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Applying International Investment Law to Disputed Maritime Zones: A Case Study of the Falklands (Malvinas)

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Abstract

This contribution explores whether and how international law applies to disputed maritime zones by examining the Falklands (Malvinas) dispute between the UK and Argentina as a case study. After briefly outlining some of the maritime aspects of the bilateral dispute, the article assesses whether a bilateral investment treaty between Argentina/the UK and the investor’s home State would cover investments located in the maritime areas adjacent to the Islands. In studying this issue, attention will be paid to, inter alia, the scope of treaties ratione loci, State practice in relation to overseas territories, the application of treaties to activities in the exclusive economic zone and the continental shelf, and select challenges that could arise in the context of investor-State arbitration.

1 Introduction

The exploration and exploitation of resources in contested maritime zones are activities regulated first and foremost by the law of the sea. States parties to the United Nations Convention on the Law of the Sea (UNCLOS) have agreed to a set of obligations designed to foster cooperation while curtailing harmful unilateral action.¹ The implications

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of these duties have been detailed in case law\textsuperscript{2} and scholarship.\textsuperscript{3} As significant as the law of the sea may be, however, it does not address all questions of relevance to disputed maritime zones. Given the right factual circumstances, other fields of international law can also have bearing on activities touching upon rival maritime claims. In an effort to illustrate the pertinence of other legal regimes, this contribution will take a closer look at international investment law\textsuperscript{4} and how it could apply to the Falkland Islands (Malvinas). In this hypothetical scenario, a foreign company has obtained a license from the UK or Argentina to explore and/or exploit hydrocarbons in the maritime areas surrounding the contested Islands.

This paper is structured as follows. After briefly outlining some of the maritime aspects of the bilateral dispute, the article will assess whether a bilateral investment treaty (BIT) between Argentina/the UK and the investor’s home State would cover investments located in the maritime zones adjacent to the Falklands (Malvinas). In tackling this problem, the contribution will consider, inter alia, the scope of treaties ratione loci, State practice in relation to overseas territories, the application of treaties to activities in the exclusive economic zone (EEZ) and the continental shelf, and select challenges that could arise in the context of investor-State arbitration.

\textsuperscript{2} See e.g., \textit{Guyana v. Suriname}, 17 September 2007, Award, 30 \textit{U.N.R.I.A.A.} 1, paras. 459-486.


The Maritime Dimension of the Falklands (Malvinas) Dispute

While the Falklands (Malvinas) are mostly known for playing centre stage in a land sovereignty dispute between Argentina and the UK, there is also a significant maritime dimension to the territorial spat. In keeping with the longstanding maxim *la terre domine la mer*, a State’s coast generates maritime zones. This principle applies likewise to islands, meaning that ownership over the Falklands (Malvinas) will give rise to maritime entitlements over adjacent ocean space. Under Article 121 of UNCLOS, to which Argentina and the UK are States parties, islands

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7 Argentina ratified UNCLOS on 1 December 1995. Upon signature and ratification of the Convention, the Argentine Government made declarations reaffirming its rights over the Islands and their maritime zones. The UK acceded to the Convention on 25 July 1997. In a similar fashion, the British Government issued a written statement extending its accession to UNCLOS to the Falklands (Malvinas). These declarations can be consulted at United Nations Treaty Series (UNTS), ‘Multilateral Treaties Deposited with the Secretary-General: Chapter XXI.6: United Nations Convention on the Law of the Sea’, <treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en>, visited on 1 May 2017. On 22 August 1994, the Constitutional Assembly approved a set of amendments to the Argentine Constitution, the first of which reads as follows: “The Argentine Nation ratifies its legitimate and non-prescribing sovereignty over the Malvinas, Georgias del Sur and Sandwich del Sur Islands and over the corresponding maritime and insular zones, as they are an integral part of
fall into one of two classes: (1) islands proper, or (2) rocks which cannot sustain human habitation or economic life of their own. The parties to the dispute treat the Falklands (Malvinas) as belonging to the first category, which pursuant to paragraph 2 of that same provision, is entitled to a territorial sea, contiguous zone, exclusive economic zone (EEZ), and continental shelf. The rights enjoyed by the coastal State in these different maritime zones vary considerably. State sovereignty extends to the territorial sea, the airspace above it, as well as its bed and subsoil.\(^8\) The contiguous zone is an area where the coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations.\(^9\) In addition, the coastal State exercises sovereign rights and jurisdiction over the continental shelf and the EEZ for the purpose of, among other things, exploring and exploiting natural resources.\(^10\)

These rights have not gone unnoticed by the UK and Argentina in regard to the Falklands (Malvinas) areas of maritime jurisdiction.\(^11\) The UK for its part has passed various regulations that are specific to the Islands and concern maritime limits, fisheries and other issues.\(^12\) Ar-

