

**ПРАВО ЗАРУБЕЖНЫХ СТРАН:
ПРОБЛЕМЫ ТЕОРИИ И ПРАКТИКИ**

**LAW OF FOREIGN COUNTRIES:
PROBLEMS OF THEORY AND PRACTICE**

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ABADIKHAN Mostafa

Ph.D Candidate and researcher of international investment law and law of the sea. Department of public international law, School of law, Qom university, Iran. Lecturer at Azad university, Yazd, Iran and Rasam University, Karaj, Iran.

Email: abadikhahmostafa@gmail.com.

ORCID: 0000-0003-3520-9309

LATYROVA Natalia Sergeevna

Candidate of Sciences (Law), Assistant Professor of the Chair of Theory of State and Law, Institute of Law, Bashkir State University, Ufa, Russia.

E-mail: marchrose@yandex.ru

**THE INVESTMENT PROTECTION AT SEA UNDER
THE INVESTMENT TREATIES: TACKLING
THE PROBLEM OF TRANSNATIONAL INVESTMENTS**

According to the provisions of investment agreements, one of the terms of investment at sea is the nexus between the investment and the maritime zones of the host state. Therefore, an investment is under treaty protection when it is under the geographical realm of states. Hence, the protection status beyond the state maritime boundaries is facing problems. Today, lack of clear rules in this filed can create challenges for the future investments as well. **Purpose:** to show how investment protection of international investment agreements beyond the states jurisdiction at sea can be created. **Methods:** general scientific methods of theoretical knowledge, as well as general logical methods and research techniques are used in ana-

lyzing existing investment agreements and ICSID awards. **Results:** the paper proposes a solution for extending the investment protection of treaties to the high sea that it is the cross-border nature of some investments that can find in the Energy Charter Treaty (1994) and the ICSID decision on *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*. Ultimately, the article shows what is the cross-border nature and how it resolves the problem of investment at high sea.

Keywords: Sea; Investment protection; territorial nexus; Energy Charter Treaty; Deutsche Bank.

Introduction. The Sea is an important area for investment [1, p. 719]. Many investments and economic activities associated with investments including exploitation, offshore energy exploration, artificial islands construction, pipelines, cables, transportation, etc. are happening today in the seas. International investment agreements (IIAs)¹, as outlined in many of their preambles, pay attention to the realm and territorial nexus of investment. As, the preamble to *the Iran, Islamic Republic of – Russian Federation BIT (2015)* states: «the Contracting Parties, desiring to intensify economic co-operation to the mutual benefit of nationals of the States of both Contracting Parties, intending to utilize their economic resources and potential facilities in the area of investments as well as to create and maintain favorable conditions for investments of the investors of the Contracting Parties in "each other's territory", and recognizing the need to promote and protect investments of the investors of the Contracting Parties in "each other's territory"»². The preamble to the *EU – SADC EPA Group Agreement (2016)*: «this Agreement ... encourage economic and trade relations between the Parties; to ... attract investment and improve living standards "in the territories

¹ Today, international investment agreements, as UNCTAD has stated, include the both of the bilateral investment treaties (BITs) and the Treaties with Investment Provisions (TIPs). A BIT is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory. The great majority of IIAs are BITs. Also, The TIPs brings together the various types of investment treaties that are not BITs. Three main types of TIPs can be distinguished: 1) broad economic treaties that include obligations commonly found in BITs (e.g. a free trade agreement with an investment chapter); 2) treaties with limited investment-related provisions (e.g. only those concerning establishment of investments or free transfer of investment-related funds); and 3) treaties that only contain «framework» clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/98/iran-islamic-republic-of> (accessed: 03.03.2020).

