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INTERPRETING THE TERRITORIAL SCOPE OF OFFSHORE INVESTMENT DISPUTES UNDER UNCLOS

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ABSTRACT: This article explores the intersection between the United Nations Convention on the Law of the Sea (UNCLOS) and the Investor-State Dispute Settlement within the framework of international investment law. It examines how UNCLOS principles, designed to regulate ocean governance, are steadily becoming relevant in resolving disputes arising from foreign investments in functional maritime zones, including the exclusive economic zone and the continental shelf. Drawing on case law, the study analyses the potential challenges posed by the territorial application of bilateral investment treaties to offshore investments and the potential interpretative role of UNCLOS and the Vienna Convention on the Law of Treaties in addressing such complexities. Emphasizing the need for a balanced approach, it argues for the broad interpretation of "territory" in international investment agreements. Given that offshore investments continue to expand, this study concludes that UNCLOS is expected to play a significant role in shaping the future of international investment law and guiding arbitral tribunals in offshore disputes.

KEYWORDS: Arbitration, Investor-state Dispute Settlement, ICSID, UNCLOS, Maritime Jurisdiction Zone.

INTERPRETACIÓN DEL ALCANCE TERRITORIAL DE LAS CONTROVERSIAS DE INVERSIÓN OFFSHORE SEGÚN LA CONVEMAR

RESUMEN: Este artículo explora la intersección entre la Convención de las Naciones Unidas sobre el Derecho del Mar (CONVEMAR) y el arbitraje de diferencias inversor-estado dentro del marco del derecho internacional de las inversiones. Se examina cómo los principios de la CON-

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VEMAR, diseñados para regular la gobernanza de los océanos, están adquiriendo una relevancia constante en la resolución de controversias derivadas de inversiones extranjeras en espacios marítimos funcionales, incluyendo la zona económica exclusiva y la plataforma continental. Basándose en la jurisprudencia, el estudio analiza los posibles desafíos planteados por la aplicación territorial de los tratados bilaterales de inversión a las inversiones offshore y el potencial papel interpretativo de la CONVEMAR y la Convención de Viena sobre el Derecho de los Tratados para abordar tales complejidades. Haciendo hincapié en la necesidad de un enfoque equilibrado, aboga por la interpretación amplia de "territorio" en los acuerdos internacionales de inversión. Dado que las inversiones offshore continúan expandiéndose, este estudio concluye que se espera que la CONVEMAR desempeñe un papel importante en la configuración del futuro del derecho internacional de las inversiones y en la orientación de los tribunales arbitrales en las controversias offshore.

PALABRAS CLAVE: Arbitraje, Solución de controversias entre inversores y Estados, CIADI, CONVEMAR, Espacios de jurisdicción marítima.

INTERPRÉTATION DU CHAMP D'APPLICATION TERRITORIAL DES DIFFÉRENDS RELATIFS AUX INVESTISSEMENTS OFFSHORE AU TITRE DE LA CNUDM

RÉSUMÉ: Cet article explore l'intersection entre la Convention des Nations unies sur le droit de la mer (CNUDM) et le mécanisme de règlement des différends entre investisseurs et États dans le cadre du droit international des investissements. Il examine comment les principes de la CNUDM, conçus pour réglementer la gouvernance des océans, deviennent de plus en plus pertinents dans la résolution des différends découlant des investissements étrangers dans les zones maritimes fonctionnelles, y compris la zone économique exclusive et le plateau continental. S'appuyant sur la jurisprudence, l'étude analyse les défis potentiels posés par l'application territoriale des traités bilatéraux d'investissement aux investissements offshore et le rôle interprétatif possible de la CNUDM et de la Convention de Vienne sur le droit des traités pour aborder ces complexités. Soulignant la nécessité d'une approche équilibrée, elle plaide en faveur de l'interprétation large du terme "territoire" dans les accords internationaux d'investissement. Étant donné que les investissements offshore continuent de se développer, cette étude conclut que la CNUDM devrait jouer un rôle important dans l'élaboration de l'avenir du droit international des investissements et dans l'orientation des tribunaux arbitraux dans les différends offshore.

MOT CLES: Arbitrage, règlement des différends entre investisseurs et États, CIRDI, CNUDM, zone de juridiction maritime.

I. INTRODUCTION

International arbitration is a well-established method for dispute settlement for public and private aspects of international law. Indeed, it has a long-standing historical tradition. The use of arbitration to resolve disputes between investors and States can be traced back to the case between the Suez Canal Company and Egypt. The disputing parties agreed to submit the matter to Napoleon III, with the arbitral commission issuing its award in 1864.

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Arbitration is a process where the disputing parties, by mutual agreement, submit their dispute to an arbitral tribunal composed of independent arbitrators. By selecting arbitration, the parties choose a private method of dispute resolution as an alternative to litigation in a national court. The tribunal is tasked with impartially considering the claims and defences and rendering a binding award in accordance with the applicable law[2].

International arbitration has become the leading method for resolving complex cross-border disputes due to its advantages. Arbitration has been employed to solve both inter-State and private disputes. With the emergence of investor-State dispute settlement (ISDS), it became a hybrid mechanism for addressing mixed disputes, those involving private entities and sovereign States. In recent decades, the growth of international investment has emerged as a significant economic trend. This expansion offers countries valuable access to foreign capital and advanced technologies. However, it also increases the likelihood of legal conflicts arising between foreign investors and host States. Investors may initiate arbitration proceedings against a host State, typically relying on an international investment agreements (IIAs). IIAs consist Bilateral Investment Treaties (BITs) between States, and Treaties with Investment Provisions (TIPs). BITs are concluded between the investor's home States and host States and this type is the most common type of IIAs. On the other hand, TIPs can be any type of investment treaty which cannot be classified as BITs and they are usually in the multilateral form. This dispute resolution framework is designed to encourage foreign investment by exempting investors from the requirement to exhaust local remedies and enabling them to directly approach an international tribunal to resolve their disputes with the host States. The adoption of modern international arbitration instruments by States serves to reassure potential foreign investors and enhances its appeal as a destination for foreign investments. In this regard, investment arbitration serves as a crucial tool for investors to mitigate political risks that they may be exposed to under normal circumstances by operation in foreign jurisdic-

[2] Blackaby KC, N., Partasides, C. and Redfern, A., *Redfern and Hunter on International Arbitration*, OUP 2022, p. 2; WIPO Arbitration and Mediation Center, "What Is Arbitration?", https://www.wipo.int/amc/en/arbitration/what-is-arb.html, accessed 29 December 2024; Müller, D., "Ad hoc Investment Arbitration Based on State Contracts: From Lena Goldfields to the Libyan Oil Arbitrations" in Ruiz Fabri, H. and Stoppioni, E. (eds.), *International Investment Law: An Analysis of the Major Decisions* , Hart Publishing, Oxford, 2022, p. 21.

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tions. Therefore, the primary reasons for referring a dispute to arbitration is perhaps the assurance of neutrality. In addition to this crucial element, speed and technical knowledge, which local courts may lack, are also appealing for the foreign investors[3].

On the other hand, from the public international law perspective, a fundamental feature of international investment law is its dispute settlement mechanism, which allows private parties other than States to bring claims against sovereign host States. Since international law is consent based, evidently such assent needs to be established. In this respect, IIAs serve as the primary means through which host States consent to arbitration and provide substantive protections to foreign investors. Clearly, IIAs are instruments of public international law since they are concluded between the States. Thus, as a distinctive aspect of investor-State treaties is that State Parties consent in advance to submit their future disputes to international arbitration. Nevertheless, the investors are not themselves parties to the IIAs. Obviously, it wouldn't be even possible to know their identities at the time of the treaty's conclusion. This mechanism is widely regarded as one of the key strengths of international investment law, as it provides a neutral platform for potential legal conflicts between foreign investors and host States[4].