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9 Art. 33 UNCLOS, supra note 1.
10 Parts V and VI UNCLOS, supra note 1.
gentina’s Act No. 23.968, which sets out the maritime zones of the Argentine Republic, contains an annex defining the baselines from which to measure said zones. The annex specifically includes the baselines of the ‘Malvinas Islands’. Another outstanding issue concerns the submissions by both parties to the Commission on the Limits of the Continental Shelf (CLCS). The disagreement over the potential rights and


interests of the inhabitants of the Islands, which feature on the UN’s list of non-self-governing territories,¹⁵ should be mentioned for its maritime component. At the conclusion of the Third United Nations Conference on the Law of the Sea, where UNCLOS came to fruition, a Final Act was adopted as well as several resolutions. Resolution III states that “provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development”.¹⁶ Upon signing and ratifying the Convention, Argentina made declarations contesting the legal status of Resolution III and its applicability to the Islands.¹⁷

In the years following the resumption of diplomatic relations between Argentina and the UK, which were broken off as a result of the 1982 War, bilateral initiatives have led to co-operation on the Falklands (Malvinas), acting under a sovereignty umbrella that safeguards the parties’ respective territorial claims.¹⁸ The areas of activity have been manifold, ranging from military affairs to fisheries conservation and the renewal of commercial flights.¹⁹ Of particular relevance to the present analysis are the efforts that have been made to manage the Islands’ non-living resources.²⁰ A milestone was reached in 1995 with the Joint Declaration

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¹⁷ UNTS, supra note 7.


on Cooperation over Offshore Activities in the South West Atlantic. The parties adopted this instrument so as to encourage the exploration and exploitation of oil and gas in the maritime zones of the Islands. The Declaration announces the establishment of a Commission tasked with furthering cooperation through the formulation of recommendations, the coordination of activities, and the promotion of hydrocarbon development. It even carves out a Special Area for collaborative activities of which the geographical coordinates are defined in an annex to the Declaration. After suspending certain practical arrangements in 2003, Argentina withdrew from the Declaration in 2007. Over the past years, the ‘Falkland Islands Government’ has awarded production licences to companies, based in the UK and elsewhere, within the so-called ‘Falkland Islands Designated Area’. In response, Argentine authorities have taken action against some of these businesses pursuant to domestic administrative and criminal law for their activities in disputed areas of the continental shelf.

The development of hydrocarbons has recently returned to the limelight in bilateral talks between Argentina and the UK. On 13 September 2016, a Joint Communiqué was issued covering a wide range of subject


matters. On the topic of the South Atlantic, the Communique opens with the following paragraph:

In a positive spirit, both sides agreed to set up a dialogue to improve cooperation on South Atlantic issues of mutual interest. Both governments agreed that the formula on sovereignty in paragraph 2 of the Joint Statement of 19 October 1989 applies to this Joint Communique and to its consequences. In this context it was agreed to take the appropriate measures to remove all obstacles limiting the economic growth and sustainable development of the Falkland Islands, including in trade, fishing, shipping and hydrocarbons. Both parties emphasised the benefits of cooperation and positive engagement for all concerned.\(^{24}\)

At the time of writing it remains to be seen how the parties’ above-stated desire to jointly develop the Islands’ oil industry will be implemented. In the interim, the unilateral granting of licenses to foreign companies to explore and/or extract hydrocarbons off the coast of the Falklands (Malvinas), whether by Argentina or the UK, lies within the realm of possibility. In such circumstances, international investment law may be called upon to govern the relationship between the host State and the foreign investor. The remainder of this piece will be devoted to this very topic. The article will offer reflections on two questions that are central to the application of international investment law in disputed maritime zones: 1) does a BIT between Argentina/the UK and a foreign investor’s home State apply *ratione loci* to hydrocarbon activities in the maritime areas of the Falklands (Malvinas); and 2) if so, would there be any particular hurdles to bringing investment claims arising from such activities before an arbitral tribunal?\(^{25}\)


Investment Law and Disputed Maritime Zones

3 The Territorial Scope of BITs

Exploring the territorial nexus between investments situated in contested maritime areas and the host State is inextricably linked with the notion of territory and its spatial extent. International law treats territory as “that defined portion of the globe which is subjected to the sovereignty of a state ... The importance of state territory is that it is the space within which the state exercises its supreme, and normally exclusive, authority”.26 It comprises the land, subsoil, and internal waters (e.g., lakes and rivers), as well as the airspace above the land, internal waters, and territorial sea.27 The territorial sea itself also forms part and parcel of the coastal State’s territory, whereas areas of maritime jurisdiction further seaward do not.28

