month following the date on which both Contracting parties have notified each other in writing that their respective internal legal procedures have been concluded'.[70] It does not contain a transition or application clause to determine whether it is applicable to disputes that crystallized before its commencement. Different from the amendment to substantive rights and obligations, the amendment to the jurisdiction of the BIT can be applied to disputes that crystallized before it came into effect. This was the conclusion reached in *Nordzucker AG* v. *Poland*.[71] Germany and Poland signed a BIT in 1991 containing an investor-state arbitration clause limited to expropriation and capital transfer. The two countries then concluded a Protocol in 2005 ('the Germany-Poland Protocol (2005)') to amend the 1991 BIT, expanding the investor-state arbitration clause to all investment disputes. The Germany-Poland Protocol (2005) does not contain a transition clause to help determine whether it applies to disputes crystallizing before its commencement. The Germany-Poland Protocol came into force on 28 October 2005. In *Nordzucker*, the disputes crystallized before the commencement of the Germany-Poland Protocol (2005) but the claimant submitted the disputes to investor-state arbitration. The claimant argued that the extensive investor-state

[66] The Modification of the Agreement on the promotion and Mutual Protection of Investments between China and Cuba, signed on 20 April 2007 and effective on 1 December 2008 (hereinafter, the Modification of the China-Cuba BIT).

[67] Ibid., Arts. 1–10. Seven aspects of the 1995 BIT are amended: the definitions of (1) investor and (2) investment; (3) MFN treatment; (4) transfer; (5) subrogation; (6) state-to-state dispute resolution; and (7) investor-state dispute resolution.

[68] Art. 9.3 of the China-Cuba BIT (1995).

[69] Arts. 10.1 and 10.3 of the Modification of the China-Cuba BIT.

[70] The Modification of the China-Cuba BIT.

[71] *Nordzucker AG v. Poland*, Partial Award, UNCITRAL, 10 December 2008, Section 6.2 (hereinafter, *Nordzucker AG v. Poland*).

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arbitration clause in the Germany-Poland Protocol (2005) should be applied. The tribunal distinguished the substantive obligation (to protect investments) which must have been in force at the time of the alleged breach of that obligation and the procedural obligation to arbitrate which only needed to be in force at the time of filing the dispute,[72] and came to the conclusion that the distinction was important when substantive and procedural rights and obligations were not created simultaneously. The tribunal held that, unless a different intention appears from the BIT, Protocol or otherwise, the investor-state arbitration clause in the Protocol governed not only future breaches, but also past breaches as long as they were not time-barred or had otherwise become inadmissible when the Protocol became effective.[73] This is not a retroactive application of the investor-state arbitration clause, but a correct application of Article 28 of the VCLT.[74] As Article 28 does not specify that it applies only to substantive rights and obligations, it may apply to jurisdiction as well. The tribunal held that '"any act of fact which took place before the date of the entry into force of the Treaty" may have a different meaning, depending on the substantive or procedural nature of the provision or obligation which is at stake'.[75] After analyzing the context, object, and purposes of the BIT and its Protocol, as well as the wording of other Polish BITs, the tribunal concluded that no alternative intention existed in the BIT and Protocol.[76] Therefore, the 2005 Protocol applies to 'old' disputes, provided they constitute a breach of the 1991 BIT.[77] Another example is *Tradex* v. *Albania*.[78] The dispute crystallized before Albanian investment law providing for ICSID arbitration entered into force.[79] The *Tradex* tribunal found that the arbitration provision in the new law could be invoked for the 'old' dispute.[80]

In the Amendment Model, modification of jurisdiction can govern disputes that arose before it came into force, unless parties indicate otherwise. However, in the Replacement Model, a new BIT may not be applied to disputes crystallizing prior to its commencement. The reason is that, in the Amendment Model, states generally do not put a transition clause in the amendment to carve out disputes existing before the commencement of the amended jurisdiction clause. With the Replacement Model, transition clauses are included to restrict jurisdiction *ratione temporis* over investment and/or investment disputes. Moreover, in the Amendment Model, un-amended substantive rights and obligations become effective earlier than the amended jurisdiction clause, whereas they become effective simultaneously with the jurisdiction clause in the Replacement Model when the new BIT replaces the old one. As the *Nordzucker* tribunal indicates, the immediate applicability of a jurisdictional clause of an amendment implies that it can also be applied to pre-exit