Inter-State disputes differ from pure commercial disputes. These cases typically are commonly adjudicated by international courts and tribunals such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), the International Tribunal for the Law of the Sea (ITLOS), or at least theoretically the International Centre for Settlement of Investment Disputes (ICSID). In contrast, pure commercial disputes are generally resolved in national courts or through international commercial arbitral bodies.

[3] Titi, C., "Investment Treaty Arbitration Caught in the Public-Private Law Divide", *Mich J Int'l L*, vol. 45, 2024, p. 441-443; Blackaby, *Op. Cit.*, p. 4; Kulick, A., "Let's (Not) (Dis)Agree to Disagree Some Thoughts on the Dispute Requirement in International Adjudication", *Law & Prac Int'l Cts & Tribunals*, vol. 19, 2020, p. 79, p. 101; Ghaffari, P., "Jurisdictional Requirements under Article 25 of the ICSID Convention: Literature Review", *J World Investment & Trade*, vol. 12, 2011, p. 603, 605; ICSID, *Introducing ICSID,* https://icsid.worldbank.org/sites/default/files/publications/ICSID_Primer.16.19.pdf, accessed 25 January 2025.

[4] García-Bolívar, O.E., "Permanent Investment Tribunals: The Momentum is Building Up" in Kalicki, J.E. and Joubin-Bret, A. (eds.), *Reshaping the Investor-State Dispute Settlement System*, Brill Nijhoff, Leiden, 2015, p. 394; Blackaby, *Op. Cit.*, p. 7; Sabahi, B., Rubins, N. and Wallace Jr, D., *Investor-State Arbitration*, OUP, 2019, p. 294.

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A key distinction of supranational disputes lies in their foundation in multilateral treaties, such as the United Nations Convention on the Law of the Sea, 1982 (UNCLOS)[5] for maritime disputes or the ICSID Convention for investor-state disputes[6].

The interplay between public international law and private national law is distinctly evident in investment arbitration. The act of establishing a forum's competence to resolve an investment dispute possesses a hybrid nature, encompassing elements of both national and international law[7]. As briefly mentioned above, the authority for ISDS is based on the consent of States, granted through international agreements. Consequently, the jurisdiction of ISDS tribunals is grounded in an instrument of public rather than private international law. Thus, the legal basis for arbitration is the treaty itself, not a contractual framework as in the example of purely commercial arbitration. Nonetheless, while IIAs are international agreements between States governed by public international law, their primary beneficiaries are often private entities incorporated under national laws[8].

Several key international conventions may be relevant in the context of the ISDS regime. These include the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention)[9] and UNCLOS. Additionally, while not focused exclusively on dispute resolution, the Vienna Convention on the Law of Treaties, 1969 (VCLT)[10] also holds significance as it offers foundational principles for general treaty interpretation as reflection of customary international law which

[5] United Nations Convention on the Law of the Sea, 1982 - UNCLOS (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397.

[6] Conerty, A., *Manual of International Dispute Resolution*, Commonwealth Secretariat, London, 2006, p. 19.

[7] Belohlavek, A.J. and Cerny, F., "Law Applicable to Claims Asserted in International Investment Disputes", *Int'l JL & Mgmt*, vol. 54, 2012, p. 443, pp. 445-446.

[8] Anđelić, K., "Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead" in Kalicki, J.E. and Joubin-Bret, A. (eds.), *Reshaping the Investor-State Dispute Settlement System*, Brill Nijhoff, Leiden, 2015, pp. 507-508.

[9] Convention on the settlement of investment disputes between States and nationals of other States – Washington Convention (adopted on 18 March 1965, entered into force on 14 October 1966) 575 UNTS 159.

[10] Vienna Convention on the Law of Treaties, 1969, VCLT (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331.

can be relevant in interpreting IIAs or other relevant principles[11].

For an investment to qualify for legal protection, it must be linked to a host State through a territorial nexus. This requirement is typically established by definitional provisions of IIAs[12]. However, such definitions are not always crystal clear. Moreover, under UNCLOS, coastal States enjoy certain sovereign rights even beyond their sovereign territories. Besides, foreign investments in the offshore energy sector are also subject to international investment law, like other types of foreign investment wherever they may be. Accordingly, BITs and TIPs may be applicable[13]. In light of the foregoing, this article will explore how the principles of the UNCLOS regime intersect with investment treaty protections and whether UNCLOS principles can be effectively invoked in ISDS process.

II. UNCLOS AND ITS DISPUTE SETTLEMENT MECHANISM

Technological progress has significantly improved access to offshore hydrocarbon resources, especially during the second half of the 20th century. In a corollary to this, oceans emerged as critical energy production sites, particularly in the exploration and extraction of hydrocarbon sources. Hence, the offshore projects that were once seen unfeasible have now become highly attractive to foreign investors. Therefore, maritime spaces beyond territorial sovereignty have become increasingly significant for international commercial activities. Ocean uses of interest to foreign investors is not confined to hydrocarbon resources but also include offshore wind energy, aquaculture and fisheries. Furthermore, the submarine cables and pipelines now serve as essential infrastructure for the global economy and geopolitics. Additionally, there has been a growing interest in deep seabed mining. Consequently, in-

[11] Conerty, *Op. Cit.*, p. 15.

[12] Schill, S.W., Tams, C.J. and Hofmann, R., "Oceans and Space: New Frontiers in Investment Protection?", *Journal of World Investment & Trade*, vol. 19, 2018, pp. 765-766.

[13] Trevisanut, S., "Foreign Investments in the Offshore Energy Industry: Investment Protection v Energy Security v Protection of the Marine Environment" in Treves, T., Seatzu, F. and Trevisanut, S. (eds.), *Foreign Investment, International Law and Common Concerns*, Routledge, London, 2014, pp. 7-9, available at SSRN https://ssrn.com/abstract=2340995.

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vestors gradually have relied on IIAs to safeguard their investments in these maritime zones.

Indeed, foreign investments can be situated, in addition to the land territory, in the territorial seas[14] of a host State where the full sovereignty is retained, and in the maritime areas beyond the territorial seas where the host State enjoys certain sovereign rights such as in the exclusive economic zone (EEZ)[15] and the continental shelf (CS)[16] under UNCLOS. The legal status of the zone where an investment is made is crucial in determining the applicable legal framework given that numerous States have yet to resolve their maritime boundary disputes. If the zone and the associated resources are undisputed, the coastal State will enjoy its sovereign rights to the maximum extent. However, if the area is subject to dispute, investors may face significant challenges in identifying which State has the legal authority to issue the necessary licenses. Furthermore, uncertainties may arise regarding the applicable legal regime governing the investment. These unresolved disputes create substantial unforeseeable risks for investors for their enterprises in such disputed zones and usually emerge as a deal breakers in practice[17].