The territorial scope of treaties is regulated in Article 29 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.29 A textual reading of this provision suggests that absent an
intention to circumvent the basic principle, the scope *ratione loci* of a treaty will extend to the territorial sea, but not to the EEZ or continental shelf of a State.\(^{30}\)

The flexibility permitted under Article 29 is plain to see in the numerous provisions placing territorial limitations on the scope of treaties. Many of these provisions were designed with metropolitan States in mind. On occasion, the latter group has sought to prevent treaties from applying to their far-flung non-metropolitan territories or territories for whose international relations they are responsible. Several techniques have been devised to accommodate these policies.\(^{31}\) There are provisions for optional extension of territorial application as well as clauses

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for optional territorial exclusion. Other provisions take into account the domestic legal requirement (where applicable) that the prior consent of the non-metropolitan territory must be secured. Conversely, some treaties expressly apply to all territories. To modern eyes these problems might seem antiquated in light of the wave of decolonisation and the concomitant independence of former territories. Although these developments have indeed reduced the need for such drafting techniques, they do retain their relevance for certain States.\footnote{32 UN, \textit{Final Clauses of Multilateral Treaties Handbook} (UN, New York, 2003) pp. 78-83.}

The UK’s relationship with the British Overseas Territories, of which the ‘Falkland Islands’ is but one example, is a case in point.\footnote{33 For an early account, see J.E.S. Fawcett, ‘Treaty Relations of British Overseas Territories’, \textit{26 British Yearbook of International Law} (1949) pp. 86-107.}

Territorial clauses are no longer a common feature of contemporary treaty-making. In fact, most treaties nowadays lack a provision to that effect. How does this impact metropolitan States? One could argue that the silence of the treaty leads to the activation of the basic principle of Article 29 of VCLT. Accordingly, the State would be bound in respect of its entire territory, including the non-metropolitan territories. In the absence of a territorial clause, the UK has consistently followed a practice since 1967 whereby its instrument of ratification\footnote{34 I. Hendry and S. Dickson, \textit{British Overseas Territories Law} (Hart, Oxford, 2011) pp. 255-256; Aust, \textit{supra} note 30, pp. 182-183.} specifies to which, if any, of its overseas territories the treaty will be extended.\footnote{35 Other metropolitan States, principally the Netherlands, Denmark and New Zealand, share practices similar to that of the UK.\footnote{36 In recent times, the People’s Republic of China has also developed a comparable approach with respect to Hong Kong and Macau. P.T.B. Kohona, ‘Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations’, \textit{99:2 American Journal of International Law} (2005) pp. 445-447.}}

Other metropolitan States, principally the Netherlands, Denmark and New Zealand, share practices similar to that of the UK.\footnote{37 Hendry and Dickson, \textit{supra} note 35, pp. 255-256; Aust, \textit{supra} note 30, pp. 182-184. \textit{See also} M.E. Villiger, \textit{Commentary on the 1969 Vienna Convention on the Law of Treaties} (Martinus Nijhoff, Leiden, 2009) p. 392.} A number of commentators have held that the longstanding practice is consonant with Article 29 as it ‘otherwise establishes’ the intent to deviate from the ‘entire territory’ rule and is not contested by other States and international organisations.\footnote{37}
exclusion is concerned, the ILC’s Special Rapporteur on Reservations to Treaties asserted in his Third Report that the practice is tantamount to a reservation.38 Ultimately, the resulting Guide to Practice on Reservations to Treaties, adopted by the ILC, did not follow suit: “[i]n principle, [declarations that purport to exclude the application of a treaty as a whole to a particular territory] are not reservations in the sense of the Vienna Convention”.39

Reference should be made to British declarations extending treaties to the ‘Falkland Islands’, ‘South Georgia’ and the ‘South Sandwich Islands’, and the ‘British Antarctic Territory’. Frequently these territorial extensions are met with objections from Argentina, owing to the competing sovereignty claims, inviting rejoinders from the UK.40

Having laid out the relevant considerations of general treaty law, it seems fitting at this juncture to zoom in on BITs. Considered by many to form the backbone of international investment law, bilateral investment treaties can be described as “reciprocal legal agreement[s] concluded between two sovereign States for the promotion and protection of investments by investors of the one State (‘home State’) in the terri-


39 This quote is taken from the commentary to Guideline 1.1.3 (Reservations relating to the territorial application of the treaty) of the Guide to Practice, which reads as follows: “A unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation”. UN, Report of the International Law Commission: Sixty-Third Session (26 April-3 June and 4 July-12 August 2011) (UN Doc. A/66/10/Add.1), 2011, pp. 48-51. For a general overview of the controversies surrounding the application of treaties without explicit territorial clauses to overseas territories, see M. Milanovic, ‘The Spatial Dimension: Treaties and Territory’, in C.J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), Research Handbook on the Law of Treaties (Edward Elgar, Cheltenham, 2014) pp. 209-218.

