Briefing

Law; Natural Resource Management

Keywords:
Investment treaties, natural resource investment, international law, marine conservation, oceans

iied ONE OCEAN HUB

Issue date
April 2020

Policy pointers

States need to recognise the specific challenges associated with the growing role international investment law plays in ocean-related economic activities.

In managing marine resources within its jurisdiction, a state should review its investment treaty policy to ensure it does not unduly restrict space to address social, environmental and economic issues.

Although there is no legal basis for generalising to areas beyond national jurisdiction the standards in investment treaties, states should consider the indirect effects investment law might have in those areas.

More research is needed to fully understand the interface between investment law and ocean governance, particularly in relation to complex transnational arrangements between businesses, sponsoring states and international agencies.

'Blue economy': why we should talk about investment law

While ocean-related economic activities have existed since time immemorial, public debates about advancing a 'blue economy' have signalled new momentum for foreign investment in the sector. Technological developments have provided new openings for activities such as deep seabed mining and multinationals have identified new opportunities in fisheries, infrastructure development, renewables and coastal tourism. Each of these trends has been met with both hopes for, and concerns about, the ultimate social, environmental and economic impacts. Greater reliance on foreign investment increases the relevance of international investment law, potentially creating tensions with other rules that govern marine environments and activities. Policymakers should carefully think through these possible tensions and work to ensure policy coherence to support sustainable development.

Since time immemorial, humans have travelled, traded, fished and conducted other economic activities at sea and in coastal areas. But rising global demand for resources, technological developments and decreasing available land space have accelerated efforts to open up ocean resources to commercial activities. Business interest in the so-called 'blue economy' has increased, including among multinationals investing in well-established sectors such as shipping, port infrastructure, fisheries, aquaculture, coastal tourism and offshore oil and gas, and in emerging activities such as offshore wind and deep seabed mining.[1,2] These trends have created hopes for new economic opportunities. But they have also led to concerns about 'ocean resource grabbing' and its impact on the environment, human rights and coastal communities' livelihoods.[3–5]

Amid these rapid developments, it is unclear how effective regulation is in bringing together multiple public and private interests. This question relates to various, often disconnected, areas of law, including national legislation — for example on fisheries and offshore petroleum extraction — and a substantial body of international law, including the United Nations Convention on the Law of the Sea (Box 1), environmental treaties and, to a lesser extent, international human rights law.

International law also includes arrangements that govern the admission and treatment of foreign investment, which are often referred to as international investment law. Additionally, contractual instruments can influence the terms of particular economic activities, for example with regards to offshore oil projects. These different legal instruments are often discussed in isolation. Yet to address the social, environmental and economic challenges at play, it is important to understand how these instruments operate and intersect.

Increased relevance of international investment law

International investment law consists mainly of investment treaties and broader trade agreements that comprise investment chapters. It also includes customary rules that apply even if states have not signed treaties. Investment treaties vary significantly in content, and their application will depend upon the nationality of the investor and which host state is involved. Most, however, protect foreign investments against unfair treatment by the host state and allow multinationals to bring disputes to investor–state arbitral tribunals rather than to domestic courts.[6] The assumption is that, by reassuring foreign investors that they will reap the benefits of their activities, these protections will promote investment (although evidence that they do in practice is inconclusive).

As technological innovation pushes forward the resource frontier, new types of investor–state disputes are being initiated

On the other hand, the prospect of costly arbitrations, and potentially of large damage awards in favour of investors, could discourage public authorities from taking public-interest actions — a concern often referred to as 'regulatory chill'.[7] Examples could include actions to protect the rights of artisanal fishers from the potentially harmful impacts of industrial trawlers' activities,[8] or to tighten environmental regulations applicable to offshore oil and gas operations.

Since the late 1980s, investors have initiated at least 56 publicly known arbitrations based on investment treaties in connection with sea-related activities.[9] Of these, 29 were filed in the past five years and most relate to offshore drilling, port infrastructure, fishing rights and tourism. Other arbitrations are known to have been initiated under contracts, rather than treaties, including at least ten in offshore oil and gas and five in relation to port infrastructure. More arbitrations may exist that are not publicly known.

Box 1. The United Nations Convention on the Law of the Sea

Adopted in 1982, the United Nations Convention on the Law of the Sea (UNCLOS) is the most comprehensive binding instrument for the law of the sea and provides a global framework that regulates all sea-related activities.[10] UNCLOS determines the rules to demarcate the areas under the control of different states and defines those states' powers in the areas within their jurisdiction. UNCLOS also establishes principles to protect the marine environment and rules applicable to areas beyond national jurisdiction.

