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“The principle of territoriality in International Investment Law and Arbitration”

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Master’s Thesis:

“The principle of territoriality in International Investment Law and Arbitration”

[1]

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[1] Image from <https://www.freepik.com/premium-photo/hand-holding-virtual-global-network-with-business-icons-such-as-graph-dollar-sign-business-investment-transformation-by-use-artificial-intelligence-analysis-big-data-is- important_8675567.htm#page=4&query=global+economy&position=3>

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Abbreviations

BIT: bilateral investment treaty

CETA: Comprehensive Economic and Trade Agreement between Canada and the EU

ECHR: European Court of Human Rights

ECJ: European Court of Justice

ECT: Energy Charter Treaty

FTA: free trade agreement

ICJ: International Court of Justice

IIA: international investment agreement

ICSID: International Centre for Settlement of Investment Disputes

ICSID Convention: The Convention on the Settlement of Investment Disputes between States and Nationals of other States

NAFTA: North American Free Trade Agreement

PCA: Permanent Court of Arbitration

SCC: Arbitration Institute of the Stockholm Chamber of Commerce

TPP: Trans-Pacific Partnership

UNCLOS: United Nations Convention on the Law of the Sea

VCLT: Vienna Convention on the Law of Treaties

VCST: Vienna Convention on Succession of States in Respect of Treaties

1. Introduction

1.1. Globalisation and the concept of territoriality

In our globalised society the normative role of territoriality has decreased. It has been explored and analysed that different actors and organising structures have emerged to take up space in the global world order[2]. Nonetheless, its organising role remains important, albeit more distinct and nuanced[3]. In Public International Law, it is important to note that the scope of application of treaties is the territory of the State, unless otherwise stated:

"*Article 29: Territorial scope of treaties*
Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

1.2. Territoriality in International Investment Law

In International Investment Law, the requirement for an investment to be made "in the territory", while not included in the ICSID Convention, appears in the text of most investment treaties.

More specifically, a definition of an "investment" is not stipulated by the ICSID Convention, which operates as a framework for ICSID arbitration, before looking to the specific provisions of different IIAs. The ICSID Convention sets out that "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State*".

Even in absence of a definition it has been argued that this article is to be interpreted as giving an "objective jurisdictional core" to investments[4]. According to this

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[2] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999.
[3] Caroline Kleiner and Francesco Costamagna, 'Territoriality in Investment Arbitration: The Case of Financial Instruments' (2018) 9 Journal of International Dispute Settlement 315.
[4] Michael Waibel, 'Sovereign Defaults before International Courts and Tribunals' (2557) 7 Cambridge Studies in International and Comperatrive Lawive Law 1. p. 250

thinking, there are objective elements which should be checked against an economic transaction to determine if it should fall under the term of investment, and article 25 ICSID should be used and interpreted so as to outline the perimeter of jurisdiction in ICSID cases[5]. This view has not been adopted by tribunals as far as territoriality is concerned but has been the way other attributables of the term have been determined by certain tribunals. It has also been argued that this requirement stems from the nature of obligations of investment protection treaties[6].

The opposite opinion, arguing that a territoriality requirement is not to be read into article 25 ICSID, has also been supported among scholars[7].

In each case, the majority of IIAs include wording limiting their scope of application ratione materiae by extending their protection only with regards to investments which present a link to their territory[8]. The few exceptions from this general rule include CETA[9].

In treaties which include a definition of the term "territory" it is construed to include a State's land, territorial sea, and any further sea zone over which a State exercises sovereignty (e.g. exclusive economic zone)[10].

The requirement for a territorial nexus between the investment and the Host State is commonly featured in their definition of an investment. An example of this is the Colombia-UK BIT, dated 2010, which defines an investment as "*every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party in the territory of the other Contracting Party, in accordance with the law of the latter*".

In addition, a lot of IIAs the territoriality requirement is referenced in clauses which set out the scope of application of the agreement. For example, NAFTA states in Chapter 11, which sets out the foreign investment protection proisions, that it covers

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[5] ibid.
[6] Katia Yannaca-Small and Dimitrios Katsikis, 'Part III Guide to Key Jurisdictional Issues, 11 The Meaning of "Investment" in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues (2nd Edition)* (2018).
[7] CHRISTOPH H Schreuer and others, *The ICSID Convention: A Commetary, A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2009).
[8] Kleiner and Costamagna (n 3).
[9] ibid.
[10] Yannaca-Small and Katsikis (n 6).

"*investments of investors of another Party in the territory of the Party*". Similarly, ECT states that "*the protection extends to investments made in the Area of a Contracting Party*".

Moreover, such qualification can also be found in provisions setting out substantive protection standards in IIAs[11]. According to the context, this can either be a repetition of the territorial requirement set already in the definition or scope, or otherwise, qualify in this way not the covered investment but the Host State's obligations regarding a specific undertaking[12]. An example of this is Japan-Uruguay BIT, dated 2014, stating "*Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circum- stances to investors of a non-Contracting Party and to their investments with respect to investment activities*".

Furthermore, this subject has also been brought up at the stage of calculation of compensable damages, where the existence of an investment has been proven, and the examination of the territoriality link refers to the parts of the international production network it includes.[13]

1.3. An introduction to challenges posed by the territoriality requirement

Territoriality as a concept appears to be straight forward.

Indeed, certain types of investments present an obvious link to a State, such as investments in real property.

[11] Kleiner and Costamagna (n 3).

[12] ibid.

[13] Marina Chernenko, 'The Upshot of Up-Stream Losses in Mexico v Cargill: Judicial Deference to International Arbitration Tribunals' [2011] Osgoode Hall Law School <http://www.thecourt.ca/the-upshot-of-up-stream-losses-in-mexico-v-cargill-judicial-deference-to-international-arbitration-tribunals/> accessed 15 November 2020.

Nonetheless, modern day complex structures of economic activity such as those regarding monetary obligations, financial transactions or shareholdings have led to a need to interpret and deconstruct the meaning of territoriality of an investment[14].

Moreover, exceptional territorial circumstances, such as the annexation of Crimea by Russia in 2014, have forced an evolution of the understanding of the territoriality requirement which has been on the epicentre on the investment arbitrations between Ukraine and Russia.

Looking to the future, we must assume that the interpretation given to the territoriality requirement will remain relevant, as the globalised economy continues to develop types of transactions that do not adhere to the traditional methods of ownership of property[15].