² Iran, Islamic Republic of – Russian Federation BIT (2015), signed in 23.12.2015, in forced in 06.04.2017.

of the Parties" ...»¹. The *Canada – EU CETA agreement (2016)* preamble states, «the provisions of this Agreement protect investments and investors with respect to their investments... within their territories». The IIAs are important backups for investments and investors, because many of their rules such as definitions, protections and dispute settlement are for protecting the investors [2, p. 213]. In *Wintershall Aktiengesellschaft v. Argentine Republic*, the tribunal mentioned that, today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce². By the way, a territorial nexus to protect the investment and investors is a requirement of the investment protection [3, p. 112]. In all IIAs, there is a territorial nexus requirement, since this is needed for a tribunal's jurisdiction and investment protection under the IIAs³. Hence, the determination of the territorial scope is important for the purposes of the investment at sea and many of the IIAs for determining the investment realm at sea pay attention to the Law of the sea. In accordance with *the United Nation Convention on the Law of the Sea 1982 (UNCLOS)*⁴, the maritime zones contain the internal water, territorial sea⁵, contiguous zone, exclusive economic zones, con-

¹ Economic partnership agreement between the European Union and its Member States, of the one part, and the SADC EPA States (including Botswana, Lesotho, Mozambique, Namibia, South Africa, Eswatini), of the other part. Signed at 10.06.2016.

² *Wintershall Aktiengesellschaft (Claimant) V. Argentine Republic (Respondent)*, (ICSID Case No. ARB/04/14), para 180.

³ Many of awards have indicated to the territorial nexus in connection with the investment. See, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case № ARB/14/3), *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case № 2014-03), *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case № ARB/03/25), *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case № 2009-12), *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case № ARB/07/24, 2007), *Tradex Hellas SA v. Republic of Albania («Tradex»)* (ICSID Case № ARB/94/2, Award, 29 April 1999, RLEX-11), *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case № ARB/10/15), *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, (ICSID Case № ARB/04/6)

⁴ UNCLOS: 1833 U.N.T.S. 397 (entered into force Nov. 1, 1994).

⁵ Sometimes may be used the other words in the investment scope instead. In *The Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, the Tribunal got that, «the Ministry's instruction that prevents the ship from leaving the "territorial waters" of Ukraine was an arbitrary measure that impeded the management, maintenance, use or enjoyment of Claimants' investment and, therefore, was a breach of Article 2(3) of the BIT». See, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case № ARB/08/8) Excerpts of Award dated March 1, 2012 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, para 282. the same goes for the art 1(m) of the Bosnia-EC Stabilization Agreement (2008) as state, «"territories" includes territorial waters».

tinental shelf, high sea and seabed¹. Generally, an IIA covers only investments that are in the territory of one of the agreement State parties [4, p. 797]². Every investment deal with the continuous relevance of territoriality as a condition that limits the reach of the international regime for the protection of foreign investments [4, p. 1]. Maritime zones are remarkable in connection with investment in two aspects. The Zones under the sovereignty and jurisdiction of states that investment protection of the IIAs is applying easily here on the one hand. As Kleiner said, «only agreements made in the territory of the host state fall within the scope of their agreements» [5, p. 1]. The zones beyond the jurisdiction of states like high sea that the investment protection of the IIAs can't apply there, on the other. In line with, the problem in within the second aspect. The literature so far has paid no attention to solution [4; 6; 7; 8; 9; 10]. So, resolving the problem is the new issue in investment law and finding the solution is so important, since non-application of protection leads to decreasing the future investment, specially the investments in the host state that extends to the high sea. Hence, there are two hypotheses in the paper. First, today the investment protection under the IIAs is applied to the geographical realm of states at sea. But beyond the territorial of state, it depends on the special nature of the investment or economic activity. In some cases, such as cables and pipelines, we see trans-border nature of investment as special one. Second, for resolving the main problem of non-application the investment protection under IIAs beyond the national jurisdiction at sea, we need both IIAs and Awards. On the one hand, finding the solution in IIAs and on the other hand, how the solution can extends the investment protection of IIAs beyond the territory of states in accordance with awards. Although the question of transnational investment at sea has not been adjudicated yet in investment tribunals, the awards exist on other issues and their reasoning is applicable.

¹ Mom, Ravin, Law of the sea: maritime boundaries and dispute settlement mechanisms, United Nations-The Nippon Foundation Fellow Germany, March-December 2005, p. 5.