[72] Ibid., paras. 103–7.
[73] Ibid., para. 108.
[74] Ibid., paras. 105 (iv), 107, 109.
[75] Ibid., para. 107 (iv).
[76] Ibid., paras. 113–14.
[77] Ibid., para. 110.
[78] *Tradex Hellas SA (Greece) v. Republic of Albania*, Decision on Jurisdiction of 24 December 1996, ICSID Case No. ARB/94/2 (hereinafter, *Tradex v. Albania*).
[79] Ibid., Section B.
[80] Ibid., Section D7.

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events, provided that those events breached the BIT at the time they occurred and arbitration was brought after the commencement of the amendment.[81]

If an amendment removes rather than bestows on investors the right to investment arbitration, could this procedural amendment govern disputes that have already crystallized? The answer is yes if the investor commences arbitration after the commencement of the amendment, the amendment has no transition clause, the amendment to jurisdiction is applicable immediately, and state parties do not intend to carve out pre-existing disputes. This amendment will have a negative effect on investors who have pre-existing disputes. A BIT is a triangular treaty which is signed by states but gives rights to a third party (investors).[82] However, for two reasons it is difficult for the investor to argue that an amendment does not apply. Firstly, the Amendment Model will not trigger the survival clause of a BIT. Survival clauses in China's BITs generally provide for a treaty to remain effective for ten years and continue in force if not terminated. After the initial ten-year period, *either contracting state* may, with one year's written notice, terminate the BIT, after which the BIT will continue to apply to investments made prior to the date of termination for a further period of ten years from the date of termination.[83] The wording 'either contracting state' means the survival clause is relevant only to *unilateral termination* and not amendments *jointly* made by two states. Secondly, Article 70 of the VCLT provides that, unless otherwise agreed, termination of a treaty shall not affect any existing right, obligation or legal situation of the parties. 'Parties' refers to contracting states to a treaty, not investor-beneficiaries of a BIT. To be a responsible host state, China should avoid using the Amendment Model to restrict the jurisdiction of a BIT. For example, when the US and Morocco signed an FTA and jointly terminated the US-Morocco BIT, they permitted investor-state and state-to-state claims with respect to existing investments and investment disputes arising under the BIT to continue for another ten years from the date of replacement.[84] This demonstrated their policy objectives to protect and promote foreign investment.

5. Joint Interpretation Model

The Joint Interpretation Model contains two scenarios. First is that member states jointly interpret a BIT by using devices such as side agreements, protocols, and understanding; and the second is that a state publishes a diplomatic announcement about an existing BIT with the other contracting state's understanding or to answer its inquiry.[85] The second scenario is used to resolve issues specific to one state but with potential impact on the interests of the other state. The Joint Interpretation Model distinguishes from the Amendment Model when states consider their interpretation

[81] *Nordzucker AG v. Poland*, *supra* note 71, paras. 105, 110–12.
[82] A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', (2015) 56 *Harvard International Law Journal* 353, at 368.
[83] See, e.g., Art. 12 of the China-Laos BIT.
[84] Arts. 1.2.3–1.2.4 of the US-Morocco FTA.
[85] If a member state makes a diplomatic announcement about an existing BIT to answer the other member state's inquiry, the announcement may be also in the form of exchanges of letters.

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is not an amendment to the existing BIT but reflects its original meaning. The Joint Interpretation Model is relevant to 'upgrading' a BIT because it helps to clarify the meaning of the BIT so may enhance its implementation.