Notably, since the 1950s, the law of the sea regime and the corresponding usage of seas and oceans have undergone a profound transformation. States increasingly sought to extend their maritime jurisdiction areas, driving the development and eventual crystallization of new concepts and norms such as EEZ and CS. These shifts aimed to refine the control of valuable marine resources. However, States frequently face challenges in extending their maritime jurisdiction to the maximum limits permitted under UNCLOS due to overlapping claims with neighbouring States. As a result, the delimitation of maritime boundaries, where competing claims arise, has become a contentious and highly sensitive issue[18]. This is important given the IIAs typically extend a tribunal's jurisdiction only to investments situated within the "territory" of the host State. But this is not always the case. In the context of offs-

[14] See Art. 2 of UNCLOS.

[15] See Art. 56 of UNCLOS.

[16] See Art. 76 of UNCLOS.

[17] Trevisanut, *Op. Cit.*, p. 4, p. 10.

[18] Sumer, M., "Equitable Considerations in the Delimitation of the Continental Shelf", *Int'l L Stud Ser US Naval War Col*, vol. 100, 2023, p. 752, p. 754.

hore foreign investments, the tribunal must decide if "territory" as used in the relevant agreement, encompasses maritime regions such as the territorial sea, the EEZ, or the CS[19].

Corporate investment in the maritime zones of other States is already substantial. Major oil companies have significant investments within the CS and EEZ of host States outside their home States. Offshore energy projects often require access to EEZ, potentially leading to conflicts with the rights of third States to exercise their freedoms. For example, renewable energy generation may necessitate the deployment of large installations, potentially interfering with navigational rights of other States and causing potential tensions. Investments in offshore energy production have now emerged as a key area where international investment law is promising to play a significant role, complementing regulations traditionally governed by the law of the sea. Therefore, it is crucial to recognize that there is no justification for isolating any of the legal frameworks i.e. international investment law and the law of the sea regime as they are interrelated[20].

Indeed, the UNCLOS establishes a comprehensive legal framework for the regulation of the world's seas and oceans. It is widely ratified and it is applicable in 170 states. Even the several non-parties, including the United States and Türkiye, adhere to most of its provisions. Its objectives include the conservation and equitable use of marine resources, the protection and preservation of the marine environment, and the sustainable management of living marine resources. Additionally, UNCLOS addresses issues such as fundamental navigational rights, various jurisdictional roles of the States, sovereignty and rights of usage in maritime zones. The widespread acceptance of the Convention underscores the recognition that UNCLOS largely reflects customary international law and provides a comprehensive legal framework for ocean governance. As such, it is broadly regarded as an umbrella conven-

[19] Tzeng, P., "Investment Protection in Disputed Maritime Areas", *J World Investment & Trade*, vol. 19, 2018, pp. 832-839.

[20] Trevisanut, S. and Giannopoulos, N., "Investment Protection in Offshore Energy Production: Bright Sides of Regime Interaction", *J World Investment & Trade*, vol. 19, 2018, p. 789, pp. 806-809; Benatar, M. and Schatz, V.J., "The Protection of Foreign Investments in Disputed Maritime Areas" in Ackermann, T. and Wuschka, S. (eds.), *Investments in Conflict Zones*, Brill, 2020, pp. 1-2; Greenwood, C., "Oceans and Space: Some New Frontiers for International Investment Law", *J World Investment & Trade*, vol. 19, 2018, p. 775, p. 777, p. 783.

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tion that underpins the development of the legal framework for oceans[21]. To illustrate the significance of UNCLOS one should bear in mind that it stands alongside the United Nations Charter and the VCLT as one of the most significant multilateral international legal instruments[22].

The discussion on UNCLOS for offshore investments is indeed pertinent since it imposes important ambulatory obligations on its Parties as a living instrument. Thus, the compliance with UNCLOS obligations can occasionally pose risks for foreign investments. For instance, the seminal 2016 *South China Sea Arbitral* Award highlighted UNCLOS obligations on States to prevent or at least mitigate significant harm to the environment when undertaking large-scale construction activities[23]. Moreover, since UNCLOS, as an umbrella Convention, through its rule of reference system, arguably imposes another indirect important obligation on the contracting Parties to UNCLOS to adhere to the International Maritime Organization's (IMO) Conventions which are deemed as Generally Accepted International Regulations, Procedures and Practices (GAIRS). Indeed, UNCLOS grants significant role to the IMO as the competent international organization to regulate international shipping[24].

Therefore, considering the living instrument character of UNCLOS and IMO's constant regulatory action, over a long period of offshore investments, remarkable regulatory changes may necessitate adjustments to the legal framework governing these investments. This evolving regulatory landscape may result in stricter standards, which can adversely affect offshore projects. This issue is illustrated in numerous investment disputes where stricter regulations enacted during the operational phase of offshore projects have been alleged to breach IIAs. Investors may claim that such regulatory changes

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[21] Sumer, M., "Overcoming the Legal Challenges of Maritime Autonomous Surface Ships (MASS) and Compliance with UNCLOS and SOLAS: Designation of a Remote Master to Assume the Safety Duties of a Master", PhD thesis, Maastricht University, 2023, pp. 116-117; Permanent Court of Arbitration, "Arbitration Services under UNCLOS", https://pca-cpa.org/en/services/arbitration-services/unclos/, accessed 29 December 2024.

[22] Walker, G.K., *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention*, Martinus Nijhoff Publishers, Leiden, 2012, p. xiv.

[23] See Art. 192 of UNCLOS.

[24] Trevisanut and Giannopoulos, *Op. Cit.*, p. 820; Sumer, *Op. Cit.*, p. 63.

amount to violations of IIAs potentially leading to legal conflicts[25].

Another important achievement of the UNCLOS regime was the creation of a comprehensive framework for resolving disputes concerning the interpretation and application of the Convention[26]. Pursuant to UNCLOS a State may select one or more mechanisms for resolving disputes through a written declaration[27]. The available options include: the ITLOS; the ICJ; an ad hoc arbitral tribunal established under the provisions of Annex VII; or a special arbitral tribunal formed under Annex VIII for certain categories of disputes. In the absence of such a selection, a State Party is deemed to have accepted arbitration under Annex VII by default. If the disputing parties have selected the same mechanism for dispute resolution, the matter shall be resolved exclusively through that procedure. Moreover, where parties to a dispute have not chosen the same dispute settlement mechanism, the dispute shall default to arbitration under Annex VII unless an alternative arrangement is agreed upon. Consequently, arbitration under Annex VII serves as the default mechanism for compulsory dispute settlement under UNCLOS. Thus, arbitration serves as the primary dispute settlement mechanism[28]. Remarkably, to date, the majority of contracting Parties have not made such declarations and are therefore considered to have opted for arbitration by default[29].

Evidently, arbitration is among the compulsory dispute resolution options available under UNCLOS. In this light, the Convention is given credit for bolstering States' confidence in arbitration mechanisms by incorporating it as one of the most important recognized dispute settlement methods for

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[25] Trevisanut and Giannopoulos, *Op. Cit.*, pp. 810-814.

[26] Sohn, L.B. and Noyes, J.E., *Cases and Materials on the Law of the Sea*, Transnational Publishers, 2004, p. 799; Oellers-Frahm, K., "Arbitration - A Promising Alternative of Dispute Settlement under the Law of the Sea Convention?", *Zaorv, vol. 55, 1995, p.* 457, pp. 459-460, https://www.zaoerv.de/55_1995/55_1995_2_a_457_478.pdf.

[27] See Article 287 of UNCLOS.

[28] Oxman, B.H., "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals" in Rothwell, D.R., Elfering, A.O., Scott, K. and Stephens, T. (eds.), *The Oxford Handbook on the Law of the Sea*, OUP, 2015, pp. 399-400; Oellers-Frahm, *Op. Cit.*, pp. 462-463.