40 See UN, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (UN Doc. ST/LEG/7/Rev.1), 1994, p. 54, para. 183.
tory of the other State (‘host State’).” As BITs tend to be negotiated on the basis of similar models they largely cover the same content. These instruments typically contain provisions defining the notion of investment, substantive protections of foreign investors (e.g., from expropriation) and dispute settlement clauses (usually providing for investor-State as well as State-to-State arbitration). The territorial condition of BITs is usually nested within the provisions defining the notion of investment within the meaning of the treaty. Generally, the instrument covers investments made ‘in the territory’ of one of the parties to the agreement.

BIT practice on the geographical scope of application shows a marked trend toward the inclusion of the EEZ and/or continental shelf in the definition of ‘territory’. In so doing, the contracting parties seek to cover investments such as extraction facilities and mineral exploration.

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located within the host State’s maritime jurisdiction.\textsuperscript{46} Examples of maritime extension can also be found in BITs concluded between coastal nations and landlocked States.\textsuperscript{47} Different formulas can be identified when it comes to the inclusion of maritime areas beyond the territorial sea.\textsuperscript{48} Certain BITs expressly list the maritime zones with respect to which the parties exercise sovereign rights or jurisdiction,\textsuperscript{49} whereas others refer to rights enjoyed under international law for the purposes of exploration and exploitation of natural resources.\textsuperscript{50} Another group of instruments opt for more general wording, merely making reference to areas where the contracting parties exercise ‘jurisdiction’ without further specification.\textsuperscript{51} Then there are BITs that provide an even more comprehensive definition of ‘territory’, encompassing the air space and artificial islands, installations and structures in the EEZ or on the continental shelf.\textsuperscript{52}

British BIT practice is best understood through the most recent version of the UK Model BIT published in 2008.\textsuperscript{53} Article 1(e)(i) stipulates that “territory” of the UK means “Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the

\begin{footnotes}
\footnote{46} UNCTAD, \textit{Scope and Definition} (UNCTAD/ITE/IIT/11 (vol. II)) p. 44; UNCTAD, \textit{Scope and Definition: A Sequel} (UNCTAD/DIAE/IA/2010/2) p. 100.
\footnote{48} UNCTAD, \textit{supra} note 45, pp. 18-19.
\footnote{49} \textit{See e.g.}, Art. 1 f (i) and (ii) Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, 26 February 1999, <investmentpolicyhub.unctad.org/Download/TreatyFile/154>, visited on 1 May 2017.
\end{footnotes}
future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12”. Although early UK BITs contained rather restrictive territorial definitions, the past two and a half decades have seen the UK include the above formulation in investment agreements fairly consistently. Territorial extension is addressed in Article 13 of the Model BIT: “At the time of [signature] [entry into force] [ratification] of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes”. The “territories” envisioned in this provision are the Crown Dependencies and the Overseas Territories. The wording of Article 13 implies that extension to such territories cannot occur without the consent of the other contracting party. The vast majority of BITs concluded by the UK contain territorial extension clauses that furthermore do not limit the territories to which the extension can be made, and they have been extended to most of the Overseas Territories, including the ‘Falkland Islands’.

As for investment agreements to which Argentina is a party, its BIT with the United States, for instance, yields interesting insights. Pursuant to the terms of this instrument, “territory” means “the territory of the United States or the Argentine Republic, including the territorial

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sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea”.

The reference to UNCLOS is noteworthy as the US is not a State party to the Convention. The expression “as reflected” attests to the customary nature of the relevant UNCLOS provisions. Finally, we turn to the Argentina-UK BIT, which is couched in language near identical to the British Model BIT with respect to its territorial scope and the territorial extension clause.

4 Applying BITs to the Disputed Maritime Zones of the Falklands (Malvinas)

4.1 BITs and Territorial Uncertainty

The overview presented above shows that (1) BITs tend to cover investments located in the territorial sea, EEZ and continental shelf and (2) overall, BITs entered into by Argentina and the UK are not outliers in this regard. Let us now return to the hypothetical scenario of hydrocarbon activities in the maritime areas surrounding the Falklands (Malvinas). Assuming arguendo that the relevant BIT between the host State (Argentina/UK) and the home State of the foreign investor conforms to this trend and, in the case of the UK, that the territorial extension to the Islands has been made, we are faced with an important quandary: does


the contested status of the maritime areas surrounding the Falklands (Malvinas) impact the applicability of the investment agreement?