In the present, I am going to discuss the multiple issues raised in investment arbitration where the territorial nexus of the investment has been called into question, and the academic analysis thereof.

[14] Christina Knahr, Noah Rubins and Ben Love, 'The Scope of Application of International Investment Agreements, F. The Territorial Nexus between an Investment and the Host State' in Marc Bungenberg and others (eds), *International Investment Law:A Handbook* (2015).

[15] Margaret Clare Ryan, 'Is There a "Nationality" of Investment? Origin of Funds and Territorial Link to the Host State', *A series on International Arbitration*, vol 8 (JurisNet LLC, International Arbitration Institute 2018).

2. Early NAFTA cases: declining jurisdiction on the basis of insufficient territorial nexus

2.1. Bayview v Mexico

In Bayview v Mexico, stakeholders of an irrigation system located in Texas U.S.A., which largely depended on the water flow of the Rio Grande river of Mexico, sought arbitral protection claiming that Mexico seized and diverted the flow of the water they had property rights in. The claimants had ownership rights in the river water once in entered into US territory.

The tribunal first considered the wording of NAFTA's definition of investment to conclude, after examining its object and purpose pursuant the interpretation rule of article 31 VCLT, that even though it was not expressly stated, NAFTA covers investments made in the territory of a different NAFTA party, and not domestic investments within NAFTA contracting parties. The tribunal stated:

"*While the effect of the NAFTA may in some respects be close to the effect of the elimination of economic boundaries between the three States Parties, and while it is certainly true that the purpose of NAFTA was to strengthen the economics link between their economies, the three States Parties remain three distinct sovereign States with three distinct nationalities. Therefore, when an investor of one NAFT A Party makes an investment that falls under the laws and the jurisdiction of the authorities of another NAFTA Party, it will be treated as a foreign investor under Chapter Eleven…*[16]"

"[NAFTA] *was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party.*[17]"

[16] *Bayview Irrigation District et al v United Mexican States, ICSID Case No ARB(AF)/05/1 (Award, June 19, 2007)* (2007) 22 ICSID Rev 433¶¶ 102.
[17] ibid, ¶¶ 103.

Having made the distinction between foreign and domestic investors, the tribunal examined if the claimant's water rights qualified them as foreign investors[18]. It found that these rights were only opposable against the State of Texas, and therefore denied jurisdiction, pursuant to the following thinking:

"*While the water is in Mexico, it belongs to Mexico, even though Mexico may be obliged to deliver a certain amount of it into the Rio Bravo / Rio Grande for taking by us nationals. Thus, the Claimants do not own any of the water within Mexico. Nor do the Claimants possess any water rights in Mexico and enforceable against the State of Mexico. Their water rights are granted by the State of Texas. Those rights are created in Texas and exercised in Texas.*[19]"

This case, which was issued in 2007, was the first case in which a tribunal declined jurisdiction for a reason relating to the territorial nexus of the investment under examination with the Respondent State[20].

2.2. Canadian Cattlemen for Fair Trade v United States

In Canadian Cattlemen for Fair Trade v United States, issued in 2008, the tribunal was also called to examine the territoriality requirement in respect to NAFTA investment provisions, coming to the same conclusions as in Bayview[21]. It also drew a distinction between cross- border trade services and investors, stating that actors which operate as investors in their home country will not be considered as such with regards to other contracting parties if their operations in the territory thereof are merely of a nature of cross-border trade[22]. More specifically it stated that:

"*The drafters of Chapter Eleven thus carefully differentiated between the underlying cross- border service and the commitment of financial resources pursuant to a requirement of the country to which the services are exported. The*

[18] Christina Knahr, 'Investments "in the Territory" of the Host State' (2009) 1101 International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer.
[19] 'Bayview Irrigation District et Al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (Award, June 19, 2007)' (n 16).
[20] Knahr, Rubins and Love (n 14).
[21] Knahr (n 18).
[22] ibid.

exclusion makes no exception for those cross-border service providers that have investments in their home country that enable them to provide the services, as this Tribunal would expect if Claimants' position were the intended one. The precise textual distinction of this Article, and the absence of provisions addressing home country investment, thus reinforce the conclusion that Chapter Eleven is not intended to apply to interests arising merely from cross-border trade activities.[23]"

2.3. Conclusions

The above- mentioned NAFTA cases were the first in which a tribunal came to base its rejection of jurisdiction on an absence of territorial nexus of the foreign investment to the Host State. In Bayview it was observed that a "legally significant connection" with the alleged Host State is required to affirm a foreign investment has been made in its territory.

This requirement leads to a distinction between an exporter to another State and a foreign investor in a State, and both cases make it obvious that such distinction is not easily made in each case[24]. It is also important to note that it is the specific structure and wording of NAFTA that promotes this distinction between economic activities and investments. More specifically, NAFTA article 1139 states that "*investment does not mean claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party*."

Other IIAs contain investment definitions that allow for a large number of economic activities to fall under the umbrella of protected investments, and it then becomes a matter of interpretation to admit the limits to the defined term.

[23] NAFTA/ UNCITRAL, 'The Canadian Cattlemen for Fair Trade v. United States of America. Award on Jurisdiction' [2008] January 28. ¶¶ 147
[24] Knahr (n 18). p. 52

3. Investments in Intangible Property

The concept of territoriality of an investment becomes harder to outline once in the sphere of intangible property investments[25]. Such investments are those concern the provision of services, financial instruments and products, intellectual property, etc.

It becomes apparent that modern day economic activity takes forms and shapes that are not easily categorized, and the application of traditional investment distinctives requires a rethinking of the purpose they fulfil in order to reconstruct these concepts to fit into the complex system of today's foreign investment protection.

In the following chapters we will consider some such issues which have been addressed by arbitrational tribunals.

[25] Yannaca-Small and Katsikis (n 6).

3.1. Contracts for the Provision of Services with operations in multiple jurisdictions

In many cases an investment can comprise of a number of activities and operations, taking place in different places. The cases of SGS v. Philippines, Paraguay and Pakistan examine the extent of activities which form part of an investment which ought to be performed "in the territory" for the fulfilment of the territoriality requirement[26].

These were cases where the investor in question had undertaken to execute pre-shipment inspections for each respective country, while basing its operations primarily outside their territory[27]. The relevant BITs all included "in the territory" qualifications in their text[28].