² For instance, ECO Investment Agreement art 2 reads as follows: Promotion and Protection of Investments: 1) the Contracting Parties shall encourage and create favorable conditions for their investors to invest in the territories of the other Contracting Parties; 2) the Contracting Parties shall encourage and create favorable conditions for investors of the other Contracting Parties to invest in their territories; 3) Investments of investors of the Contracting Parties shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territories of the other Contracting Parties. Agreement on promotion and protection of investments among eco member states. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/98/iran-islamic-republic-of/#tips> (accessed: 01.04.2020).

In order to answer the paper question, namely how can investment protection of IIAs be extended beyond the states jurisdiction at sea, it uses the quantitative and qualitative methods and in line with the methods, not only analyzes the IIAs but also examines the ICSID and UNCITRAL awards for finding the solution. The paper proceeds in three steps: Part 1 focuses on the statement and evaluate investment protection under agreements in maritime zones. In other words, the challenging issue is the investment protection under the IIAs in high sea and ocean. Second, provide an effective solution that depends on the nature of investment or economic activity at sea and is inferred from the Energy Charter Treaty and the ICSID award in the *Deutsche Bank v. Sri Lanka* case. The last part concludes.

The problem of extending the investment protection of IIAs to high sea. The purpose of defining the territory in investment treaties is not only to describe the territory, but also to determine the scope of the treaty in the maritime zones where the coastal State exercises its jurisdiction under international law of the sea [4, p. 799]. Today, the only projects in maritime zones [of states] that have been established according to the law of the sea [and were agreed by negotiations of contracting parties] are then protected [4, p. 800] under the IIAs. Hence, applying the treaty beyond the territory of states is facing ambiguity [11, p. 170]. This usually shows no difference between a definition of territory covering a wide range of maritime zones or a definition that covers a little wide, as some awards in this regard only have paid attention to the territory under jurisdiction of states, not the wide range of the territory. As in the *Tradex v. Albania* case. The Tribunal notes that, according to Art. 1(3) of the 1993 Law, only those investments qualify to be covered by that Law that are made ‘in the territory of the Republic of Albania’¹. The question of the extent of state territory was touched upon in discussions leading to the final adoption of the Vienna Convention on the Law of Treaties. In article 58 of *Waldock's Third Report* to the International Law Commission in 1964 it was noted that state practice did not justify the conclusion that a treaty applied to overseas territories only if specifically mentioned in the treaty. On the contrary, a treaty automatically embraced all the territories of the contracting parties unless a contrary intention had been expressly stated or could be inferred [12, p. 89]. As, the Decision on Jurisdiction in *SGS v Philippines* states «[t]he language is clear in requiring that investments be made ‘in the territory of’ the host State, and this requirement is

¹ ICSID Case № ARB/94/2, Award, 29 April 1999, RLEX-11, para 118. See also *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case № ARB/10/15, para 269.

underlined by other references to the territory of the host State in the BIT (see Preamble, para. 2, Articles II (1), (2), IV(1), (2), (3), VIII(2) and X(2)). In accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT»¹. In addition, in the same *Tradex case* was stated, «In principle, therefore, investments made by Tradex outside Albania do not qualify»². But such a belief can be adjusted according to the nature and type of investment.

The solution. A state law (or the investment agreement) of extra-territorial operation will be valid if there is sufficient nexus between the object and state [13, p. 107]. This nexus in zones beyond the national jurisdiction depends on the nature of the investment and the economic activities³ associated with the investment which makes investment protection effective. In general, *Canada – EU CETA TIP* under the «reservations applicable in Canada» states, an investment for implementing in Canada should consider some factors like the effect of «the investment on the level and nature of economic activity» in Canada⁴. This treaty only mentions the nature of economic activity and points out that the nature of an activity can be very influential in the investment. But in order to gain the treaties protection on the high seas, we must look for an instance of this nature. Therefore, the example can be considered in Article 1 of the «*Energy Charter Treaty (1994)*» in particular. According to the art 1(6), the Investment refers to any «investment associated with an Economic Activity» in the Energy Sector». According to the art 1(5) the «Economic Activity in the Energy Sector» means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials⁵ and art 1(5)(b)(iii) states, land transportation, distribution ... by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines [4, p 796]. It is ob-

¹ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004), para 99.

