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# THE PROTECTION OF FOREIGN INVESTMENTS IN DISPUTED MARITIME AREAS OF THE SOUTH CHINA SEA

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## Abstract

*This study used a legal framework developed by a recent scholarship to examine the protection of foreign investments in disputed maritime areas. The framework classifies these areas and establishes the jurisdictional challenges faced by investment tribunals in such constellations. For instance, there are high-profile foreign investments in the South China Sea (SCS) with significant threats of increasing escalation between SCS states. Therefore, this study aimed to examine investment protection in disputed waters of SCS using this framework. Since BITs of SCS states include maritime areas beyond the territorial sea in their territories, there is need to abide to international law. Therefore, tribunals are caught in a double bind when deciding on their jurisdiction. For instance, they need to assess whether disputed maritime areas fall under the BIT's territorial scope of protection, conferring them to territorial jurisdiction. This necessitate the need to determine the maritime entitlements conformity with international law, which is against the scope of jurisdiction of the investment tribunal. The results showed that tribunals may not overcome this jurisdictional hurdle as a matter de lege lata. In this regard, de lege feranda are promising legal rationales to establish incidental jurisdiction over disputed maritime areas. Therefore, tribunals decide on their jurisdiction over investments in these areas.*

**Keywords** : *disputed maritime areas, incidental jurisdiction, ISDS, South China Sea*

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## I. INTRODUCTION

The Asia-Pacific region receives the largest share of global FDI inflows among developing economies.<sup>1</sup> Foreign investors in the South China Sea (SCS) are more concerned about protecting their investments amid the increasing tensions in this region.<sup>2</sup> This is because SCS has untapped seabed energy reserves with increasing offshore interests and militarization.<sup>3</sup> Therefore, the protection of the existing and potential foreign investments is significant for

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<sup>1</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Foreign Direct Investment Trends and Outlook in Asia and the Pacific 2019/2020* (New York, United States: UNESCAP, 2020), 2.

<sup>2</sup> "Territorial Disputes in the South China Sea," The Council on Foreign Relation's Global Conflict Tracker, accessed 31 March 2021, <https://on.cfr.org/35aWt9U>.

<sup>3</sup> International Energy Agency, *Offshore Energy Outlook 2018 Report*, accessed 22 March 2021, <https://www.iea.org/reports/offshore-energy-outlook-2018>.

host states in the SCS and the attracted foreign investors.<sup>4</sup>

The ongoing dispute complicates the inclusion of an investment in an SCS coastal state's maritime within the BIT's territorial jurisdiction.<sup>5</sup> Therefore, a framework that classifies the types of disputed maritime areas has been developed.<sup>6</sup> The framework explores the protection of investments<sup>7</sup> beyond a host state's territorial sea,<sup>8</sup> especially in disputed waters or areas of uncertain maritime boundaries.<sup>9</sup> Offshore hydrocarbon investments<sup>10</sup> have attracted attention from scholars. Inquiries are about investments in deep seabed mining<sup>11</sup> and submarine cables<sup>12</sup> have been made. Similarly, previous investment tribunals have dealt with claims against the disputed territory, such as the Crimea cases<sup>13</sup> relating to contested annexation and in-state succession of Hong Kong/Macao<sup>14</sup> and Kosovo.<sup>15</sup> However, investor-state arbitration

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<sup>4</sup> Christian Wirth, "Antagonisms in the South China Sea: The Regional Perspective," *Global Challenges*, February 2017, accessed 22 March 2021, <https://globalchallenges.ch/issue/1/antagonisms-in-the-south-china-sea-the-regional-perspective/>.

<sup>5</sup> The Peace Palace library has compiled a comprehensive list of scholarship on the international law of the sea and geopolitical dimensions of the SCS Dispute which can be accessed at <https://peacepalacelibrary.nl/south-china-sea-new-titles/>.

<sup>6</sup> British Institute of International and Comparative Law, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas* (London, United Kingdom: BIICL, 2016), para 188; Peter Tzeng, "Investment Protection in Disputed Maritime Areas," *The Journal of World Investment & Trade* 19, (2018): 828, doi: <https://doi.org/10.1163/22119000-12340112>; Marco Benatar and Valentin J. Schatz, "The Protection of Foreign Investments in Disputed Maritime Areas," in *Investments in Conflict Zones*, Tobias Ackermann, Sebastian Wuschke, eds. (Leiden, The Netherlands: Brill/Nijhoff, 2020), 176.

<sup>7</sup> Benatar and Schatz, "The Protection of Foreign Investments," 176; Tzeng, "Investment Protection," 828; Kathryn Khamsi, "Investments in Unsettled Maritime Boundary Contexts: The Role of Bilateral Investment Treaties in Delivering Certainty," *ICSID Review*, 34 (2019): 666.

<sup>8</sup> Seline Trevisanut and Nikolas Giannopoulos, "Investment Protection in Offshore Energy Production: Bright Sides of Regime Interaction," *Journal of World Investment & Trade* 19, (2018): 789, doi: [10.1163/22119000-12340111](https://doi.org/10.1163/22119000-12340111).

<sup>9</sup> Josina A. Y. Wattimena, "Urgency of Boundary Maritime Management: Strategies to Prevent Conflict," *Indonesian Journal of International Law* 15, no.1 (2017): 29, doi: [10.17304/ijil.vol15.1.740](https://doi.org/10.17304/ijil.vol15.1.740).

<sup>10</sup> Robert Beckman, "International Law, UNCLOS and the South China Sea," in *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources*, Robert Beckman, et. al. eds., (Singapore: Edward Elgar, 2013), 47; Natalia Ermolina, "Unilateral Hydrocarbon Activities in Undelimited Maritime Areas," *Indonesian Journal of International Law* 15, no. 2 (2019): 158, doi: [10.17304/ijil.vol15.2.724](https://doi.org/10.17304/ijil.vol15.2.724)

<sup>11</sup> James Harrison, "International Investment Law and the Regulation of the Seabed," in *The Law of the Seabed*, Catherine Banet, ed. (Leiden, Netherlands: Brill/Nijhoff, 2020), 481.

<sup>12</sup> Markos Karavias, "Submarine Cables and Pipelines: The Protection of Investors Under International Law," *The Journal of World Investment & Trade* 19, (2018): 860, doi: [10.1163/22119000-12340113](https://doi.org/10.1163/22119000-12340113).

<sup>13</sup> Damien Charlotin, Lisa Bohmer, and Luke E. Peterson, "Russia Disputes Round-up: An update on 19 Treaty-Based Arbitrations Against the State," *Investment Arbitration Reporter*, accessed 17 May 2020, <https://www.iareporter.com/Articles/russia-round-up-an-update-on-19-treaty-based-arbitrations-against-the-state/>.

<sup>14</sup> Odysseas G. Repousis, "On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao," *Michigan Journal of International Law* 37, no.1 (2015): 113.

<sup>15</sup> Pierre-Emmanuel Dupont, "Foreign Investment and the Status of Kosovo in International Law," *The Journal of World Investment & Trade* 10, no. 6 (2019): 937, doi: [10.1163/221190009X00051](https://doi.org/10.1163/221190009X00051).

against a maritime sovereignty dispute has never been conducted. Conversely, there have been interstate maritime delimitation cases before the ICJ, ITLOS, and PCA. These organizations resolve disputes involving offshore concession blocks granted to foreign corporations, such as the maritime boundary case between Ghana and Côte d'Ivoire.<sup>16</sup> Moreover, there have been foreign investments in disputed maritime areas with possible territorial protection assessed.<sup>17</sup> Scholars have established that investment tribunal jurisdiction can be constrained to the point of failing to determine maritime entitlements of sovereign states. This applies to the Monetary Gold principle when the state is protesting the disputed maritime areas. In this case, the host state grants the foreign investors rights, while the protesting state is not a party to the investor-(host)-state dispute. These are referred to as the questions of implicated issues and indispensable parties.<sup>18</sup>

This study examined the foreign investments in disputed maritime areas to the South China Sea investments based on the current international law framework. It outlined the conflict dynamics, and the stakes foreign investors hold in the region. Section II of this study discusses the SCS dispute, while Section III elaborates on the current foreign investment activities in the SCS. Furthermore, Section IV examines BITs surveys by SCS states, focusing on whether maritime areas are included in the definition of territory. Section V discusses the types of disputed maritime areas between SCS states, particularly their territorial protection in BITs. Moreover, Section VI examines the jurisdictional challenges in assessing the protection of investments. The analysis is based on a preceding survey of SCS BITs and specific maritime disputes and tailors the framework on jurisdiction for potential investment disputes. In deciding *proprio motu* on its jurisdiction, a tribunal should assess its ability to establish jurisdiction *ratione loci*. However, it has to make determinations on maritime sovereignty and entitlements, which *prima facie* fall out of its jurisdiction. This means that the tribunal completely lacks jurisdiction over the investment dispute. This is referred to as the problem of implicated issue, dealt with in the last half of Section VI. Section VII addresses the jurisdictional hurdle of *ratione personae* posed by the Monetary Gold, indispensable party principle. Also, it discusses the participation of the protesting state in investor-(host)-state arbitral proceedings as an *amicus curia*.

