THE CONCEPT OF "INVESTMENT" AT THE DAWN OF THE DIGITAL ERA

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Abstract

New methods of doing international business, which have appeared in the process of digital transformation of economic and social life, have not gone unnoticed by a number of States that use tax and administrative methods to regulate them. One possible way to protect the interests of operators of digital business models from such regulation could be bringing claims against these States on the basis of bilateral and multilateral treaties for the promotion and protection of investments. Among the mandatory conditions for the presentation of such claims is the presence in the territory of a host State of protected "investments" within the meaning of an applicable treaty. This Article analyzes the meaning of the term "investment" in the pre-digital age as well as the exact content of the territorial link requirement with the host State. It describes four typical business models of the digital economy: (i) digital reseller; (ii) digital marketplace operator; (iii) search engine operator; and (iv) social network operator. It then analyzes the possibility of recognizing each business model's intangible assets as "investments" for the purposes of investment treaties. It also identifies the shortcomings of the existing concept of "investment," which was formed before the advent of the digital economy for the effective protection of digital assets and forecasts possible directions of development of existing arbitration practice to eliminate these shortcomings. The Article also identifies the emerging regulatory role of this concept in the digital era.

I. INTRODUCTION

Significant advances in information and communication technologies over the past several decades and their implementation in a wide variety of areas of economic and social life have led to a fundamental transformation in the way entrepreneurial activities are conducted and the emergence of their new forms, often described collectively by the concept of the "digital economy."[1] One of the most visible results of this digital transformation process has been the appearance of new ways of doing international business, in particular through the use of digital platforms and social networks that enable interaction with customers without the need to create a physical presence in the country in which platform operators carry out their commercial activities. These new ways of doing business have not gone unnoticed by a number of states, which,

[1] *See, e.g.*, Org. for Econ. Coop. & Dev. [OECD], OECD/G20 *Base Erosion and Profit Shifting Project Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, at 52–54 (2015), http://dx.doi.org/10.1787/9789264241046-en; United Nations Conference on Trade and Development [UNCTAD], *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries*, at 25, U.N. Doc. No. UNCTAD/DER/2019.

in an apparent effort to regulate them, have begun to use both tax methods (the so-called "digital taxes" on the activities of foreign internet companies, introduced, for example, in France,[2] Italy,[3] and the United Kingdom[4]) and administrative methods (for example, restrictions and fines applied in various countries to Uber, Airbnb, Facebook, YouTube, and similar companies).[5]

One possible way to protect the interests of digital platform operators against the impact of these tax and regulatory measures adversely affecting their rights and economic interests could be to bring claims on the basis of bilateral and multilateral treaties for the promotion and protection of investments ("investment treaties") against States imposing such measures. Among the mandatory conditions for the presentation of such claims is the presence of protected "investments" within the meaning of an applicable treaty in a host State.[6] Because the existing concept of "investment" was defined in investment treaties as well as interpreted in judicial and arbitration practice before the advent of the digital economy era, when the interpreters were predominantly facing tangible brick and mortar investments,[7] a question naturally arises as to how it meets the changing ways of doing business and allows to effectively protect the rights of foreign investors in this new era. Accordingly, the purpose of this Article is the analysis of the possibility of recognizing intangible assets of digital business models as "investments" for the purposes of existing investment treaties drawn up in a "pre-digital" era.

Besides the introduction, this Article consists of four parts and a conclusion. Part II summarizes the existing approaches to the definition of "investment," as well as various approaches to establishing a territorial link between investment and the host State. Part III presents four typical business models of the digital economy, namely: (i) digital reseller, (ii) digital marketplace operator, (iii) search engine operator, and (iv) social network operator. Part IV examines the possible ways in which the intangible assets of these digital business models might be recognized as "investments" in light of existing

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[2] Loi 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés [Law 2019-759 of July 24, 2019 Concerning Creation of Tax on Digital Services and Modification of Corporate Tax Reduction Trajectory], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 25, 2019, p. 12.

[3] Legge 27 novembre 2019, n.160 [Law of Nov. 27, 2019, No. 160], § 678, G.U. Nov. 27, 2019, n.304 (It.).

[4] Finance Bill 2019, c. 142, at pt. 2 (UK).

[5] Robert Ginsburg, *Investor-State Dispute Settlement in the Digital Economy: The Case for Structured Proportionality*, 39 NW. J. INT'L L. & BUS. 171, 180–85 (2019).

[6] *See, e.g.*, Jan Asmus Bischoff & Richard Happ, *The Notion of Investment*, *in* INTERNATIONAL INVESTMENT LAW 495, 497 (Marc Bungenberg et al., eds., 2015).

[7] *Cf.*, M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 18–19 (2021) (explaining how the term "investment" initially covering physical property was progressively extended to included intangible assets).

definitions of this concept and arbitration practice. Part V discusses the shortcomings of the current concept of "investment" for the effective protection of intangible assets of these business models, makes a forecast about the possible direction of development of the arbitration practice to address these shortcomings, and identifies the emerging role of the concept of "investment" in regulating the digital economy and internet as a whole. The conclusion briefly summarizes previous findings.

II. PROTECTED INVESTMENTS IN THE PRE-DIGITAL AGE

A. The Meaning and Characteristics of "Investment"

Despite the fact that the content of the concept of "investment" over the past decades has repeatedly become the subject of in-depth analysis in decisions of numerous arbitral tribunals[8] and in scholarly works,[9] up to the present, this issue has not received a satisfactory resolution. The origin of this uncertainty could be traced to the lack of specific criteria allowing one to distinguish "investments" from "non-investments" in existing treaties. Their

[8] *See, e.g.*, Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶ 43 (July 11, 1997), 5 ICSID Rep. 183, 199 (2002); Salini Constr. S.p.A & Italtrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 400, 413 (2004); Petrobart Limited v. Kyrgyz Republic, SCC Case No. 126/2003, Award II (March 29, 2005), 13 ICSID Rep. 387 (2008); Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. AR/99/7, Decision on the Application for Annulment of the Award, ¶ 31 (Nov. 1, 2006), IIC 172 (2006); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008), IIC 330 (2008); Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award (Perm. Ct. Arb. 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf; Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 193–210 (July 2, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf.

