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ARTICLE

Investments in Unsettled Maritime Boundary Contexts: The Role of Bilateral Investment Treaties in Delivering Certainty

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Abstract—Interest in offshore investment is growing: the oil and gas sector has been developing offshore reserves for some time; more recently, the renewable energy sector has also been investing offshore. In that context, this paper considers the legal uncertainties that overlapping sovereign claims in offshore areas create for investments. It then canvasses the commitments that States can accord to address these legal uncertainties, whether unilaterally or through inter-State authorities that jointly regulate areas subject to overlapping claims. This paper is then principally devoted to considering the role of bilateral investment treaties in enforcing such commitments, and otherwise addressing the legal uncertainties generated by overlapping maritime claims. By way of conclusion, this paper considers analogies to other situations where investments are subject to the sovereign rights of more than one State.

I. INTRODUCTION

The Democratic Republic of Timor-Leste gained independence in May 2002, after a decade of Indonesian occupation. Its best hope for economic independence lay in the petroleum resources in the Timor Sea—indeed, petroleum revenues would come to contribute the vast majority of the State's budget. However, there were no boundaries delimiting overlapping entitlements with Australia and Indonesia, and—at the time—seemingly little prospect of a delimitation.[2] An agreement that would allow joint development of Timor Sea resources pending delimitation was negotiated with Australia while Timor-Leste was still under

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[2] For the historical background, see generally Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute? An Analysis', (2005) IX:4 Harvard Asia Quarterly.

United Nations administration, and was signed by Timor-Leste upon independence.[3] The challenge for Timor-Leste was then to create a regulatory framework that would ensure sufficient stability to attract investment—notably, to assure investors that the eventual delimitation of boundaries would not jeopardize any investments made. Various instruments, both legislative and contractual, were adopted to this end.[4] I participated, as a legal advisor to the Prime Minister of Timor-Leste, in articulating some of them. And some will now come into play, as Timor-Leste and Australia recently signed an agreement delimiting boundaries in the Timor Sea.[5]

Few States face as stark an economic situation as Timor-Leste did in 2002. But the challenge of ensuring stability to investments in offshore areas of overlapping maritime claims is not unique to the Timor Sea. Indeed, the subject is of ever-increasing interest—not only to States, but also to investors—given increasing interest in offshore investments generally.[6] Of course, for some time there has been interest in offshore oil and gas resources, with a quarter of today's oil and gas supply being produced offshore.[7] More recently, the renewable energy sector has also been looking offshore, whether to avoid local resistance to windmills marring landscapes or to benefit from higher wind speeds (for wind power),[8] to tap the energy of the ocean itself (for tidal power),[9] or otherwise. In that context, this article recalls the legal uncertainties to which overlapping maritime claims give rise (I),[10] and also recalls the types of commitments that States can accord to address those uncertainties (II). This article is then principally devoted to considering the role of bilateral investment treaties (BITs) in enforcing such commitments, and otherwise addressing the legal uncertainties to which overlapping maritime claims give rise (III).

Although this article considers only investments in areas of overlapping maritime claims, many of the arguments considered here could apply by analogy to investments in other situations in which a State's sovereign rights are contested by another State, shared with another State, or limited in some way by the rights of another State. The arguments could apply, for example, to investments affected by

[3] Timor Sea Treaty between the Government of East Timor and the Government of Australia (signed 20 May 2002, entered into force 2 April 2003) (Timor Sea Treaty).

[4] See notes to Section II, below.

[5] Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea (signed 6 March 2018, entered into force 30 August 2019). (Australia–Timor-Leste Boundary Agreement). The Treaty was signed following conciliation procedures conducted under Annex V of the United Nations Convention on the Law of the Sea, 1833 UNTS 397 (UNCLOS) (signed 10 December 1982, entered into force 16 November 1994): *Timor Sea Conciliation (Timor-Leste v Australia)*, PCA Case No 2016-10, Report and Recommendations of the Compulsory Conciliation Commission (9 May 2018).

[6] The literature on investment protections in offshore areas is also beginning to develop. See, eg, Seline Trevisanut, 'Foreign Investments in the Offshore Energy Industry: Investment Protection v. Energy Security v. Protection of the Marine Environment' in Tullio Treves and others (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 247; Christine Sim, 'Investment Disputes arising out of Areas of Unsettled Boundaries: Ghana/Côte d'Ivoire' (2018) 11(1) J World Energy L & Bus 1. These and analogous issues were also the subject of the Journal of World Investment & Trade's Issue 19 (2018), entitled 'Oceans and Space: New Frontiers in Investment Protection?' Of the various articles in that issue, of particular note for present purposes is Peter Tzeng, 'Investment Protection in Disputed Maritime Areas'.

[7] See generally International Energy Agency, *Offshore Energy Outlook* (4 May 2018) (IEA Offshore Energy Report).

[8] See ibid 11.

There has been at least one investment treaty claim involving investments in an offshore wind facility, but it concerned the Wolfe Island Shoals Project, which is in undisputed Canadian waters. See *Windstream Energy LLC v Government of Canada*, PCA Case No 2013-22, Award (27 September 2016).

[9] See eg IEA Offshore Energy Report (n 7) Box 2, 19–20.

[10] There are, of course, also physical uncertainties—notably, in relation to piracy and other physical security issues—but these are not considered here.

a treaty on the management of a transboundary river (eg investments in a hydroelectric dam), to investments in areas under occupation (witness the cases involving investments in the Crimea), or to investments in areas in which all States have rights (for example, the high seas[11]) or in areas recognized as the 'common heritage of mankind' (the seabed and ocean floor,[12] or the moon and other celestial bodies[13]). International norms—notably, those relating to the protection of the environment—are also evolving in such a way as to impose increasing constraints on the exercise by any one State of its sovereign rights.[14] And environmental concerns are giving rise to new forms of cooperation between States—for example, in the creation of supra-national greenhouse gas emissions trading systems.[15] These potential analogies are revisited in the conclusion to this article (IV).

II. UNSETTLED MARITIME BOUNDARY CONTEXT: SOURCES OF UNCERTAINTY

Coastal States have sovereign rights in the waters abutting their territory. The rights of States in the 'seas' abutting their territory are set out in the United Nations Convention on the Law of the Sea (UNCLOS), a multilateral treaty that entered into force in 1994 and now counts 168 parties.[16] According to UNCLOS, a coastal State has or may claim (i) a territorial sea extending 12 nautical miles from its coast, in which it has essentially the same sovereign rights as it does in relation to its land territory;[17] (ii) a contiguous zone extending 24 nautical miles from its coast, in which it exercises the control necessary to prevent and punish the infringement of certain of its laws;[18] (iii) an exclusive economic zone, extending 200 nautical miles from its coast, in which it has rights to explore, exploit, conserve and manage natural resources;[19] and (iv) rights to explore and exploit natural resources in its continental shelf, which can extend up to 350 nautical miles from its coast.[20]

[11] The international law regime governing the high seas is set out in UNCLOS (n 5) Pt VII.

[12] The international law regime governing the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' is set out at UNCLOS (n 5) Pt XI. That area and its resources are the 'common heritage of mankind' (UNCLOS (n 5) art 136). In consequence, no State is entitled to exercise sovereignty or sovereign rights over any part of the area or its resources (art 137(1)); rather, these rights are 'vested in mankind as a whole' (art 137(2)).

[13] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, UNGA RES 34/68 (adopted 5 December 1979 by UNGA RES 34/68, entered into force 11 July 1984) art 11. In relation to the licensing of investments in outer space and the international laws applicable thereto, see eg Lorenzo Gradoni, 'What on Earth is Happening to Space Law?', EJIL: *TALK!* (31 July 2018).

[14] The literature on this subject is extensive. See eg Virginie Barral, 'National sovereignty over natural resources: Environmental challenges and sustainable development' in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* vol 3 (2016).

[15] See eg Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (signed 23 November 2017, not yet entered into force) (EU–Switzerland ETS Agreement).

[16] UNCLOS (n 5). For signatures, see status as of 9 July 2018.

The rights of States to 'lakes' are not addressed by UNCLOS, but rather by general principles of international law. There has also been controversy as to the status of the Caspian Sea, and in particular whether it was a 'sea' within the meaning of UNCLOS: see, eg, Barbara Janusz, *The Caspian Sea—Legal Status and Regime Problems*, REP BP 05/02 (August 2005). It bears noting in this context that the littoral States recently signed a treaty governing the status of the Caspian Sea: see Convention on the Legal Status of the Caspian Sea (signed 12 August 2018, not yet ratified).

[17] UNCLOS (n 5) Pt II, Section 2. These rights are subject to the right of innocent passage of other States: ibid Pt II, Section 3.

[18] ibid Pt II, Section 4.

[19] ibid Pt V.

[20] ibid Pt VI.

The rights of any one coastal State will overlap with the rights of its neighbours unless and until maritime boundaries are delimited, whether by agreement, or by some manner of third-party dispute settlement. Until delimitation occurs, then, the exercise by one State of its rights will necessarily be subject to the rights of its neighbours. Concretely, pending the delimitation of boundaries, UNCLOS requires that States with overlapping entitlements (i) 'make every effort to enter into provisional arrangements of a practical nature'[21], and (ii) 'not … jeopardize or hamper the reaching of the final agreement'.[22] Identical language to this effect is included in both article 74(3) (regarding exclusive economic zone (EEZ) entitlements) and article 83(3) (regarding continental shelf entitlements).[23]

There is little guidance on what these UNCLOS obligations entail in any given circumstance, as UNCLOS articles 74(3) and 83(3) have been considered only twice, in the cases of *Guyana v Suriname* and *Ghana v Côte d'Ivoire*.[24] That said, the case law and commentary on circumstances in which interim measures may be ordered is potentially instructive[25]—indeed, the Tribunal in *Guyana v Suriname* looked to that case law in interpreting articles 74(3) and 83(3), explaining that measures risking the 'irreparable prejudice' required to impose interim measures 'would easily meet the lower threshold of hampering or jeopardising the reaching of a final agreement' under articles 74(3) and 83(3).[26] One can glean a general understanding of the two requirements under Articles 74(3) and 83(3).

The fact that States are obliged 'not to jeopardize or hamper the reaching of the final agreement' means that, pending the conclusion of 'provisional arrangements', the activities that one State can license in an area of overlapping entitlement are limited. Only activities that do not cause permanent physical change (eg seismic exploration) can be licensed unilaterally. Activities that do cause permanent physical change (eg the drilling of exploration wells, or exploitation of oil and gas reserves) cannot; they can only be undertaken 'pursuant to provisional arrangements of a practical nature' between the two States.[27]

[21] ibid arts 74(3) and 83(3).

[22] ibid.

[23] Both provide, in their entirety, that: 'pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such agreements shall be without prejudice to the final delimitation.'

[24] *Guyana v Suriname*, PCA Case No 2004-04, Award (17 September 2007); *Ghana v Côte d'Ivoire*, ITLOS Case No 23, Judgment (23 September 2017). In the *South China Sea Arbitration*, a Tribunal constituted under UNCLOS found that arts 74 and 83 did not apply, as there were no overlapping entitlements in the areas concerned. See *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*, PCA Case No 2013-19, Award (12 July 2016) paras 694, 1025 and 1153. As such, the Tribunal did not consider the obligations that these provisions might entail.

[25] See eg Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78(2) AJIL 345, 365–66 (arguing 'the interim measures of protection ordered by the [ICJ] may offer some assistance in finding convincing answers […]. Certainly, any activity that an international court or tribunal would find sufficient to indicate an interim measure must be considered as hindering a final agreement under Articles 74/83, paragraph 3 of the LOS Convention'.) But see 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' (2016) (BIICL Report on UNCLOS Articles 74(3) and 83(3)) Section 2.7: 'The relationship between provisional measures and Articles 74(3) and 83(3)' (arguing for a cautious approach towards incorporating concepts from the preliminary measures context when interpreting arts 74(3) and 83(3), as provisional measures serve a different purpose, namely the prevention of unilateral harm to legal rights to be adjudicated upon, and decisions in their regard may be driven by the particular facts of the case).