<sup>16</sup> Christine Sim, "Investment Disputes Arising out of Areas of Unsettled Boundaries: Ghana/Côte d'Ivoire," *The Journal of World Energy Law & Business* 11, no. 1 (2018): 1, doi: 10.1093/jwelb/jwx033.

<sup>17</sup> Markus P. Beham, "The Concept of 'Territory' in BITs of Disputing Sovereigns," in *Investments in Conflict Zones*, Tobias Ackermann and Sebastian Wuschke, eds. (Leiden, Netherlands: Brill/Nijhoff, 2020), 139.

<sup>18</sup> Peter Tzeng, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction," *New York University Journal of International Law & Politics* 50, (2018): 477.

## II. THE SCS DISPUTE

### A. THE GEOGRAPHY OF THE SCS

SCS is a water body covering 3,685,000 km<sup>2</sup> stretching from the Northern border by the Taiwan Strait to the Southern border formed by Eastern and Southern limits of Singapore and Malacca Straits, the Karimata Strait, and the island of Borneo. The Western border is formed by the Southern limit of the Gulf of Thailand and the East coast of the Malay Peninsula, while the Eastern border is formed by the Philippine Luzon, Balabac, and Mindoro Straits.<sup>19</sup>

### B. THE NINE-DASH LINE

The Nine-dash line encompasses roughly 90% (the red-dashed line in Figure 2) of the SCS. This refers to the demarcation line used by China for their claims in the SCS and includes the Paracel, the Spratly, Pratas, the Scarborough Shoal, and parts of the Natuna Islands. It overlaps with the EEZ and continental shelf of China's neighboring states, including the Philippines, Vietnam, Malaysia, Brunei, and Indonesia. Although China has never designated it as a definitive border to sovereignty, there are allegations that its territorial waters cover 12nm from its mainland to the claimed offshore islands. Specifically, it anchors claims to island groups in the SCS and the potential maritime entitlements generated. This means that China claims the SCS within its sphere of maritime sovereignty,<sup>20</sup> the crux of contention in the SCS Dispute.

## III. FOREIGN INVESTMENT ACTIVITIES IN THE SCS

The SCS's potential for oil and gas significantly attracts foreign investors. The think-tank CSIS recently identified operation and exploration blocks held by foreign energy corporations investing in the SCS. It shows dozens of blocks laying in areas of overlapping EEZ, or continental shelf claims between SCS states<sup>21</sup> (See Figure 3). This section highlights high-profile energy investment projects in SCS states.

### A. INDONESIA

<sup>19</sup> International Hydrographic Organization, *Limits of Oceans and Seas, Third Edition* (Monte Carlo, Monaco: 1953), 24.

<sup>20</sup> Chinese Society of International Law, "The South China Sea Arbitration Awards: A Critical Study," *Chinese Journal of International Law* 17, (2018): 207. Liu Zhen, "What's China's 'nine-dash line' and why has it created so much tension in the South China Sea?" South China Morning Post, 12 July 2016, accessed on 31 March 2021, <https://bit.ly/3nWLWYb>.

<sup>21</sup> "South China Sea Energy Exploration and Development," Centre for Strategic and International Studies, accessed on 23 March 2021, <https://amti.csis.org/south-china-sea-energy-exploration-and-development/>.

In 2019, Spanish energy company Repsol made the largest gas discovery in Indonesia in 18 years with a preliminary estimate of at least two trillion cubic feet of recoverable resources. Indonesia planned to auction 10 oil and gas blocks in 2020, with a combined estimated potential of 5,006 billion cubic feet of gas and 3,436 million barrels of oil. However, only 54 out of 126 sediment shelves in the have been explored.<sup>22</sup>

## B. MALAYSIA

A Thai state energy company discovered its largest gas around 90km offshore the state of Sarawak in February 2021. The project partners include its operator and three other companies, specifically a Malaysian subsidiary of the Thai state energy, Kuwait's energy, and a Malaysian national oil and gas.<sup>23</sup>

## C. THE PHILIPPINES

The Philippines announced in October 2020 that it would resume oil and gas exploration in the SCS. This came after the administration of former President Benigno Aquino III suspended exploration and drilling activities in 2014 amid tensions with China. Forum, a UK company with Philippine backing, holds a contract to explore near the Reed Bank, an area rich in oil and gas. The Philippines has exploited the area due to Chinese interference. Moreover, PXP, a Hong Kong company, and the state-owned Philippine oil company hold contracts to operate in this area.<sup>24</sup>

Renewables projects involving energy generation through platforms or devices in the seabed have also attracted investors. This includes the generation of electricity from offshore geothermal heat sources, such as seabed or marine volcanoes. Examples are the NEC volcanic complex in the Indonesia Banda Sea and those near the Sangihe Island.<sup>25</sup> The Philippines' FDI policy announced that it would allow 100% foreign ownership for large-scale exploration, development, and utilization in geothermal projects.<sup>26</sup>

<sup>22</sup> Saul Daniel and Audrey Lim, "Can foreign investment in Indonesia's upstream oil and gas sector live up to expectations?" ASEAN Business, 19 October 2020, accessed on 31 March 2021, <https://bit.ly/3mkyKfy>.

<sup>23</sup> Tim Daiss, "Headwinds Remain for Malaysia's Natural Gas Ambitions," Rigzone, 15 March 2021, accessed 22 March 2021, [https://www.rigzone.com/news/headwinds\\_remain\\_for\\_malaysias\\_natural\\_gas\\_ambitions-15-mar-2021-164880-Article/](https://www.rigzone.com/news/headwinds_remain_for_malaysias_natural_gas_ambitions-15-mar-2021-164880-Article/).

<sup>24</sup> John Reed and Kathrin Hille, "Philippines to restart oil and gas exploration in the South China Sea," Financial Times, 18 October 2020, accessed 22 March 2021, <https://www.ft.com/content/b361afe9-9aa2-461a-b8ea-d8fc8850ddfa>.

<sup>25</sup> Teguh Rahat Prabowo et. al, "A new idea: The possibilities of offshore geothermal system in Indonesia marine volcanoes," in *The 6th ITB International Geothermal Workshop Conference Series: Earth and Environmental (IIGW2017) 22-23 March 2017* (Bandung, Indonesia: IOP Publishing, 2017), 5, doi: 10.1088/1755-1315/103/1/012012

<sup>26</sup> John Yeap, "Philippines allows 100% foreign investment in geothermal project," Pinsent Masons, 11 November 2020, accessed 23 March 2021, <https://www.pinsentmasons.com/out-law/news/philippines-allows->

## D. VIETNAM

In August 2020, Vietnam entered into a \$5.09 billion LNG power and terminal project with Exxon Mobil.<sup>27</sup> This was accompanied by another JV with Exxon in the Blue Whale Project<sup>28</sup> to develop an offshore platform, a pipeline to shore, an onshore gas treatment plant, and base supply pipelines. The project awarded Italian Saipem an onshore-offshore front-end engineering design contract.<sup>29</sup> Another prominent Italian energy investor, ENI, confirmed a large gas and condensate field in the Red River Basin, one of the largest discoveries made in Southeast Asia in the past two decades.<sup>30</sup>

## E. POLITICAL AND ECONOMIC PRESSURE FROM CHINA ON ITS NEIGHBOURS' FDI POLICY

Western foreign investors dominate the energy sector, though they face stiff competition from the Three Buckets of Oil, the three Chinese national oil companies that support SCS ventures outside of the energy sector, including shipbuilding and the construction of artificial islands.<sup>31</sup> Furthermore, China has developed and expanded its national capacity in offshore industries in the SCS, such as aquaculture, seabed mining for minerals and precious metals, and construction of offshore wind and solar farms, and submarine cables. Its economic and geo-strategic interests in the SCS have politically pressurized the neighbors, affecting governmental decision-making on the concrete FDI initiatives. This was evident in the 2014 moratorium on exploration and drilling activities instituted by The Philippines. In Summer 2020, Vietnam was forced to rescind licenses of a Russian-Spanish-Emirati investor consortium operating at the farther edge of Vietnam's claimed EEZ, which China asserted overlapped with its maritime claims. As a result, Vietnam paid out a one billion dollars settlement.<sup>32</sup> It remains to be seen whether Vietnam's joint ventures with Exxon and Eni would be subject to the same fate.