3.1.1. SGS v. Pakistan

In SGS v. Pakistan, Pakistan objected to the courts jurisdiction, stating that the essential part of the performance of the contract took place outside of its territory, while not disputing that SGS also maintained offices in their territory, it was stated that they contributed services of limited significance, and for this reason the activity in question did not constitute an investment within the territory of Pakistan[29][30]. The tribunal did not accept this argument, stating: "*The [...] Agreement defined the commitments of SGS in such a way as to ensure that SGS, if it was to comply with them, had to make certain expenditures in the territory of Pakistan. While the expenditures may be relatively small [..] they involved the injection of funds into*

[26] Knahr (n 18).
[27] Knahr, Rubins and Love (n 14).
[28] Ryan (n 15).
[29] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan (ICSID Case No ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction (FP Feliciano, President, A Faurès, C Thomas), 6 Aug 2003* 360. ¶¶ 75-77
[30] Ryan (n 15).

the territory of Pakistan for the carrying out of SGS's engagements under the […] Agreement.[31]"

3.1.2. SGS v. Philippines

In SGS v. Philippines the Tribunal examined this matter a bit further. The Philippines raised that the operations taking place in the territory, which were "*incidental or peripheral*" should be seen separately from services being provided extraterritorially, the latter being the operations relevant to the incident from which the claim arose. The Tribunal rejected this argument, and saw the agreement for provision of pre- shipment inspections as a whole, making a point of the benefits it allowed the Philippines, stating "*The Tribunal does not agree that SGS's services under the CISS Agreement can be subdivided in this way. Under the CISS Agreement, SGS was to provide services, within and outside the Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines*[32]".

This factor was not evaluated in isolation by the Tribunal, which added an argument in favour of the significance of the operations taking place in the Philippines, before concluding that "*These elements taken together are sufficient to qualify the service as one provided in the Philippines.*[33]". Moreover, it stated that "*The fact that the bulk of the cost of providing the service was incurred outside the Philippines is not decisive. Nor is it decisive that SGS was paid in Switzerland.*[34]".

The case of SGS v Paraguay came to similar findings[35].

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[31] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction (F.P. Feliciano, President, A. Faurès, C. Thomas), 6 Aug. 2003* (n 29). ¶¶ 136

[32] *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 (AS El Kosheri, President, A Crivellaro, J Crawford), 29 Jan 2004* [2014] Int Law Reports 444. ¶¶ 101

[33] ibid. ¶¶ 103

[34] ibid. ¶¶ 106

[35] Ryan (n 15).

3.1.3. Conclusions

In the Tribunals' reasoning in these cases we find an interplay between a traditional brick and mortar approach, and one trying to balance the different interests arising out of a certain economic activity and see how a State might benefit from it[36]. It is clear from this analysis that the Tribunals did not feel comfortable relying only in the limited operations taking place in the territory but looked to compensate for this by highlighting the benefit factor.

While a holistic approach taking into consideration all aspects of an alleged investment does not pose any problems, it is still unclear what part of an investment's operations in the territory will suffice to satisfy the relevant criterion[37].

This multifactorial approach to the interpretation of the territoriality requirement is a common feature in Tribunal's interpretation of the territoriality requirement as will also be demonstrated bellow.

[36] Ian A Laird and others, 'International Investment Law and Arbitration: 2013 in Review' in Oxford University Press (ed), *Yearbook on International Investment Law & Policy 2013- 2014* (Bjorklund, Andrea K 2015).
[37] Knahr, Rubins and Love (n 14).p 596

3.2. Intellectual Property

In Apotex v USA, a NAFTA case issued in 2013, regarding generic pharmaceuticals and patents, the tribunal examined whether a) the distribution in the US market of generic pharmaceutical products formulated, developed and manufactured in Canada, b) the preparation of ANDAs for filing in the United States, including all the effort and expenditure that this entails, and the resulting ANDAs themselves and c) utilisation of its US affiliate, and the purchase of raw materials and ingredients in the United States, could be seen, together or separately, as an investment in the US.

For the first and third element the tribunal found no significant territorial link and went on to examine the aspect of the ANDAs[38]. While the filing of the applications themselves was rejected by the court for a lack of territorial nexus, since the research and preparation took place in Canada, the case for an ANDA itself constituting a protected investment was examined more thoroughly[39].

Apotex argued that an ANDA "*comprises thousands, if not tens of thousands of pages containing confidential and proprietary information pertaining to the formulation, development, manufacture, testing, packaging, labelling, and storage of the proposed generic drug product*[40]" which stands to benefit the U.S. economy. For this reason, Apotex claimed that it is "*property acquired in the expectation or used for the purpose of economic benefit or other business purposes*.[41]"

The court rejected these arguments, stating that "*in the Tribunal's view, neither of Apotex's sertraline and pravastatin ANDAs are properly characterised as "property acquired in the expectation or used for the purpose of economic benefit or other business purposes," within the meaning of NAFTA Article 1139(g), and none of Apotex's submissions are sufficient to distinguish itself from a mere exporter of goods into the United States*.[42]", and "*the Tribunal is not persuaded that an ANDA must be characterised as "property" for the purposes of NAFTA Article*

[38] Laird and others (n 36).
[39] ibid.
[40] NAFTA/ UNCITRAL, 'Apotex Inc v the United States of America'. ¶¶ 203
[41] ibid. ¶¶ 103
[42] ibid. ¶¶ 206

1139(g) because it contains "confidential data and information". As the Respondent has observed, Apotex may have a right under U.S. law to have its disclosures to the FDA kept confidential, but there is no basis for this to transform the inherent nature of the ANDA itself, from an application for permission to export goods into the United States, into some form of investment within the scope of NAFTA Article 1139(g).[43]" and declined jurisdiction to hear the case.

This case has been criticized for having interpreted the territorial nexus requirement with a traditional, brick and mortar model investment in mind, and for this reason failing to recognise the value of intellectual property in investments[44].

As seen in similar cases, the existence of even an office in the US might have had resulted in the recognition of the existence of an investment in its territory, even though this would not have altered the nature of the activity overall[45]. While a large number of IIAs have included intellectual property in their definitions, intellectual property rights are in this way treated as secondary considerations after other elements have been assessed.

It has also been observed that there is "tension" between the approach followed in this case and its contemporary Ambiente Ufficio, which is only partly explained by the difference in the texts of the relevant treaties[46]. Some scholars, and a lot of tribunal decisions on financial transactions discussed below, that the relevant question to be asked, when dealing with investments in intangible assets is "qui bono", focusing on the benefit the Host State will stand to receive from an economic activity[47].