[29] ANNEX I Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements Philippe Sands and Ruth MacKenzie, https://docs.pca-cpa.org/2016/01/Guidelines-for-Negotiating-and-Drafting-Dispute-Settlement-Clauses-for-International-Environmental-Agreements.pdf 10-11.

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sovereign States[30]. Having said that UNCLOS dispute settlement mechanism is confined to the States Parties and unlike in BITs private investors cannot have a recourse to the dispute settlement mechanism under UNCLOS. But this doesn't necessarily mean that the Convention can provide guidance elsewhere.

III. OVERVIEW OF INVESTOR-STATE ARBITRATION

International arbitration serves as one of the most effective tools for investors to mitigate political risks attributable to the host State. It offers a neutral forum, free from the risk of the host State misusing its sovereign powers for resolving potential disputes. Indeed, this mechanism safeguards the investors from potential legislative and administrative interference[31].

Foreign investors are the primary beneficiaries of IIAs despite the fact that they are not formal parties to these agreements. These treaties are intended to encourage the attract foreign investment, establish a stable legal framework for its management, and strengthen economic relations between the contracting States[32]. However, disputes inevitably arise in such cross-border investments between parties based in different jurisdictions. As global investment increases, ISDS has become fundamental to modern business practices. To address the inherent complexities of resolving disputes between investors and host States, a specialized mechanism was deemed necessary. It is crucial to have an effective and reliable mechanism. Without an arbitration agreement, the parties must resort to litigation typically in a domestic court. This has inherent disadvantages for the foreign claimant. The aggrieved foreign party may naturally face several challenges such as unfamiliar procedural fra-

[30] Hazarika, A., *State-to-State Arbitration Based on International Investment Agreements*, Springer, Saarland University, 2021, p. 17.

[31] Cima, E., "Arbitration in the Energy Sector" in Schultz, T. and Ortino, F. (eds.), *The Oxford Handbook of International Arbitration*, OUP, 2020, pp. 822-823; Belohlavek, *Op. Cit.*, p. 447.

[32] Gazzini, T., "Bilateral Investment Treaties" in Gazzini, T. and De Brabandere, E. (eds.), *International Investment Law: The Sources of Rights and Obligations*, Martinus Nijhoff, Leiden, 2012, pp. 106-107, p. 125.

meworks, foreign language, and judges without technical expertise on the issue so and so forth. To mitigate these risks, it is prudent to include an arbitration mechanism arising from international contracts. In a nutshell, ISDS is a mechanism designed to resolve conflicts between foreign investors and the host States[33].

Investment arbitration differs significantly from purely commercial arbitration, due to the involvement of a State as the respondent[34]. To qualify for protection under an investment treaty, an asset must meet the definition of an investment as specified in the treaty and the scope of application must extend to the issue at hand. Yet, determining the scope of territorial application and whether an asset qualifies under an investment may be a thorny issue. This determination is complicated by the absence of a uniform definition under international law. Another important element is the governing law. IIAs establish rights and obligations between the parties within the framework of public international law. For instance, by concluding a BIT or becoming a party to a TIP, parties demonstrate their consent in advance to grant investors the ability to pursue claims in their own name against host States. Indeed, in arbitration proceedings, the claims often stem from acts governed by public international law. Therefore, it becomes crucial to determine the substantive law that an arbitral tribunal should apply when resolving such disputes[35].

General principles of law play a significant role in shaping arbitral procedures and they also guide the interpretation of IIA provisions. Nonetheless, obviously, treaty provisions can deviate from general principles. Nevertheless, in the absence of explicit derogation, general international law principles remain applicable by default. Indeed, general principles form an essential part of the legal framework available to arbitral tribunals when resolving disputes. Although international conventions are not entirely excluded as applicable law in investment disputes, their relevance is limited and they become instrumental in case of a need. As a matter of fact, many IIAs provide for

[33] Conerty, *Op. Cit.*, pp. 71-72; Blackaby, *Op. Cit.*, p. 1; ICSID, *Introducing ICSID,* https://icsid.worldbank.org/sites/default/files/publications/ICSID_Primer.16.19.pdf

[34] Titi, C., "International Dispute Settlement in Cultural Heritage Law and in the Protection of Foreign Investment: Is Cross-Fertilization Possible?", *J Int'l Disp Settlement*, vol. 8, 2017, p. 535, pp. 543-44.

[35] Belohlavek, *Op. Cit.*, pp. 450-451; Lowe, V., *Applicable Law in Investor–State Arbitration*, OUP, 2013, pp. 225-226.

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the application of international law. For instance, the North American Free Trade Agreement (NAFTA)[36] mandates that tribunals resolve disputes in accordance with NAFTA and applicable international legal rules. Similarly, the Energy Charter Treaty (ECT)[37] requires tribunals to decide disputes based on the treaty itself and relevant principles and rules of international law[38].

Therefore, Tribunals need to apply international law when addressing investment disputes. Nevertheless, in line with the principle of party autonomy, tribunals respect the parties' choice regarding the applicable law, whether it is international law alone, national law, or a combination of both[39]. For example, Art. 42 of the Washington Convention[40] outlines how an arbitral tribunal should determine the applicable law in an investment dispute. The primary applicable law in ISDS comprises the provisions of the underlying IIAs and general principles of international law. This provision clarifies both the priority that the parties' agreement on applicable law enjoys and the tribunal's authority when no such agreement exists. The Washington Convention grants the parties the autonomy to choose the rules of law governing their dispute. If the parties reach no specific agreement, the tribunal must apply the law of the contracting State together with any relevant rules of international law. Obviously, if the parties have chosen a particular body of law, the tribunal will respect that choice. Article 42 stipulates that in the absence of an agree-

[36] Article 1131: "1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[37] Article 26: "6. A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

[38] Gattini, A., Tanzi, A. and Fontanelli, F. (eds.), *General Principles of Law and International Investment Arbitration*, Brill Nijhoff, Leiden, 2018, pp. 3-5; Karavias, M., "Submarine Cables and Pipelines: the Protection of Investors under International Law", *J World Investment & Trade*, vol. 19, 2018, p. 860, pp. 878-881; Blackaby, *Op. Cit.*, p. 5; De Brabandere, E., *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, CUP, 2014, p. 136; Belohlavek, *Op. Cit.*, pp. 443-444.

[39] Lowe, *Op. Cit.*, pp. 213-215.

[40] Article 42: "1. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

ment between the parties on applicable rules of international law, the tribunal must apply such rules of international law as may be applicable alongside the law of the host State. Notably, parties to a dispute may choose to exclude domestic law entirely, opting instead to employ only international law, like in the aforementioned examples of the NAFTA and the Energy Charter Treaty which designate international law as the applicable legal framework[41].

Regarding the applicable law, ISDS exhibits reluctance, despite the lack of any fundamental prohibition against such considerations, to address issues that extend beyond the narrow relationship between host States and foreign investors. For example, this is particularly evident in their general hesitance to evaluate the human rights obligations of host States, which are frequently invoked by States as a justification for deviations from their obligations under investment protection treaties[42]. Consequently, it may be safe to note that the arbitral tribunals' authority is limited to disputes directly connected to the investment. Otherwise, ISDS may lead to legal issues. Obviously, they cannot be expected to deal with the substantial issues which are subject to the other exclusive branches of international law with its own remedies. This is also in parallel with the consent of States, which is confined to such investment-related claims and does not extend to broader conflicts between investors and the host State. To think otherwise would not be realistic. The scope of a tribunal's jurisdiction is defined by the treaty or other instrument expressing the parties' consent. Therefore, the Tribunals lack competence over matters beyond the mandate conferred by the parties and are bound to apply the legal framework specified by the parties as the governing law. Eric De Brabandere rightly maintains that this obvious limitation does not necessarily preclude Tribunals from considering other treaty obligations of States to the extent that they are relevant and applicable[43].