China has only used this model once. In *Sanum* v. *Laos*, the Laotian Government made diplomatic announcements (*Notes Verbales*) stating the China-Laos BIT did not extend to Macau and requesting China's response.[86] China announced in return that, according to the Macau Basic Law,[87] Macau is not bound by the BITs concluded by the Central Government, unless the Central Government seeks the Macau Government's opinion and makes separate arrangements with its contracting state.[88] These announcements were made when Laos lost an investment arbitration case against Sanum and tried to set aside the award in courts at the seat of arbitration, Singapore. The issue was whether China's diplomatic announcements should be applied to the dispute that had been submitted to arbitration before they were made. China, Laos, and the Singapore High Court[89] considered the announcements to be interpretations of the BIT so they could be applied retroactively, while the Singapore Court of Appeal held that they were amendments to the BIT without retroactive effect.[90]

5.1. *Sanum* v. *Laos*

In 1987, China and Portugal signed a Joint Declaration on the Question of Macau, as Macau was at the time a Portuguese colony, which specified the procedure and requirements under which Macau would be transferred to Chinese sovereignty in 1999.[91] The China-Laos BIT was concluded and became effective in 1993. It does not explicitly indicate its applicability to Macau. When Macau was returned to China, it became a SAR[92] under China's 'One Country, Two System' regime in 1999.[93] Both China and Laos were silent on whether the BIT extended to Macau after the handover. The silence was maintained even after the China-Laos BIT was renewed in 2003.

The Singapore Court of Appeal held that China's diplomatic announcements were inadmissible and, even if admitted, they did not change the applicability of the China-Laos BIT to Macau.[94] Firstly, the court held that the 'moving treaty frontier' rule (MTF Rule) under Article 15 of the Vienna Convention on Succession of States (VCST) and Article 29 of VCLT constituted customary international law and should

[86] 3rd affidavit of Outakeo Keodouangsinh, 19 February 2014, at 8, 10-12. *Sanum v. Laos*, [2015] SGHC 15, *supra* note 11, paras. 39–40.

[87] The Macao Basic Law (adopted at the First Session of the Eighth National People's Congress on 31 March 1993, effective 20 December 1999), available at www.umac.mo/basiclaw/english/ch1.html (accessed 16 February 2017).

[88] *Sanum v. Laos*, [2015] SGHC 15, *supra* note 11, paras. 39–40. The first diplomatic announcement was made by the Chinese Embassy in Laos in 2014 and the second was made by the China Ministry of Foreign Affairs in 2015.

[89] *Sanum v. Laos*, [2015] SGHC 15, *supra* note 11, paras. 39–40.

[90] *Sanum v. Laos*, [2016] SGCA 57, *supra* note 11, para. 116.

[91] For discussion of SAR in constitutional law, see A. Gonçalves, 'A Paradigm of Autonomy: The Hong Kong and Macau Sars', (1996) 18 *Contemporary Southeast Asia* 36.

[92] Art. 31 of the PRC Constitution [Xian Fa] (adopted at the Fifth Session of the Fifth National People's Congress on 4 December 1982, amended 14 March 2004).

[93] For discussion of the policy of One Country, Two Systems, see G.G. Wang and P.M.F. Leung, 'One Country, Two Systems: Theory into Practice', (1998) 7 *Pacific Rim Law & Policy Journal* 279.

[94] *Sanum v. Laos*, [2016] SGCA 57, *supra* note 11, para. 116. The Court held that, because the 2014 diplomatic announcement was not admissible, it was unnecessary to consider the 2015 announcement.

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be applied. According to the MTF Rule, after China took sovereignty of Macau, Chinese treaties (including the China-Laos BIT) presumably applied to Macau from the date of the succession, unless an intention 'appears' from the BIT or 'otherwise established' evidence shows that it does not. The text, objects, and purposes of the China-Laos BIT, as well as the circumstances of its conclusion, show no intention to displace the MTF Rule. The silence of China and Laos favours the conclusion that the default MTF Rule was not displaced when the dispute crystallized.

Secondly, even assuming that evidence prior to the date when the dispute crystallized ('the critical date') is inconclusive on whether the China-Laos BIT applies to Macau so diplomatic announcements are admissible, the announcements should not constitute a retroactive amendment of the BIT. This is because the MTF Rule is customary international law that can be derogated only if the parties to a treaty expressly agree or share an understanding that it will be excluded. Even if China had intended to exclude the MTF Rule in relation to Macau by way of the China-Portugal Joint Declaration in 1987, Laos did not express its agreement before the dispute with Sanum crystallized. The diplomatic announcements do not prove that China and Laos shared a common understanding over the applicability of the BIT to Macau prior to the crystallization of the dispute. The diplomatic announcements are not interpretations of the BIT, rather they are 'based on an understanding of how the rules of international law would apply to the two states in light of the domestic constitutional arrangements in [China]'.[95] China's domestic arrangements should not affect the applicability of international law, namely the MTF Rule. Therefore, the BIT should be applied to Macau.