[26] *Guyana v Suriname* (n 24) paras 468–69.

[27] ibid para 467: 'acts that do cause physical change would have to be undertaken pursuant to an agreement between the parties to be permissible, as they may hamper or jeopardise the reaching of a final agreement on delimitation. A distinction is therefore to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration'. See also *Aegean Sea Continental Shelf (Greece v Turkey)*,

The obligation to 'make every effort to enter into' such provisional arrangements, for its part, is an 'obligation of conduct' not of result.[28] Moreover, according to the Tribunal in *Guyana v Suriname*, it involves 'an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area'.[29] Thus, it imposes 'a duty to negotiate in good faith'—that is, to take 'a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement'.[30] The Tribunal explained that so-called 'joint development agreements' (JDAs) are a type of 'arrangement of a practical nature' contemplated by UNCLOS Articles 74(3) and 83(3), noting that such agreements had been encouraged in previous cases.[31]

The Tribunal in *Guyana v Suriname* did not go into any detail on JDAs, but the form of agreement is well known.[32] Perhaps a couple of dozen of them have been concluded over time, and many are still in existence: reference will, for example, be made here to the 1989 Indonesia–Australia JDA (the 'Timor Gap Treaty'),[33] to the 2002 JDA that replaced it on Timor-Leste's independence (the 'Timor Sea Treaty'),[34] and to the 2001 Nigeria–São Tomé JDA,[35] among others.[36] A JDA

(Order) [1976] ICJ Rep 62 para 30 (noting that that the seismic exploration activities undertaken by Turkey 'do not involve the establishment of installations on or above the seabed of the continental shelf; and … no suggestion has been made that Turkey has embarked upon any operations involving the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute', and thus refusing to order the provisional protection against such exploration requested by Greece); Ghana and Côte d'Ivoire (Provisional Measures), ITLOS Case No 23, Order (25 April 2015) paras 88–91 (awarding provisional measures requiring Ghana to cease all new drilling activities in the disputed area, because these activities would 'result in a modification of the physical characteristics of the continental shelf' and 'affect the rights of Côte d'Ivoire in an irreversible manner', whereas 'any compensation awarded would never be able to restore the status quo ante in respect of the seabed and subsoil'). It bears noting in this context that, in *Ghana v Côte d'Ivoire* (n 24), ITLOS ultimately found that Ghana had not breached UNCLOS art 83(3) because it ceased activities when ordered by the Tribunal, and because activities were conducted in areas ultimately attributed to it by the Tribunal in its delimitation (paras 631–34). The latter finding is difficult to reconcile with its confirmation that delimitation is constitutive rather than declaratory (para 591).

[28] *Ghana v Côte d'Ivoire* (n 24) para 627.

[29] ibid para 460.

[30] ibid para 461.

[31] ibid paras 462–63.

[32] See generally BIICL Report on UNCLOS Articles 74(3) and 83(3) (n 25) paras 52–57 and Section 3 ('State Practice Concerning States' Obligations in Undelimited Maritime Areas'); Vasco Becker-Weinberg, *Joint Development of Hydrocarbon Deposits in the Law of the Sea* (2014), chs 6 and 7.

[33] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia (signed 11 December 1989), no longer in force, (Timor Gap Treaty).

[34] Timor Sea Treaty (n 3).

[35] Treaty between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Principe on the Joint Development of Petroleum and other resources in respect of areas of the Exclusive Economic Zone of the two States (signed 21 February 2001) (Nigeria–São Tomé JDA). On the origins of this JDA, see Tanga J Biang, 'The Joint Development Zone Between Nigeria and São Tomé and Principe: A Case of Provisional Arrangement in the Gulf of Guinea—International Law, State Practice and Prospects for Regional Integration', (2010) DOALOS 19–25.

[36] Other JDAs include the Convention between the Government of the French Republic and the Government of the Spanish State on the delimitation of the territorial sea and the contiguous zone in the Bay of Biscay (Golfe de Gascogne/Golfo de Vizcaya) (adopted 29 January 1974, entered into force 5 April 1975), 996 UNTS 351; Agreement between Japan and The Republic of Korea concerning joint development of the southern part of the continental shelf adjacent to the two countries (adopted 30 January 1974, entered into force 26 June 1978), 1225 UNTS 113 (Japan - South Korea JDA); Agreement between the Government of the Democratic Republic of the Sudan and the Government of the Kingdom of Saudi Arabia relating to the joint exploitation of the natural resources of the sea-bed and subsoil of the Red Sea in the common zone (adopted 16 May 1974, entered into force 26 August 1974), 952 UNTS 193 (Sudan - Saudi Arabia JDA); Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand (adopted 21 February 1979, entered into force 24 October 1979) (Malaysia - Thailand JDA); Agreement between Norway and Iceland on the continental shelf between Iceland and Jan Mayen (adopted 22 October 1981, entered into force 2 June 1982), 2124 UNTS 247; Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and

may apply to the entire area of overlapping claim or only some of it,[37] and may apply to all activities in the area or only some—typically, petroleum activities, if the JDA is limited.[38]

The JDA will also typically (though not necessarily) set up some manner of authority to implement the JDA, and address which laws will govern investments in the JDA area. The JDA authority may be granted more or less power. The Malaysia–Thailand JDA, for example, established a 'Joint Authority' that was to assume 'all rights and responsibilities on behalf of both Parties' in relation to the development of all non-living resources.[39] By contrast, the 'Joint Commission' established by the Japan–South Korea JDA is really only a mechanism for consultation between the JDA parties.[40] And the JDA may create multiple authorities rather than just one. For example, the Nigeria–São Tomé JDA created two institutions: a Joint Authority, which manages resource development,[41] and a Joint Ministerial Council, which has 'overall responsibility' for resource development.[42]

Under some JDAs, investments are governed by the laws of both States that are JDA parties.[43] More typically, though, there is a regulatory regime specific to the JDA area—sometimes, it is set out in the JDA itself,[44] but more frequently it will be articulated by the JDA authority[45]—although the question of taxation may be left to the JDA States parties.[46]

Exploitation of Petroleum in a Defined area of the Continental Shelf involving the Two Countries (adopted 5 June 1992, entered into force 5 June 1992), reproduced in Jonathan I. Charney and Lewis M. Alexander, eds., International Maritime Boundaries, Vol. 3 (1998), 2340-2344 (Malaysia - Vietnam JDA); Management and cooperation agreement between the Government of the Republic of Senegal and the Government of the Republic of Guinea-Bissau (adopted 14 October 1993, entered into force 21 December 1995), 31 LOS Bull. 40; Maritime Delimitation Treaty between Jamaica and The Republic of Colombia (adopted 12 November 1993, entered into force 14 March 1994), 1776 UNTS 17; Joint Declaration between the United Kingdom and the Argentine Republic on Cooperation Over Offshore Activities in the South West Atlantic (adopted 27 September 1995, entered into force 17 February 1997); Exclusive Economic Zone Co-operation Treaty between the State of Barbados and the Republic of Guyana concerning the exercise of jurisdiction in their exclusive economic zones in the area of bilateral overlap within each of their outer limits and beyond the outer limits of the exclusive economic zones of other States (adopted 2 December 2003, entered into force 5 May 2004), 2277 UNTS 201.

[37] For instance, the Timor Sea Treaty (n 3) did not apply to the entire area in dispute between the parties.

[38] Thus, for example, the Malaysia–Vietnam JDA was concluded 'for the purpose of exploring and exploiting petroleum un the seabed in the overlapping area' (n 36) Preamble, and provides that, pending delimitation, the parties agree, 'through mutual cooperation, to explore and exploit petroleum' (ibid art 2(1)). By contrast, the Nigeria–São Tomé JDA provides that the JDA administering authorities may make provision for and regulate non-petroleum development (n 36) arts 32–4.

[39] Malaysia–Thailand JDA (n 36) art III(1)–(2).

[40] Japan–South Korea JDA (n 36) arts XXIV and XXV.

[41] Nigeria–São Tomé JDA (n 36) art 9.6.

[42] ibid art 8.1.

[43] In this case, the negotiation of development terms is essentially left to the respective licensees of the States. This is the case under the Japan–South Korea JDA, which requires each country to authorize a concessionaire and requires the concessionaires to reach agreement on development: see n 36 arts IV and V respectively. The Malaysia–Vietnam JDA also requires each country to authorize a concessionaire—in the event, their respective national oil companies: see (n 36) art 3.

[44] The Timor Gap Treaty itself set out the regime applicable to the treaty area. See (n 33) Annex B (mining code) and Annex C (model PSC).

[45] The Malaysia–Thailand JDA (n 36) art III, Timor Sea Treaty (n 3) art 7(a) and Nigeria–São Tomé JDA (n 36) arts 8–9, 21 and 23–4 all contemplate the creation of a regime specific to the JDA area by the JDA authority.

[46] The JDA approach to taxation may not necessarily follow their approach to regulation. For instance, the Japan–South Korea JDA provides that each country is allowed to tax its concessionaires, and therefore jurisdiction over taxation is the same as jurisdiction over authorization: see Japan-South Korea JDA (n 36) art XVII.

Under the Timor Sea Treaty, by contrast, petroleum development would occur under a production-sharing contract with the JDA authority, concluded further to the JDA regulations. The parties were to attempt to agree on a joint fiscal scheme for each project but, if not, Timor-Leste and Australia each retained the right to tax that development: (n 3) art 5.

The existence of overlapping entitlements, and the variety of ways in which concerned areas may be governed pending delimitation, create additional sovereign risk for investments in areas of unsettled boundaries. All investments are, of course, subject to the risk of one State—the host State—changing its laws or otherwise acting to the detriment of the investment.[47] But in areas in which multiple States have sovereign entitlements, there is lack of clarity as to which is the host State, and to what spatial extent. As a result, the sovereign risks are multiplied.

- There is not just one State that may change its laws in ways that affect the investment, but many States that may change their laws.
- The State may conclude a JDA, with the result that the terms applicable to the investment change.
- Over the course of the JDA's existence, the JDA authority may change the JDA regime applicable to the investment.
- Finally, if the investment is governed by a JDA regime, the States may agree to delimit their boundaries in the JDA area, with the effect that the investment becomes subject to the sovereignty of only one State.

Where one host State with exclusive sovereignty changes its law to the detriment of an investor, the investor may seek recourse under any applicable investment treaty. This article explores the types of commitments that States can accord, and whether investment treaties can assist in addressing the additional forms of sovereign risk that exist in the unsettled maritime boundary context.

III. COMMITMENTS TO ADDRESS UNCERTAINTIES

Investors in long-term projects—in particular, those with large up-front outlays that are recouped over the long term (oil and gas, energy, mining and telecommunications)—will invariably seek some manner of protection from a host State against changes to the applicable legal regime over the term of the investment.

There is a great variety of approaches to such protection, if it is granted—referred to collectively as 'stabilization' clauses. They may be included in a contract or in a law. They may apply only to the fiscal regime applicable to an investment, or more broadly, and they may take many forms. The law applicable to an investment may be frozen at a certain date, or the investment shielded in some way from the application of new law ('grandfathered,' in the parlance). Alternatively, the investor may be fully subject to the law as it evolves, but benefit from a commitment from the State or a State entity to indemnify the investor for any adverse economic impact of a new law. Or the investor may benefit from a right to request the renegotiation of an investment contract to 'rebalance' it in the event that a new law has an adverse impact.[48]

[47] This is a particular concern for investments involving high initial sunk costs, with returns to be earned over multiple decades.

[48] The literature dealing with the variety of stabilization clauses is extensive. See, eg, Prosper Weil, 'Les Clauses de Stabilisation ou d'Intangibilité Insérées dans les Accords de Développement Économique' in *Melanges Offerts à Charles Rousseau* (1974) 301; Piero Bernardini, 'Stabilization and Adaptation in Oil and Gas Investments' (2008) 1 World Energy L & Bus 98.