A broad interpretation of applicable law clauses permits the consideration of international legal instruments relevant to the claims raised during arbitration. Arbitral Tribunals indeed have earlier referred to such instruments[44]. For

[41] Kryvoi, Y., *International Centre for Settlement of Investment Disputes*, ICSID, Kluwer, 2023, pp. 149-152; Born, G.B., *International Arbitration: Law and Practice*, Kluwer Law International, 2024, pp. 520-521.

[42] Brabandere, *Op. Cit.,* p. 204.

[43] Brabandere, *Op. Cit.,* pp. 131-135.

[44] Nguyen, A., "The Protection of Foreign Investments in Disputed Maritime Areas of the

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instance, in SPP v. Egypt, the Tribunal addressed whether choosing national law rendered international law irrelevant. By referring to the Washington Convention, the Tribunal stated that when domestic law has a lacunae, or international law is violated by the exclusive application of national law, it is obliged to employ the pertinent rules and principles of international law[45]. It concluded that where national law is silent or its application would violate international law, the Tribunal must directly apply relevant international rules[46].

Investment treaty arbitration, as it has evolved since the AAPL v. Sri Lanka, progressively functions as a form of public international law dispute settlement rather than a purely private or commercial mechanism. Notably, in this case, the claim was based on the consent in the BIT between the United Kingdom and Sri Lanka. BIT explicitly extended its provisions to territories for whose international relations the UK was responsible, which included Hong Kong at the time. In this case, the ICSID Tribunal referred to international law extensively for analysing state responsibility which is essentially a public international law concept[47].

Arbitral Tribunals adjudicate allegations of States breaching obligations grounded in public international law. These obligations arise from bilateral or multilateral investment treaties, which contain the States' consent to arbitration. Overall, investment treaty arbitration may be best understood as a public international law mechanism, with any private law or commercial arbitration elements playing a secondary role[48].

1 Washington Convention

Washington Convention was formulated by the World Bank and submi-

South China Sea", *Indonesian J Int'l L*, vol. 19, 2021, p. 1, pp. 14-15.

[45] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, para. 84.

[46] Kryvoi, *Op. Cit.*, pp. 149-152.

[47] See para.s 72-78 of the award on AAPL v. Sri Lanka Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3.

[48] Brabandere, *Op. Cit.*, pp. 1-7, pp. 9-11; Dias, N., "Responsibility of States in Respect of the Aliens' Property: Arbitral Award in AAPL v. Republic of Sri Lanka", *Sri Lanka J Int'l L*, vol. 10, 1998, p. 289.

tted to its member States in 1965 for ratification. The Convention entered into force in 1966 and established the ICSID, headquartered in Washington D.C. in the United States[49]. Contracting Parties of the Washington Convention aren't under an obligation but enjoy another option for recourse to the dispute settlement of ICSID. A separate written consent is required to make it an obligation to have recourse to the ICSID arbitration The ICSID Centre provides facilities for the investment disputes between contracting States and nationals of other contracting States. Notably, the Centre itself does not participate in arbitration proceedings but fulfils various administrative functions in the form of a registry. Instead, arbitrators are appointed by the disputing parties or as specified under the Washington Convention. Remarkably, all States Parties, regardless of whether they are parties to a specific dispute, are obliged to recognize ICSID awards as binding and enforce the pecuniary obligations imposed by them[50]. Indeed, this increases the likelihood for the enforcement of ICSID awards. It may be safe to observe that this provides an important tool for compliance which is beyond the dispute settlement mechanism under UNCLOS.

2 The ICSID

Pursuant to Article 1 of the Washington Convention, the purpose of the ICSID is to provide facilities for arbitration of investment disputes. It is a truism that arbitration is subject to the overarching principles of public international law including the VCLT even though not all the disputing parties are States[51]. Membership in ICSID has significantly expanded since its adoption in 1965. As of the end of 2024, 166 States had signed the Convention, with 158 of them having become Parties[52].

[49] See Article 1.

[50] Conerty, *Op. Cit.*, pp. 71-72; Brower, C.H., "Arbitration", *Oxford Public International Law*, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e11.

[51] Article 1 (2) "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention".

[52] Anđelić, *Op. Cit.*, p. 497; ICSID, 2024 Annual Report, https://icsid.worldbank.org/sites/default/files/publications/ICSID-AR2024-WEB.pdf accessed 25 January 2025, 26.

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The Washington Convention introduced a groundbreaking mechanism, enabling individuals to directly assert rights against sovereign States through arbitration provisions in IIAs. This framework marked a significant evolution in international investment law, offering investors a neutral avenue for dispute resolution[53]. Moreover, it comprehensively addresses the institution of proceedings, determination of jurisdiction, arbitration procedures, availability of post-award remedies, and the recognition and enforcement of awards. This framework is intentionally "de-localized", ensuring that arbitration operates independently of domestic legal systems. By doing so, it rather associates the arbitration process with international law, safeguarding it from potential interference by national courts[54].

Notably, the ICSID administered 341 cases in 2024. This has marked an increase from 329 cases in the previous year. This figure represents the second largest number of cases ever handled by ICSID in a year[55].

3 PCA's Role in Investor-State Arbitration

The PCA was created under the 1899 Convention for the Pacific Settlement of International Disputes[56]. As the first intergovernmental organization of its kind, it provided a permanent framework for resolving international disputes through arbitration and other peaceful methods. However, its name can be misleading as PCA is not a court but simply serves as a registry[57]. Although some arbitration agreements explicitly reference the PCA, the UNCLOS does not enlist the PCA as one of its dispute settlement mechanisms[58]. However, in practice, the PCA is frequently requested to administer arbitra-

[53] Blackaby, *Op. Cit.*, pp. 413-414.

[54] ICSID, Background Paper: Compliance with and Enforcement of ICSID Awards, 2024, https://icsid.worldbank.org/sites/default/files/publications/Enforcement_Paper.pdf 1.

[55] ICSID, 2024 Annual Report, https://icsid.worldbank.org/sites/default/files/publications/ICSID-AR2024-WEB.pdf 15.

[56] Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) 32 Stat 1779, 1 Bevans 230.

[57] Li, Y. and Ng, C.M., "More in 2013 than Ever before: Inter-State and Investor-State Arbitrations at the Permanent Court of Arbitration", *Hague YB Int'l L*, vol. 26, 2013, p. 496, pp. 496-497.

[58] See Part XV of UNCLOS, in particular art. 287.

tion proceedings initiated under UNCLOS[59].

Moreover, the PCA frequently serves administrative functions in arbitrations under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[60]. A distinguishing feature of the UNCITRAL Rules is their specific reference to the PCA[61]. The PCA stands out as the sole arbitral institution explicitly mentioned in these rules, highlighting its role in administering arbitrations under the UNCITRAL framework[62]. The PCA often provides administrative support for such disputes, facilitating arbitration proceedings conducted under the UNCITRAL Arbitration Rules[63]. UNCITRAL Arbitration Rules provide a comprehensive framework for conducting arbitral proceedings. These rules are widely employed in both ad hoc and administered arbitrations. UNCITRAL Rules are increasingly referenced in IIAs as the procedural framework for arbitration. Notably, they are the second most frequently used rule in ISDS, surpassed only by the ICSID Rules[64].