The existence of unsettled territorial disputes appears to have been factored into the drafting of some BITs. Take for instance a few of the BITs to which Georgia is a party, which define Georgian territory as “recognized by the international community”. It is likely that the choice of wording is influenced by the secessionist conflict over South Ossetia and Abkhazia. Another case in point is the Mauritius-Switzerland BIT, which provides that territory in respect of Mauritius means “all the territories and islands which, in accordance with the laws of Mauritius, constitute the State of Mauritius ...”. The referral to domestic law is possibly connected to the ongoing sovereignty disputes concerning the Chagos Archipelago (administered by the UK as the 'British Indian Ocean Territory') and Tromelin Island (administered by France as part of the ‘French Southern and Antarctic Lands’). The Japan-Peru BIT offers another illuminating illustration albeit unrelated to a territo-


63 For an account of some of the relevant facts of the dispute, see Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), 1 April 2011, ICJ, Preliminary Objections, I.C.J. Reports 2011, p. 70.


rrial dispute. The definition of Japan’s “Area” mentions the EEZ and the continental shelf, yet the description of Peru’s “Area” is generic, simply referring to “the maritime zones.”66 This differentiation, which is out of step with other investment agreements negotiated by Japan in the same period, is due to Peru’s excessive claim to a 200-nautical-mile territorial sea.67

Conversely, the problem is not directly taken up in Argentine and British investment agreements, prompting an examination of the general terms used in these instruments. The territorial scope provisions of the UK Model and Argentina-US BITs, cited above, have a notable commonality. Both cover investments situated in the host State’s maritime zones as designated “in accordance with international law”. Scholars commenting on BITs with similar references to international law note that they are intended to rein in exorbitant assertions of maritime jurisdiction.68 Could this wording be interpreted such that contested ocean spaces fall outside the territorial remit of the otherwise applicable BIT?

At the present, it would be useful to recall that different categories of disputed maritime areas exist. For instance, many undelimited waters are the result of overlapping projections from States whose territory is not in doubt. Other disagreements, by way of example, relate to the breadth of an area of maritime jurisdiction proclaimed by a coastal State or the rights it purports to exercise within that zone. The clash over the Falklands (Malvinas) however is essentially a sovereignty dispute of which the maritime dimension is a derivation. For the latter class of dispute, the “in accordance with international law” proviso might only have an exclusionary effect on disputed maritime zones if it is equally intended to apply to the territory generating areas of mari-

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66 Art. 1.7(a) and (b) Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, 21 November 2008, <investmentpolicyhub.unctad.org/Download/TreatyFile/1733>, visited on 1 May 2017. The definition of the term “Area” is followed by a note declaring that “[n]othing under this paragraph shall affect the rights and obligations of the Contracting Parties under international law”.


The territorial clauses in the cited Argentine and British BITs do not necessarily suggest as much. Upon closer inspection of the structure and grammar of Article 1(e)(i) of the UK Model BIT, one could maintain that the phrase “in accordance with international law” only has bearing on areas beyond the territorial sea, not territory sensu stricto. The argument is stronger still for the Argentina-US agreement, which adds the formula “as reflected in the 1982 United Nations Convention on the Law of the Sea”, because UNCLOS does not directly govern questions of sovereignty over continental or insular land territory.

The jurisprudence of investment tribunals does not provide guidance on this thorny issue. While there has been litigation concerning investments located on the continental shelf and even in disputed maritime zones, there is to the author’s knowledge no publicly available pronouncement addressing the application ratione loci of investment agreements to contested maritime areas. Most of the cases in which the respondent has alleged a lack of territorial nexus between the in-

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72 See D. Roughton, ‘Rights (and Wrongs) of Capture: International Law and the Implications of the Guyana/Suriname Arbitration’, 26:3 Journal of Energy and Natural Resources Law (2008) p. 400, footnote 100: “While the utility of investment treaty claims in the context of a disputed boundary is questionable, it has raised interesting questions in at least one case (not yet in the public domain) as to the extent to which a host state may be liable for an investment made ‘in its territory’ (and so attracting the protections of an investment treaty) or was in fact made in the territory of another state (in which case the protections would not bite). In the latter case, a host state may be estopped from denying such investment was not made ‘in its territory’.”
vestment and the host State deal with completely different matters: the qualification of financial transactions (e.g., loans, sovereign bonds) as investments made ‘in the territory’ of the host State and the degree to which the activities of the investor must be performed within the host State so as to meet the territorial link requirement.73