[9] *See, e.g.*, RUDOLF DOLZER ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 82 (3d ed. 2022); Roberto Castro de Figueiredo, *The Investment Requirement of the ICSID Convention and the Role of Investment Treaties*, 26 AM. REV. INT'L ARB. 453 (2015); Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSIID Practice*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 403 (Christina Binder et al., eds., 2009); Emmanuel Gaillard & Yas Banifatemi, *Chapter 8, The Long March Towards a* Jurisprudence Constante *on the Notion of Investment*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 97, 112–16 (Meg Kinnear et al., eds., 2016); Julian Davis Mortenson, *The Meaning of "Investment": ICSID's* Travaux *and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257 (2010); Noah Rubins, *The Notion of "Investment" in International Investment Arbitration, in* 19 ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS, STUDIES IN TRANSNATIONAL ECONOMIC LAW 283 (Norbert Horn & Stefan M. Kröll eds., 2004).

absence is manifested in older European treaties which, rather than define, merely describe the content of this concept and do not even mention any characteristics which it should possess. A fairly typical definition of this term in these treaties would simply open with a general statement that it comprises every kind (or type) of asset, followed by an illustrative list of their categories, which it "includes, in particular, though not exclusively."[10]

Unlike their European counterparts and the definitions in earlier versions of the U.S. model bilateral investment treaties,[11] the definitions of "investment" in the 2004 and the 2012 versions of the U.S. model bilateral treaty,[12] as well as signed treaties based on these models[13] and certain treaties

[10] *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments art. 1(a), Apr. 6, 1989, Gr. Brit-USSR, GR. BRIT. T.S. No. 3 (1992) (Cd. 1791) [hereinafter UK-USSR BIT].

[11] The 1982 Model Treaty Between The United States of America and _____ Concerning the Reciprocal Encouragement and Protection of Investments, art. 1(1)(c), *reprinted in* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS app. A, at 769 (2009); The 1983 Model Treaty Between The United States of America and _____ Concerning the Reciprocal Encouragement and Protection of Investment, art. 1(1)(c), *reprinted in* VANDEVELDE, *supra*, app. B, at 779; The 1984 Model Treaty Between The United States of America and _____ Concerning the Reciprocal Encouragement and Protection of Investment, art. 1(1)(b), *reprinted in* VANDEVELDE, *supra*, app. C, at 789; The 1987 Model Treaty Between The United States of America and _____ Concerning The Reciprocal Encouragement and Protection of Investment, art. 1(1)(b), *reprinted in* VANDEVELDE, *supra*, app. D, at 796; The 1991 Model Treaty Between The United States of America and _____ Concerning the Encouragement and Reciprocal Protection of Investments, art. 1(1)(a), *reprinted in* VANDEVELDE, *supra*, app. E, at 803; The 1992 Model Treaty Between The United States of America and _____ Concerning the Reciprocal Encouragement and Protection of Investment, art. 1(1)(a), *reprinted in* VANDEVELDE, *supra*, app. F, at 810; The 1994 Model Treaty Between The Government of the United States of America and The Government of Concerning the Encouragement and Reciprocal Protection of Investment, art. 1(d), *reprinted in* VANDEVELDE, *supra*, app. G, at 817.

[12] *See* The 2004 Model Treaty Between The Government of the United States of America and The Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 1, *reprinted in* VANDEVELDE, *supra* note 11, at app. H, 825, 826–27 [hereinafter 2004 U.S. Model BIT]; OFF. OF THE U.S. TRADE REP., OFF. OF THE PRESIDENT, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, art. 1, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited Oct. 27, 2022) [hereinafter 2012 U.S. Model BIT].

[13] *See* Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 1, Feb. 19, 2008, S. TREATY DOC. NO. 110-23 [hereinafter U.S.-Rwanda BIT]; Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 1, Nov. 4, 2015, S. TREATY DOC. NO. 109-9 [hereinafter U.S.-Uruguay BIT].

concluded by European and other countries in recent years,[14] provide additional guidance as to the meaning of this term. These definitions open with a general statement that "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[15] Similar to European treaties, these definitions also include an illustrative list of forms which an investment may take.[16]

Although both U.S. Model Bilateral Investment Treaties' opening statements expressly name three characteristics of "investment," they do not require that, in order to be recognized in this capacity, a certain asset shall simultaneously possess all of them.[17] Moreover, the use of the word "include" strongly suggests that there could be other characteristics that an investment may possess.[18] Nevertheless, no indication is provided as to what these additional characteristics could be, or what would be their relative weight as compared with those three expressly referred to in this definition in both U.S. Model Bilateral Investment Treaties. It follows that, similarly to their predecessors, the latest definitions also do not prescribe any clear set of criteria allowing one to distinguish "investments" from "non-investments."

In view of this gap, the task of determining the exact meaning of the term "investment" in a given treaty has fallen by default upon arbitral tribunals resolving individual disputes under the treaty and, ultimately, upon domestic courts, which are located in jurisdictions where these tribunals have their seats and consider applications for annulment of these awards from parties

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[14] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investment Between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan, Austria-Kaz., art. 1(2), Jan. 12, 2010, 2884 U.N.T.S. 103, 104–05 [hereinafter Austria-Kazakhstan BIT]; Agreement between the Swiss Confederation and the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments, Switz.-Egypt, art. 1(1), Jun. 7, 2010, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1113/download [hereinafter Switzerland-Egypt BIT].

[15] 2004 U.S. Model BIT, *supra* note 12; 2012 U.S. Model BIT, *supra* note 12; U.S.-Rwanda BIT, *supra* note 13; U.S.-Uruguay BIT, *supra* note 13; Austria-Kazakhstan BIT, *supra* note 14; Switzerland-Egypt BIT, *supra* note 14.

[16] 2004 U.S. Model BIT, *supra* note 12; 2012 U.S. Model BIT, *supra* note 12. These lists are supplemented by three footnotes, which identify the forms of debt which are most likely to have the characteristics of investments; the factors determining whether licenses, authorization permits, and similar instruments possess these characteristics; as well as state that "investment" does not include an order or judgment entered in a judicial or administrative action. *See* 2004 U.S. Model BIT, *supra* note 12, at art. 1, nn.1–3; 2012 U.S. Model BIT, *supra* note 12, at art. 1, nn.1–3.

[17] 2004 U.S. Model BIT, *supra* note 12; 2012 U.S. Model BIT, *supra* note 12.