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foreign-investment-in-geothermal-projects.

<sup>27</sup> "Vietnam city says approves LNG project to be developed by Exxon Mobil," Reuters, 2 October 2020, accessed 23 March 2021, <https://www.reuters.com/Article/us-vietnam-exxon-mobil-lng-idUSKBN26N1KZ>.

<sup>28</sup> "Ca Voi Xanh Project Overview," Exxon Mobil, accessed 30 March 2021, <https://exxonmobil.co/3ui56Km>.

<sup>29</sup> "FEED for Ca Voi Xanh Project," Saipem, accessed 30 March 2021, <https://www.saipem.com/en/projects/feed-ca-voi-xanh-project>

<sup>30</sup> Damon Evans, "Eni strikes one of the biggest gas finds in Southeast Asia for 20 years," Energy Voice, 30 July 2020, accessed 30 March 2021, <https://www.energyvoice.com/oilandgas/asia/255731/eni-gas-find-vietnam/>.

<sup>31</sup> "Stirring up the South China Sea (IV): Oil in Troubled Waters," Crisis Group, 27 January 2016, accessed 30 March 2021, <https://medium.com/@CrisisGroup/stirring-up-the-south-china-sea-iv-oil-in-troubled-waters-7d4b7286aac0>.

<sup>32</sup> Bill Hayton, "China's Pressure Costs Vietnam \$1 Billion in the South China Sea," The Diplomat, 20 July 2020, accessed 30 March 2021, <https://thediplomat.com/2020/07/chinas-pressure-costs-vietnam-1-billion-in-the-south-china-sea/>.



To counter China's political pressure, the regent of Indonesian Natuna Islands called for United States, Japan, South Korea, and Australia to invest on the island. The Southern tip of the nine-dash line is one of the contested island groups in the SCS dispute.<sup>33</sup> China's leveraging of its economic statecraft has severed ties with foreign investors and strategic competitors. This has also resulted in tacit renouncement of its SCS claims, such as the case with Brunei, which secured BRI-related investments.<sup>34</sup>

#### IV. THE INCLUSION OF A STATE'S MARITIME ZONES IN THE TERRITORIAL SCOPE OF SCS STATES' BITS

Under international law, the territory over which a state exercises its sovereignty encompasses the land, subsoil, internal waters, the airspace above that land, and the territorial sea or archipelagic waters. However, other zones of functional rights and jurisdiction have emerged beyond this maritime belt.<sup>35</sup> First, the contiguous zone (Article 33 UNCLOS) is where the coastal state may exercise certain maritime administrative functions. Second, the exclusive economic zone (EEZ) is where the coastal state enjoys sovereign rights over natural resources and other rights regarding marine research (Article 87 UNCLOS). Third, the continental shelf is a submarine area, comprising the seabed and subsoil, over which the coastal state has resource exploitation rights (Article 76 UNCLOS). The BIT is responsible for providing a specific definition of what is considered part of its territorial scope. When it fails to provide the definition, it is determined by Article 29 VCLT,<sup>36</sup> which sets out that treaties by default apply to the contracting state party's territory. Therefore, an investment treaty, without further guidance on its territorial scope, would not apply to maritime zones beyond the contracting state's maritime belt.

Surveying the BITs in the SCS shows a pattern including maritime zones beyond the coastal state's maritime belt in the definition of 'territory'. This trend previously observed in a UNCTAD Report.<sup>37</sup> The inclusion is prevalent

<sup>33</sup> James Massola and Amilia Rosa, "Natuna chief urges Australia to invest, says Chinese aid not welcome," *The Sydney Morning Herald*, 26 June 2020, accessed 30 March 2021, <https://www.smh.com.au/world/asia/natuna-chief-urges-australia-to-invest-says-chinese-aid-not-welcome-20200610-p551e7.html>.

<sup>34</sup> Bama Andika Putra, "Comprehending Brunei Darussalam's vanishing claims in the South China Sea: China's exertion of economic power and the influence of elite perception," *Cogent Social Sciences* 7, (2021): 4, doi: 10.1080/23311886.2020.1858563.

<sup>35</sup> Malcolm N. Shaw, *International Law, Eighth Edition* (New York: Cambridge University Press, 2017), 402.

<sup>36</sup> Syméon Karagiannis, "Article 29 1969 Vienna Convention," in *The Vienna Convention on the Law of Treaties: A Commentary*, Oliver Corten and Pierre Kleineds, eds. (New York: Oxford University Press, 2008).

<sup>37</sup> UNCTAD, *Bilateral investment treaties 1995-2006: Trends in Investment Rulemaking* (Geneva, Switzerland: UNCTAD, 2006), 17.



when the BIT is concluded between two coastal states. The BITs surveyed concluded between the six SCS and twenty-one other coastal states. Of the possible 126 BIT constellations, eighty-six existed or were publicly available, in which only fourteen did not include a definition. The remaining seventy-four BITs included the definition of territory, referencing the sea and maritime zones extending beyond. Therefore, they yielded an 86% likelihood of maritime zones being included in the territorial scope of BITs between SCS and other coastal state.

Among those seventy-four BITs, the first two included a definition explicitly referring to the EEZ (twenty-two BITs) and the continental shelf (twenty-nine BITs).<sup>38</sup> The third type implicitly referred to these two zones by referencing maritime zones (including seabed and subsoil) beyond a state's maritime belt (the territorial and adjacent seas, and coast). These are the zones over which a state exercises resource explorations and exploitation rights (six BITs).<sup>39</sup> The fourth type, to which most cases belong, referred to maritime zones over which the state has sovereign rights and jurisdiction (forty-seven BITs). Although almost all these provisions are included an 'in accordance with international law' clause, UNCLOS was referenced in thirteen surveyed BITs. Some surveyed BITs also had different definitions of territory for the contracting states. For instance, one party may be defined by a general reference to maritime zones, while the territory of the other one may contain an explicit reference to the EEZ or continental shelf.<sup>40</sup> The territory of one state was only defined as land territory and the territorial sea,<sup>41</sup> or to its national law, under which maritime areas constituted territory.<sup>42</sup> The last one included maritime zone concerning international law.

SCS BITs concluded with landlocked states were also surveyed. The sample included seven land-locked states and five SCS, giving forty-five possible land-locked-coastal-state-BIT constellations. A BIT existed or was public only in twenty-five constellations, of which sixteen constellations included a definition of territory. Furthermore, twelve included maritime zones into the definitions, while four encompassed only generic definitions,

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<sup>38</sup> Article 1(6), Agreement between Denmark and The Philippines regarding the Promotion and Reciprocal Protection of Investments (1997), signed 25 September 1997 (entered into force 19 April 1998).

<sup>39</sup> Article 1(4), Agreement between Indonesia and Spain on Reciprocal Promotion and Protection of Investment (1995), signed 30 May 1995 (entered into force 18 December 1996).

<sup>40</sup> Article 1(4), Agreement between Netherlands and Indonesia on Promotion and Protection of Investment (1994), signed 6 April 1994 (entered into force 1 July 1997). See also Article 1(5), Investment Protection Agreement between France and Vietnam (1992), signed 26 May 1992 (entered into force 10 August 1994).

<sup>41</sup> Article 1(5), Agreement between Denmark and Malaysia for the Mutual Promotion and Protection of Investments (1992), signed 6 January 1992 (entered into force 18 September 1992).

<sup>42</sup> Article 1(a), Agreement between Netherlands and Philippines for the Promotion and Protection of Investments (1985), signed 27 February 1985 (entered into force 1 October 1987).

such as the territory of state as defined in its law, or over which (state) exercises sovereign rights and jurisdiction in line with international law. A total of nine constellations lacked definition of territory. This survey indicates no likelihood of a definition including the maritime zone across the BITs, with 12/25, nearly 50%. However, when states include a definition of territory in the BIT, they would likely not include maritime areas (12/16, indicating a 75% chance compared to 4/16, 25%). The tables showing the results of both surveys are found in the Annex.