In a significant recent development, Ukrainian private investors and State-owned enterprises with investments in Crimea have filed claims against the Russian Federation under the 1976 UNCITRAL Arbitration Rules pursuant to the Russia-Ukraine BIT.74 The claims were brought in the aftermath of Russia’s annexation of the peninsula in 2014. The


tribunals in a few of these cases have already held that they have jurisdiction. It appears that the territorial nexus requirement did not form a jurisdictional impediment and the arbitrators arrived at this result without having to assess the lawfulness of Russia’s occupation. The arbitral decisions could be of import to the problems discussed in the present paper but currently remain confidential. Under the applicable procedural rules in these cases, the 1976 UNCITRAL Rules, the awards cannot be publicized without the consent of both parties. As Russia is maintaining a policy of non-participation in respect of the Crimean investment claims, it is uncertain if and when the awards will become part of the public domain.\(^75\)

4.2 Establishing the Territorial Nexus

Due to the novelty of this contribution’s hypothetical scenario, it is a matter of some speculation how an investment tribunal hearing a case concerning hydrocarbon activities in the Falklands (Malvinas) would come down on the territorial nexus requirement. Potential arguments both in favour of and against the existence of such a link will be explored in the ensuing paragraphs.

The determination that an investment has been made ‘in the territory’ of the host State might arise from the arbitrators’ adherence to the host State’s own definition of its territory and maritime areas. It can be argued that a tribunal would attribute considerable weight to such a definition without being bound by it.\(^76\) The same result might obtain

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\(^75\) A. Ross, ‘Crimea Cases against Russia to Proceed’, *Global Arbitration Review*, 9 March 2017, <globalarbitrationreview.com/article/1137587/crimea-cases-against-russia-to-proceed>, visited on 1 May 2017; D. Thomson, ‘Crimea Real Estate Claim Goes Forward’, *Global Arbitration Review*, 5 April 2017, <globalarbitrationreview.com/article/1139023/crimea-real-estate-claim-goes-forward>, visited on 1 May 2017. Russia has stated its position as follows: (1) the “[Ukraine-Russia BIT] cannot serve as a basis for composing an arbitral tribunal to settle [the Claimants’ claims]”, (2) it “does not recognize the jurisdiction of an international arbitral tribunal at the [PCA] in settlement of the [Claimants’ claims]” and (3) nothing in its correspondence “should be considered as consent of the Russian Federation to constitution of an arbitral tribunal, participation in arbitral proceedings, or as procedural actions taken in the framework of the proceedings” (see the PCA’s press reports of the cases listed in *supra* note 74).

\(^76\) Waibel, *supra* note 44, pp. 1249-1250. Furthermore, it is highly unlikely that the respondent State in the proceedings would raise the objection that the Islands fall outside of the BIT’s territorial scope given its longstanding position on the
through other lines of reasoning. Investment tribunals, it would seem, have in the past interpreted unclear BIT terms to the advantage of the investor. Support for this criticised *in dubio pro investore* approach has often been sought in the object and purpose of the treaty, which is purportedly the desire to ‘create favourable conditions for investment’ as expressed in the BIT’s preamble. Applied to the present case, this could lead to a finding that contested areas fall within the treaty’s territorial scope because this outcome would maximize investment protection.77 Alternatively, the tribunal might resort to some sort of effective control criterion.78 The analysis would then hinge on the host State’s actual administration of the area where the investment is located rather than the legal pedigree of its sovereignty and maritime claims. Practice pertaining to the BIT could be yet another relevant factor. By way of illustration, if the host State were the UK, the other State party’s consent to extend the BIT to the Falklands (Malvinas) could be deemed relevant as might be Argentina’s protest to such an extension (or lack thereof).

By the same token, the disputed status of the Islands, as recognised by the UN General Assembly (UNGA),79 and associated considerations of general international law could lead to the rejection of there being a territorial link. The tribunal might derive this result from its applicable law80 and/or an interpretation of the BIT’s territorial scope that relies

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79 E.g., UNGA Resolution 2065 (XX), 16 December 1965. See also UNGA Resolution 31/49, 1 December 1976, in which the General Assembly calls upon the two parties “to refrain from taking decisions that would imply introducing unilateral modifications in the situation”.

80 See e.g., Art. 42 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, <icsid.worldbank.org/en/Documents/resources/2006%CRR_English-final.pdf>, visited on 1 May 2017: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement,
on the technique reflected in Article 31(3)(c) of the VCLT. The latter provision requires the interpreter to take into account “any relevant rules of international law applicable in the relations between the parties”.81

The recent 2016 Council v. Front Polisario judgment of the European Court of Justice (ECJ) is a leading example of the impact that such rules can have on an agreement’s application in contested areas.82 The case was founded on an appeal filed by the Council of the European Union (EU) challenging an earlier decision of the General Court of the EU (GC). In that previous ruling, based on an action brought by the Front Polisario in reaction to the export of Sahrawi produce to the EU, the GC had partially annulled a Council Decision on the conclusion of the EU-Morocco Liberalisation Agreement on agricultural and fishery products “in so far as it approves the application of that agreement to Western Sahara”.83 Said treaty introduces a set of amendments to the