² *Op. cit.*, para 19.

³ «Economic activity» includes any activities of an economic nature except activities carried out in the exercise of governmental authority, i.e., activities not carried out on a commercial basis or in competition with one or more economic operators. See, art 1.2(11) of the EU – Singapore Investment Protection Agreement (2018)

⁴ Part 4(a) of *Canada – EU CETA TIP*.

⁵ Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download>.

vious, in gathering both treaties words (*Canada – EU CETA TIP* and *Energy Charter Treaty*), as the paper found, the only investment and economic activity at sea that goes beyond the territory of states (including high sea) and gains the protection of treaties at high sea or ocean is the investment /or economic activity on cables and pipelines.

Today, the pipelines are employed in the transit of energy materials, whereas submarine cables are predominantly used for the transmission of data [4, p. 863]. Since the «fibre-optic submarine cables transmit most of the world's data and communications, they are vitally important to the global economy...»¹. Besides, the growth of energy consumption, and correspondingly of cross-border trade of fossil fuels, has resulted in an increase in the laying both onshore and offshore pipelines [7, p. 862]. Emphasis on the «world economy» and «cross-border trade» states implicitly the nature of investment /or economic activity on submarine cables and pipelines are trans-boundary or sometimes trans-continental. Because the nature leads to traversing from high sea or oceans. Then it becomes clear that the laying of cables and pipelines across various maritime zones, and – what is more – across the seabed beyond national jurisdiction, raises significant questions from the perspective of investment law². But such a nature, how leads to investment protection extension beyond the national Jurisdiction, it can be found in *Deutsche bank AG V. Republic of Sri Lanka* case. Because on the one hand, the claimant, as was accepted by *ICSID*, emphasizes the transnational nature of the investment. On the other hand, the case indicates, the «territorial nexus» requirement is either a precondition for jurisdiction or conditions the scope of application of the various substantive requirements of the BIT³. In accordance with the «territorial nexus», Sri Lanka points out that the Preamble to the Germany-Sri Lanka BIT expresses the State parties' intention «to create favorable conditions for investment by nationals and companies of either State *in the territory of the other State...*»⁴. So, tribunal is re-

¹ UNGA Res 71/257 (23 December 2016) UN Doc A/RES/71/257.

² Ibid., p. 881.

³ *DEUTSCHE BANK AG V. DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA* ICSID CASE NO. ARB/09/02, para 222.

⁴ Ibid., para 221.

quired to decide the issue whether the Hedging Agreement¹ constitutes an investment «within the territory» to find that it has jurisdiction over the present dispute and as a precondition to any consideration of the merits², since there isn't any territorial nexus here. According to Respondent, the Agreement was explicitly entered into by Deutsche Bank London and the Central Bank of Sri Lanka has no regulatory authority over Deutsche Bank London and its investigation was limited to Deutsche Bank Colombo's intermediary role and did not purport to investigate the conduct of Deutsche Bank London³. Therefore, since the Central Bank did not and cannot regulate the seller of the product, Deutsche Bank London, it cannot be the case that financial products emanating from Deutsche Bank London are located «within the territory» of Sri Lanka for the purposes of the BIT⁴. Also, Deutsche Bank Colombo did not provide the financial product in question and the payments made by CPC to Deutsche Bank were remitted to Deutsche Bank London and not Deutsche Bank Colombo⁵. London was the locus of the Agreement and Deutsche Bank handled it throughout from London. The benefits Deutsche Bank suggests «accrued in Sri Lanka» do not serve to locate the Hedging Agreement in Sri Lanka⁶. In this sense, Sri Lanka say there isn't isn't any territorial nexus with Sri Lanka because the banking operation took place in Deutsche bank of London and not in Sri Lanka, so the Arbitral Tribunal does not have jurisdiction under the BIT⁷. The same goes for the cables cables and pipelines. As mentioned about the nature of them, they aren't in the territory of the state completely and some of their segments are outside the territory, like submarine cables networks *SEA-ME-WE 3* and *SEA-ME-WE 4* that connect the countries over the world⁸.