The reasoning of the Singapore Court of Appeal contrasts with that of *Tza Yap Shum* v. *Peru*, which is the first investment arbitration involving an investor from China's SAR who would like to apply a BIT concluded by China.[96] The tribunal held that whether the China-Peru BIT (1994) should be applied to Tza depends on his nationality and whether he is a Chinese national is a Chinese domestic law issue. The Chinese Nationality Law confers Chinese nationality to natural persons of Chinese descent born in China.[97] The Hong Kong Basic Law provides that Chinese Nationality Law applies to Hong Kong, so Hong Kong residents of Chinese descent and born in the Chinese territories (including Hong Kong) are Chinese nationals.[98] Because the definition of 'investor' in the China-Peru BIT rests on nationality, the tribunal held that Tza had a standing to bring arbitration under this BIT. Following this logic, Sanum would not be able to invoke the China-Laos BIT.[99] Sanum is a corporate established according to Macau law. Article 1.2(b) of the China-Laos BIT provides that it applies to economic entities established in accordance with the laws and regulations of each contracting state. The Macau Basic Law does not indicate

[95] *Sanum v. Laos*, [2016] SGCA 57, *supra* note 11, para. 116.
[96] *Tza Yap Shum v. The Republic of Peru*, Decision on Jurisdiction and Competence of 19 June 2009, ICSID Case No. ARB/07/6.
[97] Ibid., paras. 58, 61.
[98] Ibid., paras., 54, 60.
[99] See W. 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', (2011) 10 *Chinese Journal of International Law* 55, at 61–3.

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that Chinese Corporate Law applies to Macau.[100] Therefore, Sanum is not a qualified investor under the China-Laos BIT.[101]

It is unsurprising that soon after the Singapore Court of Appeal rendered its judgment, China's Foreign Ministry Spokesperson stated that this judgment was incorrect.[102] As a principle, the BITs that China concluded do not apply to SARs, unless otherwise decided by the Central Government after seeking the views of the SAR governments and consulting with the other contracting party of a BIT.[103]

5.2. Applicability of China's BITs to its SARs

China has 5,000 years of ancient history glory, but Hong Kong and Macau remind it of its modern history of semi-colonization. China disagrees that the handover of Macau and Hong Kong from Portugal and the UK, respectively, is state succession. During negotiations with the UK and Portugal, China repeatedly emphasized its historical sovereignty over Hong Kong and Macau and how resumption of that sovereignty is unrelated to state succession.[104] For China, the MTF Rule should not be applied because it is a rule for state succession.[105]

The Singapore Court of Appeal does not discuss whether the turnover of Macau from Portugal to China is state succession. This is because both Sanum and Laos did not dispute on this point.[106] Under public international law, whether the turnover of a territory to a state is a state succession is not only based upon the view of international community but also the self-perception of the states involved.[107] *Sanum* is not only concerned with the interests of Sanum and Laos, but also has great implications on China. China is a third party which has a direct interest in the outcome of the case. Sanum's acceptance of VCST cannot represent China's position. Although the court has no obligation to, it may consider China's opinion at least as an *amicus* brief. Even if the court holds that it is unnecessary to consider China's opinion because it only decides the jurisdiction of the particular dispute between Sanum and Laos, the court should refrain from making a sweeping conclusion that the China-Laos BIT

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[100] Annex III of the Macau Basic Law.

[101] N. Hart and S. Srikumar, 'Investor-State Arbitration before the High Court of Singapore: Territoriality, Nationality and Arbitrability Case Note', (2015) 4 *Cambridge Journal of International and Comparative Law* 191, at 195.

[102] Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016, available at www.italaw.com/sites/default/files/case-documents/italaw7687.pdf (accessed 16 February 2017).