[18] 2004 U.S. Model BIT, *supra* note 12; 2012 U.S. Model BIT, *supra* note 12.

dissatisfied with their results.[19] The implementation of this approach could have led to largely predictable results in cases where such awards had the value of setting a binding precedent.[20] Nevertheless, while investment arbitration awards will certainly be carefully considered by tribunals subsequently addressing similar issues, unlike common law judgments, they do not have such binding value.[21] Thus, even though a certain arbitral tribunal has interpreted the meaning of "investment" in a given treaty in a certain way, the participants of future disputes arising out of the same treaty cannot be sure that other tribunals would automatically follow their findings. By the same token, even though decisions of domestic courts setting aside these awards could be mandatory for courts in the same jurisdiction, they do not necessarily have be followed by arbitral tribunals seated in other jurisdictions or by foreign courts considering similar applications for annulment.

The lack of binding force of arbitral awards combined with the absence of clear criteria for distinguishing "investments" from "non-investments" in investment treaties has unsurprisingly led to a wide variety of views being expressed on this subject by arbitral tribunals over the years.[22] A major

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[19] Although the list of grounds for annulment of arbitral awards may differ from one jurisdiction to another, most of them allow for such possibility. *See, e.g.*, GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 373 (3d ed. 2021); William W. Park, *Why Courts Review Arbitral Awards*, *in* LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY 595, 597–98 (2001).

[20] A classic example of this approach would be the definition of the term "security" in the U.S. Federal Securities Acts. As was observed by the United States Supreme Court, while including this definition into these Acts, Congress did not attempt to articulate the relevant economic criteria that would distinguish "securities" from "non-securities." The task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and ultimately to the federal courts to decide which of the myriad financial transactions in our society fall within the coverage of these statutes. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 847–48 (1975).

[21] *See, e.g.*, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 76 (Nov. 14, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0074.pdf; Jan de Nul N.V. & Dredging Int'l v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 64 (Jan. 16, 2006), 15 ICSID Rep. 406, 421 (2010); AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 30–32 (July 13, 2005), 12 ICSID Rep. 312, 317–18 (2007).

[22] On one end of this broad spectrum is *Petrobart Limited v. the Kyrgyz Republic*, where the tribunal recognized as "investment" Petrobart's right under a contract to payment for goods delivered under this contract. This was despite the fact that the usual criteria for investment under the ICSID Convention, including contribution which extends over a certain period of time, were not met. *See* Petrobart Limited v. Kyrgyz Republic, SCC Case No. 126/2003, Award II (March 29, 2005), 13 ICSID Rep. 387, 460–61 (2008). On the opposite end of this spectrum, in *Romak S.A. v. Republic of Uzbekistan*, the tribunal held that the term "investment" has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends

contributing factor towards this diversity of views was (and still is) an ongoing debate about the meaning of "investment" in Article 25 of the International Centre for Settlement of Investment Disputes (ICSID) Convention.[23] While the existence of a legal dispute arising directly out of an "investment" is one of the pillars of ICSID jurisdiction,[24] the Convention itself does not define this term.[25] Such a gap was clearly not redressed by arbitral tribunals, which applied significantly different approaches to finding a solution to this question. Some tribunals took the position that the concept of "investment" in Article 25 had an "objective" meaning and embodied certain general characteristic, all of which should be mandatorily present.[26] Over the years, arbitral tribunals have identified several such characteristics, notably, contribution,[27] certain duration,[28] participation in the risk of the transaction,[29] contribution to the host

over a certain period of time and that involves some risk. By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in its definition in the treaty does not transform it into "investment." *See* Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award, ¶ 207 (Perm. Ct. Arb. 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf.

[23] *See, e.g.*, Roberto Castro de Figueiredo, *The Investment Requirement of the ICSID Convention and the Role of Investment Treaties*, 26 AM. REV. INT'L ARB. 453 (2015); Gaillard & Banifatemi, *supra* note 9, at 112–16.

[24] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), *entered into force* Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[25] According to a frequently cited extract from the Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID Convention, no attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting Sates can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre according to ICSID Convention, *supra* note 24, at art. 25(4). *See* Int'l Ctr. for Settlement of Inv. Disps. [ICSID], Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID/2, *reprinted in* ICSID, II-2 HISTORY OF THE ICSID CONVENTION 647, 1078 (1968); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008), IIC 330 (2008).

[26] Salini Constr. S.p.A & Italtrade S.p.A v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001) 6 ICSID Rep. 400, 413 (2004); Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. AR/99/7, Decision on the Application for Annulment of the Award, ¶ 31 (Nov. 1, 2006), IIC 172 (2006).

[27] *Salini*, 6 ICSID Rep. at 413; Consortium Groupement LESI-DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8, Award, § II, ¶ 13(iv) (Jan. 10, 2005), 15 ICSID Rep. 7, 16 (2005).

[28] *Salini*, 6 ICSID Rep. at 413; *Consortium Groupement*, 15 ICSID Rep. at 16.

[29] *Salini*, 6 ICSID Rep. at 413; *Consortium Groupement*, 15 ICSID Rep. at 16.

State's development,[30] and "regularity of profit and return."[31] Still however, no uniformity exists among the tribunals as to the required number of these characteristics (three,[32] four,[33] or five[34]) or their exact content, and in particular, whether there are legally binding requirements as to the minimal duration of investment.[35]

Some other tribunals took a significantly different approach, emphasizing that various characteristics of investment identified in the *Salini v. Kingdom of Morocco* award did not appear in the ICSID Convention.[36] These characteristics may be seen as typical features of investments under this Convention rather than as "a set of mandatory legal requirements."[37] As such, they may assist in identifying or, in extreme cases, excluding the presence of an investment. However, they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent that it is not limited by the relevant treaty.[38] "The *Salini* criteria may be useful to further describe what characteristics a contribution may or should have. They should, however, not

[30] Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶ 65 (July 16, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0225.pdf.

[31] Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53 (Aug. 6, 2004), 13 ICSID Rep. 123, 133 (2008); Helnan Int'l Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2016), https://www.italaw.com/sites/default/files/case-documents/ita0398_0.pdf.

[32] *Consortium Groupement*, 15 ICSID Rep. at 16.

[33] *Salini*, 6 ICSID Rep. at 413; Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 31 (Nov. 1, 2006), IIC 172 (2006).