These traditional stabilization mechanisms may be of limited help in protecting an investor against the additional risks arising from making investments in disputed areas of overlapping claim.

One State purporting to authorize activity in a disputed area obviously cannot shield investors from the laws of a State with competing claims. Nor, as a practical matter, is a State likely to agree to indemnify an investor for the impact of another State's laws, given that (i) the commitment could be expensive, and uncontrollably so, since the State has no control over that other State's laws, and (ii) an indemnity might look like a form of recognition of that other State's sovereign rights.

In JDAs, States with overlapping entitlements do typically attempt to address the additional sovereign risk for investors. Certain JDAs grandfather pre-existing licences or contracts[49] (although by no means all JDAs do[50]). Certain JDAs provide stabilization protections during the JDA's term, whether from a change to applicable laws of one of the JDA parties,[51] or from a change to the JDA regime.[52] Alternatively, a JDA authority may enter into a contractual stabilization commitment. Finally, certain JDAs seek to provide protection from a change of regime *after* the term of the JDA.[53]

As a practical matter, though, such protections may prove illusory, as an investor may have limited or no means to enforce the protections set out in the JDA. JDAs typically set out how disputes between the States parties to the JDA are to be resolved: many contemplate some form of binding third-party dispute settlement[54] (although not all JDAs do even that[55]). What no JDA appears to do, however, is

[49] That was, for instance, the approach of the Malaysia–Thailand JDA, which grandfathered all 'concessions or licenses' made by either party: (n 36) art III(2):

> The Joint Authority shall assume all rights and responsibilities on behalf of both Parties for the exploration and exploitation of the non-living natural resources for the sea-bed and subsoil in the overlapping area (hereinafter referred to as the joint development area) and also for the development, control and administration of the joint development area. The assumption for such rights and responsibilities by the Joint Authority shall in no way affect or curtail the validity of concessions or licenses hitherto issued or agreements or arrangements hitherto made by either Party (emphasis added).

[50] The 2002 Timor Sea Treaty between Timor-Leste and Australia recognized contracts concluded under its predecessor JDA, the Timor Gap Treaty, but also contemplated their renegotiation (which did in fact occur): Timor Sea Treaty (2002) (n 3) art 5(a) and Annex F. The latter, entitled 'Annex F under article 5(a) of this Treaty Fiscal scheme for certain petroleum deposits', provided:

> Contracts shall be offered to those corporations holding, immediately before entry into force of the Treaty, contracts numbered 91-12, 91-13, 95-19 and 96-20 in the same terms as those contracts modified to take into account the administrative structure under this Treaty, or as otherwise agreed by Australia and East Timor.

A JDA may also say nothing at all about pre-existing licences.

[51] The Nigeria–São Tomé JDA provides explicit protection from changes to one party's taxation regime (n 36) art 24.4: 'Neither State Party shall tax development activities in the Zone or the proceeds deriving therefrom except in accordance with this article. This does not affect the States Parties' rights to tax any profits arising from the processing or further treatment of petroleum beyond the initial treatment necessary to effect its sale as a raw material.'

Similar protection is also arguably implicit in provisions transferring all regulatory authority of JDA States parties to the JDA body: eg Malaysia–Thailand JDA (n 36) art III(2).

[52] Such protection was, for instance, provided in the mining code annexed to the Timor Gap Treaty (n 33) Annex II, art 43. However, the Nigeria–São Tomé JDA specifically states the opposite—that the JDA body 'may at any time adopt such modifications as it thinks fit to the regulatory and tax regime so established': (n 36) art 21.4.

[53] For example, the Timor Sea Treaty provides for the survival of rights granted under the treaty. See Timor Sea Treaty (n 3) art 22.

[54] That might be before a tribunal (eg Japan–South Korea JDA (n 36) art XXVI(2); Nigeria–São Tomé JDA (n 36) art 49.2; Timor Sea Treaty (n 3) art 23, the ICJ (eg Sudan–Saudi Arabia JDA (n 36) art XVI(2)), or the International Tribunal for the Law of the Sea (ITLOS) for UNCLOS members: see UNCLOS (note 5) art 288(2).

[55] See eg Malaysia–Thailand JDA (n 36) art VII; Malaysia–Vietnam JDA (n 36) art 6.

allow an investor in the JDA area to bring a claim against either the JDA authority or one of the States parties to enforce the JDA provisions.[56]

An investor may succeed in having those protections reiterated in any investment contract with the JDA authority, supported by some form of binding dispute settlement. Even that may be of limited utility, though, as the JDA authority may have limited assets against which to enforce any judgment or award. There might also be uncertainty as to what will happen when the authority ceases to exist, as was contemplated for the authority established by the Timor Sea Treaty in the 2018 boundary agreement between Timor-Leste and Australia.[57]

For these reasons, the question of whether recourse can be sought under an investment treaty in the event of adverse action by a State or the JDA authority is a question with real practical application.

IV. THE ROLE OF INVESTMENT TREATIES IN ADDRESSING UNCERTAINTY

This section considers a selection of issues relevant to whether an investor in an area of overlapping maritime entitlement could seek recourse under an investment treaty in the event of adverse action. There is a threshold issue that will apply in all circumstances: whether the BIT applies to the area of overlapping claim at all. This part first considers that threshold issue (A). It then considers how the 'legitimate expectations' analysis on which an investment treaty case typically turns would apply, depending on whether the investment is made under a unilateral instrument, or an instrument granted by a JDA authority (B). Finally, this part considers whether JDA authority conduct can be attributed to the State, such that it could found a claim for breach (C).

A. *Does the BIT Apply to the Area of Overlapping Claim?*

Most investment treaties define the areas to which they apply.[58] As such, whether an investment treaty will apply to a State's EEZ and continental shelf is likely to turn on the terms of the treaty. Treaties demonstrate a variety of approaches in this regard.[59] This section considers the UK–Vietnam BIT, the China–Nigeria BIT and the UK–China BIT, which have been chosen (somewhat at random) to illustrate the variety using treaties that might apply to areas of overlapping claim (i). This section then considers whether a State's claim to an area has to be consistent with international law in order for a treaty to apply to that area (ii).

(i) *Investment treaty language*

Under the UK–Vietnam BIT and the China–Nigeria BIT, the definition of 'territory' is key to determining whether the treaty can be invoked in relation to

[56] Certain JDAs speak to how disputes between an investor and the JDA authority under an investment contract will be resolved. This is the case for the Nigeria–São Tomé JDA (n 36) art 47. However, no JDA appears to contemplate any form of dispute settlement between an investor and the JDA authority in relation to the authority's respect for the JDA provisions.

[57] Australia–Timor-Leste Boundary Agreement (n 5) art 10(a).

[58] For an overview of practice and trends in this regard, see United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007) (UNCTAD Report on BITs) 17–18.

[59] See ibid.

investments in either State's EEZ or continental shelf. However, it is key for different reasons, and the two BITs define 'territory' differently.

Under the UK–Vietnam BIT, the definition of 'territory' is key because the BIT provides for arbitration of disputes concerning *obligations* under the BIT,[60] and such obligations are owed in the 'territory' of each party.[61] Under the China–Nigeria BIT, the definition of 'territory' is key because it provides for arbitration of disputes in connection with *investments* in the 'territory' of a contracting party.[62]

In the former case, therefore, the definition of 'territory' might be interpreted in the light of general principles of international law regarding the areas in which a State may incur responsibility.[63] And in the latter case, the understanding of 'territory' might be influenced by the definition of 'investment' and the general principles of investment treaty law that have been articulated in their regard.[64] At any rate, what limited case law there is on the subject suggests that the purpose for which the term 'territory' is used in an investment treaty will influence how that term is interpreted.[65]

As for the definition of 'territory', under the UK–Vietnam BIT, that term is defined relatively narrowly.

[60] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments (signed 1 August 2002, entered into force 1 August 2002) (UK–Vietnam BIT) art 8(1): '[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former'.

[61] Thus, for example, art 2(2) provides that investors 'shall at all times be accorded fair and equitable treatment [...] in the territory of the other Contracting Party'; art 3(1) states that '[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State'; and art 3(2) states that '[n]either Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State'.

[62] Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, (signed 27 August 2001, entered into force 18 February 2010) (China–Nigeria BIT) art 9(3), read together with art 9(1), which refers to: '[a]ny dispute between an investor of the other contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party'.

[63] See Section IV.A.ii, below.

[64] See eg *Fedax NV v The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997). In that case, the Tribunal noted that a transfer of funds or value does not necessarily occur in the host State for all types of investment, and in that case: '[t]he important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs' (para 41). That said, the Tribunal in that case also recognized that there were 'some kinds of investments [...] such as the acquisition of interests in immovable property, companies and the like' which would involve a transfer of funds or value into the territory of the host country (para 41).

[65] In this regard, it is instructive to contrast the outcomes in *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) and *Romak SA (Switzerland) v The Republic of Uzbekistan*, PCA Case No AA280, Award (26 November 2009).

In *SGS v. Philippines*, the Tribunal noted that the treaty language was 'clear in requiring that investments be made "in the territory of' the host State"'. It therefore found that:

> '[i]n accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT. For example the construction of an embassy in a third State, or the provision of security services to such an embassy, would not involve investments in the territory of the State whose embassy it was, and would not be protected by the BIT'.

See para 99; see generally ibid paras 99–112.

In *Romak v Uzbekistan*, by contrast, the Tribunal noted that '[a]lthough the BIT contains numerous references to the "territory" of the Contracting States, [...] Article 1(2) of the BIT, which defines the term "investments," does not'. It considered that, 'unless contracting States have made "territoriality" an express pre-requisite for treaty coverage (which is not the case in the BIT), references to "territory" normally refer to the benefit that the host State expects to derive from the investment.' See para 237; see generally paras 233–41.

In respect of Vietnam, for instance, 'territory' means 'all territory including the territorial sea or islands where Vietnam has sovereign rights or jurisdiction in accordance with international law'.[66] The reference only to 'territory including the territorial sea or islands' in this definition could be argued to suggest an intention to exclude Vietnam's EEZ and continental shelf. That said, a degree of ambiguity is created by the use of the expression 'territory ... where Vietnam has sovereign rights or jurisdiction': at international law, a State is said to have 'sovereignty' (not just 'sovereign rights') over its land, internal waters and territorial sea, whereas 'sovereign rights' are what a State has over its EEZ and continental shelf. In light of that ambiguity, an eventual tribunal would likely consider other factors in determining whether the BIT applies to Vietnam's EEZ and continental shelf, including potentially the BIT's negotiating history.[67]

By contrast, in the China–Nigeria BIT, the term 'territory' is explicitly defined more broadly, as follows:

> [T]he land area, the inland area, the territorial sea of the Contracting Party, as well as continental shelf and the exclusive economic zone over which the State concerned exercises, in accordance with international law, sovereign and jurisdictional rights.[68]

Thus, the China–Nigeria BIT would *prima facie* apply to China and Nigeria's respective continental shelves and EEZ. Whether the BIT would actually apply in any given case concerning an investment in China or Nigeria's continental shelf/EEZ would depend on whether the State concerned 'exercises, in accordance with international law, sovereign and jurisdictional rights' over the part of the continental shelf/EEZ concerned.[69] How that question might be answered is illustrated by considering the respective maritime claims of Nigeria and China.

A part of Nigeria's claimed continental shelf/EEZ is covered by the Nigeria–São Tomé JDA. The JDA creates two institutions: the Joint Ministerial Council and the Joint Authority. The Joint Ministerial Council consists of Ministers of Nigeria and São Tomé,[70] and has 'overall responsibility' for resource development.[71] The Joint Authority manages resource development,[72] but is responsible to the Council.[73] Resource development is a quintessential sovereign right.[74] It is, therefore, at least arguable that Nigeria does exercise jurisdictional rights in areas covered by the JDA through these JDA authorities. And the China–Nigeria BIT does not seem to require that Nigeria be the sole State exercising jurisdictional rights in this area in order for it to be considered part of Nigeria's 'territory' for

[66] UK–Vietnam BIT (n 60) art 1(e)(ii).