[103] Ibid.

[104] H. Xu, 'The Practice of Applying International Treaties to Hong Kong and Macau Special Administrative Regions', *Legal Daily*, available at news.xinhuanet.com/legal/2016-10/22/c_129333036.htm (accessed 10 November 2016). The author is the Head of Treaty and Law Department, China Ministry of Foreign Affairs.

[105] A similar view can be found in C.J. Tams, 'State Succession to Investment Treaties: Mapping the Issues', (2016) 31 *ICSID Review: Foreign Investment Law Journal* 314, at 340 (indicating that the handovers of China's SARs are unusual cases of successions and the MTF Rule needs to be qualified).

[106] Sanum and Laos agree that Art. 15 of the VCST should be considered customary international law and applied to this case. *Sanum v. Laos*, [2016] SGCA 57, *supra* note 11, para. 17. The Singapore High Court also bases its judgment on parties' agreement on succession, *Sanum v. Laos*, [2015] SGHC 15, *supra* note 11, para. 60. For criticism of the High Court judgment, see M. Hwang and A. Chang, 'Government of the Lao People's Democratic Republic v Sanum Investments Ltd', (2015) 30 *ICSID Review: Foreign Investment Law Journal* 506, at 517–18.

[107] A. Zimmermann and J. G. Devaney, 'Succession to Treaties and the Inherent Limits of International Law', in C.J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), *Research Handbook on the Law of Treaties* (2014), 505 at 515.

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applies to *Macau* generally before the critical date. A more precise judgment should be that the China-Laos BIT applies to *Sanum and its investment* before the critical date. A good practice is the *Tza* award where the tribunal explicitly indicates that it deals with Tza's investment only and 'determining the applicability of the Peru-China BIT to Hong Kong is unnecessary'.[108]

Although Article 27 of the VCLT provides that a party may not invoke its internal law to justify its failure to perform a treaty, Article 27 is without prejudice to Article 46.[109] Article 46 provides that if a state's violation of its internal law regarding its competence to conclude a treaty is manifest and concerned a fundamental rule of domestic law, the state can withdraw its consent to the treaty: 'A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'[110] If China concludes a BIT and applies it to Macau without consulting the Macau Government, China manifestly violates the Macau Basic Law.[111] Article 2 of the Macau Basic Law provides that Macau has a high degree of autonomy and enjoys executive, legislative, and independent judicial power.[112] This high degree of autonomy derives from the China-Portugal Joint Declaration. Article 136 of the Macau Basic Law authorizes the SAR Government to conclude treaties with a foreign state in appropriate fields including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields.[113] Accordingly, after reuniting with China, Hong Kong and Macau have concluded many treaties with foreign states.[114] Article 138 provides that the application to the SAR of international agreements to which China is a member or becomes a party shall be decided by the Central Government after seeking the views of the SAR Government.[115] Considering the fundamental importance of 'One Country, Two Systems' to China and as an international commitment to Portugal, the Singapore Court of Appeal should have exhibited more caution in rejecting China's diplomatic announcements.

Article 31.3(a) of the VCLT requires that any subsequent agreement between member states regarding the interpretation of a treaty shall be taken into account. If the subsequent agreement is an interpretation of the treaty, it should be applied both retroactively and proactively. However, member states to a BIT have dual roles as 'treaty parties (with an interest in interpretation) and actual or potential respondents in investor-state disputes (with an interest in avoiding liability)'.[116]

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[108] *Tza Yap Shum v. The Republic of Peru*, Decision on Jurisdiction and Competence of 19 June 2009, ICSID Case No. ARB/07/6, para. 68.

[109] Art. 27 of the VCLT.

[110] Ibid., Art. 46.

[111] For a discussion about the similar scenarios in Hong Kong, see A. Chen, 'Queries to the Recent ICSID Decision on Jurisdiction upon the Case of Tza Yap Shum v. Republic of Peru: Should China-Peru BIT 1994 Be Applied to Hong Kong SAR under the One Country Two Systems Policy', (2009) 10 *Journal of World Investment and Trade* 829, at 839–45.