[34] Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶ 43 (July 11, 1997), 5 ICSID Rep. 183, 199 (2002); *Joy Mining Mach. Ltd.*, 13 ICSID Rep. at 133, ¶ 53.

[35] Although the ICSID Convention does not prescribe any such requirements, according to certain tribunals, the minimum duration of investment transaction from two to five years would be sufficient for satisfying this characteristic of "investment." *See, e.g.*, *Salini*, 6 ICSID Rep. at 414, ¶ 54; Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶ 62 (July 16, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0225.pdf; Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 93–95 (June 16, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf; Malaysian Hist. Salvors SDN BHD v. Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 65 (Apr. 16, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf.

[36] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008), IIC 330 (2008).

[37] Philipp Morris Brand Sàrl, Philipp Morris Prod. S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 206 (July 2, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf.

[38] *Id.*

serve to create a limit, which the Convention itself nor the Contracting Parties to a specific [bilateral investment treaty (BIT)] intended to create."[39]

Unlike the first approach, under this second approach, the absence of some of these typical characteristics in a particular transaction does not, by itself, preclude the qualification of this transaction as an "investment" within the meaning of the ICSID Convention. This concept in the Convention has an autonomous meaning for purposes of ICSID jurisdiction that does not necessarily coincide with its meaning in investment treaties.[40] This manifest difference in approaches reflects the overall lack of consensus concerning the "ordinary meaning" of this term, which is referred to in the general rules of treaty interpretation prescribed by the Vienna Convention on the Law of Treaties.[41] In view of this uncertainty, a foreign investor claiming that a certain asset should be recognized as "investment" would not be able to simply rely on its supposed ordinary meaning but would have to, first, try to establish such meaning.

Although the existing definitions of "investment" in investment treaties may not, by themselves, allow the drawing of a clear distinction between "investments" and "non-investments" unless these treaties are modified or terminated, they remain binding for their contracting States in accordance with the well-established principle of *pacta sunt servanda*.[42] It follows that any inquiry into the meaning of this term in a certain treaty should start with the analysis of the wording of its definition, notably the composition of its non-exclusive list of assets.[43] Despite possible differences among these lists in various U.S. and European treaties, such analysis reveals that these treaties intended the term "investment" to encompass assets of all kinds, in both tangible and intangible forms. At the same time, the express reference in the latest U.S. BIT to every asset "that has the characteristics of an investment,"[44] combined with

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[39] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 364 (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf.

[40] This difference is reflected in the existence of the so-called "double-barreled" test, according to which—for the purposes of the ICSID jurisdiction—an investment shall exist both within the meaning of an applicable investment treaty and within the meaning of Article 25 of the ICSID Convention. *See* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 226 (2d ed. 2017).

[41] Vienna Convention on the Law of the Treaties, art. 31(1), *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

[42] *Id.* at art. 26 (referring to "*pacta sunt servanda*" of the Vienna Convention on the Law of the Treaties that every treaty in force is binding upon the parties to it and must be performed by them in good faith).

[43] *See also* Dmitry A. Pentsov, *Contractual Joint Ventures in International Investment Arbitration*, 38 NW. J. INT'L L. & BUS. 391, 414 (2018).

[44] U.S.-Rwanda BIT, *supra* note 13, at art. 1; U.S.-Uruguay BIT, *supra* note 13, at art. 1; UK-USSR BIT, *supra* note 10, at art. 1(a).

the preparatory work of its earlier treaties,[45] as well as various arbitral awards dealing with European treaties,[46] reveals that the definition of investment was not intended to include purely commercial transactions.[47] Thus, the next stage of the inquiry should be drawing the distinction between those assets which are "investments" and those assets which cannot be recognized in this capacity.

When a certain investment treaty (such as the latest U.S. BITs) expressly identifies three characteristics of "investment," namely, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk, this distinction shall be drawn on their basis.[48] The first of these characteristics would cover any dedication of resources that has an economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance.[49] At the same time, the use of the term "commitment" suggests that a certain period of time shall exist between the moment when such dedication is made and the moment when the return is received. The existence of this mandatory time interval goes in line with the economic concept of investment, which is based on the idea of giving up current consumption in exchange for a possible increase in future consumption.[50] It follows that the recognition of a particular commitment as an investment

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[45] Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Lith.-U.S., art 1., *opened for signature* Jan. 14, 1998, S. TREATY DOC. NO. 106-42 (entered into force Aug. 9, 2000); Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, Together with an Amendment to the Treaty Set Forth in an Exchange of Diplomatic Notes Dated Aug. 8, 2000 and Aug. 25, 2000, Azer-U.S., art. VII, *opened for signature* Aug. 1, 1997, S. TREATY DOC. NO. 106-47 (entered into force Sep. 8, 2000).

[46] *See, e.g.*, Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶ 42 (July 11, 1997), 5 ICSID Rep. 183, 198–99 (2002); Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004), 13 ICSID Rep. 123, 134–35 (2008).

[47] By way of example, according to the Letter of Submittal to the U.S.-Georgia BIT, investment as defined by this Treaty generally excludes claims arising solely from trade transactions, such as a sale of goods across a border that does not otherwise involve an investment. *See* Treaty Between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, Geor.-U.S., art. VII, *opened for signature* Mar. 7, 1994, S. TREATY DOC. NO. 104-13 (entered into force July 10, 1995).

[48] 2004 U.S. Model BIT, *supra* note 12, at art. 1; 2012 U.S. Model BIT, *supra* note 12, at art. 1; U.S.-Rwanda BIT, *supra* note 13, at art. 1; U.S.-Uruguay BIT, *supra* note 13, at art. 1.

[49] Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award, ¶ 214 (Perm. Ct. Arb. 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf.

[50] *See, e.g.*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 408 (15th ed. 1995); WILLIAM F. SHARPE & GORDON J. ALEXANDER, INVESTMENTS 1 (4th ed. 1990).

depends on the existence of such a period but not on its duration. While it could be shorter or longer, contrary to certain arbitral awards,[51] the threshold of two to five years should not affect the qualification of commitment as investment but only its qualification as a short-term or medium-term commitment.[52]

The second characteristic of investment does not refer to actual receipt of gain or profit but merely to its expectation. Despite the best efforts of a foreign investor, the implementation of a particular project could still result in a loss for a variety of external reasons, which may be totally unrelated to the particular project and could have nothing to do with the nature of the commitment.[53] It follows that the absence of such expectations, notably in the case of contributions made within the framework of charitable activities, should prevent their qualification as "investment."