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[43] ibid. ¶¶ 219
[44] Laird and others (n 36).
[45] ibid.
[46] ibid.
[47] ibid.

3.3. Financial transactions instruments and products

The location of an investment is particularly elusive in cases of financial transactions, instruments and products. The reason is that these kinds of transactions do not present a strong territorial element.

As will be analysed bellow, tribunals have argued against the universal application of criteria for determining the situs of the investment and have determined substitute criteria for the fulfilment of this requirement in the case of financial instruments. More specifically, they have argued that it is not crucial for activities to be partly performed in the territory of the Host State or an injection of funds to be made into the country[48]. Instead they have found their determining factor as regards financial instruments to be the previously discussed "qui bono" or benefit of the Host State.

3.3.1. Fedax v Venezuela

The Fedax v Venezuela case, issued in 1997 by an ICSID tribunal, concerned debt instruments issued by Venezuela and assigned by way of endorsement to Fedax[49]. In this case, the Respondent contended that the debt instruments in question did not qualify as an investment, since they did not concern a "*a long-term transfer of financial resources -capital flow- from one country to another... which normally entails certain risks to the potential investor",* and overall, there was no territorial nexus to the country.

The tribunal examined the definition of investment included in the relevant BIT which included *"titles to money [which] are not in any way restricted to forms of direct foreign investment or portfolio investment.*"

The tribunal held that an injection of funds into the Host State is not a necessary condition for a transaction to be considered an investment in financial transactions, since in these cases, it is typical for the agreement to have funds otherwise granted

[48] Ryan (n 15). p 116

[49] 'Fedax N.V. v. the Republic of Venezuela' [1997] International Centre for Settlement of Investment Disputes: Case No. ARB/96/3. ¶¶ 1

to the Host State, without them being physically transferred into its country. In the tribunal's words "*While it is true that in some kinds of investments… such as the acquisition of interests in immoveable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities*".

The tribunal instead considered that the critical question was the resulting contribution of funds to the Host State in a framework where they are to be utilised for governmental needs resulting to its development, as was the case in Fedax v. Venezuela, where funds were provided to finance its budget. More specifically, the tribunal concluded that "*The 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. It is not disputed in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs*[50]".

Fedax established the "benefit test". It is important to note, that in this case, the promissory notes in question were issued in connection with a contract for the provision of services. As discussed below, Fedax findings were later adopted by the tribunals of the Argentinian sovereign bond cases to support the existence of a territoriality requirement in debt instruments purchased in the secondary market[51].

[50] ibid. ¶¶ 41
[51] Kleiner and Costamagna (n 3). p. 325

3.3.2. CSOB v Slovakia

In CSOB v Slovakia, issued in 1997, the tribunal followed the findings of Fedax when also facing a similar jurisdictional objection concerning lack of territorial nexus. The case considered a loan which did not involve a transfer of funds into Slovakia, but the tribunal did not find this to be decisive as regarded the qualification of this invested to have been mad "in the territory" of the state.

The tribunal found that considered holistically, this transaction fulfilled the benefit test, as it aimed at facilitating the privatisation of its bank "*CSOB's activity in the Slovak Republic and its undertaking to ensure a sound banking infrastructure in that country compel the conclusion that CSOB qualifies as the holder of an 'asset invested or obtained' in the territory of the Slovak Republic within the meaning of Article 1(1) of the BIT*[52]"

[52] 'Ceskoslovenska Obchodni Banka, a.s. (CSOB) v. Slovak Republic' [1999] International Centre for Settlement of Investment Disputes: Case No. ARB/97/4. ¶¶ 89

3.3.3. Cases resulting from the Argentinian financial crisis: Abaclat and Ambiente

3.3.3.1. Background

In December 2001, Argentina declared a moratorium on its debt payments, which lead to a sovereign debt of $100 billion. In response to this financial crisis the Argentinian government implemented a sovereign debt restructuring program. The process followed was to offer to exchange defaulted bonds with new, heavily discounted instruments in 2005 and again in 2010[53].

While most creditors accepted the offer, there was a very small percentage that refused this the option to exchange their bonds. Instead, they brought various lawsuits against Argentina.

Among these were requests for arbitration filed by Italian nationals, under Argentina- Italy BIT before ICSID tribunals, most notably Abaclat and Ambiente Ufficio[54].

In these cases, the claimants had purchased security entitlements to Argentinian sovereign bonds issued in various currencies and listed in different international exchanges worldwide. It is important to state that they were not counterparties to the original subscription to the bond loan program, meaning that they had not directly funded Argentina's economic ability, nor its development. Rather, they had purchased the sovereign bonds in the secondary market, from which the original bondholders only stood to gain. On the other hand, the ability to sell bonds in the secondary market increases the desirability of investing in sovereign bonds, and in this way, it could be argued that there is a link between their activity and the funding Argentina got from the subscription of its sovereign debt.

Furthermore, the sovereign bonds were governed by foreign law and were subject to the jurisdiction of courts outside Argentina[55].

[53] 'Argentina Debt Timeline' [2013] The Wall Street Journal.
[54] Kleiner and Costamagna (n 3). p. 317
[55] Yannaca-Small and Katsikis (n 6).

These cases presented an opportunity to explore the findings of Fedax and elaborate on them.

Pursuant to the wording adopted by the Argentina- Italy BIT, an investment can be "*any conferment or asset invested or reinvested… in the territory of the other Contracting Party*". Argentina raised a jurisdictional objection claiming that these transactions had not taken place in its territory, nor had there been an allocation of funds in its territory, and therefore these transactions did not constitute investments, pursuant to the meaning of the term in investment protection treaties.

3.3.3.2. Abaclat

The first such case was Abaclat v Argentina, issued in 2011, where the tribunal held that for investments of a financial nature, the existence of a territorial nexus between an investment and the Host State should not be examined on the basis of traditional criteria such as the existence of "*business operations and/or involving manpower and property*" in the territory of the Host State.

The tribunal also rejected the criterion of the location where the funds had been physically transferred[56]. Instead it suggested that in establishing the situs of the investment, the determinant factor should be the identification of the Host State's benefit from this transaction, such as having funds be made available for its economic development.