Treaty-making practices of SCS states include maritime zones within the definition of territory. However, it would be incorrect to interpret this observation into a BIT, which excludes maritime zones. The omission could also reflect the intention of the contract parties to constrain the territorial investment on land. Article 29 VCLT stipulates that a treaty applies to the entire territory of each party unless there is a different definition or is otherwise established. However, the treaties aim to protect investments made in areas which the contracting party, such as the host state, effectively or *de facto* controls. Otherwise, the investment would not have been possible. This understanding includes areas over which the contracting party has sovereignty (territory) and the maritime areas beyond the territorial seas, over which the contracting party exercises sovereign rights or jurisdiction.<sup>43</sup>

## V. THE CLASSIFICATION OF DISPUTED MARITIME AREAS

SCS BITs would likely include maritime zones into the definition of territory through teleological interpretation. Therefore, maritime or offshore investments in the SCS may fall within the territorial scope of the BITs concluded by coastal states. This implies jurisdiction *ratione loci* could *prima facie* be given.

Based on the status of maritime areas disputed, a new question arises on the protection of investments made in the disputed territory. The first step is to examine the nature and types of disputed maritime areas proposed by recent scholarship<sup>44</sup> and the examples from the SCS.

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<sup>43</sup> Benatar and Schatz, "The Protection of Foreign Investments," 185.

<sup>44</sup> Benatar and Schatz, "The Protection of Foreign Investments" 185; Tzeng, "Investment Protection," 844.

## A. CLASSIFICATION ACCORDING TO THE STATUS OF THE DISPUTE

### 1. ‘UNREGULATED AREAS’

The disputed SCS areas are summarized in the following table:<sup>45</sup>

Disputed Area	Disputing states
China’s Nine-dash line	Disputed by all remaining SCS states, except Taiwan
Maritime boundary of Borneo (incl the islands of Ligitan and Sipadan)	China, Taiwan, Brunei, Philippines, Malaysia Indonesia (with respect to the two mentioned islands only between these latter states)
Paracel Islands, Pratas Island and the Vereker Banks, Macclesfield Bank, Scarborough Shoal and the Spratly Islands	Generally, between China, Taiwan, The Philippines, Vietnam Parts only between Malaysia and The Philippines
Maritime boundaries in the waters of Natuna Islands	China, Taiwan, Indonesia
Maritime boundaries off the coast of Palawan and Luzon (incl islands in the Luzon Strait)	China, Taiwan, The Philippines,
Maritime boundary, land territory, and the islands of Sabah, including Ambalat,	Indonesia, Malaysia, and the Philippines.

### 2. JOINT DEVELOPMENT AREAS (JDA)

In November 2018, The Philippines and China signed an MoU on Cooperation on Oil and Gas Development. They agreed to establish an Inter-Governmental Joint Steering Committee and Inter-Entrepreneurial Working Groups to negotiate and pursue cooperation agreements for oil and gas.<sup>46</sup> Areas under such an arrangement are referred to as Joint Development Area (JDA). These are undertakings by coastal states in line with Article 74(3) and 83(3) of UNCLOS, which requires states with overlapping EEZs and continental shelves claim to enter practical provisional arrangements.<sup>47</sup> The only other JDA between SCS states is the Malaysia-Vietnam JDA,<sup>48</sup> which along with the Malaysia-Thailand JDA, forms a tripartite and the first multilateral JDA

<sup>45</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Foreign Direct Investment Trends and Outlook in Asia and the Pacific 2019/2020* (New York, United States: UNESCAP, 2020), 4.

<sup>46</sup> Jay Batongbacal, “The Philippines-China MOU on Cooperation in Oil and Gas Development,” CSIS, 5 December 2018, accessed 30 March 2021, <https://amti.csis.org/philippines-china-mou-cooperation-oil-gas-development/>.

<sup>47</sup> Muhammad Faiz Aziz, “Developing Joint Development Zone in Disputed Maritime Boundaries,” *Indonesian Journal of International Law* 15, no. 4 (2018): 432, doi: <http://dx.doi.org/10.17304/ijil.vol15.4.735>

<sup>48</sup> “Petronas And Petrovietnam Extend PM3 CAA Production Sharing Contract,” Petronas, 9 May 2016, accessed 23 March 2021, <https://www.petronas.com/media/press-release/petronas-and-petrovietnam-extend-pm3-caa-production-sharing-contract>.

worldwide.<sup>49</sup>

### 3. “PROVISIONALLY DELIMITED AREAS”

This is a provisional delimitation of the disputing party currently absent in the SCS. In 2009, Malaysia and Vietnam made a Joint Submission to the CLCS<sup>50</sup> on their extended continental shelf claims under Article 76 UNCLOS. However, the submission did not define the extended continental shelf claim of each country. Instead, it merely defined the area jointly claimed by both countries. It was referred to as a broad understanding of the apportionment of the respective area by the Malaysian Prime Minister.<sup>51</sup> In consequence, China and The Philippines issued notes verbale against this submission.<sup>52</sup> This study only examined investments in unregulated areas constituting the possible investor-state cases in the SCS. There is only one Agreement, one MoU on JDA, and no provisionally delimited areas.

## B. CLASSIFICATION ACCORDING TO THE DISPUTE CONTENT

### 1. OVERLAP OF MARITIME CLAIMS

The states disagree on delimiting maritime boundaries based on overlapping claims to their territorial sea, EEZ, or continental shelf. The overlap of China’s Nine-dash line with its neighbors’ EEZ and continental shelf entitlements forms the basis of the SCS Dispute. In this regard, the Nine-dash line is anchored by China’s sovereignty claims over islands groups in the SCS and not generated by its mainland coastline. This would tie in with the further types of disputed areas. Without China’s Nine-dash line claim, disagreements about overlapping entitlements amongst China’s SCS neighbors would persist. An example is The Philippines’ protest to the joint submission by Malaysia and Vietnam to the CLCS.

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<sup>49</sup> Hong Thao Nguyen, “Vietnam and Joint Development in the Gulf of Thailand,” *Asian Yearbook of International Law* 8, (2003): 138.

<sup>50</sup> “Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Joint submission by Malaysia and the Socialist Republic of Viet Nam,” UN Division for Ocean Affairs and the Law of the Sea, last modified, 3 May 2011, accessed 30 March 2021 [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm).

<sup>51</sup> “Hanoi and KL reach broad understanding on sea claims,” *The Star Malaysia*, 2 June 2009, accessed 25 March 2021, <https://web.archive.org/web/20121009010400/http://thestar.com.my/news/story.asp?file=/2009/6/2/-nation/4029224&sec=nation>.

<sup>52</sup> “Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Joint submission by Malaysia and the Socialist Republic of Viet Nam,” UN Division for Ocean Affairs and the Law of the Sea, accessed 22 March 2021, [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mys\\_12\\_12\\_2019.html](https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html).

## 2. CONTESTED SOVEREIGNTY OVER COASTAL LAND OR A FEATURE THAT GENERATES MARITIME ENTITLEMENT

### a. Disputes Over the Position of Drawing of (Main)Land Boundary

China and Vietnam's maritime delimitation in the Gulf of Tonkin in 2000 contradicted a land border agreement a year before. However, this was considered political to further negotiate maritime boundaries and not a legal condition to generate entitlements. Also, the delimitation of the Gulf of Tonkin was based on the location of Vietnamese and Chinese islands in those waters, not on their coastal land.<sup>53</sup> An example is the *Guyana v Venezuela* ICJ case, in which Venezuela refuted an arbitral award that settled a land boundary, complicating the achievement of a final maritime delimitation.<sup>54</sup>

### b. Dispute Over Sovereignty Over Islands

The nine-dash line of China, anchored by its sovereignty claims to islands in the SCS, is reflected in its ratification of UNCLOS. It filed a declaration to UNCLOS reaffirming its sovereignty over all its archipelagoes and islands as listed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone. According to this provision China's land territory includes its mainland (including Taiwan and the Penghu Islands), coastal islands. Furthermore, the Diaoyu (Senkaku) islands in the East China Sea<sup>55</sup> and islands in the SCS, Dongsha, Xisha, Zhongsha, and the Nansha Island (Pratas, Paracel, Macclesfield Bank, and the Spratlys).<sup>56</sup>

### c. Disputes over the Characteristics of a Maritime Feature

Even when sovereignty over the land or maritime features is established, states could still dispute the entitlements these features generate.