Since commercial transactions also involve certain risks, any meaningful use of the third characteristic of investment requires distinguishing its risk element from commercial risks. Such distinction can be made on the basis of the nature of these two risks. Unlike ordinary commercial risks of non-performance of contractual obligations by a counterparty, the risk associated with an investment involves a situation when an investor cannot be sure of a return on his investment. As a result, he may not know the amount he will end up spending, even when all relevant counterparties properly discharge their contractual obligations.[54]

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[51] Salini Constr. S.p.A & Italtrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 54 (July 23, 2001), 6 ICSID Rep. 400, 414 (2004); Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶ 62 (July 16, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0225.pdf; Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 93–95 (June 16, 2006); Malaysian Hist. Salvors SDN BHD v. Government of Malaysia, ICSID Case No. ARB 05/10, Decision on the Application for Annulment, ¶ 65 (April 16, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf.

[52] *See* Gaillard & Banifatemi, *supra* note 9, at 104.

[53] For example, the discovery of natural resources or the evolution of the oil price on the oil market. *See, e.g.*, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 305 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf.

[54] Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award, ¶¶ 229–30 (Perm. Ct. Arb. 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf; Emmanuel Gaillard, *Centre International Pour Le Règlement Des Différends Relatifs Aux Investissements (CIRDI): Chronique Des Sentences Arbitrales* [*International Center for Settlement of Investment Disputes (ICSID): Chronicle of Arbitral Sentences*], 126 J. DU DROIT INT'L 273, 292 (1999).

Although some ICSID arbitral tribunals have identified further characteristics of investment, such as contribution to the host State's development[55] and regularity of profit and return,[56] they cannot be included among the criteria for such distinction. Even though economic development of a host state may certainly be considered as one of the proclaimed objectives of investment treaties[57] or of the ICSID Convention,[58] the benefit of a particular investment for this State should be seen as its desirable result, but not as its essential characteristic.[59] Similarly, since by its very essence, the investment involves the risk of loss, the absence of actual profit shall not affect the nature of commitment as an investment.[60]

Finally, when a certain investment treaty (such as European treaties or earlier U.S. treaties) does not expressly identify any characteristics of an "investment," a foreign investor cannot simply "borrow" its three characteristics from the latest U.S. treaties. If the parties to a certain treaty intended to rely upon them, they could have easily included them in the definition of "investment" in the treaty. Instead, this investor may argue that under the Vienna Convention on the Law of the Treaties, the word "investment" should be interpreted in accordance with its ordinary meaning.[61] Such meaning can be established on the basis of the most frequent use of characteristics of investment in arbitral practice.[62] Although some tribunals may have identified four or five

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[55] Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶ 65 (July 16, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0225.pdf.

[56] Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53 (Aug. 6, 2004), 13 ICSID Rep. 123, 133 (2008); Helnan Int'l Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0398_0.pdf.

[57] *See, e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Kazakhstan and the Kingdom of the Netherlands, Kaz.-Neth., Nov. 27, 2002, pmbl., https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1784/download [hereinafter Kazakhstan-Netherlands BIT].

[58] ICSID Convention, *supra* note 24, at pmbl.; Bischoff & Happ, *supra* note 6, at 513.

[59] Victor Pey Casado & President Allende Foundation v. Republic of Chile, ICISD Case No. ARB/98/2, Award, ¶ 232 (May 8, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0638.pdf; Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 111 (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf.

[60] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 305 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf; Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, § 5.43 (Nov. 30, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf.

[61] Vienna Convention on the Law of the Treaties, *supra* note 41, at art. 31(1).

[62] *Cf.* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 824 (2018).

of such characteristics, these "expanded" lists inevitably include the three *Salini* criteria, namely contribution, certain duration, and participation in the risk of the transaction.[63] Thus, any further characteristics beyond these three cannot be considered as the most frequently used, which places them outside the ordinary meaning of "investment."

A foreign investor may further argue that, from the point of view of the logical relationship between the whole and its constituent parts, the three *Salini* characteristics should be present in all illustrative categories of assets. Even though the definitions of "investment" in these treaties may refer to "every kind of asset," in accordance with the rules of interpretation of terms in their context,[64] they would not cover assets which do not possess these characteristics. On the contrary, since the list is, by its nature, non-exhaustive, the non-resemblance of a certain asset to any of its categories should not, by itself, prevent its qualification as "investment," provided that it possesses these three characteristics.[65]

Despite apparent differences in formulation of the *Salini* criteria and the characteristics of "investment" in the latest U.S. treaties, the comparison of their wording reveals that the combined effect of each of the two sets of characteristics should, in most of the cases, lead to the same overall result. Indeed, the "contribution" and "duration" elements of the *Salini* test should be covered by the "commitment" characteristic of a U.S. definition. Likewise, the "participation in the risk" element of the test is virtually identical to the "assumption of risk" characteristic.

At the same time, unlike the U.S. definition, the "expectation of profit" characteristic is not covered by the three elements of the *Salini* test. While such expectation may be considered as the usual driving force behind any commitment of capital, this traditional association shall not preclude the existence of an investment for purely altruistic purposes. In this case, the application of *Salini* criteria not insisting on this element could potentially be more beneficial for investment protection of charitable projects than the application of the latest U.S. definitions, which expressly refer to this characteristic.

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[63] Salini Constr. S.p.A & Italtrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 400, 413 (2004).

[64] Vienna Convention on the Law of the Treaties, *supra* note 41, at art. 31(1).

[65] Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award, ¶ 207 (Perm. Ct. Arb. 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf.

B. Requirement of a Territorial Link with the Host State

Many bilateral investment treaties expressly include in their definitions of "investments,"[66] or in articles defining scope of their application,[67] the requirement that such investments be made "in the territory" of one Contracting Party by investors from another Contracting Party.[68] However, they do not provide any guidance on how to determine the place where the investment was actually made. Despite the silence of treaties on this matter, finding an answer to this question should generally not be difficult in cases where investments are made in tangible form, since the location of the investment usually coincides with the physical location of the assets. The answer to the same question will be less obvious in the case of investments made in intangible form (such as financial instruments or services), as is reflected in the existence of at least four different approaches to this issue in arbitration practice and commentaries.[69]

The first one may be referred to as the "location of the beneficiary of the funds" approach. It was applied in *Fedax N.V. v. Republic of Venezuela* to government bonds purchased on the secondary market.[70] Under this approach, compliance with the territorial link requirement depends on whether the funds provided were used by the beneficiary of the loan, as in the case of the

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[66] *See, e.g.*, Acuerdo Entre La Republica Argentina y La Republica Italiana Sobre Promocion y Proteccion de las Inversiones [Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments], Arg.-It., art. 1(1), May 22, 1990, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5898/download [hereinafter Argentine-Italy BIT].