[112] Art. 2 of the Macau Basic Law.

[113] Art. 136 of the Macau Basic Law; Art. 150 of the Hong Kong Basic Law.

[114] For BITs concluded by Macau, investmentpolicyhub.unctad.org/IIA/CountryBits/123. For BITs concluded by Hong Kong, investmentpolicyhub.unctad.org/IIA/CountryBits/93 (accessed 16 February 2017).

[115] Art. 138 of the Macau Basic Law; Art. 153 of the Hong Kong Basic Law.

[116] A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', (2010) 104 *The American Journal of International Law* 179, at 180.

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Therefore, courts and arbitration tribunals are with caution when member states make a joint interpretation detrimental to an investor's interests after an investment dispute crystalizes.[117] In *Sanum*, China's diplomatic announcements were made at a very late stage, after the tribunal had rendered the award. China and Laos are improperly silent regarding whether the BIT shall be applied to China's SARs even after it has been renewed. In this scenario, the tension between Laos' role as a treaty party and respondent becomes stark. The Singapore Court of Appeal does not find convincing evidence to support that China and Laos had agreed upon the territorial application of the BIT before the investment dispute crystalized. From this aspect, the Singapore Court of Appeal's decision that China's diplomatic announcements shall not be applied to Sanum is supported by the general presumption of international law against retroactivity.

To avoid uncertainties and controversies,[118] China should review its BITs and work with its contracting states to clarify whether its BITs apply to SARs.[119] China's FTAs generally contain a territorial application provision providing that the FTAs apply to the customs territory of China.[120] This excludes SARs because they are separate customs territories. In contrast, China's BITs, except the China-Russia BIT,[121] do not include such a provision. It is unclear whether this omission was deliberate because China has not completed consultation procedures with its SARs governments or whether China and its contracting states improperly ignore the applicability of the BITs to China's SARs. Nevertheless, non-application of China's BITs to its SARs is a double-edged sword. SARs are of special significance in China's investment regime, because China's SARs have served as a critical springboard for China's outbound investment.[122] China needs to carefully review all of its BITs and make diplomatic announcements to clarify their applicability to SARs. This may balance China's domestic constitutional requirement, historical and political pride, and protection and promotion of international investment.

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[117] Ibid., at 212–13.

[118] The applicability of China's BITs to its SARs have been much debated in literature, see Hwang and Chang, *supra* note 106, at 509, 516; N. Gallagher, 'Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy', (2016) 31 *ICSID Review: Foreign Investment Law Journal* 88, at 98; O.G. Repousis, 'On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao', (2015) 37 *Michigan Journal of International Law* 113, at 115.

[119] A comparable example is the EU. In order to avoid an international court or arbitral tribunal from interpreting or applying EU law in investment arbitration, in 2009, the European Court of Justice rendered three important judgments on the relationship between pre-accession BITs of EU member states with a third state and the EU law. Case C-205/06, *Commission v. Austria* [2009] ECR I-1301; Case C-249/06, *Commission v. Sweden* [2009] ECR I-1335; Case C-118/07, *Commission v. Finland* [2009] ECR I-10889. For comments, see N. Lavranos, 'Bilateral Investment Treaty (BITs) and EU Law', at 3, available at www.researchgate.net/publication/228148786.

[120] See, e.g., Art. 1.5 of the China-South Korea FTA.

[121] Art. 1 of the Protocol of the China-Russia BIT excludes Hong Kong and Macau SARs from its application. The Protocol was concluded the same date as the BIT.

[122] Toh Han Shih, 'China Outbound Investment Deals from Hong Kong Rise 66.6 Per Cent', *South China Morning Post*, available at www.scmp.com/business/china-business/article/1329807/china-outbound-investment-deals-hong-kong-rise-666-cent (arguing the 66.6 per cent rise highlights Hong Kong's importance as a hub for overseas investments from China).