Status of a rock or island: Under Article 121 UNCLOS, an island generates a territorial sea and an EEZ, while a rock is entitled to only a territorial sea. The distinguishing factor is whether the feature sustains human habitation or economic life. In this regard, the PCA tribunal in the *Philippines v China*<sup>57</sup> held that the Spratly Islands or their features could not generate an EEZ. This means that the Spratlys are not considered islands under the UNCLOS definition.

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<sup>53</sup> Benoît de Tréglodé, "Maritime Boundary Delimitation and Sino-Vietnamese Cooperation in the Gulf of Tonkin (1994-2016)," *China Perspectives* 3, (2016): 36, doi: 10.4000/chinaperspectives.7030.

<sup>54</sup> British Institute of International and Comparative Law, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS*, para 188-190.

<sup>55</sup> "Tensions in the East China Sea," The Council on Foreign Relations's Global Conflict Tracker, accessed 31 March 2021, <https://on.cfr.org/31GnSPE>.

<sup>56</sup> China, *Laws on the Territorial Sea and the Contiguous Zone*, Order No. 55 of 1992.

<sup>57</sup> South China Sea (Philippines v China), PCA Case No 2013-19, Award (2016), para 577, 646.

Status of a low tide elevation (LTE): Under Article 10 UNCLOS, an island must be above water at high tide. In contrast, a naturally formed area of land above and surrounded by water at low tide but submerged at high tide is an LTE. It may only measure the breadth of the territorial sea (Art 11) or draw straight baselines in certain circumstances (Art 7 (4) UNCLOS). Different to rocks, which are permanently above water, LTEs do not generate maritime entitlements. In line with this, The Philippines argued in the PCA case that the Gaven Reef and McKennan Reef were LTEs, which the tribunal qualified as rocks.<sup>58</sup>

Dispute over the drawing of baselines: Maritime entitlements could be claimed in excess when a coastal state draws baselines in contravention with UNCLOS or CIL. This is often the case with misusing straight baselines (joining selected points with a straight line, instead of taking low-water line along the coast), which is only permissible under certain conditions under Art 7 UNCLOS. Upon UNCLOS ratification, China filed a declaration announcing the use of straight baselines to measure the territorial sea from its mainland and the Paracels.<sup>59</sup>

## VI. INVESTMENTS IN DISPUTED MARITIME AREAS OF THE SCS AS ‘PROTECTED INVESTMENTS’?

### A. A QUESTION OF JURISDICTION *RATIONE LOCI* OR *RATIONE MATERIAE*

A question arises on whether a dispute over maritime areas affects the territorial scope of the BIT, jurisdiction *ratione loci*, or in case it concerns jurisdiction *ratione materiae*. Also, another question concerns the tribunal’s empowerment to decide on an investor-state dispute that is tied up with an interstate territorial maritime dispute.

Jurisdiction *ratione materiae* is the investment disputes the tribunal decides on, contingent on states’ consent.<sup>60</sup> The tribunal may only decide on issues to which the states agreed subject to arbitration. These include disputes between an investor and the host state concerning damages and losses incurred by the investor through alleged breaches of the BIT by the host state.<sup>61</sup>

<sup>58</sup> *Ibid*, 645.

<sup>59</sup> China, *Declaration of the Government of the People’s Republic of China on the baselines of the territorial sea*, 15 May 1996. Government of the People’s Republic of China, available at <<https://bit.ly/3m95Ajm>>

<sup>60</sup> Christoph Schreuer, “Jurisdiction and Applicable Law in Investment Treaty Arbitration,” *McGill Journal of Dispute Resolution* 1, no.1 (2014): 16-17.

<sup>61</sup> Christoph Schreuer, “Investment Disputes,” *Max Planck Encyclopedia of Public International Law*, May 2013, accessed 23 March 2021, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law->

The definition of territory in the BITs survey included the maritime zones as established according to international law, with some BITs expressly referring to UNCLOS. An exception to this is the UK-China BIT, which only refers to areas over which sovereignty, sovereign rights, or jurisdiction are exercised without referring to international law.<sup>62</sup> However, BITs often include an applicable law clause that allows consideration of rules of international law, such as in the Greece-Vietnam BIT.<sup>63</sup> When such clauses are absent in BITs, which provide for ICSID Arbitration, Article 42 (1) ICSID Convention allows international law to be applied.

When an investment is made in the host state's territory, it indicates consent to allow tribunals to consider the territorial scope of the BIT by applying international law. However, the tribunal must decide on maritime sovereignty issues over which *prima facie* does not have jurisdiction, to which the states would not have likely consented.<sup>64</sup> The next section addresses tribunals' inherent self-imposed constraints on their jurisdiction when dealing with such renvoi clauses.

## B. THE NATURE OF APPLICABLE LAW CLAUSES AND 'IN ACCORDANCE WITH INTERNATIONAL LAW' REQUIREMENTS AS RENVOI CLAUSES

A liberal understanding of applicable law clauses allows the application of rules of international law invoked during the arbitration significant to the claims submitted.<sup>65</sup> Tribunals have previously applied instruments such as the ICCPR, UN Convention against Corruption, and UNESCO Conventions.<sup>66</sup> Moreover, the consideration of non-investment norms in investment arbitration has been debated recently in the context of invoking the host state's international human rights obligations, such as claims of expropriation.<sup>67</sup> Under a narrow interpretation of the applicable rules clause, only rules directly

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9780199231690-e517?prd=EPIL.

<sup>62</sup> Article 1 (2), Agreement between People's Republic of China and United Kingdom concerning the Promotion and Reciprocal Protection of Investments (1986), signed 15 May 1986 (entered into force 15 May 1986).

<sup>63</sup> Article 10 (4), Agreement between Greece and Vietnam on the Promotion and Reciprocal Protection of Investments (2008), signed 13 October 2008 (entered into force 8 December 2011).

<sup>64</sup> John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (New York: Oxford University Press, 1999), 227.

<sup>65</sup> Ralph A. Lorz, "Fragmentation and Consolidation and the Future Relationship Between International Investment Law and General International Law" in *Investment Law within International Law: Integrationist Perspectives*, Freya Baetens, ed. (New York: Cambridge University Press, 2013), 482.

<sup>66</sup> Schreuer, "Jurisdiction and Applicable Law," 16.

<sup>67</sup> Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge: Cambridge University Press, 2014), 129. Chin Leng Lim, Jean Ho and Martins Paporinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (Cambridge: Cambridge University Press, 2018), 86.



related to investment law may be referred to.<sup>68</sup> This would make it particularly challenging to refer to UNCLOS or customary law of the sea to determine the territorial scope of the BITs in question.

An investment tribunal's jurisdiction is granted to decide on the international legal responsibility of host states. Therefore, relying on rules of international law is allowed, especially when a subject matter of that obligation is regulated by international law.<sup>69</sup> When interpreting a treaty, Article 31(3) (c) VCLT requires any relevant rules of international law applicable in the relations between the parties to be considered. This provision is embodied in the clinical isolation holding by the WTO Appellate Body on the relation between WTO and general international law.<sup>70</sup> In the *Oil Platforms* case, the ICJ took an integral approach *qua* treaty interpretation<sup>71</sup> by considering the rules on the use of force relevant to the interpretation of the US-Iran Treaty of Amity. However, dissenting judges warned against incorporating the totality of substantive international law.<sup>72</sup>

When applying Article 31(3)(c) VCLT, the UNCLOS rules of the customary law of the sea applicable to assess disputed maritime areas are not related to the host state and the investor's home state. On the contrary, they apply between the host state and the protesting state, which is not a contracting party to the BIT. Furthermore, the contracting parties to the BIT agree that their territory is defined based on international law. This could be an implicit understanding between states' economic relations to refrain from creating an investment environment that contradicts international law due to the potential political risk.

## C. THE JURISDICTIONAL CONSTRAINTS ON RENVOI CLAUSES IN BITS

### 1. THE PROBLEM OF IMPLICATED ISSUES

An investment tribunal's main challenge in applying renvoi clauses implicates another non-investment question of international law over which it lacks jurisdiction. This problem arises when the tribunal has jurisdiction *ratione materiae* over an inside issue. However, that would implicate the

<sup>68</sup> Schreuer, "Jurisdiction and Applicable Law," 16.

<sup>69</sup> De Brabandere, *Investment Treaty Arbitration as Public International Law*, 127-128.