[67] Regarding the circumstances in which reference will be had to a treaty's 'preparatory work', see Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 (VCLT) art 32. Regarding these additional factors more generally, see ibid arts 31–32.

[68] China–Nigeria BIT (n 62) art 1(4).

[69] This question is distinct from that of whether the acts of a JDA authority can be attributed or otherwise imputed to a State such that the State may be internationally responsible for those acts, which is addressed at Section IV.C, below.

[70] Nigeria–São Tomé JDA (n 36) art 6.

[71] ibid art 8.1.

[72] ibid art 9.6.

[73] ibid arts 9.3 and 11.1.

[74] See generally the provisions of UNCLOS discussed in Section II; General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.

BIT purposes. On this basis, it appears that the China–Nigeria BIT could apply to the area covered by the Nigeria–São Tomé JDA.

China's maritime claims raise separate issues—specifically, whether the exercise of a State's rights in an area must be legal, in order for the BIT to apply to that area, a point addressed in the Section IV.A.ii.

The UK–China BIT takes a somewhat different approach. It does not use the defined term 'territory', but rather directly addresses the areas to which it applies. It provides:

> This Agreement shall also apply to investments made by nations or companies of one Contracting Party in the territorial sea or maritime zone or on the Continental Shelf where the other Contracting Party exercises its sovereignty or sovereign rights or jurisdiction.[75]

Thus, it is potentially the most expansive of the three treaties, as it not only applies to the EEZ and continental shelves of the two countries, but also contains no requirement of consistency with international law—or, at least, no explicit requirement: one may be implied by the use of terms such as 'sovereign' rights and 'jurisdiction'—a matter to which I now turn.

(ii) *Requirement of legality*

In the South China Sea, China makes controversial claims to sovereignty over all islands and features,[76] and to vast maritime areas bounded by the so-called 'nine-dashed line'.[77] In the 'South China Sea Arbitration', a Tribunal constituted under UNCLOS rejected many of those claims—finding, *inter alia*, that China's claims in those areas within the 'nine-dash line' at issue in the case were contrary to UNCLOS and 'without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements' under UNCLOS.[78] The Tribunal therefore found that China's purported exercise of sovereign rights in those areas was in breach of UNCLOS.[79]

[75] Agreement between the Government of the Kingdom of Great Britain and Northern Ireland the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments with Exchanges of Notes (signed 15 May 1986, entered into force 16 May 1986) art 1(2).

[76] Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, 25 February 1992 art 2(1)–(2); 'United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter', China, 25 August 2006 Item 3. See also Communication from the Government of China, 13 April 2009.

China has only filed baseline declarations with the United Nations relating to the mainland, the Paracel Islands and the parts of the Tonkin Gulf (Beibu Bay to the Chinese) delimited in the agreement with Vietnam. See Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996, 37, and 'List of Geographic Coordinates of Points as Specified in the Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Seas, the Exclusive Economic Zones and Continental Shelves in Beibu Bay/Bac Bo Gulf' 137. It has not filed baseline declarations relating to the Spratly Islands.

[77] In 1947, the Chinese government (then still the Kuomintang government that fled to Taiwan) published an official map that used 11 interrupted lines to indicate its boundaries in the South China Sea. Two lines in the Tonkin Gulf were later eliminated and the configuration has come to be known as the 'nine-dashed line'. See Mark J Valencia, Jon M van Dyke and Noel A Ludwig, *Sharing the Resources of the South China Sea* (1997) 24–25.

A map with the so-called nine-dashed line was included with the Note Verbal filed by China in response to Vietnam and Malaysia's 2009 submissions to the Commission on the Limits of the Continental Shelf, although in that submission China merely claimed sovereignty over the islands and their waters. See Communication received with regard to the submission made by Viet Nam to the Commission on the Limits of the Continent Shelf, PRC, 7 May 2009. See also Communication received with regard to the joint submission made by Malaysia and Viet Nam to the Commission on the Limits of Continental Shelf, PRC, 7 May 2009.

[78] See generally *South China Sea Arbitration* (n 24). See also South China Sea Arbitration (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013–19, Award on Jurisdiction and Admissibility (29 October 2015).

[79] For example, the Tribunal found that Chinese acts taken in an attempt to induce the M/V Veritas Voyager to cease survey operations were in breach of UNCLOS: ibid paras 707–08.

Even a Chinese exercise of sovereign rights through an eventual JDA authority could be inconsistent with international law, insofar as it did not respect the entitlements of all States in the areas concerned.[80]

The question, then, is whether any unilateral Chinese exercise of rights in those areas would be an exercise of 'sovereign and jurisdictional rights', and one that is 'in accordance with international law', within the meaning of the China–Nigeria BIT's definition of 'territory'.[81] A similar question might arise under the UK–China BIT: does China exercise 'sovereignty or sovereign rights or jurisdiction' in areas in the South China Sea, such that that treaty would apply to investments in those areas? What little precedent that exists on similar questions does not provide a clear answer.

On the one hand, a 'no' is suggested by a series of recent decisions relating to the application of agreements between the European Union and Morocco to Western Sahara. Morocco is not recognized by the international community as having sovereignty over Western Sahara.[82] While its status is debated, it is generally understood as the *de facto* administering power[83] (although the African Union considers it a belligerent occupier[84]). The cases concern the EU–Morocco 'Association Agreement', which creates a framework for co-operation between the EU and Morocco,[85] and various agreements concluded under that Association Agreement—notably, for present purposes, a Fisheries Partnership Agreement.[86]

The Grand Chamber of the European Court of Justice (ECJ) has repeatedly held that those agreements cannot be interpreted as applying to Western Sahara, as this would be inconsistent with the principle of self-determination at customary international law. Thus, it found that the reference to the 'territory of the Kingdom of Morocco' in the Association Agreement could not include Western Sahara.[87] And it found that the reference to the 'waters falling within the … jurisdiction of the Kingdom of Morocco' in the Fisheries Partnership Agreement

[80] It is, for instance, widely accepted that the Timor Gap Treaty, the JDA between Australia and Indonesia relating to parts of the Timor Sea, was inconsistent with international law. See, eg, Roger S Clark, 'Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"' (1992) 4 Pace YB Intl L 69. Timor-Leste was at the time under illegal Indonesian occupation. See, eg, Security Council Resolution 384 of 22 December 1975, UN Doc S/RES/384. Portugal, the erstwhile colonial power, brought a claim against Australia before the ICJ after Australia's signature of the Timor Gap Treaty with Indonesia. The ICJ ultimately declined jurisdiction on the basis that it could not decide the claim without deciding on the rights of Indonesia, who was not a party to the proceedings. See *Case Concerning East Timor (Portugal v Australia)*, 1995 ICJ Rep 90.

[81] China–Nigeria BIT (n 62) art 1(4): 'the land area, the inland area, the territorial sea of the Contracting Party, as well as continental shelf and the exclusive economic zone over which the State concerned exercises, in accordance with international law, sovereign and jurisdictional rights'.

[82] See, generally, *eg Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> accessed 21 July 2005 [139]–[142]

[83] This is the view of the United Nations and the European Union. See, respectively, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc S/2002/161; Legal Opinion of the Legal Service of the European Parliament, 4 November 2013, Doc SJ/0665/13.

[84] Legal Opinion of 2015 by the Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission, Annex to UN Doc S/2015/786.

[85] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (signed 26 February 1996, entered into force 1 March 2000) [2000] OJ L70/2 (or OJ L70, 18 March 2000 2, for consolidation).

[86] *Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco* (signed 26 July 2006, entered into force 28 February 2007) [2006] OJ L141/4.

[87] Case C-104/16P *Council of the European Union v Front Polisario* [2016] ECR 973, paras 84–92. In relation to this Decision and its antecedents, see generally Kate Parlett, 'Trade and Investment Agreements in Disputed Territories: The case of Western Sahara', Kluwer Arbitration Blog, 4 April 2017.

could not include the waters adjacent to Western Sahara and forming part of its territorial sea or EEZ.[88]

On the other hand, a 'yes' is suggested by a series of tribunals hearing investment treaty claims against Russia relating to investments in the Crimean peninsula.[89] The Russia–Ukraine BIT under which at least some of the claims have been brought provides for arbitration of claims 'in connection with … investments',[90] defines 'investments' by reference to the defined term 'territory',[91] then defines 'territory' as follows:

> 'Territory' shall denote the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law.[92]

There are as yet no publicly available decisions in the Crimea cases. But reports indicate that at least six tribunals have confirmed jurisdiction and/or admissibility,[93] with four having now issued awards in favor of the claimants,[94] and attempted challenges to two of those awards before the Swiss courts having failed.[95] Those brought under the Russia–Ukraine BIT will necessarily have involved a determination that Russian 'territory' covered by the BIT includes the annexed peninsula. Although that does not necessarily require a finding that Crimea is Russian territory 'in conformity with the international law', there may have been such a finding in at least one case: one of the tribunals has reportedly found that the language 'as defined in conformity with the international law'

[88] Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECR 118, paras 57–73. See also ibid paras 74–83 (finding that a protocol concluded under the Fisheries Partnership Agreement also could not apply to the waters adjacent to Western Sahara and forming part of its territorial sea or EEZ).

[89] In early 2014, Russia purported to annex the Crimean peninsula, a part of Ukraine. A number of investors in that area—notably, Ukrainian investors—have brought claims against Russia relating to subsequent measures. The claims are *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v The Russian Federation*, PCA Case No 2015-07; *Oschadbank v. The Russian Federation*, PCA Case No. 2016–14; *Everest Estate LLC and Others v The Russian Federation*, PCA Case No 2015-36; *Limited Liability Company Lugzor and Others v The Russian Federation*, PCA Case No 2015-29; *NJSC Naftogaz of Ukraine and Others v The Russian Federation*, PCA Case No 2017-16; *PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation*, PCA Case No 2015-21; *Stabil LLC and Others v The Russian Federation*, PCA Case No 2015-35; *PJSC Ukrnafta v The Russian Federation*, PCA Case No 2015-34.

[90] Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments (signed 27 November 1998, entered into force 27 January 2000) (Russia–Ukraine BIT) art 9.

[91] ibid art 1(1): '"Investments" shall denote all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation'.

[92] Russia-Ukraine BIT (n 90) art 1(4).

[93] They are: *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v The Russian Federation*, PCA Press Release of 9 March 2017; *PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation*, PCA Press Release of 9 March 2017; *Everest Estate LLC and Others v The Russian Federation*, PCA Press Release of 5 April 2017; *Stabil LLC and Others v The Russian Federation*, PCA Press Release of 24 April 2019; *PJSC Ukrnafta v The Russian Federation*, PCA Press Release of 4 July 2017; *Limited Liability Company Lugzor and Others v The Russian Federation*, PCA Press Release of 13 December 2017. See generally Jarrod Hepburn, 'INVESTIGATION: full jurisdictional reasoning comes to light in Crimea-related BIT arbitration vs. Russia', *IA REPORTER* (9 November 2017). In the claim brought by Limited Liability Company Lugzor and Others, the tribunal has, since its initial decision on jurisdiction and admissibility, reportedly granted The Russian Federation the right to make submissions in that regard: PCA Press Release of 28 November 2019.

[94] *Everest Estate LLC and Others v The Russian Federation (Everest Estate)*, PCA Press Release of 9 May 2018; *Oschadbank v The Russian Federation* ('Russian Federation is Hit with $1.3 Billion Dollar UNCITRAL Bilateral Investment Treaty Award', IA REPORTER, 26 November 2018); *Stabil LLC and Others v The Russian Federation*, PCA Press Release of 24 April 2019; *PJSC Ukrnafta v The Russian Federation*, PCA Press Release of 24 April 2019.