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6. Direction of Bit upgrading

What would be the general direction of BIT upgrading with China being a case study? China's experience demonstrates that the direction of BIT upgrading is two-fold. Firstly, the Coexistence Model and the Replacement Model are the most frequently adopted models because they can comprehensively improve investment regulation regimes. They are states' favourites in BIT upgrading. However, states may begin to move from the Coexistence Model to the Replacement Model. This is mainly because the vertical treaty overlap arising from the Coexistence Model and the consequent controversial treaty application may result in an old BIT prevailing over the investment chapter of a new FTA, which may contradict states' intentions. Realizing these issues, the EU has decided to use EU-wide investment treaties to replace all BITs between an EU treaty partner and individual EU members. The Mexico-Central America FTA (2011) replaces the Mexico-Costa Rica FTA (1994), Mexico-Nicaragua FTA (1997), and Mexico-El Salvador-Guatemala-Honduras FTA (2000). China should follow these examples to work with its contracting states to terminate old BITs that coexist with new FTAs. Moreover, US withdrawal from the TPP may have a discouraging effect on the development of a mega-FTA, which may encourage the shift from the Coexistence Model to the Replacement Model in the field of international investment law.

Secondly, more states will possibly adopt multiple models consecutively to upgrade their BITs. The China-South Korea BIT, the China-Japan BIT, the China-Switzerland BIT, and the China-Laos BIT were upgraded by more than one model. Adoption of multiple models depends on states' economic needs and negotiation agendas. For example, China and Switzerland concluded a BIT in 2009 replacing the China-Switzerland BIT (1986), and they also signed an FTA with an investment chapter in 2003.[123] Although the China-Switzerland FTA and the China-Switzerland BIT (2009) coexist, there is no *de facto* vertical treaty overlap between them. This is because the investment chapter of the China-Switzerland FTA is so brief and contains no contradictory provisions to the China-Switzerland BIT (2009).[124] When China and Switzerland concluded the FTA, they may have already envisioned that they would soon replace their old BIT with a new one and so they purposefully left the investment chapter of the FTA almost blank.

As a conclusion, the procedural models used to upgrade BITs can be divided into the Coexistence Model, the Replacement Model, the Amendment Model, and the Joint Interpretation Model. Each model has benefits and issues. This article suggests that if states plan to conclude an FTA with a comprehensive investment chapter, they should consider terminating their old BIT to avoid vertical treaty overlap. In replacing a BIT, a clear transition clause should be included in the new BIT. If the Amendment Model is chosen, states should bear in mind that jurisdiction *ratione temporis* of the amendments to jurisdiction of a BIT differs from the amendments to the substantive rights and obligations of contracting states. Regarding the Joint

[123] Ch. 9 of the China-Switzerland FTA.
[124] Ibid., Arts. 9.1 and 9.2.

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Interpretation Model, China should work with its contracting states to clarify whether its BITs apply to its SARs as soon as possible

Appendix

Thirty-two BITs are surveyed in this article. Among them, the China-South Korea BIT, the China-Japan BIT, the China-Switzerland BIT, and the China-Laos BIT use more than one model. They are as follows:

Coexistence Model:

1. The China-Pakistan BIT
2. The China-Australia BIT
3. The China-New Zealand BIT
4. The China-Chile BIT
5. The China-Peru BIT
6. The China-Iceland BIT
7. The China-Japan BIT
8. The China-South Korea BIT
9. The China-Switzerland BIT
10. The China-Thailand BIT
11. The China-Singapore BIT
12. The China-Malaysia BIT
13. The China-Philippines BIT
14. The China-Viet Nam BIT
15. The China-Laos BIT
16. The China-Indonesia BIT
17. The China-Cambodia BIT
18. The China-Myanmar BIT

Replacement Model:

1. The China-Sweden BIT
2. The China-Germany BIT
3. The China-France BIT
4. The China-Belgium and Luxemburg BIT
5. The China-Finland BIT
6. The China-the Netherlands BIT
7. The China-Switzerland BIT
8. The China-Portugal BIT
9. The China-Spain BIT

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10. The China-Uzbekistan BIT
11. The China-Nigeria BIT
12. The China-South Korea BIT

Amendment Model:

1. The China-Romania BIT
2. The China-Cuba BIT
3. The China-Bulgaria BIT
4. The China-Czechoslovakia BIT

Diplomatic Announcement Model:

1. The China-Laos BIT

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