Due to the significant rise in investor-State arbitration over the decades, PCA's caseload has also substantially expanded. As of writing, it is acting as a registry in 95 arbitrations arising under IIAs or national investment laws, 109 arbitrations arising under contracts involving a State or other public entity[65].

IV. THE TERRITORIAL APPLICATION OF INVESTOR-STATE ARBITRATION AND INTERSECTION WITH UNCLOS

According to international law, a State's sovereignty extends over its territory, including the land, subsoil, internal waters, the airspace, and the territo-

[59] Li, Y. and Ng, C.M., *Op. Cit.*, p. 512.

[60] Permanent Court of Arbitration, "UNCITRAL Arbitration Rules", https://pca-cpa.org/en/services/arbitration-services/uncitral-arbitration-rules/, accessed 29 December 2024.

[61] See Art. 6 of UNCITRAL Rules.

[62] Li, Y. and Ng, C.M., *Op. Cit.*, pp. 513-514.

[63] Permanent Court of Arbitration, "Energy Charter Treaty", https://pca-cpa.org/en/services/arbitration-services/energy-charter-treaty/, accessed 29 December 2024.

[64] Li, Y. and Ng, C.M., *Op. Cit.*, pp. 513-514.

[65] Bosman, L., "The PCA's Contribution to International Dispute Resolution in Africa", *Stellenbosch L Rev*, vol. 25, 2014, p. 311; Permanent Court of Arbitration, "Cases", https://pca-cpa.org/cases/, accessed 25 January 2025.

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rial sea. Beyond this maritime belt, additional zones of functional rights and jurisdiction have been established under UNCLOS such as EEZ and CS[66].

Clearly, UNCLOS dispute settlement framework is not the reliable avenue for safeguarding investments in disputed maritime areas. Private foreign investors cannot directly initiate arbitral proceedings under the UNCLOS, as it is exclusively available to Parties. Theoretically, the protection of investments through direct UNCLOS dispute resolution is contingent upon the investor's home State invoking diplomatic protection on their behalf against a host State[67]. However, this doesn't necessarily follow that UNCLOS is not relevant at all for ISDS. Although many of its provisions or principles may have relevance, this study will suffice to focus on one of the critical aspects of ISDS, which is the territorial application of IIAs.

The definition of the territory of the host States in IIAs is certainly an important integral element to be considered by the parties. Notably, although not all IIAs refer to UNCLOS, nonetheless their definitions align with the UNCLOS. Or else, some refer to UNCLOS concepts without explicitly mentioning the Convention. For example, the following definition of the Model BIT of the United Kingdom is notable to show its inclusiveness:

> …in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12[68]…

Even those States that are yet to become party to UNCLOS do not suffice to define their actual land territories but also feel obliged to refer to international law or customary law to extend the effect of territorial scope

[66] Nguyen, *Op. Cit.*, p. 7.

[67] Tzeng, *Op. Cit.*, pp. 849-850.

[68] UNCTAD, "International Investment Agreements", https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download, accessed 25 January 2025.

to functional maritime zones. For instance, as non-parties to UNCLOS, the relevant practices of Israel, Turkey and the United States follow a similar pattern. In fact, this is also in tandem with Parties to UNCLOS which basically shows that IIAs are typically designed to apply not only to the areas where States have full sovereignty but also where they exercise certain sovereign rights such as in their EEZs and CSs. For instance, the 2012 Model BIT of the United States defines the territorial scope by referring to its physical territory, which covers its 50 states, territorial sea but also remarkably any area beyond its territorial sea within which, in accordance with customary international law as reflected in the UNCLOS the US exercises sovereign rights or jurisdiction[69].

Modern investment treaties expressly define "territory" to include maritime spaces, referencing both international law and UNCLOS. The territorial sea forms part of a host State's territory because UNCLOS[70] extends the coastal State's sovereignty to its territorial sea, thus bringing territorial waters under the notion of "territory". On the other hand, Tzeng aptly observes that the EEZ and CS present a more nuanced question given that UNCLOS confers sovereign rights over these maritime zones rather than full sovereignty. Notwithstanding the technical debates over the legal scope of "territory", many commentators practically contend that these treaties aim merely to protect foreign investments in areas under a State's de facto control which can thus extend beyond strictly defined land boundaries. Consequently, investments situated in a State's EEZ, or CS, may still be covered if the relevant agreement indicates that protection extends to maritime zones under that State's jurisdiction[71]. In the absence of overlapping claims, this would be a straightforward issue without legal complications.

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[69] Office of the United States Trade Representative, "Bilateral Investment Treaty Text", https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf, accessed 12 January 2025.

[70] Art. 2 of the UNCLOS: "1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil".

[71] Tzeng, *Op. Cit.*, pp. 832-839.

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1 BIT Examples

BITs typically define the territorial scope to which they apply. In cases where BIT does not explicitly define its territorial scope, the VCLT applies by default, as BITs are essentially treaties. Under Article 29 of the VCLT, a treaty applies to the entire territory of each party unless otherwise defined or established[72]. Consequently, unless expressly stated otherwise, an investment treaty would not apply to maritime zones beyond the host State's territorial sea to where sovereignty doesn't extend. On the other hand, the majority of BITs appear to expressly include maritime zones beyond the coastal State's territorial sea within the definition of territory. Indeed, in a nutshell, IIAs generally aim to protect investments in areas where the host State exercises effective control. Obviously, this is done in order to make these maritime areas more attractive investment desteinations[73].

Unlike the US Model, the Turkish model BIT doesn't mention UNCLOS specifically however it defines territory in a similar way in its Art. 1/4 as follows: "The territory means; territory, territorial sea, as well as the maritime areas over which each Contracting Party has jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to international law"[74]. Likewise, Israel-Japan BIT defines the territorial scope of Israel by including functional maritime zones as follows: "…the territory of the State of Israel including the territorial sea as well as the continental shelf and the exclusive economic zone, over which the State of Israel exercises sovereignty, sovereign rights or jurisdiction in accordance with international law…"[75]. This illustrates the expansive scope of modern investment treaties[76].

[72] Art. 29 of the VCLT: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

[73] Nguyen, *Op. Cit.*, pp. 7-9.

[74] UNCTAD, "International Investment Agreements", https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2852/download, accessed 25 January 2025.

[75] Agreement Between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5849/download, accessed 25 January 2025.

[76] Happ, R. and Wuschka, S., "Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexes Territories", *J Int'l Arb*, vol. 33, 2016, p. 245, p. 256, p. 263.

An interesting example would be the situation of the Falklands which fall under the territorial scope of application of both the United Kingdom's and Argentina's IIAs. Investors therefore could lodge proceedings against both States depending on the facts of a case depending on their treaty relation. This is indeed a thorny legal matter with political sensitivity. However, obviously, arbitral tribunals would not be required to delve into the details of the sovereignty question given the tribunal's limited competence under the applicable investment agreement which certainly wouldn't comprise such substantial international law issues. Arguably, they need to suffice with determining whether the host State has de facto effective control over the location in question or not. Indeed, this is not without precedents. For instance, European Court of Human Rights (ECtHr) did not hesitate to interpret the coverage of the European Convention on the Human Rights to the non-States Parties which are under the effective control of the States Parties. For example, the violation of fundamental human rights under the Convention in Iraq was subject to litigation at the ECtHR.