¹ The Hedging Agreement was concluded to protect Sri Lanka against the impact of rising oil prices. Para 14 of the *DEUTSCHE BANK AG V. DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA ICSID*, and the dispute has its origins in the Hedging Agreement concluded on 8 July 2008 between Deutsche Bank and CPC. he para 12. And CPC is a 100 % State-owned petroleum company established by an Act of the Sri Lankan Parliament, namely Act № 28 of 1961 (the «CPC Act»), the para 13.

² For example, is there any investment protection beyond the territory. *Ibid.*, para 222.

³ *Ibid.*, para 223.

⁴ *Ibid.*, para 224.

⁵ *Ibid.*, para 225.

⁶ *Ibid.*, para 229.

⁷ *Ibid.*, para 128. the BIT between Germany and Sri Lanka.

⁸ Carter L., Burnett D. Drew S, Marle G., Hagadorn L, Bartlett-McNeil D, and Irvine N. Submarine Cables and the Oceans – Connecting the World .UNEP-WCMC Biodiversity Series № 31. ICPC/UNEP/UNEP-WCMC. 2009, p. 3.

According to the respondent there isn't any territorial nexus for jurisdiction of tribunal at first glance [5, p. 5]¹. But the conditions can be changed by deep sight, as the claimant declined the claims of Sri Lanka and asserted that the legal parties to *the Hedging Agreement* were CPC and Deutsche Bank AG and not Deutsche Bank London². But more than the other reasons, the Claimant insisted on the «global nature of Deutsche Bank's operations» which can match to the investment on cables and pipelines with cross-border nature. Therefore, in line with using the criterion of some of ICSID awards, as well as to refer to UNCLOS and jurists opinions, the necessity of IIAs protection extension to the high sea or ocean is proved as follows:

First, the global nature is reflected in the presence of many branches of the Deutsche bank. In other words, the accounts are prepared for Deutsche Bank AG as a whole and not for separate branches³. It means, although some operation took place in branches outside of Sri Lanka, it is not the reason for denying the territorial nexus because the Deutsche bank operation must be considered as a whole and the branches aren't separate from mother bank. So in respect of the cables and pipelines investment, we have to see the investment as a whole; it means the sending and receiving state boundaries and the maritime zones (e.g. high sea and ocean) between the borders are in the investment territory scope. Hence, although there is the high sea or ocean as the maritime zone in investment on cables or pipelines, this isn't the reason for denying the investment protection under the IIAs. And the investment protection under the BIT includes the investment maritime zones all completely.

The **second** reason for the global nature of the bank operation is the centralization of some of the functions in certain centers, such as Singapore where all credit decisions are made with regard to Sri Lankan clients.

¹ The existence of a link with the territory of the host State is an element that contributes to identifying what investments are protected under the majority of IIAs and, thus, to determine the scope of the application *ratione materiae* of their provisions. Interestingly, Santiago Torres Bern'ardez, in his dissenting opinion in *Ambiente Ufficio*, observes that the issue of territoriality may also concern the definition of the notion of 'investor' and thus affect the jurisdiction *ratione personae* of the arbitral tribunal. This is the case of Article 1(2) Argentina-Italy BIT, where 'being a holder of a protected investment in the territory of the Argentine Republic at the relevant dates' is one of the requirements to be considered as a protected investor (*Ambiente Ufficio SPA and others v the Argentine Republic*, ICSID Case No ARB/08/9, Dissenting Opinion of Santiago Torres Bern'ardez (2 May 2013), para 132).

² *The DEUTSCHE BANK AG V. DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA*, para 139.

³ *Ibid.*, para 142.

It means although the credit decisions on Sri Lankan investors take place in Singapore Deutsche Bank, the whole of operation is important, not the special function or special branch of bank. Therefore, although the high sea or ocean are not the territory of the state, part of the investment goes through them, for this reason, there is the link between the territory and the investment. In other words, the investment territory must be considered a single and integrated territory in terms of investment protection.