<sup>70</sup> The GATT is not to be read in clinical isolation from public international law. See *United States - Standards for Reformulated and Conventional Gasoline*, AB-1996-1, Report of the Appellate Body 1996, 17.

<sup>71</sup> Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" *International and Comparative Law Quarterly* 60, no. 3 (2011): 573, doi:10.1017/S0020589311000224.

<sup>72</sup> *Oil Platforms (Iran v United States)*, ICJ Reports 2003, at para 4; Separate Opinion Judge Higgins, Judgement of 12 December 1996, at paras 45-46; Separate Opinion Buergenthal, Separate Opinion Judge Higgins, Judgement of 12 December 1996, at paras 22-23.

exercise of jurisdiction over an outside issue beyond the tribunal's jurisdiction.<sup>73</sup> Furthermore, there is a possibility of renvoi to international law for maritime areas. The tribunal's decision on whether the investment is made in disputed areas that are 'in accordance with international law' would still require a prior determination. This decision concerns inter-state maritime disputes, which is not commensurate with the tribunal's mandate to settle investment disputes.<sup>74</sup>

The problem of implicated outside issues could be indispensable or incidental.<sup>75</sup> The implicated issue is indispensable when the tribunal cannot exercise jurisdiction over the inside issue. This would require the determination on an outside issue over which the tribunal cannot exercise jurisdiction. Furthermore, the implicated issue is incidental when the tribunal may exercise jurisdiction over the outside issue. Although this outside the tribunal's jurisdiction, it makes such determinations because it concerns the inside issue dispute.<sup>76</sup>

The maritime cases, including in *Aegean Sea Continental Shelf*, *Pedra Branca*, *the South China Sea and the Black Sea*, *Sea of Azov*, and *Kerch Strait*, were outside the ICJ and PCA's jurisdiction. The ICJ and PCA held that such issues require the Court or tribunal to decide on maritime entitlements. The entitlements regard Greek island's claim to a continental shelf,<sup>77</sup> delimiting territorial waters between Singapore and Malaysia,<sup>78</sup> the sovereignty of islands and maritime features claims by The Philippines and China,<sup>79</sup> and sovereignty over Crimea.<sup>80</sup> These issues were considered out of the tribunal's jurisdiction. Concurrently, they fall within the categories of disputed maritime areas established in Section V part B.<sup>81</sup> Therefore, an investment tribunal must also decide on these issues to establish whether investments made in such areas are considered protected. On the contrary, in *Certain German Interests in Polish Upper Silesia*, the PCIJ held that it might interpret other international agreements regarded incidental and to which it has jurisdiction.<sup>82</sup>

<sup>73</sup> Tzeng, "The Implicated Issue Problem," 471.

<sup>74</sup> Benatar and Schatz, "The Protection of Foreign Investments," 189.

<sup>75</sup> For discussion adopting the terminology of from the doctrines of 'indispensable part' and 'incidental jurisdiction'. See Tzeng, "Investment Protection," 844.

<sup>76</sup> Tzeng, "The Implicated Issue Problem," 471. Benatar and Schatz, "The Protection of Foreign Investments," 189.

<sup>77</sup> *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Reports 1978, at para 83.

<sup>78</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Report 2008, at paras 298-299.

<sup>79</sup> *South China Sea (Philippines v China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 October 2015), at para 153.

<sup>80</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award on Preliminary Objections (2020), at paras 197.

<sup>81</sup> The implicated issues in *Aegean Sea Continental Shelf* relate to the maritime dispute in Section V.B.3.c., in *Pedra Branca* to that in V.B.1., in *South China Sea* to that in V.B.2.b.c, in *Black Sea* to that in V.B.2.a.

<sup>82</sup> *Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Preliminary Objections, PCIJ

Moreover, in Chagos Marine Protected Area, the PCA held that its jurisdiction extends to making such findings or ancillary determinations of law to resolve the dispute.<sup>83</sup>

The ICJ and PCA are two institutions with more suitable competence than investment tribunals to affirm incidental jurisdiction. They might decline jurisdiction on questions regarding maritime disputes to which the inside issue of the mentioned ICJ/PCA proceedings is stronger compared to an investment dispute. In this case, investment tribunals must also decline jurisdiction. Even with renvoi, allowing the tribunals to use rules of international law regarding a maritime issue does not automatically affirm their jurisdiction over such issues.<sup>84</sup> It is because an investment tribunal making determinations on maritime sovereignty or entitlements would be an act of inherent ultra vires character. Therefore, *de lege lata*, the renvoi to international law in BIT's territorial scope, is not commensurate with the tribunal's jurisdiction *ratione materiae*. However, *de lege feranda*, there are important policy arguments for a tribunal's establishment of incidental jurisdiction over disputed maritime areas, as explored in the next section.

## 2. INVESTMENT TRIBUNALS' "INCIDENTAL JURISDICTION" OVER DISPUTED MARITIME AREAS

Determinations might be perceived to be incidental because the tribunal is responsible for settling the dispute referred to it by exercising jurisdiction. This is because the failure to exercise jurisdiction could amount to a denial of justice,<sup>85</sup> especially to investors operating in highly risky areas. It is in these areas that investors need assurance of the host state's commitment to protect their assets from third-state interference. Based on estoppel<sup>86</sup> considerations, a host state authorizing investments in hotly contested areas should not escape its treaty obligations under the BIT. Instead, the state should claim it when its protection in territory it considers full proof against any objection to its conformity to international law by rival states.

The approach taken by tribunals in the Crimea cases indicates the possibility for an investment tribunal to sidestep legality under international law regarding the territory under the BIT. Instead, the investment treaties should protect investments under the effective control of the contracting states, even

Reports 1925 (ser A) No. 6, at 18.

<sup>83</sup> Chagos Marine Protected Area (Mauritius v United Kingdom). PCA Case No. 2011-03, Award, at para 220.

<sup>84</sup> "Just as the basis of a tribunal's jurisdiction does not determine the law it has to apply, the law applicable in a case does not determine the tribunal's jurisdiction," See Schreuer, "Jurisdiction and Applicable Law," 2.

<sup>85</sup> Tzeng, "Investment Protection," 845.

<sup>86</sup> Benatar and Schatz, "The Protection of Foreign Investments," 199.

when the investment is in the territory of the respondent state.<sup>87</sup> According to the tribunals in *PJSC Ukrnafta v Russia* and *Stabil LLC v Russia*, the entire territory of Crimea under Russia's effective control would constitute territory under the Russia-Ukraine BIT.<sup>88</sup> These findings on territorial jurisdiction were affirmed by Swiss courts in set-aside proceedings.<sup>89</sup> The Paris Court of Appeals set aside the *Oschadbank v Russia* award because of the tribunal's lack of *ratione temporis*. However, the Court did not make any findings on the issue of territorial jurisdiction.<sup>90</sup>

The host state and foreign investor made a mutual calculated risk by investing in contested areas of the SCS. Also, a coastal state exercising control over a maritime area to grant energy concession blocks to foreign investors asserts its rights and jurisdiction over this area. Therefore, it would not object to a tribunal's lack of territorial jurisdiction because this would undermine its maritime claim.<sup>91</sup>

Effective control could be established by adapting the extraterritorial application of international human rights law for an investment law context. Human rights treaties are designed to guarantee effective protection of human rights. Therefore, their extraterritorial application is affirmed in situations of contested sovereignty of occupation and armed conflicts. The most notable contestations were made by the ICJ in the *Wall Advisory Opinion* and *Armed Activities on the Territory of Congo* cases.<sup>92</sup> Furthermore, the same reasoning could be adopted to protect investments made in disputed maritime areas effectively. This could involve expanding jurisdiction by extraterritorial application of BITs beyond the territorial sea. Consequently, potential investments in the growing industry of offshore energy would be effectively protected.<sup>93</sup>

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<sup>87</sup> Tzeng, "Investment Protection," 845.

<sup>88</sup> Jarrod Hepburn and Ridhi Kabra, "Investigation: Further Russia Investment Treaty Decisions Uncovered, Offering Broader Window into Arbitrators' Approaches to Crimea Controversy," *Investment Arbitration Reporter*, 17 November 2017, accessed 31 May 2018, [www.iareporter.com/Articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controver-sy/](http://www.iareporter.com/Articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controver-sy/).

<sup>89</sup> Damien Charlotin, "Russia Fails to Set Aside Two Crimea-Related Awards at Swiss Seat," *Investment Arbitration Reporter*, 17 December 2019, accessed 31 May 2018, <https://www.iareporter.com/Articles/russia-fails-to-set-aside-two-crimea-related-awards-at-swiss-seat/>.