More specifically, the tribunal found that the funds generated by the issuance of sovereign bonds were directly linked to Argentina's development, such as having previous debt repaid: "*There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina's economic development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its*

[56] 'Abaclat and Others v Argentine Republic' (2011) 27 International Centre for Settlement of Investment Disputes: Case no. ARB/07/5 237. ¶¶ 374

finances, and as such must be considered to have contributed to Argentina's economic development and thus to have been made in Argentina[57]".

As regards the fact that the sovereign bonds in question were purchased in the secondary market, the tribunal held that that did not minimize the connection with the funding provided to Argentina. It argued that such connection stems from the structure of such transactions, where the initial obligation for payment included in the original bond hold agreement is the reason why the secondary investors chose to purchase the bonds. In the words of the tribunal "*such argument ignores the reality of the bond issuance process. Indeed, although the payment of the lump sum price for the bonds and the payment of the purchase price by the individual holders of security entitlements happened at different points in time, the latter constitutes the basis for the former. As mentioned above (see § 359), the bonds and the security entitlements are part of one and the same economic operation and they make only sense together: Without the prior insurance to be able to collect sufficient funds from the individual purchasers of security entitlements, the underwriters would never have committed to the payment of the lump sum payment. In other words, the lump sum payment is an advance made by the underwriters to Argentina on the future payments of individual investors*.[58]"

3.3.3.3. Ambiente Ufficio v Argentina

The Ambiente Ufficio tribunal followed close to the line of reasoning adopted by the Abaclat majority, and a dissenting opinion was expressed, close in reason to the one in Abaclat.

The tribunal similarly found that the criteria for determining the territoriality factor should vary according to the nature of the transaction. It argued that a financial instrument is not a physical investment, and it would be absurd for the decisive criterion to be whether it is physically located in Argentina. "*financial instruments*

[57] ibid. ¶¶ 378
[58] ibid. 376

such as bonds/security entitlements are not physical investments such as a piece of land, an industrial plant or a mine, […].[59]"

It continued to establish the benefit test as decisive, stating "*The Tribunal is convinced that, in order to identify in which State's territory an investment was made, one has to determine first which State benefits from this investment. Most observers will agree that the one criterion which may be taken from the ICSID Convention itself when it comes to determining the nature of an investment under this Convention, is that of a contribution "for economic development", as referred to in the first preambular paragraph of the ICSID Convention*[60]".

The tribunal found that the correct reading of article 25 of the ICSID Convention is to one that makes it flexible for different kinds of investments, and rejected the necessity for an investment to fulfil predetermined criteria, regardless of its nature. In this way it agreed with the approach adopted by Professor Schreuer in the second edition of the Commentary to the ICSID Convention. Nonetheless, it found that such criteria are typical in an investment and examined the facts of the case against those. In examining the significant contribution to the development of the host country, it found that "*given the unity of the economic operation at stake, that the funds generated through the bonds issuance process were ultimately made available to Argentina and must be deemed to have contributed to Argentina's economic development. In view of the volume of the bonds involvement, the contribution was certainly significant to Argentina's development*.[61]".

This case clearly showcases the similarity of the interpretation given to the territoriality requirement in financial transactions and the fourth Salini criterion. In the view of the writer, the different analyses through which this prerequisite is being confirmed by tribunals when examining the notion of investment showcases the urgency of a prerequisite for a distinct contribution to the development of the Host State in today's investment protection priorities.

[59] ICSID, 'Ambiente Ufficio S.P.A. and Others (Case Formerly Known as Giordano Alpi and Others) v Argentina. Decision on Jurisdiction and Admissibility' [2013] (ICSID Arbitral Tribunal, Case No ARB/08/9, 8 February 2013). ¶¶ 509

[60] ibid. ¶¶ 499

[61] ibid. ¶¶ 487

3.3.4. Deutsche Bank v Sri Lanka

The Deutsche Bank v Sri Lanka case, issued in 2012, is a case where an economic agreement with an even more remote territorial element was found to fall within the notion of the territory of an investment, following the reasoning adopted by the Abaclat tribunal. It concerned a hedging agreement, executed between Deutsche Bank and CPC, a petroleum company wholly owned by Sri Lank, whose object was to absorb oil price fluctuations.

The tribunal examined the existence of a territorial nexus following the benefit test, concluding that the intended benefit was sufficient to satisfy the territorial requirement[62]. In the words of the tribunal "*the funds paid by Deutsche Bank in execution of the Hedging Agreement were made available to Sri Lanka, were linked to an activity taking place in Sri Lanka and served to finance its economy which is oil dependent. The Tribunal therefore decides that the condition of a territorial nexus with Sri Lanka is satisfied*[63]".

[62] Kleiner and Costamagna (n 3). p. 321

[63] ICSID, 'Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka' [2012] ICSID CASE NO. ARB/09/02. ¶¶ 292

3.3.5. Cui bono or the benefit test pursuant to the cases examined

In the cases analysed above, the tribunals have found that in financial transactions a territoriality requirement can be fulfilled when there is a "continuous credit benefit" to the State[64].

In Abaclat and Ambiente Ufficio, the tribunals clearly stated that no physical element is implied in the territoriality requirement as regards investments which lack a physical element[65]. Adopting the views of the Fedax tribunal, the question then turned to establishing that funds were made available to be utilised by the Host State to finance its budgetary needs.

Likewise, in CSOB the objective of the transaction was to facilitate CSOB transition to a free market enterprise, which was also found to fulfil the benefit test.

In Abaclat and Ambiente, the tribunal went so far as to state that purchases of sovereign bonds on the secondary market fulfilled the benefit criterion, since they were prt of the same process, aimed at raising funds for the governmental spending and development needs of Argentina[66]. The tribunals held that actual demonstration of a link between the resources provided and activities aimed at the promotion of Argentina's economic development were not necessary, since such result is implicit in the nature of sovereign debt, regardless of how these funds are actually used[67].

Additionally, in Deutsche Bank v Sri Lanka, the benefit test was satisfied by an agreement with no territorial features, other than its contribution to stable oil price earnings of a state-owned company.

It is also noted that the SGS v Philippines tribunal explicitly rejected the benefit test as a stand-alone condition.

These findings have been met with a lot of criticism. Academics have made a number on remarks regarding the suitability of the benefit test.