When sovereignty over a territory is contested, an arbitral tribunal's refusal to assume jurisdiction could effectively deprive the investor of protection. In this regard, Tribunals may apply a test to determine whether the exercise of sovereign rights in a contested area is sufficient to establish that the investment was made within the territory or maritime zone of the host State. Naturally, in this respect, UNCLOS may be an important tool for arbitral tribunals to interpret the scope of application in disputed maritime zones to clarify their geographical scope of application. References to the applicable rules of international law such as UNCLOS in investment agreements also ensure that these agreements incorporate subsequent normative developments in the law of the sea regime which can extend the protective reach of investment agreements to offshore investments[77]. For instance, the Agreement be-

[77] Trevisanut and Giannopoulos, *Op. Cit.*, pp. 797-805.

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tween the Argentine-Japan BIT[78] and Argentine-UAE BIT[79] while defining the territory of Argentine refer to the constitution of Argentine which notes its sovereignty over the Malvinas Islands (Falklands)[80].

In Santa Elena v. Costa Rica, ICSID arbitration, the investor argued that the parties had not reached an agreement on the rules of applicable law. Consequently, the claimant invoked Article 42 of the Washington Convention. In this context, the investor submitted that Costa Rican law should govern the issues in dispute. Moreover, the investor rejected the application of international law noting that international law applies only in cases of gaps in Costa Rican law or inconsistencies with international law principles of good faith and *pacta sunt servanda*. The Tribunal determined that, in the absence of an agreement on applicable law, Article 42 applies, requiring it to consider Costa Rican law alongside applicable international law. Furthermore, it noted that the relevant Costa Rican law generally is consistent with international law principles. Be that as it may, in cases of inconsistency, international law prevails to ensure protection for foreign investors[81].

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[78] Article 1 (g): "the term 'Area' means: (ii) with respect to the Argentine Republic, the territory subject to the sovereignty of the Argentine Republic, and the exclusive economic zone and the continental shelf with respect to which the Argentine Republic exercises sovereign rights or jurisdiction in accordance with its domestic law, including its constitutional provisions, as well as international law" available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download.

[79] Article 1: "The term 'territory' means: With respect to the ARGENTINE REPUBLIC: the territory subject to the sovereignty of the Argentine Republic, and the exclusive economic zone and the continental shelf with respect to which the Argentine Republic exercises sovereign rights or jurisdiction in accordance with its constitutional provisions, legal provisions and intemational law", available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download.

[80] See the Temporary Provisions of the Argentinian Constitution: "First.- The Argentine Nation ratifies its legitimate and non-prescribing sovereignty over the Malvinas, Georgias del Sur and Sandwich del Sur Islands and over the corresponding maritime and insular zones, as they are an integral part of the National territory. The recovery of said territories and the full exercise of sovereignty, respectful of the way of life of their inhabitants and according to the principles of international law, are a permanent and unrelinquished goal of the Argentine people", available at: https://faolex.fao.org/docs/pdf/arg77017E.pdf

[81] Santa Elena v. Costa Rica Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1 Award - 17 Feb 2000 Available at: https://jusmundi.com/en/document/decision/en-compania-del-desarrollo-de-santa-elena-s-a-v-republic-of-

The approach adopted by arbitral tribunals in the Crimea cases suggests that investment tribunals may bypass issues regarding the territorial coverage of a BIT. Investment treaties could be interpreted as extending protection to investments in areas under the effective control of a State whether it is a true host or not, meaning that even if, the territory in question falls under the sovereignty of another State under international law. In one instance regarding the Crimea-related cases, Ukraine notably contended that the tribunal could accept jurisdiction over the dispute without necessarily addressing the legal status of Crimea. This is striking as Crimea is part and parcel of Ukraine under international law despite the defacto occupation. For instance, in Stabil LLC v. Russia, the arbitral tribunal held that Crimea, where the Russian Federation exercised de facto control[82], fell within the ambit of the 1998 Russian Federation-Ukraine BIT[83]. Notably, this conclusion was reached even though, under the terms of the BIT, "territory" is defined as the territory of Russia or the territory of Ukraine, as well as their respective EEZs and the CSs, under international law[84].

2 Multilateral Agreement Examples

Annex 201.1 of NAFTA elaborates comprehensive country-specific definitions for Canada, Mexico and the United States, according to which, territory means: "…with respect to Canada: the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources…",

> with respect to Mexico: the islands, including the reefs and keys, in adjacent seas; the islands of Guadalupe and Revillagigedo situated in the

costa-rica-award-thursday-17th-february-2000#decision_918, paras. 60-65.

[82] Stabil and others v. Russia, Stabil, Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation, PCA Case No. 2015-35, 12 Apr 2019, 337.

[83] Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments (adopted 27 November 1998, Moscow).

[84] Nguyen, *Op. Cit.*, pp. 17-18.

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> Pacific Ocean; the continental shelf and the submarine shelf of such islands, keys and reefs; the waters of the territorial seas, in accordance with international law, and its interior maritime waters; …any areas beyond the territorial seas of Mexico within which, in accordance with international law, including the United Nations Convention on the Law of the Sea, and its domestic law, Mexico may exercise rights with respect to the seabed and subsoil and their natural resources;

and "with respect to the United States: any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources".

All these definitions refer to international law. Notably, the territorial scope for Mexico also refers to UNCLOS. More remarkably, the common aspect of all three definitions does not suffice to refer to areas where they enjoy full sovereignty but also to maritime zones beyond their territorial waters where they exercise certain functional rights[85]. Notably, Art. 70 notes that the Washington Convention extends to all territories for which a State Party bears responsibility for international relations. However, it is possible to restrict this exclusive impact. The State Party may exclude specific territories from the Convention's application by submitting a notice to the depositary[86].

By referring to the law of the sea, Art. 1/10 of ECT defines its scope of application as follows:

> Area means: (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction[87].

The Arbitral Tribunal highlighted the right of investors to invoke international law directly against host States based on the applicable law clause in the

[85] North American Free Trade Agreement, https://www.italaw.com/sites/default/files/laws/italaw6187%2814%29.pdf, accessed 25 January 2025.

[86] See Art. 70 of the Washington Convention.

[87] Energy Charter Treaty, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf, accessed 25 January 2025.

treaty[88]. The Tribunal concluded that, in accordance with Article 26/6 of the ECT, the said case is germane to a claim under international law[89].

3 Treaty Interpretation in Case of Legal Ambiguity

The proliferation of investment treaties that empower foreign investors to initiate claims against host States has significantly contributed to the growing reliance on international law in resolving such disputes. Furthermore, the treaty-based nature of investment arbitration frequently leads tribunals to prioritize the application of the treaty itself and international law more broadly. This approach underscores the arbitral tribunals' task to interpret the IIA provisions within the context of public international law[90].

Eventually, regardless of whether a treaty specifies the applicable law, Arbitral Tribunals typically assign a controlling role to international law. This approach is grounded in the VCLT, which establishes that treaties are governed by international law. Indeed, IIAs are not a closed legal system in isolation and they operate within and therefore must be interpreted within the broader context of international law[91]. According to the general rule of treaty interpretation, which is codified in the VCLT[92], the standard interpreta-

[88] See Petrobart Limited v Kyrgyz Republic (2005) Arbitration No 126/2003, SCC Arbitration Institute.