Third, the claimant said the territorial nexus exists where the purpose of the transaction is achieved in the host State. As the rationale of the territorial limitation is to ensure that the host State benefits from the investments made within its territory [14]. Sometimes the investment may be located in other territory but the benefits belong to the host state. As *Abaclat and others. V. Argentine Republic case*, confirmed this approach, holding that in the case of financial instruments: «the relevant criteria should be where and/or to the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred»¹. Certainly, the main purpose of investment is gaining the benefit by the contracting parties. As ICSID in *Bernhard von Pezold and Others V. Republic of Zimbabwe*, states,» that there is similarly no requirement in the BITs that, in order for investments to benefit from protection, the investments must have been acquired through the use of capital that originates from outside Zimbabwe»². It means there isn't any difference between the origin of capital, either domestic or foreign, in the terms of benefit from protection. Hence, gaining the benefit is important. So in Deutsche bank case the Claimant asserts the all other benefits of the Agreement such as the improvement of CPC's cash flow, also occurred in Sri Lanka and all payments by Deutsche Bank to CPC ...were required to be made in Sri Lanka³. ICSID created a new attitude in *Deutsche Bank v. Sri Lanka case*(2012) by accepting the claimant's idea on benefit, because ICSID in *SGS v. Philippines case*(2004) believed, «investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT»⁴. Hence, it is obvious in *SGS case*,

¹ *Abaclat and others. v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, para. 374.

² *Bernhard von Pezold and Others V. Republic of Zimbabwe*, ICSID Case № ARB/10/15, para 269.

³ So, it is obvious, there is the territorial nexus as the claimant asserted and The Tribunal has jurisdiction to hear Deutsche Bank's claims. see, *Deutsche bank v. Sri Lanka*, para 142.

⁴ See, *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case № ARB/02/6, Decision on Jurisdiction (29 January 2004), para 99.

the main point is the territory and investment is considered on the base of territory. But in the *Deutsche Bank* case, the main point is benefit. And although the investment takes place beyond territory of states, there is territorial nexus. Because the benefit belongs to the investment all. So the protection should extend beyond the territory of states. Because, if it would not be possible to exist investment protection in maritime zones beyond the territory of state, the investment may damage without any compensation¹. Hence, it doesn't have main benefit for the parties. As, each year sees more than 100 cable faults on average, usually due to fishing trawlers or anchors². So, a high number of cable failures will decrease the likelihood that a future cable will be deployed in the area³. In other words, a lack of protection against other users of the sea decreases the likelihood of future investments [15, p. 88] in maritime zones. Therefore, although, UNCLOS considers some regulations about the submarine cables and pipelines beyond the territory of states in arts 113, 114 and 115, the investment protection under the IIAs is important because UNCLOS states the regulations in general, but the investment need special attention on protection.

Forth, investment coherence. In «*the Blusun S.A. Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*» case that was accepted by ICSID, the respondent mentioned, 'the presence of economic activity ... in the territory of the host State shall be evaluated in the concrete case and in light of the specific context'⁴. It means every investment or economic activity must be considered in its specific aspects, like the nature of it. As the claimant reasoning in *Deutsche bank v. Sri Lanka* considers the nature of operations as a special aspect of the investment⁵. Because the nature of investment on cables and pipelines needs to territorial cohesion to extend protection to high sea or

¹ As GA resolution states, «these cables are susceptible to intentional and accidental damage from shipping and other activities and ... the maintenance, including the repair, of these cables is important». UNGA Res 71/257 (23 December 2016) UN Doc A/RES/71/257.

² DOUG BRAKE, Submarine Cables: Critical Infrastructure for Global Communications, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, APRIL 2019, p. 2.

³ Palmer-Felgate A., Booi P. How resilient is the global submarine cable network? How resilient is the global submarine cable network? Conference of Emerging Subsea Networks – The World's Expanding Treasure, Dubai from the 18th–21st April 2016, pp. 1–7. Available at: <http://www.suboptic2016.com/> (accessed: 03.06.2021).