[95] Lisa Bohmer, 'Swiss Federal Tribunal Provides Reasons for Refusing to Set Aside Two Crimea-Related Awards', (*IA REPORTER*, 21 January 2020).

applies not only to the EEZ and continental shelf, but also to land territory.[96] The Crimea cases thus appear to suggest that an investment treaty could be invoked against a State in relation to actions in areas that are occupied or in which jurisdiction is exercised as a matter of fact—whether lawfully or unlawfully.

The difference in approach between the ECJ's Western Sahara cases and the BIT cases relating to Crimea is doubtless explained by the 'object and purpose' of investment treaties as compared with that of the agreements considered in the Western Sahara cases. The object and purpose of an investment treaty is to protect investments. The Russia–Ukraine BIT, for instance, refers to the parties' 'intention to create and maintain favorable conditions for mutual investments' and 'desire to create favorable conditions for the expansion of economic cooperation'.[97] And at least one of the Crimea tribunals reportedly based its finding of territorial application in part on the fact that this purpose would be defeated by not applying the Russia–Ukraine BIT to occupied Crimea.[98]

Moreover, it is well established that a State may engage its responsibility under international law for acts in a territory that it administers or otherwise occupies as a matter of fact. Notably, this is the consistent position of the European Court of Human Rights (ECtHR) in relation to the territoriality requirement in article 1 of the European Convention on Human Rights (ECHR), which provides: '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'[99] The ECtHR has consistently held that 'jurisdiction' in that context extends to areas over which States parties exercise 'effective control'.[100] The nature and degree of 'jurisdiction' required to be exercised by a State party differs depending on the type of ECHR right that is said to have been violated.

In this light, an investment treaty tribunal might reach a conclusion different from that of the ECJ Grand Chamber if called upon to determine whether one of Morocco's investment treaties could apply to investments in waters off Western Sahara.

B. *Does the Investor Have 'Legitimate Expectations' Worthy of Protection?*

It is typical practice for an investment treaty claimant to advance claims under all treaty provisions. Equally typically, the focus will be on claims of fair and equitable

[96] Hepburn (n 93) (discussing the *Everest Estate* Tribunal's interpretation of the phrase 'defined in accordance with international law' and explaining that the Tribunal found that the phrase 'arguably qualified "territory" as well as "exclusive economic zone" and "continental shelf", potentially requiring an assessment of whether Crimea was Russian territory as "defined in accordance with international law".')

[97] Russia–Ukraine BIT (n 90) Preamble.

[98] Hepburn (n 93).

[99] Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights, as amended) (ECHR) 6.

[100] See, eg, *Loizidou v Turkey (preliminary objections)*, App No 15318/89, Decision of the Grand Chamber (ECtHR 23 March 1995) para 62:

> 'bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.'

See also *Banković v Belgium*, App No 52207/99, Decision of the Grand Chamber on Admissibility (ECtHR 12 December 2001) paras 67–73. See generally Nicola Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects' MPEPIL (May 2008).

treatment (FET) breach—unless, that is, the investment treaty does not allow for arbitration of such claims.

It is by now settled law that the FET standard requires 'treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment'.[101] As a consequence, a key question in most investment treaty cases will relate to what expectations the investor could legitimately have held. The answer will very much depend on the facts of the case, but there is little debate that an explicit stabilization commitment from a State will—all other things being equal—give rise to a 'legitimate expectation' of stabilization that will be protected.[102]

This section considers whether investors in areas of overlapping claim can have protected expectations. It first considers investments under a unilateral instrument from one State, asking whether that instrument can give rise to protected expectations vis-à-vis the granting State, or indeed even the contesting State (i). This section then considers investments made under a JDA instrument, asking whether commitments made in the JDA or the JDA instrument create protected expectations vis-à-vis either of the JDA States parties (ii).

(i) *Investment under a unilateral instrument*

Investments in resource *exploitation* under unilateral instruments in areas of overlapping claim are relatively rare—at least in relation to non-living resources.[103] Investors typically want greater comfort before investing the substantial sums required for exploitation: investments tend to be made under the rubric of a JDA, if they are made at all, in areas of overlapping claim. The issues that investments under a JDA raise are addressed in Section IV.B.ii.

Exploration under unilateral instrument in areas of overlapping claim is much less rare, although it is typically hotly contested by the non-authorizing State. The South China Sea, for one, has a long and storied history in this regard. Taking just one of the South China Sea Claimant States: over decades, Vietnam has made multiple attempts to license exploration, which have typically been met with heavy protest from China. Thus, in 1994, Vietnam awarded a concession to Mobil to the 'Blue Dragon' area, estimated to contain between 500 million and 1 billion barrels of oil. China objected, and ultimately moved in two warships. After a period of

[101] The leading case in this regard is *Técnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) para 154.

[102] Thus, for example, a series of tribunals found that the Argentine regime applicable to gas transportation and distribution from the 1990s included various 'stabilization guarantees' regarding tariffs—including commitments that tariffs would be subject to adjustment based on the US Producer Price Index, and that they could be calculated in US dollars and then converted to Argentine pesos at a set rate—and that Argentina's revocation of these guarantees was a breach of the FET standard. See eg *CMS Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005). In relation to these cases, see generally Kathryn Khamsi, 'Compensation for Non-expropriatory Investment Treaty Breaches in the Argentine Gas Sector Cases: Issues and Implications' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010); José E Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Foreign Investment Regime' (2009) Ybk on Intl Inv L & Poly 379.

[103] One notable exception is Australia's unilateral licensing of the exploitation of the Buffalo, Corallina and Laminaria fields in areas of the Timor Sea disputed by Timor-Leste. That exploitation was licensed before Timor-Leste's independence, and Timor-Leste's protests on independence went unanswered. Ultimately, Timor-Leste and Australia agreed to an interim arrangement relating to the disputed areas, so no claim was brought under UNCLOS arts 74(3) and 83(3). See Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (signed 12 January 2006, terminated by Timor-Leste on 10 January 2017). In relation to the latter treaty, see generally Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute? An Analysis' (2005) IX:4 Harvard Asia Quarterly.

unsuccessful drilling, Mobil abandoned the area.[104] A decade later, PetroVietnam granted BP a contract for two other blocks near the Spratly Islands. China protested, and warned BP to cease work or suffer unspecified 'economic consequences'. BP ultimately cancelled its contract.[105] More recently, Vietnam has authorized drilling in the 'Red Orchid' block by Russian State-owned Rosneft,[106] as well as in the 'Red Emperor' block by Spanish oil company Repsol, although it has reportedly halted the Repsol project following pressure from China.[107]

The question addressed here is what recourse an investor would have—whether against the authorizing State or the contesting State—in the event that the instrument authorizing its investment (whether that be a licence or a contract) is cancelled. The authorization may be revoked as a result of political, economic and/or military pressure, as in the above examples, or it may be revoked as a result of a tribunal order or boundary agreement. Thus, for example, the International Tribunal on the Law of the Sea (ITLOS) ordered that exploratory drilling under unilateral Ghanaian licence cease, pending its determination of the above-noted dispute between Ghana and Côte d'Ivoire.[108]

The investor may have spent considerable sums preparing for the exploration, whether it be seismic exploration or exploratory drilling. It may also have to make payments to subcontractors even if the exploration does not proceed—as, for instance, happened to Tullow Oil in the wake of the aforementioned ITLOS Order: an English court rejected its attempt to invoke *force majeure* to avoid payments under its drilling subcontract when ITLOS ordered drilling under its unilateral Ghanaian licence to cease.[109] And the investor will no doubt have expected to recoup its investment in the exploration in some manner, whether by selling its findings or by developing any commercial deposits identified.

The balance of this section considers, in turn, the possibility of claims against the authorizing State (a) and against the contesting State (b).

(a) *Claim against the authorizing State*

Whether an investor can recover from the authorizing State will turn in substantial part on whether the investor can establish that the unilateral authorization created 'legitimate expectations'. That will, as usual, be a fact-specific exercise. But there will be an additional facet to the exercise in the overlapping claims context—specifically, this section considers whether a tribunal would consider the legality of the unilateral authorization under relevant rules of international law as part of the exercise.[110]

[104] Wendy N Duong, 'Following the Path of Oil: The Law of the Sea or Realpolitik—What Good Does Law Do in the South China Sea Territorial Conflicts?' (2007) 30 Fordham Int LJ 1098, 1150–57.

[105] Cable dated 7 September 2009 from US Embassy, Hanoi <http://leaks.hohesc.us/?view=07HANOI1599>.

[106] James Pearson, 'As Rosneft's Vietnam unit drills in disputed area of South China Sea, Beijing issues warning', Reuters, 17 May 2018.

[107] James Pearson and Henning Gloystein, 'Vietnam halts South China Sea oil drilling project under pressure from Beijing', *Reuters* (23 March 2018). Repsol is reportedly seeking compensation: see Jose Elías Rodríguez, Isla Binnie, and Sonya Dowsett, 'Repsol asks Vietnam for compensation after drilling project halted', *Reuters* (4 May 2018).

[108] Ghana and Côte d'Ivoire (Provisional Measures) (n 27).

[109] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm) paras 60–81. Tullow Oil's attempt to recover some of those payments from its joint venture partner has reportedly failed. See Alison Ross, 'Win declared in West African offshore drilling case', Global Arb Rev, 18 July 2018.

[110] There could also be a threshold issue as to whether a tribunal *could* consider the legality of the unilateral instrument. The analysis in relation to this threshold question will depend on whether the legality of the unilateral instrument is relevant (i) as part of the matrix of circumstances relevant to the 'legitimate expectations' analysis; (ii) as

As noted above,[111] pending delimitation of maritime boundaries, States with overlapping entitlements must 'not … jeopardize or hamper the reaching of the final agreement'. As a consequence, a State's ability unilaterally to authorize activities is limited. Only activities that do not cause permanent physical change (eg seismic exploration) can be authorized unilaterally. Activities that do cause permanent physical change (including not only the exploitation of reserves, but also the drilling of exploration wells) should in principle be undertaken only 'pursuant to provisional arrangements of a practical nature' between the claimant States.

More specifically, the *Guyana v Suriname* Award suggests that before issuing a unilateral drilling licence, a State should: (i) give the other claimant State(s) official and detailed notice of the planned activities; (ii) seek co-operation with those other claimant State(s) in undertaking the activities; (iii) offer to share the results of the exploration and give the other claimant State(s) an opportunity to observe the activities; and (iv) offer to share all the financial benefits received from the exploratory activities.[112]

A State might seek to argue that an investor cannot have a 'legitimate expectation' based on a unilateral instrument that is itself inconsistent with international law. However, there would be awkwardness to such an argument, at least if the State being pursued is the State having granted the instrument, as the State would in effect be relying on its own failings to resist its obligations. The argument would be particularly difficult for the State if the instrument granting the rights (whether licence or contract) contained some form of assumption of risk by the State in relation to its legality. That assumption of risk might take multiple forms: a stabilization clause, or a representation and warranty, for instance.

Indeed, a tribunal might consider that a State is precluded from advancing such an argument by some manner of procedural bar. International tribunals have, for instance, recognized and applied the principle of estoppel—whether under that name, or as a facet of the principle of good faith (frequently articulated using the Latin maxim *non concedit venire contra factum proprium*)—to preclude certain types of arguments.[113]

At any rate, such an assumption of risk by the State would be the type of explicit commitment that tribunals typically consider in finding that an investor has a protected expectation.[114] And an eventual tribunal would consider the circumstances surrounding the grant of the instrument, in particular in evaluating the significance of any commitments that the investor did—or did not—secure.[115]

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a 'relevant rule[ ] of international law applicable in the relations between the parties' within the meaning of art 31(3)(c) VCLT (n 67); or (iii) as an 'implicated issue' requiring an exercise of jurisdiction. In the latter regard, see generally Peter Tzeng, 'The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction', 50 NYU J Intl L 447.

[111] See Section II, above.

[112] *Guyana v Suriname* (n 24) para 477.