[89] Lowe, *Op. Cit.*, p. 223; Happold, M. and Roe, T., "The Energy Charter Treaty" in Gazzini, T. and De Brabandere, E. (eds.), *International Investment Law: The Sources of Rights and Obligations*, Martinus Nijhoff, Leiden, 2012, pp. 69-70.

[90] Lowe, *Op. Cit.*, pp. 222-223.

[91] Blackaby, *Op. Cit.*, pp. 432-433.

[92] Art. 31 of the VCLT: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of interna-

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tion of a treaty requires determining the common intention of the parties by analysing the ordinary meaning of its terms, considering their context and the treaty's objective and purpose[93]. Notably, the general rule of treaty interpretation of the VCLT[94] obliges Tribunals to consider any relevant international legal rules applicable in the relations between the parties[95].

Article 34 of the VCLT[96] which reflects the customary international law on the general principle regarding the third States, notes that a treaty does not create either obligations or rights for a third State without its consent. Indeed, customary international law principles are frequently invoked and now often explicitly incorporated into modern investment treaties. Even in the absence of such references, arbitral tribunals regularly rely on these principles to interpret and apply treaties[97].

In the Case of the Monetary Gold Removed from Rome in 1943, the ICJ unanimously determined that it could not decide a dispute where a third States' interests would form the subject matter of the issue. The ICJ noted that Albania's interests not only stood to be affected by the potential decision but constituted the very subject matter under consideration[98]. As such, the Monetary Gold principle establishes that a court cannot render a decision without the consent of a third party if the subject matter of the case directly impacts the legal interests of that third State[99]. As a matter of fact, the arbitral tribunal's deliberation on whether the host State exercised sovereignty/

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tional law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended".

[93] Petrobart Limited v Kyrgyz Republic, Arbitration No 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 29 March 2005, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/128/petrobart-v-kyrgyz-republic, accessed 25 January 2025, 23.

[94] See Art. 31(3- c) of the VCLT.

[95] Nguyen, *Op. Cit.*, pp. 14-15.

[96] Art. 34 of the VCLT: "A treaty does not create either obligations or rights for a third State without its consent".

[97] Blackaby, *Op. Cit.*, p. 7; Sabahi, *Op. Cit.*, p. 294.

[98] Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954: I.C. J. Reports 1954, p. 32, p. 34.

[99] Mollengarden, Z. and Zamir, N., "The Monetary Gold Principle: Back to Basics", *American Journal of International Law*, vol. 115, No. 1, 2021, p. 41.

jurisdiction/de facto control over a disputed maritime area may raise the potential for prejudice to the claims of a third State. The Monetary Gold principle, which applies to international dispute settlement, establishes that an indispensable party must be present for a matter to proceed. Therefore, this principle prevents tribunals from adjudicating disputes between two parties within their jurisdiction when the interests of a third State could be significantly affected[100].

A potential recent example of this principle being invoked is in the arbitration between Sea Search-Armada, LLC (USA) and the Republic of Colombia which is being currently conducted under the UNCITRAL rules, where the PCA serves as registry[101]. The core of the dispute revolves around the ownership of the San José galleon, a Spanish warship, enjoying sovereign immunity, sunk in 1708. While the said arbitration is between a U.S. company and Colombia, Spain argues that it has a significant legal interest in the matter. Spain claims that the galleon, as a State Warship, is its sovereign property and it never abandoned its inherent rights as a flag State. Moreover, Spain contends that any decision by the Arbitral Tribunal on the ownership of the shipwreck would directly and necessarily impact Spain's sovereign rights. In this sense, Spain's legal interests appears to constitute the very subject matter of the current arbitration.

> 12. According to Spain, the legitimacy of its intervention "arises from the fact that it has a right over the subject matter of the dispute in the present arbitration, for which reason, its position may be affected by any decision that may be rendered in these proceedings, and it must be heard and its rights must be clarified. Put differently: "no right can be recognized to a third party on the basis of a property whose ownership is already in dispute[102].

By raising this argument, Spain seems to be using the Monetary Gold principle to challenge the Tribunal's jurisdiction to rule on the merits of the case without its consent.

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[100] Nguyen, *Op. Cit.*, p. 19.

[101] https://pca-cpa.org/cn/cases/300/, accessed 24 August 2025.

102 PCA Case No. 2023-37 Decision on Spain's Application to Intervene, 30 December 2023, https://pcacases.com/web/sendAttach/68047.

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An Arbitral Tribunal tasked with resolving an investment dispute in a contested maritime space must initially establish jurisdiction. This would entail determining whether the location falls within the territorial scope of the respondent State. This necessarily follows that there may be overlapping claims of a third State in the said contested area. Some investment agreements either do not define the territory or define it generically. Arguably, the legal analysis of the Arbitral Tribunals shouldn't amount to assessing whether the host State has sovereignty over the contested maritime zone. Otherwise, this would amount to deciding on the sovereignty issue itself where third parties rights may be violated as they are most likely not parties to same IIAs in the matter in hand in the first place. Therefore, the test should be simply to determine whether the host State has de facto control over the contested location or not[103].

V. CONCLUSIONS

Arbitral tribunals frequently rely on international law, including UNCLOS, to resolve disputes arising under investment treaties, particularly in offshore contexts. This reliance underlines the integration of public international law principles into ISDS. This article attempted to analyse the interplay between the UNCLOS and ISDS in particular regarding the scope of application of IIAs. In this context, especially CS and EEZ were subject to the investigation considering the fact that coastal States' lack of full sovereignty in the said zones. As a matter of fact, investments in maritime areas often involve complex legal questions about the territorial application of investment treaties. While UNCLOS was not designed to address investor-State disputes directly, yet its rules and principles increasingly may serve as a reference point for resolving issues related to offshore investments. This emphasizes the potential role of UNCLOS to guide ISDS in maritime zones, particularly when disputes involve the interpretation of jurisdictional rights.

In light of the foregoing, arguably, Tribunals must carefully balance the principles of UNCLOS with those of IIAs to ensure the protection of investors in the maritime domain while respecting the sovereign rights of all interested coastal States or as case may be the well established navigational

[103] Tzeng, *Op. Cit.*, pp. 839-840.

rights of flag States may need to be considered as well. In this context, the term territory in IIAs may be interpreted broadly to include maritime zones where States exercise sovereign rights or jurisdiction irrespective of the sovereignty statues. This flexible approach mitigates interpretative issues and enhances investor protection in offshore locations. Hence, arguably it serves the very purpose of the ISDS. Furthermore, similar to disputes on lands, the test on effective control can be also employed for maritime areas where overlapping claims exist. Nonetheless, the Monetary Gold principle remains a critical safeguard against encroaching on the rights of third States. Indeed, Tribunals are expected to remain within their mandates, avoiding sovereignty discussions while leveraging UNCLOS principles to address jurisdictional and regulatory issues. Perhaps, in such cases, Arbitral Tribunals can insert "no-prejudice" clauses in their decisions as follows "without prejudice to the final delimitation" safeguards that whatever determination is made will not bear any eventual effect on the future maritime boundary delimitation. In addition to being an instrumental tool for addressing territorial aspects in the context of ISDS, UNCLOS appear to have a further potential role in investor-State arbitration as the various offshore investments becomes more feasible in time.

In conclusion, UNCLOS has a huge potential to play a crucial role in investor-State arbitration, in the context of offshore investments. Its principles provide a robust framework for interpreting jurisdictional issues and offer guidance to Arbitral Tribunals while safeguarding the interests of both host States and investors. As investments in maritime zones continue to grow, the role of UNCLOS in shaping the future of international investment law can be expected to become more evident.

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