[64] Kleiner and Costamagna (n 3). p. 321
[65] ibid. p. 321
[66] ibid. p. 321
[67] ibid. p. 321

3.3.6. Abaclat Dissenting Opinion by Abi- Saab and other criteria proposed for the determination of the territorial nexus

In his dissenting opinion of arbitrator and professor Abi-Saab advocates for a radically different approach of method to determine the situs of the investment, which is founded in private international law rules.

More specifically, he considers that an investigation into the existence of a territorial nexus should look at the legal and material criteria underlying the treaty claim[68].

First, he observes that the financial instruments in question "*have been sold in international financial markets, outside Argentina, with choice of law and forum selection clauses subjecting them to laws and fora foreign to Argentina. In fact, they were intentionally situated outside Argentina and out of reach of its laws and tribunals.*[69]". He considers the selection of courts outside Argentina to be amongst the most prominent elements to be examined with regards to the territorial nexus[70]. He also finds indicative the currency of payment, the place of payment and the residence of the intermediaries[71]. In examining these elements, he concludes that the structure of the transaction has been "*deliberately structured so as to have their situs outside Argentina*". For this reason, he finds no legal basis to support that these transactions present a territorial nexus to Argentina.

Last, he disagrees with the majority's findings that the forum selection clauses are included in contractual agreements and cannot be considered when examining the interpretation of the term investment pursuant to treaty claims. In his opinion "a *treaty claim is necessarily based on a right that has been allegedly violated; here, the debt that was not repaid. If this right is created by contract, it is the contract that governs its legal existence and the modalities of this existence, including the location of this right (and its reciprocal obligation) … The treaty claim cannot by-pass or circumvent this right, or change its modalities of existence, including its situs according to its legal title-the contract and the applicable law under which it*

[68] Georges Abi-Saab, 'Abaclat and Others v. Argentina. Decision on Jurisdiction and Admissibility. Dissenting Opinion'. ¶¶ 77
[69] ibid. ¶¶ 78
[70] ibid. ¶¶ 81
[71] ibid. ¶¶ 82

exists- as this right, in its fixed legal configuration, serves as the legal basis underlying the treaty claim[72]".

3.3.7. Caroline Kleiner and Francesco Costamagna

3.3.7.1. Analysis of the benefit test and the proposition of application of Private International Law tools to determine the territorial nexus

Caroline Kleiner and Francesco Costamagna have argued extensively against the interpretation adopted by the Abaclat majority, and in favour of the argumentation presented by arbitrator and professor Abi-Saab in his dissenting opinion in the same case.

First, they note that there is no wording in the IIA in question, and in IIAs in general, from which textual interpretation, pursuant to article 31 of the VCLT, can consider a different approach to financial investments.

Further, the benefit test still does not stand to reason with regards to sovereign bonds purchased in secondary markets, since the Host State does not benefit from the surplus value of such transactions.

In addition, the establishment of the benefit test would make an objective condition into a subjective criterion[73].

Last, the benefit test can lead to illogical results. On the one hand, any transaction, even the purchase of a ticket to visit a country, can be argued to qualify this condition. On the other hand, tax avoidance schemes result in tax heavens heavily benefiting from a lot of transactions which do not have any substantial connection to their territory, but could, following the benefit test, end up being considered as investments in their territory[74].

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[72] ibid. ¶¶ 84

[73] Kleiner and Costamagna (n 3). p. 323

[74] ibid. p. 324

They make a case for a need for a specific territorial connection to be established. Agreeing with the views expressed by Abi-Saab in his dissenting opinion in Abaclat, they consider that a financial operation needs to be linked to a specific project, enterprise or activity which qualifies as an investment[75].

3.3.7.2. Alternative based on Private International Law

They proceed to investigate the way in which Private International Law could play a role in the determination of the situs of the investment.

One Private International Law approach to locate an investment would be the “indirect” one.

Pursuant to this, the localisation of the investment would be found pursuant to the provisions of the substantive law applicable to the investment. This approach would not provide with an immediate solution but would indicate the legal order where such solution could be determined, similar to the conflict of laws approach. It is noted that reliance upon domestic law for the determination of aspects of IIAs is not uncommon, with notable examples being the nationality of the investor and the legality of an investment[76]. The issue here is that domestic law does not provide answers regarding the localisation of immaterial nature, and for this reason this approach is not helpful.

Another approach is to consider various elements applicable for the localisation of contracts, which is the “direct” method. This method is closest to the proposition of the dissenting opinion in Abaclat[77].

Such elements are the domicile of the parties, the location of execution and that of the performance of an agreement. While such factors might not provide an immediate answer, they could prove the “delocalisation” of the investment from the territory of a State was the intention of the parties[78].

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[75] Abi-Saab (n 68). ¶¶ 95
[76] Kleiner and Costamagna (n 3). p. 328, 329
[77] ibid. p. 332
[78] ibid. 329

One such factor to be considered is the choice of law and forum. Since relevant clauses are left to party autonomy, the choice of governing law and forum outside the territory of the State examined can be an indication that legally the investment is not localised in the country[79].

Another factor proposed to be considered is that of the State's capacity to exercise sovereign power over an investment. In Abaclat the securities were governed by foreign municipal law. Contrarily, in the case of the Greek Debt Crisis the majority of Greek bonds were examined by Greek law, and the Greek parliament adopted legislation with which the terms of these bonds were unilaterally amended. In this case, the ECJ held that the fact that this amendment was introduced by law does not make it iure imperii. If we take this to be true in the Greek restructuring effort, it is even more so in the case of Abaclat. This would also imply a lack of territorial nexus[80].

Last, this analysis proposes the examination of the jurisdiction in case the claim is seen as tort action for financial damage. The facts of the case do not include a contractual relation between the claimants and Argentina. The facts of the Argentinian cases would also lead to a conclusion that this element would suggest foreign jurisdiction regarding the claims, thus adding another argument that the localisation of the investment is outside Argentina[81].

In conclusion, it is argued that arbitral tribunals should take into consideration legal elements which indicate that the parties have meant to delocalise the transaction from a legal perspective. In addition, they highlight the importance of the Host State's position to amend the situation of the investment by use of its sovereign power, as another indication of potential aim to delocalise the transaction[82].

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[79] ibid. 329-332
[80] ibid. 332-334
[81] ibid. 334- 337
[82] ibid. p. 338

3.3.8. Another take at the "cui bono" criterion for the establishment of territoriality in financial transactions

Michael Waibel has argued that ICSID jurisdiction regarding "debt instruments in particular" is very weak. He adopts a "double barrelled test", requiring the scope of the investments covered to have BIT provisions checked against the "objective jurisdictional core" of article 25 of the ICSID Convention. He states that in his view most sovereign debt will not qualify as an investment. He contends that sovereign bonds are ordinary commercial transactions[83].