⁴ Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3 para 129.(Counter-Memorial, para. 284) (ICSID).

⁵ Also, the Claimant finally submits in *Deutsche Bank* case that the nature of any territoriality requirement must depend on the investment at issue.

ocean. This is because the nature of investment in pipelines or cables also requires this coherence, and in a global cables project which connects several continents the segments in the high seas or oceans should be considered.

Fifth, one may argue that the mere presence of a cable on the seabed amounts to control over that part of the seabed on behalf of the State of nationality, and thus would bring it within its 'territory' for purposes of investment protection [7, p. 884]. But the words are not correct. Although there is jurisdiction, it is jurisdiction on cables and pipelines, not on the high sea or ocean territory. Or on the other words the «transnational jurisdiction» term is wrong and because of the nature of the investment on the cables and pipelines, the «transnational protection» term must be used instead and it can extend protection to high sea or ocean.

Sixth, some commentators have suggested that UNCLOS rules be interpreted in light of the investment protection standards contained in investment treaties [16, p. 890–929]¹. Such comment could extend the protection under the IIA to investment beyond the state's jurisdiction. So, it should be noted, according to the UNCLOS the states have freedom to lay submarine cables and pipelines², and it can be considered as a protective act by UNCLOS, that leads to prolongation of the investment protection to high sea. Of course, the freedom isn't absolute, but it is conditional. Namely Freedom of the high seas is exercised under the conditions laid down by UNCLOS and by other rules of international law³. Also, today no states as parties to the investment on the cables or pipelines apply jurisdiction or sovereignty on the high sea and all countries have accepted the law of the sea rules about the high sea⁴. Besides, there is a difference between the claim to the maritime zones beyond the state territory and the claim on investment protection, because when an area is a state territory, the state has jurisdiction or sovereignty, there is no difference whether the cables or pipelines there exist or not. But when there is an area like high sea, a state only has right to the investment protection on cables and pipelines, not to the territory. Hence it means if the investment in high sea is destroyed, on the contrary of state territory, the state has no rights any more. And since the good function of investment is

¹ Lorenzo Cotula, Thierry Berger (2020). *Blue Economy*: Why we should talk about Investment Law, International Institute for Environment and Development, 1-4, p. 3. Available at: <https://pubs.iied.org/pdfs/17746IIED.pdf>.

² Art 87(1)(C) of UNCLOS.

³ *Ibid.*

⁴ Art 89 of UNCLOS, «no state may validly purport to subject any part of the high seas to its sovereignty».

important, the investor is in force for protecting the investment beyond the territory of states.

Conclusion. Today, the seas play an important role in international investment and many of the investments happen at sea, especially in maritime countries. That's why many investment agreements pay attention to the territory, including geographical scope at sea. To date, 3292 investment agreements have been concluded in the world¹. One important element in IIAs is the territorial nexus. It means, to qualify for investment protection under the Agreements, it must be placed in the territory defined by the Agreements on the basis of the international law. Iran, Russia, EU and many of countries have paid attention to territory and territorial nexus, especially at sea in their IIAs. Today, the countries are united in the fact that the rules of the investment agreements govern on the investments made in the maritime zones of the states of the investment parties and not the zones outside the sovereignty and jurisdiction of the states such as high sea. So it means, to protect the investment under IIAs, there must exist a territorial nexus between investment and territory of the host state. In other words, the protection needs to nexus between the investment and territory. The perspicuity of some awards indicates this. As ICSID in the *Tradex V. Albania* case, states», only the investment within the territory of Albania will be qualified for investment protection under IIA». The Geographical scope of states at sea in accordance with UNCLOS contains the investment in internal water, territorial sea, contiguous zone, exclusive economic zone and continental shelf. But the investment protection doesn't extend beyond the jurisdiction of states. However, we can find the solution of mentioned problem in some IIAs like the treaty between Canada – EU and Energy Charter Treaty with explicit language. The solution is nature of investment, specially the nature of investment and economic activity on cable and pipelines. The nature of investment /or economic activity on submarine cables and pipelines is trans-boundary or sometimes trans-continental. And this nature leads to traversing the high sea or oceans. So we have to see the investment as a whole, on the cables and pipelines investment, it means the sending and receiving state boundaries and the maritime zones (e.g. high sea and ocean) between the borders are in investment territory scope. Hence, although there may be the high sea or ocean as the maritime zone in investment realm on cables or pipelines, this isn't the reason for denying the investment protection under the IIA when the investment