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EU-Morocco Association Agreement which applies to “the territory of the Kingdom of Morocco” as far as Morocco is concerned. Western Sahara is a territory in north-west Africa that appears on the UN’s list of non-self-governing territories. Most of the territory is controlled by Morocco, while the remainder is under the control of the Front Polisario, a national liberation movement of the Sahrawi people. The ECJ set aside the GC’s judgment, ruling that it had “erred in holding ... that the Liberalisation Agreement was to be interpreted as applying to the territory of Western Sahara”. According to the ECJ, the territorial scope of the Liberalisation Agreement in light of the Association Agreement could not be interpreted in a manner that would cover Western Sahara. The reasoning behind this conclusion drew in part upon Article 31(3)(c) of the VCLT.

The ECJ identified three relevant rules of international law. The first is the principle of self-determination, which grants Western Sahara a separate and distinct status in relation to any State, including Morocco. Secondly, the ECJ pointed to the rule codified in Article 29 of the VCLT on the territorial scope of treaties, which has already been discussed in some detail in this contribution. Thirdly, the principle of the relative effect of treaties was given prominence. Article 34 of the VCLT expresses the concept as follows: “A treaty does not create either obligations or rights for a third State without its consent”. As regards the relative effect principle, the ECJ held that (1) the Association Agreement, if applied to Western Sahara, would be tantamount to a treaty affecting a third party and (2) the people of Western Sahara must be regarded as that third party. Without their consent, therefore, the application of the Agreement could not extend to Western Sahara.


84 Council v. Front Polisario, supra note 82, para. 16.
85 Ibid., para. 116.
87 Council v. Front Polisario, supra note 82, paras. 94-99.
88 Ibid., paras. 100-108. See also ibid., Opinion of Advocate General Wathelet, paras. 101-115; Brita, 25 February 2010, ECJ, C-386/08, <curia.europa.eu>, visited on 1 May
The ECJ’s approach in *Council v. Front Polisario* could inform an investment tribunal’s decision as to the territorial applicability of a BIT to the Falklands (Malvinas), although significant distinctions set these two cases apart. A point worth flagging is that the Luxembourg Courts had to interpret the territorial scope of a treaty via a broadly worded provision referring to “the territory of the Kingdom of Morocco”. With respect to British BIT practice, the application of the investment agreement to the Falklands (Malvinas) and its maritime zones would be based on the contracting parties’ explicit consent to a territorial extension, leaving little room for doubt as to their intention.89 Another difference stems from the importance that the ECJ attaches to the particular situation of Western Sahara. The right of its people to self-determination and the separate status of the territory are widely acknowledged by the international community. Turning to the Falklands (Malvinas), it is a matter of controversy if and to what extent its inhabitants can claim the right of self-determination. Moreover, the UN has included the Islands on its non-self-governing territories listing, but not without highlighting the sovereignty dispute between Argentina and the UK. It is thus unclear if and how the ECJ’s reasoning on Western Sahara, whose international status is determined,90 may be replicated for territories and maritime zones that are disputed by States each putting forward plausible legal arguments.

4.3 **The Monetary Gold Principle**

In addition to the interpretative conundrum concerning the territorial nexus, the absence of either Argentina or the UK as a party to the hypothetical arbitral proceedings between the investor and the host State might thwart further consideration of the case. The ‘indispensable third party’ principle, also known as the *Monetary Gold* principle, prevents an international court or tribunal “from deciding a case between two parties amenable to its jurisdiction on the merits if the legal interests of a third State would not only be affected by a merits judgment, but would

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89 In Argentine BIT practice, there is no equivalent resort to the technique of territorial extensions and the scope *ratione loci* tends to be worded in general terms without specific mention of the Falklands (Malvinas).

90 *Council v. Front Polisario*, supra note 82, Opinion of Advocate General Wathelet, paras. 72-75.
form ‘the very subject-matter’\textsuperscript{91} of the case”.\textsuperscript{92} The doctrine is primarily associated with the International Court of Justice,\textsuperscript{93} but has been acknowledged by other inter-State adjudicators.\textsuperscript{94} In the instances where the principle has been raised in investment litigation, the tribunals have not directly taken a position on its applicability to mixed (State/non-State) dispute settlement.\textsuperscript{95} However, it bears mentioning that there has been an arbitration under UNCITRAL Rules in which the Monetary Gold doctrine was invoked \textit{proprio motu} in support of a decision to decline jurisdiction.\textsuperscript{96} Assuming, for argument’s sake, that the notion of indispensable parties does protect third States in the context of investment proceedings, it must still be examined if the principle could play a role in a case based on the hypothetical scenario of this contribution. One could imagine, for instance, a foreign investor obtaining a British

\textsuperscript{91} Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), 15 June 1954, ICJ, Preliminary Question, \textit{I.C.J. Reports} 1954, p. 32.


hydrocarbon license to drill on the continental shelf of the Falklands (Malvinas) and at a later stage launching a case against the UK alleging breaches of its substantive rights. Could Argentina’s position as a non-party to the case bring it to a grinding halt?