[83] Waibel (n 4). p. 250

4. Legal war over Crimea: Crimean investment treaty claims, jurisdiction and territoriality

4.1. Introduction: the Annexation of Crimea by Russia in 2014

In 2014 Ukraine faced civil disturbances and revolution leading to a presidention election from which a new government was formed. Russian military then used military force to gain control over the Crimean Peninsula. This led to militant demonstrations requesting the independence of Crimea, and ultimately to a call for a referendum in respect to the status of Crimea[84]. The referendum was decided in favour of an integration with the Russian Federation by 97% vote with an 83% voter turnout[85].

While this referendum is considered unconstitutional pursuant to the Ukrainian legal order, it was further ratified by the Crimean parliament and a declaration of sovereignty came after. Recognising the declaration, Russia proceeded to ratify the Agreement on Admission of the Republic of Crimea into the Russian Federation, to formally include Crimea to its territory[86].

The international community has reacted but the situation has acquired a de facto permanency. Various states have imposed sanctions on Russia, and Russia answered by seizing assets in the annexed territory[87].

Since direct recourse before the ICJ to judge the issue of illegitimate annexation of the territory of Crimea was not an option, since Russia would not consent to its jurisdiction, this situation lead to a "legal war"[88], in which Ukraine and Crimean nationals have sought protection under various different international courts and tribunals, on the basis of different treaties.

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[84] Nataliia Tuzheliak, 'Investors at Conflict's Crossroads: An Overview of Available International Courts and Tribunals in the Crimean Context' [2017] UCL Journal of Law and Jurisprudence 14. p. 15

[85] '2014 Crimean Status Referendum' Wikipedia <https://en.wikipedia.org/wiki/2014_Crimean_status_referendum>.

[86] Tuzheliak (n 84). p. 15

[87] ibid. p. 15

[88] Nicholas Peacock, Olga Dementyeva and Denise Choung, 'Inside Arbitration: Crimean Investment Treaty Arbitration Claims: Recent Developments' *Herbert Smith Freehills* (February 2020) 1 <https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-crimean-investment-treaty-arbitration-claims-recent-developments>.

Amongst other venues which have been chosen, cases have been brought before the International Court of Justice to consider issues strictly under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention for the Suppression of the Financing of Terrorism, the European Court of Human Rights and an UNCLOS Annex VII Tribunal. The following analysis will focus on the venue of International Investment Arbitration which has played a prominent role in this "legal war".

4.2. Crimean Cases before International Investment Tribunals

Ukrainian nationals, corporations and state-companies have requested protection before arbitral tribunals regarding their investments in Crimea which have been seized by the Russian Federation. So far, thirteen cases have been brought before different arbitrational tribunals, namely the PCA, SCC and ICSID. These cases have mainly been brought under the Russia-Ukraine BIT, with one exception following the Netherlands-Ukraine BIT.

The most prominent issue with regards to these cases has been whether the tribunals will accept jurisdiction to hear them. The reason for this is that the relevant BITs do not provide for situations of annexation of territory or succession of states, and so it depends on the interpretation given to these treaties and their territoriality provisions to determine whether these circumstances can fall under their scope of protection.

Up until now the awards issued have accepted jurisdiction to hear the claims, but the findings of these tribunals have remained confidential[89]. In the present I will proceed to examine the legal issues scholars have brought up in relation to the territoriality requirement.

[89] ibid. p. 80

4.3. "Territorial" application of the relevant BITs in Crimea

The definition of territory included in the Russia–Ukraine BIT states that: "'*Territory' shall denote the territory of the Russian Federation or the territory of Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with international law*". This definition does not contain any provisions for cases of annexation, secession or succession, as in this case. It appears, though, from a first reading that it is broad so as to be possible to argue that it should encompass de jure as well as de facto territory of a State[90].

As discussed above, the VCLT in article 29 provides a legal presumption in favour of a territorial application of a treaty. This provision must be construed as to permit territorial application pursuant to the "moving treaty frontiers rule", as follows from customary law and stated by the International Law Commission in their commentary of the VCLT. This interpretation can also be argued based on article 15 of the VCST which can be seen as codifying this rule[91].

Nonetheless, this interpretation is limited to cases of territorial shifts taking place in accordance with international law as those are stipulated in the Charter of the United Nations, and not those achieved by the use of force[92].

It seems that in deciding whether to include these provisions in its thinking, the tribunals would necessarily be required to state if the facts amount to a lawful succession or an unlawful annexation of Crimea.

A way out would be for the jurisdiction not to be disputed by Russia; in which case the tribunal would not have to decide on its competence-competence due to the voluntary nature of the proceedings.

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[90] Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi, 'International Investment Law and the Law of Armed Conflict', *European Yearbook of International Economic Law* (2019).
[91] ibid. p. 81
[92] Odysseas G Repousis, 'Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo-Ukrainian Territorial Conflict' (2016) 32 Oxford University Press Arbitration International. p. 465

Russia did not initially take part in the proceeding, which would mean that the tribunal would have to interpret Russia's abstinence from the proceedings as an indication for or against disputing the jurisdiction[93].

In any case, in May 2019 Russia changed its strategy with regards to the pending investment arbitrations on Crimea and announced it would challenge these cases before awards were issued. In cases PrivatBank and Lugzor the tribunals allowed Russia to submit jurisdictional objections after the issuance of the relevant awards[94].

4.4. A different approach

Another academic adopts a different approach. He considers that in the present case the presumption for de jure territorial application stands because of the use of force that took place in the procedure for the integration of Crimea to the Russian Federation. He goes on to argue that in this case this non conclusive presumption must be overturned following teleological considerations[95].

4.4.1. Analogy from human rights treaties extraterritorial effect

First, he considers the extraterritorial application of treaties found in international jurisprudence. In cases of human rights, such as ICJ case "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" it has been found, pursuant to an interpretation based on the object and purpose of the treaty that the provisions of human rights conventions should also apply to occupied territories[96].