¹ UNCTAD, International Investment Agreements Navigator, Investment policy Hub, 12 February, 2020. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements>.

places on the high sea or ocean. Because on the one hand, the interest of investment needs that the investment protection under the IIA contains the geographical scope of the investment as a whole. On the other hand, there is jurisdiction on the located cables and pipelines on the high sea, not on the high sea territory. It means, someone states the investment beyond the territory of state leads to «transnational jurisdiction», but we believe in accordance with the nature of the investment or the economic activity, it leads to «the transnational protection» as the new term. Because the intention of state is the investment protection of cables and pipelines in the maritime zones, including the territory of states or beyond it, and not applying the sovereign rights or jurisdiction on high sea or ocean. In addition, this is in compliance with the UNCLOS about the high sea. Since the convention in arts 87 and 112 considers the freedom for laying cables and pipelines on the high sea, applying the investment protection of cables and pipelines under the IIAs shouldn't be challenged. So the nature of the cables and pipelines can convince the international community that protection under the investment agreements must go beyond the maritime zones of the Contracting parties in order for the investment to be meaningfully protected.

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АБАДИХА Мостафа

*соискатель степени доктора наук, исследователь в области международного инвестиционного права и морского права, кафедра международного публичного права юридического факультета Университета Кум, Иран. Преподаватель университета Азад, Йезд, Иран, и Университета Расам, Карадж, Иран.
Email: abadikhahmostafa@gmail.com.
ORCID: 0000-0003-3520-9309*

ЛАТЫШОВА Наталия Сергеевна

*кандидат юридических наук, доцент кафедры теории государства и права Института права Башкирского государственного университета, г. Уфа, Россия.
E-mail: marchrose@yandex.ru*

**ЗАЩИТА ИНВЕСТИЦИЙ НА МОРЕ
В СООТВЕТСТВИИ С ИНВЕСТИЦИОННЫМИ
ДОГОВОРАМИ: РЕШЕНИЕ ПРОБЛЕМЫ
ТРАНСНАЦИОНАЛЬНЫХ ИНВЕСТИЦИЙ**

В соответствии с положениями инвестиционных соглашений одним из ключевых условий инвестирования в морскую сферу является связь между инвестиционным и морским национальным законодательством. Таким образом, инвестиционный договор имеет правовую защиту только в пределах морских границ государства, на территории которого он заключен. При защите инвестиций за пределами государственных морских границ возникают проблемные правовые ситуации. На сегодняшний день отсутствие четких юридических норм в этой области создает экономические риски для будущих инвестиций. **Цель:** показать возможности обеспечения защиты инвестиций в рамках международных инвестиционных соглашений за пределами юрисдикции государств в морской сфере. **Методы:** при анализе существующих инвестиционных соглашений и решений Международного центра по урегулированию инвестиционных споров (МЦУИС) использовались общенаучные методы теоретического познания, а также общелогические методы и исследовательские приемы. **Результаты:** в статье предлагаются правовые способы распространения принципа защиты инвестиций по договорам на сферу морских инвестиций, поскольку трансграничный характер некоторых из них подтверждается в Договоре к Энергетической Хартии

(1994) и решении МЦУИС по делу Дойче Банк АГ против Демократической Социалистической Республики Шри-Ланка. Раскрывается сущность трансграничного характера инвестиционных договоров и его влияние на решение проблемы инвестиций в открытом море.

Ключевые слова: море; защита инвестиций; территориальная связь; Договор к Энергетической хартии; Дойче Банк.

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