Policy initiatives to attract more foreign investment will increase the relevance of international investment law to ocean-related economic activities. And as technological innovation pushes forward the resource frontier, new types of investor–state disputes are being initiated, including arbitrations relating to deep seabed mining. Many investment treaties were concluded years if not decades ago, and there are questions as to whether they are suited to addressing the challenges facing the 'blue economy' today.

Resource extraction: how investment law comes into play

Depending on the circumstances, both UNCLOS and international investment law could have a bearing on ocean-related activities such as fisheries, mining, coastal tourism and infrastructure development. Take, for example, the case of mineral and petroleum extraction. UNCLOS rules will determine the area that lies within a state's national jurisdiction. Here, public authorities can award concessions for offshore oil and gas projects and deep seabed mining. Meanwhile, that state's investment treaties will protect foreign investments made by nationals of other states parties, including in the extractive sectors, and virtually all treaties will consider natural resource concessions to be a type of protected investment.

UNCLOS and investment treaties tend to take different approaches when defining what areas lie within national jurisdiction. UNCLOS operates through diverse legal regimes of decreasing state control as distance from the coast increases (Figure 1): states have full territorial sovereignty over their territorial sea, but have more restricted powers in their continental shelf.[11] In contrast, investment treaties tend to define the geographic scope of their application on the basis of the 'territory' of the state parties — and whether the treaty applies is, in effect, a yes or no question.

While many investment treaties explicitly define territory as including various marine areas within a state's jurisdiction, many others do not. This issue does not seem to have come up before investor–state arbitral tribunals, but these tribunals may well consider that territory encompasses the territorial sea and, in relation to a state's exercise of the specific rights granted to it by UNCLOS, the exclusive economic zone and the continental shelf.[12] An investment treaty would therefore apply to activities in these areas.

Depending on applicable investment treaties, foreign investors operating in areas within national jurisdiction may be able to challenge state conduct before international investor–

Figure 1. Maritime zones under UNCLOS

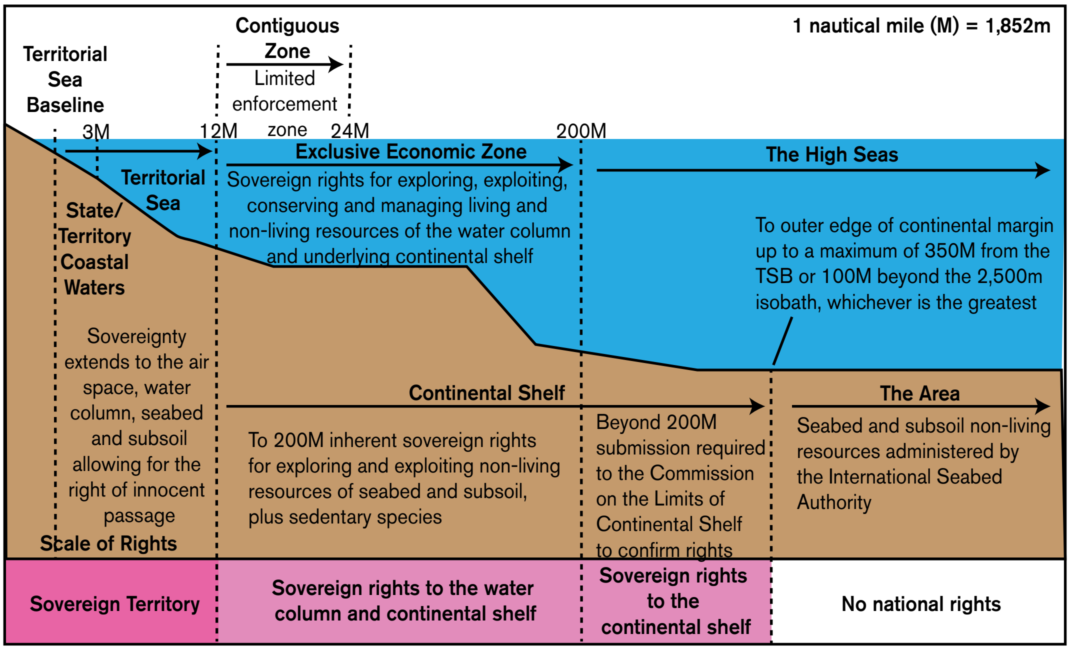

Figure adapted from: Law of the Sea and Maritime Boundary Advice Project (2011) Australia's Maritime Jurisdiction: Teacher Notes and Student Activities. Record 2011/24. Geoscience Australia, Canberra. Available via CC BY 3.0 AU.

state tribunals to protect their commercial interests. This could encompass wide-ranging measures, including those to address socio-cultural and environmental issues. So, in managing marine resources within its control, a state would need to ensure its investment treaty policy does not unduly restrict space for actions to address the social, environmental and economic challenges at play.