He then observes that it is only in human rights treaties that this kind of argumentation has been established. He makes a claim that investment protection treaties should also follow the same thinking, because they present similarities with regards to interests protected[97]. While they are no to be equated with human rights

[93] ibid. 467-9
[94] Peacock, Dementyeva and Choung (n 88).
[95] Gómez, Gourgourinis and Titi (n 90). p. 82
[96] ibid. p. 81
[97] ibid. p. 82

treaties overall, both types of treaties give direct rights to individuals and in this way a potential recourse in cases where their rights are infringed upon by a State.

4.4.2. Territoriality as jurisdiction

He continues to include a reference to Sir Ian Brownlie statement that reference to territory can sometimes be construed as to refer to jurisdiction. The latter remarks that such interpretation "*avoids a legal vacuum […] and provides sensible solution without the necessity for lengthy inquiry into roots of title, or the legal quality of a protectorate or trusteeship […] Ultimately territory cannot be distinguished from jurisdiction for certain purposes. Both terms refer to legal powers, and, when a concentration of such powers occurs, the analogy with territorial sovereignty justifies the use of the term "territory" as a form of shorthand*[98]"

Indeed, this argument perfectly fits the case of investment protection treaties, since their aim is to protect investors from arbitrary actions by Host States, and a new entity exercising effective control over the territory where their investment is situated would make this new State the bearer of the same power[99].

4.4.3. Examination of such a proposition against potentially conflicting rules of International Law

Following the interpretational tools provided in article 31 of the VCLT, and specifically the requirement to take into account any relevant rules of international law applicable in the relations between the parties found in 31(3)(c), he continues by examining potential conflict of this solution with other rules of International Law.

He finds a first contrast of his proposition with the rules concerning the law of occupation. According to these the authority of the occupying power must not be

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[98] Ian Brownlie, *Principles of Public International Law, 7th Edition* (Oxford University Press 2008). p. 112–113

[99] Gómez, Gourgourinis and Titi (n 90). p. 84

affirmed by third parties, while only very specific powers relating to the administration of the region must be recognised. This has been confirmed in UN Security council condemning Israel for expanding its legislation regarding the occupied Golan Heights, as well as in ICJ's findings regarding Namibia where it stated that member states must refrain from using treaties where South Africa is a counterparty with regards to Namibia which require intergovernmental co-operation[100].

In this case, it does also make sense to consider that considering the occupied territory as territory of the occupant might conflict with the aforementioned prohibition. This contradiction though is, in reality, superficial. The occupant power is accorded some authority, which is not sovereign authority over the occupied territory pursuant to the law of occupation. What is the subject matter here, is the application of a treaty that protects the affected individuals from further infringement of their rights. For this reason, the extension of the application of existing IIAs does not go counter to the provisions of law of occupation[101].

Last, he notes that it is important to keep in mind that this kind of result should only be preferred when a threshold of effective control has been reached[102]. Even more, it needs to be kept in mind that the extension of application of treaties to the occupied territory works also as an indication of the normalisation of the occupation which might encourage it to remain so[103].

[100] ibid. p. 85,86
[101] ibid. 88
[102] ibid. p. 84
[103] ibid. p. 89

5. Damages in the territory

Compensation for up-stream losses: The case of Cargill v Mexico

In Cargill v Mexico the Chapter 11 NAFTA tribunal came to some surprising findings concerning the scope of activities for which it should award damages.

In a brief presentation of the facts of the case, Cargill Inc. was a company based in the United States, whose product, high fructose syrup, was manufactured domestically, and then sold, through a subsidiary, Cargill de Mexico, into the Mexico market. After some measures adopted by the Mexican government to give advantage to its domestic sugar cane industry, Cargill sought arbitral protection for its losses incurred in connection to these measures[104].

The tribunal examined the facts of the case and held that Cargill should be compensated both for "down-stream" and "up-stream" losses. What this means is that the tribunal considered, not only the losses suffered by the subsidiary company in selling the product into the Mexican market, but also losses suffered by the parent company, in selling the product manufactured in its territory to its subsidiary[105].

On this point the Respondent contended that the losses suffered by the parent company were in its capacity as producer and exporter of the product, and not as investor "in the territory" of the Host State. The tribunal dismissed this argument, and found that the business model of the claimant must be considered as integrated to the investment made through its subsidiary in Mexico. Selling the product in Mexico was the reason why it was imported from the United States, and the subsidiary depended on the product being sold to it from the parent company[106].

The tribunal also remarked that this case differed from the Archer Daniels case, where the investment was an extensive joint venture production in Mexico[107].

The findings of this case have been met with criticism

[104] Chernenko (n 13).
[105] ibid.
[106] ibid.
[107] ibid.

First, parent and subsidiary companies develop a wide range of economic affairs between them, and it is not clear in which cases such n association between them should suffice to establish an integrated operation to the investment made by one[108].

In addition, the tribunal makes a case that different parts of an economic operation should be seen as a consolidated investment, disregarding the different roles different parties had in the overall activities[109].

Last, the most important point to be made, is that the implicit policy objective of investment protection agreements is to have a bigger part of the profit-making operations move to the Host State. This interpretation, on the other side, advocates for quite the opposite result and minimises the advantage the Host State would stand to gain from such structures[110].

In the proceedings for the application to partly set aside this award before the Ontario Court of Appeal, both Canada and the United States intervened in support of Mexico's position, that the only compensable damages should be those suffered in the territory of the Host State. The court did not set aside the award for going beyond its jurisdiction. It followed a very strict correctness standard which did not allow for a chance to review if the interpretation adopted by the tribunal was correct[111].

It becomes apparent by this analysis that territoriality also serves a role in considering the extent of operations which should be protected under the umbrella of the investment. Modern international production networks can lead to complicated structures, and claimants might be allowed to recover wide-ranging damages, which do not relate strongly to the investment.

[108] ibid.
[109] ibid.
[110] ibid.
[111] William G Horton, 'Correctness and Deference in the Review of Arbitral Jurisdiction: Mexico v. Cargill Inc.' (2012).

Conclusion

In time of consistent change of the models of economic activity, the interpretation of the condition of the territorial nexus with the Host State is also being tried. What becomes apparent from close examination of the different instances in which it has been contested before arbitral tribunals, is that it still has a purpose to serve, as its role is critical in outlining the concept of an investment.

Moreover, the Crimean cases have offered a chance for the territoriality requirement to expand in a direction which wasn't previously imagined.

The different issues raised with regards to this requirement call for its closer systematic examination, its de-construction and ultimately a new direction with regards to its function in the modern investment protection framework.

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