[113] See eg *Case Concerning the Temple of Preah Vihear* (*Cambodia v Thailand*) (Merits) [1962] ICJ Rep 6, 32; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) paras 42–49.

[114] See n 115.

[115] See eg *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, (11 September 2007) para 333

> (finding that '[t]he investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently,

(b) *Claim against the contesting State*

Perhaps the more interesting question is whether an investor under a unilateral instrument from one State can claim against the contesting State if its instrument is terminated—notably, if it is terminated as a result of political, economic and/or military pressure from that contesting State. This section first considers the limits on what a contesting State can do at international law, and then considers whether a tribunal constituted under an investment treaty with that State (as opposed to the host State) would consider those limits in assessing the contesting State's actions.

There are limits to what the contesting State can do at international law. Most obviously, as enshrined in the Charter of the United Nations, the use of force is prohibited except in limited circumstances (in self-defence, or as authorized by the Security Council).[116] And at least one Tribunal has found that that prohibition limits what a State can do in the face of unilateral activity by another State in an area of overlapping claim: it was in the above-noted case opposing Guyana and Suriname. In that case, both Guyana and Suriname had granted concessions in the area of overlapping claim. In 2000, CGX (a Canadian company) started drilling pursuant to a Guyanese licence. The Surinamese navy ordered CGX to leave or suffer the 'consequences'. The Tribunal found that Guyana had breached UNCLOS Articles 74(3) and 83(3) in unilaterally issuing the drilling licence to CGX.[117] But, interestingly for the present purposes, it also found that Suriname was in breach, because it should have engaged in dialogue with Guyana rather than resorting to self-help in threatening the CGX rig.[118] It found that Suriname should, instead, have 'actively attempt[ed] to bring Guyana to the negotiating table', or at least accepted Guyana's 'last minute' invitation to negotiations and negotiated in good faith.[119]

Indeed, UNCLOS articles 74(3) and 83(3) require that States with overlapping entitlements 'make every effort to enter into provisional arrangements of a practical nature' pending the delimitation of boundaries.[120] As noted above,[121] that obligation involves a duty to negotiate in good faith—that is, adopting a conciliatory approach and being prepared to make concessions in order to avoid the suspension of development. The logical corollary is that a State cannot unilaterally block exploration and development by refusing to agree to provisional arrangements that would involve compromise.

Finally, there will be circumstances in which the contesting State's claim is inconsistent with international law, as a Tribunal constituted under UNCLOS found

an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment');

Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador, ICSID Case No ARB/04/19, Award (18 August 2008) para 340 (finding that '[t]he assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State').

[116] Charter of the United Nations (adopted 16 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 2(4).

[117] *Guyana v Suriname* (n 24) para 477 and paras 479–82, in conjunction with para 486.

[118] ibid paras 474–76 and 484.

[119] ibid para 476.

[120] UNCLOS (n 5) arts 74(3) and 83(3).

[121] See generally Section II of this article.

of China's claims to certain parts of the South China Sea, including near Reed Bank.[122] The same Tribunal therefore found that China had acted in breach of international law in taking measures to prevent Forum Energy from completing seismic exploration activities near Reed Bank under a unilateral Philippine licence.[123]

With that international legal framework in mind, the balance of this section considers whether an investor can claim against the contesting State if its unilaterally licensed activity is terminated by that State in some way that is inconsistent with international law.

According to the Vienna Convention on the Law of Treaties (VCLT), treaties are to be interpreted by reference to 'relevant rules of international law applicable in the relations between the parties'.[124] The above-noted rules of international law will likely be 'relevant rules of international law applicable in the relations between' the parties to an investment treaty. The prohibition on the use of force is set out in the almost universally ratified Charter of the United Nations,[125] and is understood to constitute a fundamental principle of customary international law (*jus cogens*).[126] There is also widespread adherence to UNCLOS.[127]

So it is at least arguable that these rules should be taken into account in interpreting what is 'fair and equitable' under an investment treaty—or, for that matter, what actions are 'arbitrary', 'unreasonable' or 'tantamount to expropriation' within the meaning of typical investment treaty provisions.[128] With that in mind, there could be circumstances in which an investor under a unilateral instrument from one State could claim against the contesting State if the contesting State has affected its rights under the authorization. In this regard, it bears recalling that a State's claim to a maritime area need not necessarily be consistent with international law in order for an investment treaty to apply to its actions in that area (as discussed in Section IV.A.ii).

(ii) *Investment under a JDA instrument*

As set out above,[129] it is generally accepted that an explicit stabilization commitment from a State will—all other things being equal—give rise to a 'legitimate expectation' of stabilization that is protected by the FET standard (and

[122] See Section IV.A.ii of this article.

[123] *South China Sea Arbitration* (n 24) paras 652–60 (describing the measures), 708 and 716 (finding that the measures breached the Philippines' sovereign rights to its continental shelf under art 77 UNCLOS).

[124] VCLT (n 67).

[125] n 115.

[126] See eg *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, para 190:

> 'a further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.'

See generally James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 595.

[127] It now counts 168 parties: see n 16.

[128] In support of the argument that investment treaty protections must be interpreted in light of the law of the sea (including UNCLOS), see, eg, Sir Christopher Greenwood, 'Oceans and Space: Some New Frontiers for International Investment Law' (2018) 19 JWIT 775, 780–82.

[129] See Section IV.B of this article.

other treaty standards). As also set out above,[130] stabilization commitments may also be included in a JDA, or granted by a JDA authority through regulation or contract. The question addressed in this section is whether such commitments can create 'legitimate expectations' that could found an investment treaty claim against a State party to the JDA acting contrary to the commitment.

The nature of the analysis will depend (among other things) on whether the protection is in the JDA itself or granted by the JDA authority.

If the protection is in the JDA itself, then by virtue of the fact that the JDA is a treaty, it might influence the interpretation of the investment treaty standards. As noted, treaties are to be interpreted by reference to 'relevant rules of international law applicable in the relations between the parties'.[131] Since a JDA is an international agreement, any commitment in the JDA can fairly be characterized as a 'rule of international law'. The question is whether it can be characterized as a rule 'applicable in the relations between the parties' to the investment treaty if the JDA is between one party to the investment treaty and a third party—for example, are any commitments in the Nigeria–São Tomé JDA commitments 'applicable in the relations between' Nigeria and China such that they should be taken into account in interpreting the standards in the China–Nigeria BIT?

There is no clear answer to this question at international law. Some authors argue that even a treaty B that binds only one of the parties to a treaty A can be relevant to the interpretation of that treaty A, insofar as it is being interpreted for application to the State that is also party to treaty B.[132] On that view, stabilization commitments in the Nigeria–São Tomé JDA would be taken into account in interpreting the China–Nigeria BIT insofar as it was being applied to Nigeria (but not to China).

There are, though, other authors who argue that a treaty B has to bind all of the parties to a treaty A in order for it to be relevant to the interpretation of that treaty A.[133] On that view, commitments in the Nigeria–São Tomé JDA would not necessarily be taken into account in interpreting the legal obligations in the China–Nigeria BIT.

Even on that view, though, the commitments would be relevant to the legitimate expectations analysis as a matter of fact. If the protection is in the JDA itself, then each JDA State party will have signed and ratified it. Staying with the Nigeria–São Tomé JDA example, in signing the JDA, the relevant government bodies of Nigeria and São Tomé will each have positively considered and explicitly committed to the principle set out in the JDA that: 'neither State Party shall tax development activities in the Zone or the proceeds deriving therefrom except in accordance with this article.'[134] In signing and ratifying the JDA, various State organs may also have made public pronouncements about the intention behind the JDA, including pronouncements about the intention behind provisions relating to investments. These types of circumstances are analogous to the circumstances that tribunals

[130] See Section III of this article.
[131] See Section IV.A.i of this article.
[132] See eg Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 EJIL 753, 782; David Palmeter and Petros Mavroidis, 'The WTO Legal System: System of Law' (1998) 92 AJIL 398, 411; and Panos Merkouris, 'Debating the Ouroboros of International Law: the Drafting History of Article 31(3)(c)' (2007) 9 ICLR 1, 29, 30–31 (suggesting that the drafting history of art 31(3)(c) might support an expansive interpretation).
[133] See eg Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 433; Ulf Linderfalk, *On the Interpretation of Treaties* (Springer, 2007) 178.
[134] Nigeria–São Tomé JDA (n 36) art 24.4.

have considered in finding that the laws or other unilateral acts of States give rise to legitimate expectations.[135]

The analysis will be somewhat different if the stabilization protection is not in the JDA, but rather in a regulation passed by the JDA authority or a contract concluded by the JDA authority.

It would be more difficult to establish that the protection is a 'relevant rule of international law applicable in the relations between the parties', since it is not in an international agreement. It could also be difficult to establish that contractual commitments made by a JDA authority can be imputed to a State party to the JDA. As a general rule, the contractual obligations of even wholly owned State companies are not (without more) imputed to States for investment treaty purposes: companies operating for profit are in principle legally separate from their owners. Investment treaty tribunals have applied the principle of privity of contracts, refusing in many cases to impute the obligations of State companies with separate legal personality to States.[136] A joint authority with separate legal personality established by a JDA will be even further removed from the State.

Again, though, the JDA commitments would be relevant to the legitimate expectations as a matter of fact. Under many JDAs, a contract concluded by a JDA authority or regulation passed by that authority effectively requires approval from the JDA State parties. Thus, under the Nigeria–São Tomé JDA, contracts for petroleum activities are entered into with the JDA authority (called the 'Authority').[137] However, they have to be approved by the Joint Ministerial Council.[138] The Joint Ministerial Council does not have separate legal personality,[139] but rather comprises Ministers of Nigeria and São Tomé.[140] And given the rules of the Council, a contract could not be approved without express approval from Ministers of each State.[141] As such, any stabilization commitment in an investment contract concluded with the Authority will have been expressly

[135] For a recent example, see *Antin Infrastructure Services Luxembourd Sàrl and Antin Energia Termosolar BV v The Kingdom of Spain*, ICSID Case No ARB/13/31, Award (15 June 2018) para 554 (summarizing its factual findings on the Claimants' expectations at the time of their investment as follows:

> 'Spain (i) recognised that RE projects required high upfront capital investments; (ii) understood that to foster investments in that sector, in line with its policy goals, it needed to create more appropriate incentives; (iii) issued RD 661/2007 providing incentives to encourage investments in certain RE technologies, including CSP projects, and (iv) represented, through its acts and regulations, that the economic regime applicable to RE projects would remain stable and predictable').

See generally ibid paras 508–73.

[136] For instance, the Tribunal in *EDF (Services) Limited v Romania* rejected EDF's argument that Romania was bound by contracts entered into by two State entities, ASRO and SKY. See ICSID Case No.ARB/05/13, Award (8 October 2009) paras 317–19:

> [...] the attribution to Respondent of AIBO's and TAROM's acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause. Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it make Romania party to such contracts.

[137] Nigeria–São Tomé JDA (n 36) arts 9.6(b) and 23.1.

[138] ibid art 8.2(f).

[139] ibid art 6.3: 'the Council does not have separate legal personality.'

[140] ibid art 6.

[141] ibid art 6.2 provides that the Council

> 'shall comprise not less than two nor more than four Ministers or persons of equivalent rank appointed by the respective Heads of State of each State Party'. Article 7.1 requires at least one Minister appointed by each of

approved by Ministers of both States. This, too, is the type of act that tribunals typically take into account in the legitimate expectations analysis.

If it is established that the investor has a legitimate expectation of stability, there remains the question of whether the State has acted inconsistently with that expectation. The following section addresses the question of whether breach by a JDA authority can be attributed to a JDA State party, so as to found a claim against that State under an investment treaty.

C. *Is There State Action If the Impugned Act is That of the JDA Authority?*

The question of whether JDA authority actions can be attributed to a JDA State party so as to found a claim against that State under an investment treaty will be governed by the general rules of international law, as investment treaties do not typically define the contours of the State.