[67] *See, e.g.*, Accord Entre la Confédération Suisset la République Islamique du Pakistan Concernant la Promotion et la Protection Réciproque des Investissements [Agreement Between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments], Switz.-Pak., art. 2(1), July 11, 1995, https://www.admin.ch/opc/fr/classified-compilation/19983263/199605060000/0.975.262.3.pdf [hereinafter Switzerland-Pakistan BIT] ("The present Agreement shall apply to any investments *in the territory of one Contracting Party* by investors of the other Contracting Party, that have been made later than first September 1954 in accordance with the laws of regulations of the former Contracting Party." (emphasis added)).

[68] Argentine-Italy BIT, art. 1(1); Switzerland-Pakistan BIT, art. 2(1).

[69] *See, e.g.*, Christina Knahr, *Investments 'in the Territory' of the Host State, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 42, 52 (Christina Binder et al. eds., 2009); Margaret Clare Ryan, *Is There a Nationality of Investment? Origin of Funds and Territorial Link to the Host State*, *in* JURISDICTION IN INVESTMENT TREATY ARBITRATION, IAI SERIES NO. 8, at 97, 112–13 (Yas Banifatemi ed., 2018).

[70] Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶ 41 (July 11, 1997), 5 ICSID Rep. 183, 198 (2002).

Republic of Venezuela, to finance its various public needs.[71] A similar approach was used by the majority of the members of the tribunal in *Abaclat v. the Argentine Republic* with respect to rights in Argentine sovereign bonds also purchased on the secondary market.[72] According to the tribunal's majority, unlike investments consisting of business operations and/or involving manpower and property, with regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question would be "where the invested funds were ultimately made available to the Host State and did they support the latter's economic development."[73]

The second approach can be called the "private international law" approach. It was used by Professor Abi-Saab in his dissenting opinion in *Abaclat*,[74] as well as by several authors.[75] Under this approach, investments are made "in the territory of the host State" when they fall under the territorial prescriptive and enforcement jurisdiction of that State.[76] Determining whether investments fall under that jurisdiction may be done based on the rules of private international law of the host State. Accordingly, an analysis based on these rules makes it possible to establish whether the place (*situs*) of investment is located in this state, subjecting this investment to its enforcement jurisdiction.[77] For assets in tangible form, the definition of its *situs* is a simple matter of fact, that is, the establishment of the place where the property is physically located.[78] Regarding assets in intangible form, it is necessary to use

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[71] *Id.*

[72] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C95/DS10925_En.pdf.

[73] *Id.* ¶ 374.

[74] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, ¶ 82 (Aug. 4, 2011), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/5 (Prof. Georges Abi-Saab, dissenting).

[75] *See, e.g.*, Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 363, 383 (Zachary Douglas et al. eds., 2014); Caroline Kleiner & Francesco Costamagna, *Territoriality in Investment Arbitration: The Case of Financial Instruments*, 9 J. INT'L DISP. SETTLEMENT 315 (2018); MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 238 (2011); Christopher R. Zheng, *The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*, 34 SING. L. REV. 139 (2016).

[76] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 170–72 (2009); Zheng, *supra* note 75, at 147.

[77] Zheng, *supra* note 75, at 147–48. The term "*situs*" originates from Latin for site and denominates a location or place. *See Situs*, BLACK'S LAW DICTIONARY (6th ed. 1990).

[78] DOUGLAS, *supra* note 76, at 171.

the rules of private international law of the host State, which in respect of some forms of such assets may establish a fictitious *situs.* Thus, if under the rules of private international law of the host State, the *situs* of assets in intangible form is located in that State, the requirement of a territorial connection with respect to an investment in the form of such assets shall be deemed to have been complied with.[79] Finally, with respect to other forms of intangible assets for which private international law does not designate a fictitious *situs* (such as, for example, intellectual property rights), the solution is to ascertain, by direct reference to the substantive law of the host State, whether this law provides a basis for recognizing the existence of such property. If there is such basis, the existence of a territorial connection is considered as established.[80]

The third approach may be denominated as the "unity of investment" approach. It was applied by the tribunal in *Československa Obchodní Banka* (CSOB), *AS v. Slovak Republic* with respect to a loan granted by a bank as part of interrelated transactions to facilitate its privatization in accordance with the Agreement on the Basic Principles of a Financial Consolidation of CSOB concluded with the Ministries of Finance of the Slovak Republic and of the Czech Republic (the "Consolidation Agreement").[81] Although the loan itself did not involve any transfer of resources in the host State, the tribunal pointed out that the dispute that was brought before the ICSID must be deemed to arise directly out of an investment. This was so despite the fact that it was based on a transaction which, standing alone, would not qualify as an investment under the ICSID Convention, provided that the particular transaction formed an integral part of an overall operation that qualified as an investment.[82] "In the tribunal's view, the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of CSOB in both Republics. This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention."[83]

The fourth approach may be denominated as the "place of investor activities" approach. It was applied by the arbitral tribunals in *SGS v. Pakistan,* as well as in *SGS v. Philippines*, to pre-shipment inspection services provided by a Swiss surveillance company with respect to the goods to be imported into

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[79] *Id.* at 171–72.

[80] *Id.* at 172.

[81] Československa Obchodní Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (May 24, 1999), 5 ICSID Rep. 330 (2002). *See also* Christoph Schreuer, *The Unity of an Investment*, 19 ICSID Rep. 3, 9 (2021).

[82] *Československa Obchodní Banka*, 5 ICSID Rep. at 352, ¶ 72 (1999).