The investment tribunal could reach this conclusion due to the territorial link that must be established between the investment and the host State. An analysis of the ICJ’s jurisprudence reveals that the Monetary Gold doctrine will apply in situations where the Court would otherwise have to evaluate the legality of a third State’s conduct or its legal position.97 Paying heed to this restriction on “prerequisite determination[s],”98 the arbitrator might decide not to assess whether an investment has been made ‘in the territory’ of the UK as this would necessarily entail a determination of Argentina’s legal position on the Falklands (Malvinas), something that would run afoul of the principle.99 Nonetheless, an alternative framing of the territorial nexus requirement could circumvent this obstacle if the tribunal accentuates the limited framework within which it operates. The BIT’s definition of territory is generally prefaced by a chapeau employing language such as “for the purposes of this treaty”. Relying on this wording, the award could specify that any finding on the territorial link strictly concerns the application and interpretation of the investment agreement and is without prejudice to questions of sovereignty and maritime jurisdiction under international law more broadly. Additionally, the attitude of the non-party State towards the proceedings could potentially exert influence. Two recent developments should be mentioned in this regard. In the South China Sea Arbitration between the Philippines and China, the arbitrators ruled that Vietnam was not an indispensable third party. In doing so, they stressed that this conclusion was endorsed by Vietnam

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98 Tzeng, supra note 78, pp. 5-6. See also Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), 5 October 2016, ICJ, Preliminary Objections, Dissenting Opinion of Judge Crawford, para. 32, <www.icj-cij.org/files/case-related/160/19224.pdf>, visited on 1 May 2017: “The case law has however set firm limits to the Monetary Gold principle. It applies only where a determination of the legal position of a third State is a necessary prerequisite to the determination of the case before the Court”.
99 See Tzeng, supra note 78, p. 7.
(as evidenced in a statement Hanoi had sent to the tribunal).\textsuperscript{100} The Crimean investment cases discussed above are also noteworthy in that many of the tribunals hearing these claims granted Ukraine permission to make a submission as a non-disputing party to the Ukraine-Russia BIT.\textsuperscript{101} It would seem that Kiev’s goal was to reassure the arbitrators that they could find jurisdiction without having to rule on Russia’s presence in Crimea.\textsuperscript{102} As some of these tribunals have already decided that they may proceed to the merits, it is entirely possible that Ukraine’s statements helped ease any concerns over its rights as a third State being harmed by the rulings. In light of these developments, an Argentine submission objecting to a Falklands (Malvinas) investment case between the investor and the UK could impact the appreciation of the doctrine of indispensable parties.\textsuperscript{103}

5 Conclusion

It has been observed that “the era of investment protection has been one of stable territorial relations”.\textsuperscript{104} As we face evermore situations of territorial complexity, be it Crimea, Western Sahara or the intricacies

\begin{itemize}
\item \textsuperscript{100} South China Sea Arbitration, supra note 94, paras. 179-188.
\item \textsuperscript{101} The cases mentioned in supra note 74.
\item \textsuperscript{102} Ross, supra note 75.
\item \textsuperscript{103} The ability of Argentina to make such a submission to an investment tribunal will depend on the applicable procedural rules. See e.g., Art. 37(2) ICSID Arbitration Rules, 10 April 2006, <icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partF.htm>, visited on 1 May 2017; “After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission”.
\item \textsuperscript{104} Grant, supra note 61, p. 30.
\end{itemize}
of State succession, international investment law is gradually entering uncharted waters.\textsuperscript{105}

The Falklands (Malvinas) and their surrounding maritime zones form no exception to this rule. As long as Argentina and the UK have not worked out a plan pursuant to the 2016 Joint Communiqué allowing for and regulating foreign investment, the unilateral licensing of concessions in these areas will be fraught with legal uncertainty. This contribution has demonstrated that general international law could have a disruptive effect on the application of international investment law to disputed zones. An investment tribunal hearing claims relating to the contested Islands might very well be undeterred by the underlying sovereignty dispute or find ingenious means to overcome this concern.

It is, however, equally possible that the territorial link requirement under BITs and/or the Monetary Gold principle will stop such a case in its tracks, lest the adjudicator pass judgment on the rights of whichever claimant State is absent from the proceedings. If anything, foreign companies contemplating investments in contested maritime areas are well-advised to reflect upon these legal risks as part of their due diligence process.\textsuperscript{106}