The international law rules relating to when actions by an organ or corporate entity of *one* State can be imputed to that State for purposes of establishing the State's responsibility are familiar to investment treaty tribunals. They are the international law rules of 'attribution', set out in the International Law Commission's 'Draft articles on Responsibility of States for Internationally Wrongful Acts' (ILC Articles on the Responsibility of States).[142] Those rules are regularly applied by investment treaty tribunals. Although their application to the facts of a case is often contested (in particular, where the actions are by a State corporation), the rules themselves are typically less controversial.

Where the actions at issue in an investment treaty case are actions of a JDA authority, even the applicable rules may be debatable. In particular, although the question may be governed by the international law rules on the responsibility of States (ie the above-noted ILC Articles on the Responsibility of States), there are also international law rules on the responsibility of international organizations. In some situations, both might apply. And while there are ILC codifications of both sets of rules, there is less of a consensus that the ILC's codification of the latter rules represents customary international law.[143]

In concept, the question of which rules will apply can be thought of as a question of whether the act in question is the act of the State or the act of the JDA authority. In practice, however, that question may boil down to whether the JDA authority has independent legal personality.

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the States parties to constitute a quorum, and art 7.4 provides that all Council decisions 'shall be adopted by consensus'.

[142] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (ILC Articles on the Responsibility of States), UN Doc No. A/56/10, ILC YB, 2001, vol II, Part One, ch II. Having now been accepted by the United Nations General Assembly, these articles are no longer in 'draft' form, and are commonly understood to reflect the current state of customary international law.

The question of when actions by a State entity can be imputed to that State for purposes of establishing the State's responsibility is distinct from the question of when a State entity's contractual commitments can be imputed to a State for purposes of establishing the State's obligations.

[143] See eg José E Alvarez, 'Book Review of Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*' (2007) 101 AJIL 674, 677 (describing the ILC's effort as 'at best premature and at worst misguided'); Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed 2009) 292. But see Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2015) 25(4) EJIL 991, 993 ('These critics are too pessimistic; the IO Responsibility Articles are neither premature nor feckless. On the contrary … [they] can help to clarify the primary international law norms that bind IOs').

After a brief discussion of the principles relating to legal personality (i), the following discusses the applicable principles under each of the two sets of rules—regarding the responsibility of States (ii), and regarding the responsibility of international organizations (iii). This section concludes by considering how the rules might apply as a practical matter (iv).

(i) *Existence of legal personality*

An inter-governmental organization will have legal personality when words to that effect are included in the constituent instrument of the organization.[144] Thus, for example, there would be little doubt that the Joint Authority created by the Nigeria–São Tomé JDA has legal personality, as the JDA specifically states that it 'shall have juridical personality in international law'.[145] There would be equally little doubt that the Joint Ministerial Council created by the same JDA is not an international organization, as the JDA states that it 'does not have separate legal personality'.[146]

How separate legal personality can be established in the absence of explicit wording is a matter of some debate. Some authors argue that the mere existence of an obligation under international law implies legal personality; others argue that further elements are required.[147] Thus, there may be some debate as to whether the Joint Authority created by the Malaysia–Thailand JDA has separate legal personality, as this is not explicitly addressed by the JDA.[148]

(ii) *ILC Articles on the Responsibility of States*

The general principle at international law, codified in the ILC's Articles on the Responsibility of States, is that '[e]very internationally wrongful act of a State entails the international responsibility of that State'.[149]

That general principle applies equally to a State's conduct within an international organisation, as confirmed by the International Court of Justice (ICJ) in *FYROM v Greece*.[150] FYROM (or 'Macedonia') and Greece had entered into an Interim Accord in 1995.[151] In that Interim Accord, Greece had agreed *inter alia* not to object to any membership application by Macedonia to any international organization of which Greece was a member.[152] However, when Macedonia's membership application was considered at a 2008 plenary meeting of the North Atlantic Treaty Organization (NATO), Greece formally objected and thereby blocked the necessary consensus for

[144] See eg International Law Commission, Draft articles on the responsibility of international organizations, with commentaries (ILC Articles on Responsibility of International Organizations), UN Doc No. A/66/10, ILC YB, 2011, vol II, Part Two, Commentary No 7 to art 2, 50.

[145] Nigeria–São Tomé JDA (n 36) art 9.2:

> The Authority shall have juridical personality in international law and under the law of each of the States Parties and such legal capacities under the law of both States Parties as are necessary for the exercise of its powers and the performance of its functions. In particular, the Authority shall have the capacity to contract, to acquire and dispose of movable and immovable property and to institute and be party to legal proceedings.

[146] ibid art 6.3: 'the Council does not have separate legal personality.'

[147] See eg ILC Articles on the Responsibility of International Organizations (n 143) Commentary No 8 to art 2, 50.

[148] Malaysia–Thailand JDA (n 36) art III(1)–(2).

[149] ILC Articles on the Responsibility of States (n 141) Pt One, ch I, art 1.

[150] *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644, paras 81–83.

[151] ibid para 20.

[152] ibid para 21. The condition was that Macedonia refer to itself only as the 'former Yugoslav Republic of Macedonia' (FYROM).

Macedonia's admission, in breach of its obligation under the Interim Accord.[153] The ICJ held Greece in breach of its treaty obligations.[154] The wrongful conduct was that of Greece, not NATO.

There is, moreover, investment treaty case law that may suggest that the same general principle would apply to responsibility under an investment treaty. Specifically, the majority in *Swissbourgh v Lesotho* appears to have accepted that a State may be liable for breach of an investment treaty on the basis of its conduct as a member of an international organization. Although the Award is not yet public, this can be gleaned from the set-aside Decision of the Singapore High Court.[155]

The South African Claimants were prosecuting an expropriation case against Lesotho before the court of the Southern African Development Community (SADC), the SADC Tribunal. While that case was pending, Zimbabwe submitted a motion to SADC to close the SADC Tribunal. Lesotho supported the resolution. As a consequence, SADC closed the SADC Tribunal while the Claimants' part-heard expropriation case against Lesotho was pending.[156] The Claimants filed a claim under the SADC Investment Protocol, alleging a denial of justice in breach of the Investment Protocol.[157]

A majority of the Tribunal appears to have accepted that claim. According to the Singapore High Court, the Tribunal found as follows:

> As for the fact that the shuttering of the SADC Tribunal was attributable to a collective decision by the SADC Member States, the majority considered that there was 'no basis for dismissing a claim purely because it involves—in part—State actions taken at an international organisation' (at [7.168]). In any event, the wrongdoing lay not only in decisions taken by the SADC Summit but 'involve[d] actions taken by [the Kingdom] individually' (at [7.168]).[158]

In other words, the Tribunal appears to have found that the fact that prejudice is caused by a decision or other conduct of an international organization does not exclude the possibility that individual member states may also have international responsibility for their own conduct leading to that prejudice.[159]

On the basis of the foregoing principles, a State party to a JDA could in principle be responsible for the acts of JDA authorities if those acts can be considered internationally wrongful acts of the State.

As for whether the acts of a joint State authority will be considered acts of the State in any given case, the ILC Articles on the Responsibility of States explain that the (or at least a) determining factor will be whether the joint authority has legal personality separate from its constituent States. An 'international

[153] Macedonia v. Greece (n 149) paras 81–83.
[154] Macedonia v. Greece (n 149) paras 42–44.
[155] *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and others*, 14 August 2017 [2017] SGHC 195 (*Lesotho v Swissbourgh* (High Court)).
[156] ibid paras 33–38.
[157] ibid paras 42, 44.
[158] ibid para 254.
[159] This aspect of the Award was set aside by the Singapore High Court, and the set-aside Decision was upheld by the Court of Appeal of Singapore. However, the basis of the set-aside was a finding that the dispute did not satisfy the requirement in the arbitration clause that the dispute concern 'an obligation … in relation to' the investment. See generally *Lesotho v. Swissbourgh (High Court)* (n 154) paras 253–77; *Swissbourgh Diamond Mines (Pty) Limited and others v Kingdom of Lesotho* [2018] SGCA 81 paras 92–204. This requirement is not typical of BITs, as the High Court noted: '[t]his is an unusual choice of language amongst BITs or multilateral investment treaties, which more commonly restrict their application to disputes "in relation to", "with respect to" or arising "out of" or "in connection with" the investment' (at para 263).

organization'—meaning 'an "intergovernmental organization" [that] possesses separate legal personality under international law'—'is responsible for its own acts, ie for acts which are carried out by the organization through its own organs or officials'. That responsibility is governed by the international law rules relating to the responsibility of international organizations.[160]

That said, the State remains responsible under the rules relating to the responsibility of States for its own acts vis-à-vis the organization, as distinct from acts carried out by the organization through its own organs.[161] International case law confirms that there may be State responsibility for its own acts even when the international organization is also potentially responsible.[162]

Where the joint State authority does not possess legal personality separate from its constituent States, the ILC Articles on the Responsibility of States explain that each State remains responsible for its own conduct, and responsibility is governed by the rules of attribution.[163]

It is not, however, immediately clear how those rules of attribution should apply. For example, article 4—which confirms that the conduct of State organs is State conduct—applies to the organs of '*a* State' (singular), not to joint organs. And it applies to entities that have the status of organ 'in accordance with the internal law of the State', not in accordance with a treaty.[164] Article 5—which attributes conduct of entities 'exercising elements of the governmental authority' to the State—also seems by its terms to apply to entities mandated by one, not more, State. It applies to entities 'empowered by the law of *that* State' to exercise elements of '*the* governmental authority'.[165]

Article 8 is perhaps a likelier candidate, at least on its face. It attributes the conduct of a 'person or group of persons' to a State where the person or group of persons 'is in fact acting on the instructions of, or under the direction or control

[160] ILC Articles on the Responsibility of States (n 141) Commentary (2) to Article 57. Article 57, regarding 'Responsibility of an international organization', provides: 'these articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.'

[161] ILC Articles on the Responsibility of States (n 141) Commentary (5) to Article 57. It is not entirely clear when an act will be considered an act of the State or an act of the international organization, although some guidance is provided by Commentary (3) to Article 57: 'if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles'. (The latter is a reference to the ILC Articles on the Responsibility of States.)

[162] See eg *Boivin v 34 Members of the Council of Europe* (App no 73250/01) ECHR 9 September 2008.

[163] ILC Articles on the Responsibility of States (n 141) Commentary (2) to Article 57:

> 'by contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as Article 47 confirms, each State remains responsible for its own conduct.'

[164] ILC Articles on the Responsibility of States (n 141) art 4:

Conduct of organs of a State

(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

(2) An organ includes any person or entity which has that status in accordance with the internal law of the State.

[165] ibid art 5:

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

of, that State in carrying out the conduct'.[166] While it is intended to be directed at the actions of private persons,[167] if taken literally, article 8 could conceivably be applied to a JDA authority (as the authority will, literally, be a group of persons).

However, applying article 8 on its face might mean that the conduct of a joint authority without separate personality would never be attributed to the State, contrary to what is stated in the ILC Articles. That is because article 8 only attributes an act of a person or group where the person or group 'is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[168] However, for a joint State authority, that may never be the case. JDA authorities are typically constituted to act under the joint control of the JDA States parties—for example, the Joint Ministerial Council created by the Nigeria–São Tomé JDA is composed of an equal number of ministers from each of Nigeria and São Tomé,[169] a quorum requires at least half the members including at least one appointed by each State,[170] and decisions must be adopted by consensus.[171] That said, it is not clear that the actions of a JDA authority would have to be attributable to only one State. The ILC Articles on the Responsibility of States specifically contemplate a potential 'plurality of responsible States' in relation to an act.[172] Interestingly, the Commentary states that the range of circumstances in which several States may be responsible for the same act include circumstances where 'two States may act through a common organ which carries out the conduct in question, eg a joint authority responsible for the management of a boundary river'.[173]

Thus, it appears at least possible that the actions of a JDA authority without separate personality could be attributed to State parties to the JDA in order to found an investment treaty claim. By contrast, as discussed in the following section, it is not clear that joint responsibility is possible under the rules applicable to JDA authorities with separate personality (the ILC Articles on the Responsibility of International Organizations).