Mining in the deep seabed

UNCLOS creates a special legal regime for the exploration and exploitation of mineral resources in the seabed beyond the limits of national jurisdiction (the 'Area'). Mineral resources in the Area are a 'common heritage of mankind' and benefits from their exploitation must be shared equitably among states. UNCLOS establishes institutional arrangements for managing these mineral resources, namely the International Seabed Authority (ISA), and mechanisms to resolve disputes.

An investor must conclude a sponsorship agreement with a state, and on that basis it can then apply for a mining licence from the ISA with which it can ultimately enter into a mining contract. The ISA has issued 29 exploration contracts for large seabed areas in the Indian and Pacific Oceans, though none of these projects has reached exploitation stage. The ISA is developing a 'Mining Code' to regulate mining operations.

In the Area, investment treaties do not apply, as states cannot exercise any type of sovereign rights. Some commentators have suggested that UNCLOS rules be interpreted in light of the investment protection standards contained in investment treaties.[13] In effect, this could extend these standards to activities in the Area. But such an interpretation begs questions — not least because different bilateral and regional investment treaties establish different rules, making it hard to identify the standards that would be applicable to areas beyond national jurisdiction. More importantly, UNCLOS and investment protection norms reflect fundamentally different approaches.[14] Although some recent investment treaties refer to aspects of sustainable development, most of those currently in force focus on protecting commercial interests. Several arbitral tribunals have considered social and environmental issues in their decisions and recognised that states have the right to regulate in the public interest. But in line with the treaties' framing, it is the protection of foreign investment that usually provides the starting point for the analysis. UNCLOS, however, takes a more holistic perspective on the multiple interests at stake, and its preamble and provisions emphasise, for example, the protection of the marine environment and the equitable sharing of economic benefits.

One important aspect is that scientific understanding of deep seabed ecosystems remains limited, and as this understanding improves over time there may be calls for tighter regulations that could adversely affect business interests. In these circumstances, a mechanical extension of investment protection standards to the Area could tilt UNCLOS's careful balancing of economic and environmental considerations and could make it more difficult for international agencies such as the ISA to protect the marine environment.

UNCLOS does feature economic provisions, some of which offer investors significant reassurances. For instance, it states that contracts between the ISA and an investor to carry out deep seabed mining activities in the Area must provide the investor with 'security of tenure' and 'exclusive right'. But the wording of these provisions differs from the investment protection standards typically included in investment treaties, such as 'fair and equitable treatment'. As international law requires treaties to be interpreted in accordance with the 'ordinary meaning' of their terms and in the light of their policy objectives (the treaties' 'purpose', as reflected in the preamble), there is arguably no legal basis to extend to the Area the standards of treatment established by investment treaties.

International rules on the treatment of foreign investment may, however, have an indirect bearing on activities in the Area — for example in governing relations between businesses and their sponsoring state. Only nationals of sponsoring states may apply for sponsorship, but foreign investors often incorporate a local subsidiary to make the application. This is particularly common in small island developing states, which may eventually rely on these sponsorships for revenues. Some small island states, including those in the Pacific, have established legislation and institutions to manage deep seabed mining both on the continental shelf and in the Area.[15]

UNCLOS requires the sponsoring state to supervise the investor's activities in the Area. Should a sponsoring state sanction a business for violations, for example by suspending its sponsorship, the investor might seek to resort to investor–state arbitration under an applicable investment treaty between its home and sponsoring states (although such a lawsuit would need to overcome significant legal hurdles).[16] These complex interactions between national and international regulations are yet to be fully explored and would benefit from further research.

Looking ahead

As private-sector interest in ocean resources increases, so will the relevance of international legal arrangements that are primarily geared towards protecting commercial interests. Deep seabed mining illustrates this trend. But comparable considerations may apply to other sectors such as fisheries, coastal tourism and infrastructure. These evolutions may create tensions with an international legal regime that, in governing the law of the sea, has traditionally balanced multiple interests and considerations. Measures to protect the environment and vulnerable communities in the face of new threats, or improved understanding of existing threats, could be subject to challenge over their impacts on commercial returns. In such instances, investor–state arbitrations will likely weigh most heavily on small states, which may struggle to pay out expensive legal bills and compensation awards.

Policymakers should carefully consider the governance arrangements for the 'blue economy', given the far-reaching implications these can have for the environment and for people in coastal areas and beyond.