[83] *Id.* ¶ 88.

the host States.[84] In both cases, the tribunals found that a certain part of the expenditures of SGS, including the establishment of local offices, involved the injection of funds into the territories of the host States.[85] Furthermore, in *SGS v. Pakistan*, the tribunal noted that a Pre-Shipment Inspection Agreement amounted to "concession of public law," by which the State of Pakistan granted to SGS the right to exercise its activity of control in the customs field, which is normally left to the public power of the State.[86] Although the services were provided both outside and inside the host States, in *SGS v. Philippines* the tribunal came to the conclusion that "[a] substantial and non-severable aspect of the overall service was provided in" the host State. Since it was a cost to SGS to provide it, in the tribunal's view it was enough to amount to an investment in the Philippines within the meaning of the Switzerland-Philippines BIT.[87]

None of the four approaches described above is free from shortcomings and, therefore, cannot be considered satisfactory. To begin with, the major shortcoming of the "location of the beneficiary of funds" approach is that it provides different rules for establishing a territorial link for tangible and intangible investments, while neither the ICSID Convention nor the investment treaties make any distinction in the legal regime for these two types of investments. Each of them should be considered as a different facet of the same indivisible concept of "investment," which has the same internal characteristics, including the element of "contribution" of capital.[88]

A similar shortcoming is inherent in the "place of activity of investors" approach. It does not consider that neither the ICSID Convention nor investment treaties distinguish between investments made by "active" investors operating independently in the territory of the host State and those made by "passive" investors who merely provide funds to third parties and expect to profit

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[84] SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan (*SGS v. Pakistan*), ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406 (2005); SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (*SGS v. Philippines*), ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

[85] *SGS v. Pakistan*, 8 ICSID Rep. at 433, ¶ 136; *SGS v. Philippines*, 8 ICSID Rep. at 546, ¶ 101.

[86] *SGS v. Pakistan*, 8 ICSID Rep. at 434, ¶ 139.

[87] *SGS v. Philippines*, 8 ICSID Rep. at 546–47, ¶¶ 102–03; Accord entre la Confédération Suisse et la République des Philippines concernant la promotion et la protection réciproque des investissements [Agreement Between the Swiss Confederation and the Republic of Philippines on the Promotion and Reciprocal Protection of Investments], Phil.-Switz., Aug. 31, 1997, https://www.admin.ch/opc/fr/classified-compilation/20002319/199904230000/0.975.264.5.pdf.

[88] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, ¶ 82 (Aug. 4, 2011), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/5 (Prof. Georges Abi-Saab, dissenting).

solely from third party efforts. Thus, the consistent application of this approach in the case of "passive" investors may lead to the conclusion that there is no territorial link between their investments and the host State.

In its turn, the use of the "private international law" approach for determination of territorial link would be inconsistent with the function of the concept of *situs* in the conflict of laws.[89] This concept is traditionally considered as the principal connecting factor concerning immovable property,[90] designed to determine which law should be applicable to such property as well as which court should have jurisdiction *in rem* over related disputes.[91] It is also applied for resolving the same issues with respect to tangible and intangible movable property,[92] albeit with some notable exceptions, such as special rules applicable to goods in transit or to the succession of movable property.[93] At the same time, according to the generally accepted view, in addition to jurisdiction to adjudicate, associated with courts, the jurisdiction of states also includes jurisdiction to prescribe (legislate), associated with legislative branch of government, and the jurisdiction to enforce, associated with executive branch of government.[94] While exercising jurisdiction to prescribe or jurisdiction to enforce, the States may be guided by other connecting factors, namely, a person's nationality,[95] and, therefore, do not necessarily follow the rules established for determining jurisdiction of their domestic courts. It follows that the use of the concept of *situs* covers only part of the host State's jurisdiction, which, in accordance with a clearly emerging trend, can in certain cases be carried out extraterritorially.[96]

In addition, the use of the concept of *situs* for establishing the territorial link between investments and a host State could also lead to paradoxical results. While in the case of immovable property the determination of its *situs*

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[89] DAVID MCCLEAN, MORRIS: THE CONFLICT OF LAWS 3 (5th ed. 2000).

[90] FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 174–75 (William Guthrie, trans., 2d ed., Edinburgh, T & T Clark 1880); WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 252–53 (1949); JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 1199 (Peter North ed., 14th ed. 2008).

[91] WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 134 (4th ed. 2013); MARTIN WOLF, PRIVATE INTERNATIONAL LAW 553 (1945).

[92] JANEEN M. CARRUTHERS, THE TRANSFER OF PROPERTY IN THE CONFLICT OF LAWS: CHOICE OF LAW RULES CONCERNING *INTER VIVOS* TRANSFERS OF PROPERTY 24–29 (2005); FAWCETT & CARRUTHERS, *supra* note 90, at 1211–15.

[93] FAWCETT & CARRUTHERS, *supra* note 90, at 1214–15.

[94] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 462–63 (9th ed. 2019); Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 194–95 (2014).

[95] Mills, *supra* note 94, at 198.

[96] Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1303–04 (2014).

does not pose any difficulty,[97] in the case of intangible movable property, the designation of notional or fictional *situs* would be required, because, by its very nature, this property has no physical location.[98] Although such fictional *situs* may be considered a convenient formalistic legal tool for allocating jurisdiction among courts of different countries, or, in case of the United States, among courts of different U.S. states, it does not necessarily accurately reflect economic relationships underlying investments in intangible form.

This potential divergence between the legal form and economic substance can be best illustrated on the example of bearer securities, notably shares, which throughout their centuries-old history remain a quintessential tool for investment.[99] According to the rules of private international law of a number of countries, *the situs* of bearer shares is determined by the physical location of their certificates.[100] It follows that if, after paying-in the share capital and creating a joint-stock company, the foreign shareholder placed the bearer share certificates he received in a safe located outside the host State, its courts would no longer have jurisdiction over these shares.[101] Thus, from an economic and legal point of view, by making a contribution to the share capital, the shareholder has undoubtedly made the investment in the host State. However, as a result of the application of the private international law approach, there will be no territorial connection between his investment and this State. Thus, the use of the concept of *situs* in this context would mean a triumph of legal form over economic substance, which is difficult to reconcile with an ordinary view of things.[102]

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[97] *See, e.g.*, Joseph H. Beale, *The Situs of Things*, 28 YALE L.J. 525, 525–26 (1919).

[98] CARRUTHERS, *supra* note 92, at 24–25.

[99] JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 16–17 (2003).

[100] MAISIE OOI, SHARES AND OTHER SECURITIES IN THE CONFLICT OF LAWS 34–38 (2003).