(iii) *ILC Articles on the Responsibility of International Organizations*

There has been and remains much debate about the proper definition of an 'international organization'.[174] For present purposes, it suffices to note that the ILC' Articles on the Responsibility of International Organizations provide that 'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international

[166] ibid art 8.
[167] ibid, Commentary No 1 to Article 8 (explaining that Article 8 deals with the conduct of 'private persons') and the case law cited in the commentary more generally.
[168] ibid art 8.
[169] Nigeria–São Tomé JDA (n 36) art 6.2: 'the Council shall comprise not less than two nor more than four Ministers or persons of equivalent rank appointed by the respective Heads of State of each State Party.'
[170] ibid art 7.1.
[171] ibid art 7.4.
[172] Article 47(1) of the ILC Articles on the Responsibility of States (n 141), entitled 'Plurality of responsible States', states that: 'where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'
[173] ibid Commentary No 2 to art 47, 124.
[174] See eg José E Alvarez, *International Institutions as Law-Makers* (OUP 2005), Profit Petroleum, 4–17 ('Defining IOs').

legal personality'.[175] Thus, a JDA authority with independent legal personality will be an 'international organization' within the meaning of those articles.

Whether and when a State member of an international organization can be responsible for the acts of that organization is a matter of debate. The position adopted by the ILC in its attempt to codify international law is set out at article 61 of its Articles on the Responsibility of International Organizations, entitled 'Circumvention of international obligations of a State member of an international organization'. Article 61 provides:

> (1) A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
> (2) Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 61 is, therefore, quite restrictive.

In particular, the act of the State must have caused the act of the organization. The text of article 61 does not address the standard of causation for these purposes. Thus, it is not clear whether the act of the State has to be the sole cause of the international organization's committing the act, or not. However, something closer to the former is suggested by the Commentary, which explains that there must be a 'significant link' between the conduct of the State and the act of the organization.[176]

Moreover, the Commentary indicates that, in order for State responsibility to arise in this manner, a State must have acted within the organization with the intention of circumventing its obligations: responsibility will not arise if the act of the organization is the unintended result of the State's conduct.[177]

(iv) *Practical application*

As the above discussion reveals, there is a great deal of uncertainty as to the standard that would apply to determine the responsibility of a State for the acts of a JDA authority. In any scenario, the key will be the degree of control that the State has over the authority. Although there is some ambiguity in how the rules will apply, it seems possible that there could be joint State responsibility for the acts of JDA authorities without separate personality.[178] However, for JDA authorities with separate personality, the State will have to have intentionally caused the JDA to act if that action is to be imputed to the State.

[175] ILC Articles on the Responsibility of International Organizations (n 143) art 2, 49. As noted (see Section IV.C, above), the articles are not considered to represent the current state of customary international law in their entirety. However, the definition of international organizations is understood to represent the current state of the law. It is, for instance, adopted in the ILC Articles on the Responsibility of States (n 141), Commentary No 2 to Article 57:

> In accordance with the articles prepared by the International Law Commission on other topics, the expression 'international organization' means an 'intergovernmental organization'. Such an organization possesses separate legal personality under international law and is responsible for its own acts, ie for acts which are carried out by the organization through its own organs or officials.

[176] ILC Articles on the Responsibility of International Organizations (n 143) Commentary No 7 to art 61, 99.

[177] ibid 99 (Commentary No 2 to art 61).

[178] In this context, it also bears noting that there can be responsibility for aiding and abetting another State in the commission of an internationally wrongful act: ILC Articles on the Responsibility of States (n 141) art 16, 65.

In many cases, there might be an additional complexity arising from the fact that any given measure might actually be the action of more than one authority established by a JDA.

As noted above, for example, the Nigeria–São Tomé JDA created two institutions: a Joint Authority with separate personality, and a Joint Ministerial Council without separate personality.[179] Each of the two bodies may contribute to measures that an investor might want to impugn under an investment treaty. For instance, each of the two bodies will have a role to play in relation to new regulations, which might adversely affect an investor: the Joint Authority prepares the regulatory and tax regime for petroleum activities, but it is approved/adopted by the Joint Ministerial Council.[180] Similarly, contracts for petroleum activities are entered into with the Authority[181] and approved by the Council.[182]

In light of this potentially unresolvable complexity, as a practical matter, an investment treaty tribunal's determination of whether JDA authority action can be attributed to a State may end up being more intuitive than principled.

V. CONCLUSION

The unsettled maritime boundary context creates additional sources of regulatory risk for investors. Investment treaties do have a role to play in protecting investments in areas of overlapping claim, and thus in attracting investments to those areas. However, the unsettled boundary context presents additional hurdles to successfully invoking treaty protections. Whether those protections could be invoked successfully in relation to any eventual adverse regulatory action in an area of overlapping maritime claims would very much depend on the specifics of the situation.

As such, the issues addressed in this article do not lend themselves to overarching conclusions—except, that is, to the conclusion that other means of protecting investments in areas of overlapping claim will likely remain important to investors. In this conclusion, this article briefly considers what those other means might be.

In certain sectors, investors may seek contractual stabilization commitments from States before making any kind of significant investment in an area of overlapping claim. In the petroleum sector, contractual stabilization commitments are not uncommon—indeed, ConocoPhillips sought and received such commitments when it invested in areas covered by the Timor Sea Treaty.[183] However, in other sectors that are more regulation driven, there may be less of an appetite among States to engage themselves contractually in relation to investments in areas of overlapping claim. Contract-based stabilization commitments to investors in the

[179] See Section IV.A.i of this article.
[180] Nigeria–São Tomé JDA (n 36) art 21.
[181] ibid arts 9.6(b) and 23.1.
[182] ibid art 8.2(f).
[183] ConocoPhillips reports that it initiated arbitration against Timor-Leste in October 2012 for outstanding disputes related to a series of tax assessments 'pursuant to the terms of the Tax Stability Agreement with the Timor-Leste government'. See ConocoPhillips, Form 10-K, 31 December 2016 14. The making of such commitments was enabled by the Timor Sea Petroleum Development (Tax Stability) Act, Law No 4 of 1 July 2003.

renewable energy sector are, for instance, less common at present than in the petroleum sector.

With that in mind, States might want to consider providing other avenues to investors to enforce any stabilization commitments made in relation to areas of overlapping claim (whether they be contained in a JDA or granted by a JDA authority). For instance, States could consider including investor–State dispute settlement provisions in JDAs akin to those in investment treaties.

The regime established by UNCLOS for deep seabed mining may provide an interesting model. UNCLOS established the International Seabed Authority (ISA) to 'organize and control' activities in the seabed and ocean floor.[184] The ISA has passed a 'Mining Code' and has to date concluded a number of contracts with private corporations (in addition to a number of contracts with States and State entities).[185] Of particular note for present purposes, UNCLOS includes provisions allowing investors to bring claims against the ISA or relevant States. It provides that the Seabed Disputes Chamber of the ITLOS 'shall have jurisdiction … in disputes with respect to activities in the Area [ie the seabed]', including disputes between investors, the International Seabed Authority and States parties.[186] Disputes concerning an investment contract may be submitted to 'binding commercial arbitration', although in such instances the Seabed Disputes Chamber retains jurisdiction over all questions relating to the interpretation of UNCLOS.[187]

As stated at the outset, many of the arguments considered in this article in relation to areas of overlapping maritime claims could also apply by analogy to other situations where a State's sovereignty or sovereign rights are contested by another State, shared with another State, or limited in some way by the rights of another State.[188] The analogies may be particularly interesting to other situations where investments are—like under JDAs—made in areas where States exercise their sovereignty through some manner of inter-State body. For example, transboundary water treaties typically establish a joint body to implement and manage the agreement.[189] More recently, the August 2018 Convention on the Legal Status of the Caspian Sea contemplates that its effective implementation will be assured by 'five-party regular high-level consultations'.[190] Finally, one can envisage eventual joint authorities to oversee supra-national greenhouse gas emissions trading systems,[191] or other matters of international environmental interest.

[184] In relation to the International Seabed Authority, see generally UNCLOS (n 5) Pt XI, Section 4.

[185] The so-called 'Mining Code' is in fact a series of regulations and procedures to regulate prospecting, exploration and exploitation of marine minerals in the international seabed. In this regard, and in relation to the contracts (which do not appear to be public), see generally the website of the International Seabed Authority <https://www.isa.org.jm/>. See also Joanna Dingwall, 'International Investment Protection in Deep Seabed Mining Beyond National Jurisdiction' (2018) 19 JWIT 890.

[186] UNCLOS (n 5) art 187.

[187] ibid art 188(2).

[188] See Introduction of this article.

[189] See eg Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (adopted 5 April 1995, entered into force 5 April 1995) 2069 UNTS 3.

[190] Convention on the Legal Status of the Caspian Sea (n 16) art 19:

> To ensure effective implementation of the Convention and to review cooperation in the Caspian Sea, the Parties shall establish a mechanism of five-party regular high-level consultations under the auspices of their Ministries of Foreign Affairs to be held at least once a year, on a rotation basis, in one of the coastal States, in accordance with the agreed rules of procedure.

[191] For example, the November 2017 EU-Switzerland ETC Agreement linking their respective emissions trading systems creates a 'Joint Committee' (n 15) ch VI.

Indeed, it is in contexts where markets are new and growing rapidly, and regulations are particularly prone to evolution—like the licensing of offshore renewable energy[192] or the emissions trading market[193]—that both States and investors will need clarity on how that evolution will be managed.

In some such instances, States will be explicit that investments are made at risk, or at least that their ability to evolve and adapt regulations is unfettered. For example, the EU-Switzerland ETC Agreement linking their respective emissions trading systems is explicit that it is 'without prejudice to the right of each Party to amend or adopt legislation of relevance to this Agreement, including the right to adopt more stringent protective measures'.[194]

In others, however, there will be benefit to be gained—both in developing markets and reducing costs—to States granting a degree of stability, and a means to enforce that grant of stability. In this vein, the International Energy Agency notes that almost one trillion dollars of investment in offshore wind will be required to meet the objectives of the Paris Agreement, and that achieving this will be affected by regulatory risk.[195] For the reasons explored in this article, investment treaties have a potential role to play in this regard—and it bears noting in this context that efforts are being made to ensure that the analysis under such treaties strikes the right balance between protection and a State's right to regulate, including notably in areas of environmental protection.[196] States might also, though, consider including tailored investor–State dispute settlement provisions akin to those in investment treaties in future agreements creating supra-national bodies.

[192] Regarding the growth and prospects of the offshore renewable energy market, see generally IEA Offshore Energy Report (n 7).

[193] According to the World Bank, in 2018, the total value of emissions trading systems and carbon taxes was US$82 billion, representing a 56% increase compared with the 2017 value of US$52 billion. See World Bank, *State and Trends of Carbon Pricing*, May 2018 8.

[194] See EU–Switzerland ETS Agreement (n 15) art 10(1). It also specifically reserves the rights of the Joint Committee to amend applicable criteria: '[t]he Joint Committee may decide to adopt a new Annex or to amend an existing Annex to this Agreement' (ibid art 13(2)). Annex I to the agreement sets out the 'essential criteria' that the emissions trading systems of the EU and Switzerland 'must meet' (ibid art 2).

[195] IEA Offshore Energy Report (n 7) 50–53.

[196] For example, the 'Stockholm Treaty Lab' competition, which is an initiative of the Arbitration Institute of the Stockholm Chamber of Commerce, invited participants to draft an investment treaty to promote investments that achieves the objectives of the 2015 Paris Agreement and the Sustainable Development Goals. See Stockholm Treaty Lab, 'The Outcome' <http://stockholmtreatylab.org/the-outcome/>.