Lorenzo Cotula and Thierry Berger

Lorenzo Cotula is a principal researcher in law and sustainable development in IIED's Natural Resources Group. Thierry Berger is an associate in IIED's Natural Resources Group.

The authors would like to thank Daniela Diz Pereira Pinto, James Harrison, Essam Mohammed, Elisa Morgera and Brendan Schwartz for their helpful comments; the views expressed are the authors' own.

Knowledge Products

The International Institute for Environment and Development (IIED) promotes sustainable development, linking local priorities to global challenges. We support some of the world's most vulnerable people to strengthen their voice in decision making.

The One Ocean Hub aims to bridge current disconnections in law, science and society with a view to balancing multiple ocean uses with conservation and sharing equitably environmental, socioeconomic and cultural benefits from ocean conservation and sustainable use of marine resources across scales and sectors.

Contact
Lorenzo Cotula
lorenzo.cotula@iied.org

80–86 Gray's Inn Road
London, WC1X 8NH
United Kingdom

Tel: +44 (0)20 3463 7399
www.iied.org

IIED welcomes feedback via: @IIED and www.facebook.com/theiied

ISBN 978-1-78431-790-4

The One Ocean Hub is funded by UK Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF) — which is a key component in delivering the UK AID strategy and puts UK-led research at the heart of efforts to tackle the United Nations Sustainable Development Goals.

Notes

[1] OECD (2016) *The Ocean Economy in 2030*. OECD Publishing, Paris. https://dx.doi.org/10.1787/9789264251724-en. / [2] See also Jouffray, J-B, Blasiak, R, Norstrom, AV, Osterblom, H and Nystrom, M (2020) The blue acceleration: The trajectory of human expansion into the ocean. *One Earth* 2 43–54. There are different views on the sectors and activities that concepts such as 'blue economy' encompass. / [3] Ranganathan, S (2019) Ocean floor grab: International law and the making of an extractive imaginary. *European Journal of International Law* 30(2) 573–600. / [4] Feichtner, I (2019) Sharing the riches of the sea: The redistributive and fiscal dimension of deep seabed exploitation. *European Journal of International Law* 30(2) 601–633. / [5] Solimeo, E and Schwartz, B (12 November 2018) Mining in the deep-sea bed: are we ready? www.iied.org/mining-deep-sea-bed-are-we-ready / [6] For more background on these arrangements, see Cotula, L (2016) Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries (2nd edn) IIED, London, 15–42. https://pubs.iied.org/12587IIED. / [7] Tienhaara, K (2018) Regulatory chill in a warming world: The threat to climate policy posed by investor-state dispute settlement. *Transnational Environmental Law* 7(2) 229–250. / [8] See, eg, Hodal, K (17 June 2019) Illegal fishing by foreign trawlers costs Ghana $50m a year, researchers say. *The Guardian*. www.theguardian.com/environment/2019/jun/17/illegal-fishing-by-foreign-trawlers-costs-ghana-50-million-dollars-a-year-researchers-say. / [9] Based on www.iareporter.com, www.icsid.worldbank.org, www.italaw.com and www.investmentpolicy.unctad.org/investment-dispute-settlement. / [10] Harrison, J (2017) Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment. Oxford University Press, Oxford. / [11] According to UNCLOS, Article 76(1), the continental shelf of a coastal State "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." / [12] See, eg, Tzeng, P (2018) Investment protection in disputed maritime areas. *Journal of World Investment & Trade* 19(5–6) 828–859; and Harrison, J (2020) International investment law and the regulation of the seabed. In: Banet, C. *The law of the seabed: Access, uses and protection of seabed resources*. Brill Nijhoff, Leiden and Boston, 481–502. / [13] Dingwall, J (2018) International investment protection in deep seabed mining beyond national jurisdiction. *Journal of World Investment & Trade* 19, 890–929 / [14] Bondy, C (2017) Intégrer le droit de la mer et le droit international de l'investissement. *XII Annuaire du droit de la mer*, 15–26. / [15] Bordahandy, P-J (forthcoming 2020) La blue economy, la nooéconomie, l'exploitation minière en eaux profondes et les enjeux territoriaux du Pacifique. In: G. Giraudeau (ed). *Les enjeux territoriaux du Pacifique*. https://larje.unc.nc/wp-content/uploads/sites/2/2019/12/PJBordahandyBlueeconomy.pdf. / [16] Pecoraro, A (10 July 2019) Deep seabed mining in the Area: Is international investment law relevant? *EJIL:Talk*. www.ejiltalk.org/deep-seabed-mining-in-the-area-is-international-investment-law-relevant.