<sup>90</sup> Damien Charlotin, "Crimea-Related 1 Billion USD Award Against Russia is Set Aside, as Paris Court Finds that the Tribunal Lacked Jurisdiction," *Investment Arbitration Reporter*, 30 May 2021, <https://www.iareporter.com/Articles/crimea-related-1-billion-usd-award-against-russia-is-set-aside-as-paris-court-finds-that-the-tribunal-lacked-jurisdiction/>.

<sup>91</sup> Michael Waibel, "Oil Exploration Around the Falklands (Malvinas)," EJIL Talk, 13 August 2012, accessed 27 March 2021, <https://www.ejiltalk.org/oil-exploration-around-the-falklands-malvinas/>.

<sup>92</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 113; *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Reports 2005, paras 216–17

<sup>93</sup> Benatar and Schatz, "The Protection of Foreign Investments", 198; Violeta Moreno-Lax, "The Archi-

## VII. THE PROTESTING STATE AS AN INDISPENSABLE PARTY TO THE INVESTOR-(HOST)-STATE DISPUTE?

### A. THE MONETARY GOLD PRINCIPLE

The tribunal's task of determining whether the host state exercised its sovereignty or jurisdiction over the supposed disputed maritime area 'in accordance with international law' could prejudice to maritime sovereignty of a third state. As a result, an additional jurisdictional hurdle regarding *ratione personae* arises. *The Monetary Gold*, an indispensable party principle, was established in the ICJ's case law<sup>94</sup> and is applicable in international dispute settlement.<sup>95</sup> It prohibits international courts and tribunals from deciding a case between two parties amenable to its jurisdiction.<sup>96</sup> This is because the legal interests of a third state would be affected by a merit judgment, forming the subject matter of the case. On the contrary, the principle applies to prerequisite determinations in situations requiring the court to determine the legality of a third state's conduct or legal position before determining the case in the court.<sup>97</sup>

Investment tribunals dealing with objections based on the Monetary principal objections do not confirm their applicability in investment arbitration.<sup>98</sup> Based on the SCS, the tribunal may establish incidental jurisdiction over disputed maritime areas. Also, it may decide on the 'in accordance with international law' requirement in the BIT's definition of territory. However, this would constitute a determination of another third state's legal position regarding territorial sovereignty, maritime delimitation, or entitlements. Consequently, the tribunal would have to decline jurisdiction over the investment dispute.<sup>99</sup>

### B. *AMICUS CURIAE* PARTICIPATION

Although the tribunal may side-step the question of maritime sovereignty, the protesting state may still appear before the tribunal as a non-disputing party (concerning the investor-state dispute) or an *amicus curiae*. Article 37

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ecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model,'" *German Law Journal* 21, no. 3 (2020): 385. doi:10.1017/glj.2020.25.

<sup>94</sup> Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford, United Kingdom: Oxford University Press, 2013) 715 et seq; 1658 et seq.

<sup>95</sup> Ori Pomson, "Does the *Monetary Gold* Principle Apply to International Courts and Tribunals Generally?," *Journal of International Dispute Settlement* 10, No. 1 (2019): 88, <https://doi.org/10.1093/jnlids/idz001>.

<sup>96</sup> *Monetary Gold Removed from Rome in 1943 (Italy v France, UK, and USA)* (Preliminary Question) ICJ Report 1956, para 32.

<sup>97</sup> Malcom N Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015, Volume 1* (Leiden, Netherlands: Brill/Nijhoff, 2015), 568.

<sup>98</sup> Benatar and Schatz, "The Protection of Foreign Investments," 193.

<sup>99</sup> *Ibid.*, 94.

(2) ICSID Arbitration Rules and Article 5 UNCITRAL Transparency Rules allow the non-disputing party to file a submission regarding a matter within the dispute where it has a significant interest and provide the tribunal with a different perspective.

Two notable examples of *amicus curiae* participation in investment arbitration were the EU Commission's *amicus curiae*<sup>100</sup> submissions in arbitrations to dispute the application of intra-EU BITs<sup>101</sup> and Ukraine's submission in the Crimea cases. The Commission stated that intra-EU BITs were incompatible with EU law because they constituted a parallel system overlapping with Single Market rules. Additionally, they entrusted disputes dealing with EU law to tribunals outside the mechanisms of dispute resolution in the TFEU. The EU's position is essentially not different from one's state, which objects to international tribunals deciding on sovereignty issues. In another *amicus*, Ukraine argued that the tribunal could accept jurisdiction without deciding on the status of Crimea.<sup>102</sup> The SCS remains unclear how the protesting state, especially China, would strategically handle investor-state proceedings. It has a vested interest in an international tribunal not making any determinations on issues implicating its Nine-dash Line claims. This would be similar to Russia's interest to prevent tribunals from making determinations on Crimea. However, in the SCS dispute, the potential protesting state may hit the host state with whom it is disputing over the maritime area with a foreign investment claim. This creates high fiscal exposures, with claims amounting to hundreds of millions or billions of dollars imposed. Consequently, this imposes a hefty burden on public budgets in the host state, especially developing economies, such as all SCS states.<sup>103</sup> However, this cannot happen unless China or another state is confronted with an investment claim. The consideration was not open to Russia in the Crimea cases. From a political perspective, this might be the difference between China and Russia in the ISDS proceedings, implicating questions on their sovereign rights over disputed territory in their influence.

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<sup>100</sup> Filipe G.T.S. Afonso, "The European Commission as Amicus Curiae of Arbitral Tribunals is it a Legitimate Relations," *Spain Arbitration Review* 34, (2019): 113.

<sup>101</sup> "Commission provides guidance on protection of cross-border EU investments," EU Commission, last modified 19 July 2018, accessed [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_18\\_4529](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_4529).

<sup>102</sup> Hepburn and Kabra, "Investigation: Further Russia Investment."

<sup>103</sup> Directorate for Financial and Enterprise Affairs, *Government perspectives on investor-state dispute settlement: a progress report* (Organisation for Economic Co-operation and Development Investment Division, 2012), accessed 30 March 2021, <https://www.oecd.org/daf/inv/investment-policy/ISDSProgressreport.pdf>.

## VIII. CONCLUSION

The study adopted the current international law framework on foreign investments in disputed maritime areas to the South China Sea investments. The foreign investment activities in the region, BITs concluded by SCS states, and the disputed maritime areas between SCS states were also examined. The hotly contested status of the region makes it attract foreign investments, especially from the energy sector. For this reason, investors commit to high-profile and forward-looking ventures in the disputed SCS waters. Therefore, foreign investments are against the multilateral interstate maritime dispute on the overlapping maritime claims over contested waters and features, specifically the island groups. According to the BITs survey, the states include maritime areas beyond their territorial sea, including continuous zones, EEZ, and continental shelf, into their territorial scope of protection. In most cases, the BIT's definition of territory requires states to exercise sovereignty, sovereign rights, and jurisdiction over these areas based on international law. This renvoi to rules of international law requires tribunals to decide *Proprio motu* on their jurisdiction. Furthermore, they should examine the territorial jurisdiction conferred to them by the BIT, though this requires decisions on maritime entitlements of sovereign states outside investment tribunals' jurisdiction *ratione materiae*. The problem of implicated issues significantly affects the assessment of territorial jurisdiction. By determining what constitutes as territory under the BIT, maritime entitlements are implicated by making decisions regarding disputed areas.

This study also examined the rationale for tribunals to decline jurisdiction over the inside issue of territorial scope because of the implicated outside issue on maritime entitlements (the indispensable issues argument). It concluded that this may be the case *de lege lata*. However, *de lege ferenda* there are rationales that support the tribunal's acceptance of incidental jurisdiction over the outside issue as a necessary prior consideration for the inside issue of territorial scope (the incidental issues argument). The first rationale is the consideration of the political reality of the investor and host state making a calculated risk to invest in disputed waters of the SCS.

The second rationale is the effective control, the approach taken by tribunals in the Crimea cases. They applied investment treaties to areas controlled by the host state. However, the area did not meet the strict notions of territory under international law. The third rationale is the extraterritorial application of investment treaties. This would allow the tribunal to address SCS states' maritime entitlements without making direct determinations on these entitlements. Therefore, they would not be confronted with the *Monetary*



*Gold* or indispensable parties. Instead, the tribunals must only consider amicus curiae submissions from the protesting state as a non-disputing party to the investor-(host)-state dispute.

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## ANNEX

All the surveyed BITs can be found on UNCTAD's International Investment Agreements Navigator on Investment Policy Hub.

### I. SURVEY OF "COASTAL STATE - SCS COASTAL STATE" BITS

This survey considered any state with a coastline, i.e. access to open adjacent sea or ocean.

**Category 1:** explicit reference to EEZ (cat1)

**Category 2:** explicit reference to the continental shelf (cat2)

**Category 3:** implicit reference to EEZ or CS, by referencing maritime zones (including seabed, subsoil) beyond a state's maritime belt (beyond the "territorial seas", "adjacent seas", "coast"), over which a state exercises resource explorations and exploitation rights (cat 3)

**Category 4:** general reference to maritime zones, over which the state has sovereign rights and jurisdiction (cat4)

	<b>Brunei</b>	<b>China</b>	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
<b>Argentina</b>	No BIT	Art 1(5): cat4	Art 1(4): with respect to Argentina's territory: cat 4; with respect to Indonesia's "territory": cat4 ref to UNCLOS	Art 1(d): cat4	Art 1(5): with respect to Argentina's territory cat4, with respect to the Philippines's ref to its Constitution, which includes its territorial seas and maritime zones beyond	Art 1(5): cat4
<b>Australia</b>	No BIT	Art 1(g): cat2, cat4	Art 1(1)(B)(d): cat2, cat4, ref to UNCLOS	Art 1.2.(x) of Australia-Malaysia-FTA: cat1, cat2, cat4, ref to UNCLOS	Art 2(2): cat1, cat2	Art 1(f): cat2, cat4

	<b>Brunei</b>	<b>China</b>	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
<b>Canada</b>	No BIT	Art 1(22): with respect to Canada's "territory": cat1, cat2, ref to UNCLOS; with respect to China's territory cat 4	No BIT	No BIT	Art 1(k): with respect to Canada's "territory" cat3, ref to Philippines' Constitution	No BIT
<b>Chile</b>	No BIT	Art 1(4): cat4	Art 1(3): cat2, cat4	Art1(e): cat1, cat2, cat4	Art 1(3): cat1, cat2	Art 1(3): cat4
<b>Denmark</b>	No BIT	Art1(5): cat4	Art 1(4): with respect to Denmark's territory: cat 4; with respect to Indonesia's "territory": cat2, ref to UNCLOS	Art 1(5): with respect to Denmark's territory cat4, but to Malaysia's territory, only "land territory and the territorial sea"	Art 1(6): cat1, cat2	Art 1(4): cat4
<b>France</b>	No BIT	Art 1(4), Art 2: cat4	No definition of territory	No definition of territory	Art 1(5): cat1, cat2, cat4	Art 1(5), Art 3. cat4

	<b>Brunei</b>	<b>China</b>	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
<b>Germany</b>	Art 1(2): cat1, cat2	No definition of territory, but in the Protocol to the BIT, Ad Art 2: explicit reference to inclusion of cat1, cat2	No definition of territory	No definition of territory	No definition of territory	No definition of territory
<b>Greece</b>	No BIT	No definition of territory	No BIT	No BIT	No BIT	Art 1(4): cat4
<b>Italy</b>	No BIT	No definition of territory, but in the Protocol to the BIT, Ad Art 2: explicit reference to inclusion of cat1, cat2	Art 1(6): cat4, ref to UNCLOS	Art 1(4): cat4	Art 1(4): cat4	No definition of territory, but in the Protocol to the BIT, Ad Art 3: ref to cat 4

<b>India</b>	Art 1(f): cat1, cat2	<b>Brunei</b>	Art 1(d): cat1, cat2, ref to UNCLOS	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
	Art 1(f): cat1, cat2, ref to UNCLOS	Art 1(f): cat1, cat2	Art 1(4): with respect to India's "territory" cat1, cat2, ref to UNCLOS; with respect to Indonesia's "territory" ref to its national law	Art 1(f): with respect to India's territory cat1, cat2, ref to UNCLOS but to Malaysia's territory, only "land territory and the territorial sea"	Art 1(6): with respect to India's territory cat1, cat2, ref to UNCLOS, ref to Philippines Constitution	Art 1(f): cat1, cat2, ref to UNCLOS	Art 1(3), cat1, cat2
<b>Japan</b>	Art 2(a) Japan-Brunei Agreement on Economic Partnership: cat4		No definition of territory	No BIT	No BIT	No BIT	

	<b>Brunei</b>	<b>China</b>	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
<b>Morocco</b>	No BIT	Art 1(4): cat3, cat4	Art I (5): with respect to Morocco's "territory"; cat3; with respect to Indonesia': ref to national law	Art 1(1)(d): with respect to Morocco's territory cat3 but to Malaysia's territory, only "land territory and the territorial sea"	No BIT	Art 1 (4): cat3, cat4
<b>The Netherlands</b>	No BIT	Art 1(v): cat2, cat4	Art 1(4): with respect to The Netherlands' territory: cat 4, with respect to Indonesia's "territory": cat2, ref to UNCLOS	No definition of territory	Art 1(a): cat4	Art 1 (c): cat4

	<b>Brunei</b>	<b>China</b>	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
<b>Saudi Arabia</b>	No BIT	No definition of territory	Not publicly available	Art 1(4): with respect to Saudi Arabia's territory cat4, but to Malaysia's territory, only "land territory and the territorial sea"	Not publicly available	No BIT
<b>Singapore</b>	No BIT	No definition of territory	Not publicly available	No BIT	No BIT	No definition of territory
South Korea	Art 1(2): cat4	No definition of territory	Art 1(6): cat2,cat4,	Art 1(e): with respect to South Korea's territory cat4, but to Malaysia's territory, only "land territory and the territorial sea"	Art 2(e): with respect to South Korea's "territory" cat4, ref to Philippines' Constitution	Art 1 (4): cat4



	<b>Brunei</b>	<b>China</b>	<b>Indonesia</b>	<b>Malaysia</b>	<b>The Philippines</b>	<b>Vietnam</b>
Spain	No BIT	Art 1(4): cat1, cat2	Art 1(4): with respect to Spain's territory cat1, cat2, ; with respect to Indonesia: cat 4 ref to UNCLOS	Art 1(4). cat4	Art 1 (2): cat1, cat2,	Art 1(4), cat1, cat2
Turkey	No BIT	No definition of territory	Art 1(4): cat4	Art 1(d): cat4	Art 1 (4): cat3, cat4	Art 1 (4): cat4
UAE	No BIT	Art 1(6): cat4	No BIT	Art 1(6): only "land territory and the territorial sea"	No BIT	Art 1 (4): cat1, cat4
UK	No BIT	Art 1(2): cat2, cat4	Art 1(e): cat4	Art 1(5): generic definition of territory	Art 1(2): ref to Constitution of both parties	Art 1 (e): cat4
USA	No BIT	No BIT	No BIT	No BIT	No BIT	No BIT

II. SURVEY OF “LAND-LOCKED STATE - SCS COASTAL STATE” BITS

Coastal SCS States // Landlocked States	China	Indonesia	Malaysia	The Philippines	Vietnam
Armenia	Art 1 (d) Generic	No BIT	No BIT	No BIT	BIT not public
Austria	No definition	No BIT	No definition	No definition	No definition
Bolivia	No definition	No BIT	No BIT	No BIT	No BIT
Czech Republic	Art 1 (4) With reference to maritime zone	Art 1 (4) Generic	Art 1 (d) with reference to the maritime zone	Art 1 (3) Generic	Art 1 (4) With reference to maritime zone
Kazakhstan (*despite being landlocked, its coastline along the Caspian Sea is a likely drafting consideration)	Art 1 (5) With reference to maritime zone	No BIT	Art (d) With reference to continental shelf	No BIT	Art 1 (4) With reference to maritime zone
Luxembourg	Art (d) With reference to continental shelf	No BIT	No definition	Art 1 (4) With reference to maritime zone	No definition
Serbia	No definition	Art 1 (5) With reference to maritime zone and UNCLOS	No BIT	No BIT	No BIT

<b>Switzerland</b>	Art 1 (4) with reference to maritime zone	No definition	No BIT	Art I (4) Generic	Art 1 (3) With reference to the maritime zone
<b>Uganda</b>	Art 1 (4)With reference to maritime zone	No BIT	No BIT	No BIT	No BIT