[101] For example, in Switzerland, the courts are unable to impose judicial attachment at the request of the creditors of the shareholder on their bearer shares, the certificates of which are located outside the country. *See* PIERRE-ROBERT GILLIÉRON, POURSUITE POUR DETTES, FAILLITE ET CONCORDAT [DEBT COLLECTION, BANKRUPTCY, AND CONCORDAT] 521–22 (5th ed. 2012). It should be added that since November 1, 2019, bearer shares in Switzerland are permitted only if the company has equity securities listed on a stock exchange or if the bearer shares are organised as intermediated securities in accordance with the Federal Act on Intermediated Securities and are deposited with a custodian in Switzerland designated by the company or entered in the main register. *See* Code des obligations [CO] [Code of Obligations] Mar. 30, 1911, RS 210, art. 622, para. 1bis (Switz.).

[102] In case of bearer shares, this contradiction can potentially be eliminated by referring to the fact that the concept of "share" simultaneously denotes both its certificate and the intangible participatory interest in the company itself, which is a set of property and personal non-property rights of the shareholder (the so-called "corporate rights"). It can also be argued that investment treaties apply not to share certificates, but to interests in companies with respect of which the location of the issuing company may be recognized as their

Finally, the shortcoming of the "unity of investment" approach is that it does not take into account the internal logical structure of the definition of "investment" in existing bilateral and multilateral investment treaties. This structure is not based on the idea of an *interconnected set of operations*, but on individual categories of assets. In view of this structure, in cases where a certain asset does not independently satisfy the requirement of a territorial connection, this gap should not be filled by referring to other parts of the "single" investment operation carried out in the territory of the host State.

From a practical point of view, the diversity of approaches taken by arbitral tribunals in establishing a territorial link makes it impossible to make an unambiguous preliminary determination as to whether investments will enjoy the protection offered by applicable investment treaties. Thus, unless a certain uniform approach is adopted, the requirement of a territorial link may become illusory, which could lead to considerable uncertainty in the legal status of investments. Since such uncertainty adversely affects both foreign investors and host States, it would clearly be in their common interest to develop a uniform approach. In addition to being desirable in terms of legal certainty, such a uniform approach to establishing a territorial link with the host State for all forms of investment is also dictated by a single concept of "investment" in investment treaties as well as in the ICSID Convention. Neither of these instruments draws any distinction between legal regimes of tangible and intangible investments.[103] Moreover, from an economic point of view, any investment involves an inflow of capital into the production of new capital. This concept of capital flow inevitably includes a certain "territorial" movement of resources from the investor to their recipient, which occurs regardless of the form in which a particular investment is made.[104]

Such a uniform approach may be based on the new idea of "investment jural relations." The concept of "jural relation" in literature is generally understood as a relation between a person and other person (or persons), determined by a rule of law.[105] Depending on their nature, jural relations reflect

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situs. Since the company is located in the host State, there will be a territorial link between the share and that State. However, the application of such arguments to other bearer securities, such as bonds, may be difficult because, unlike stocks, the term "bond" is not ambiguous but denotes the security itself.

[103] *Cf.* Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, ¶ 97 (Aug. 4, 2011), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/5 (Prof. Georges Abi-Saab, dissenting).

[104] WILLIAN J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 399 (10th ed. 2006).

[105] *See* FRIEDRICH CARL VON SAVINGY, 1 SYSTEM OF THE MODERN ROMAN LAW 271 (William Holloway trans., 1867); Wesley Newcomb Hochfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 26 YALE L.J. 710 (1917); Albert Kocourek,

traditional distinction property rights (rights *in rem*) and contractual rights (rights *in personam*) and may be subdivided into "property" jural relations and "contractual" jural relations.[106] The property jural relations involve an individual's rights "against all the world," imposing on an undetermined circle of persons a general, passive duty to abstain from violation of *in rem* rights of this individual towards a certain object. However, contractual jural relations involve an individual's right against one or several specific individuals, imposing on them concrete active duties to perform towards this individual.[107] Jural relations arising in connection with the membership in a corporation involve both rights *in rem*, which are associated with participatory interest, as well as rights *in personam*, which are directed towards the corporation (including right to dividend in case of its attribution, right to a proportionate share of its assets available upon its liquidation after satisfaction of the creditor's claims). Thus, a new separate category of jural relations—"corporate" jural relations—may also be distinguished.

Applying this conceptual framework to investment activities, it may be concluded that, by investing capital and acquiring a certain asset in return, the investor enters into a jural relation with another person (persons) regarding this asset. Depending on the type of asset, such jural relations, by their legal nature, can be property, contractual, or corporate. In the case of a property jural relation, the connecting factor creating a territorial link between this jural relation and the host State would be the location of the asset on its territory.[108] In the case of a contractual jural relation, such a factor will be the location of the person whose actions are decisive for the content of the obligation. Accordingly, in the case of a debt obligation related to the use of funds provided by a foreign investor, it is the actions of the debtor, whether it is the State that issued the bonds or the private borrower, that will be of such decisive importance. This is true even if the bonds themselves were purchased by the investor in the secondary market. Finally, in the case of a corporate jural relation, such a factor will be the location of the organization in which the investor participates.[109]

Various Definitions of Jural Relation, 20 COLUM. L. REV. 394, 395 (1920); Arthur L. Corbin, *Jural Relations and their Classification*, 30 YALE. L.J. 226, 227 (1921).

[106] Hochfeld, *supra* note 105, at 718; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 790–91 (2001); JAMES PENNER, PROPERTY RIGHTS: A RE-EXAMINATION 87 (2020).

[107] *See* PENNER, *supra* note 106, at 87; DOUGLAS, *supra* note 76, at 205.

[108] For example, the location of a factory which the foreign investor bought in the host State.

[109] For example, the seat of a joint-stock company in which the foreign investor bought shares.

III. TYPICAL DIGITAL BUSINESS MODELS

A. Mechanism of Functioning

Although the specific details of the functioning of a digital reseller, a digital marketplace operator, a search engine operator, and a social network operator may differ significantly from each other, all four of these business models are based on a multilateral internet platform that allows interaction between different categories of its users. In the case of a digital reseller, the online platform allows consumers to purchase goods (in both tangible and intangible form) that this intermediary previously purchased from their sellers. Among many examples of such intermediaries are Amazon[110] and Zalando.[111] Since digital resellers work with multiple merchants and consumers at the same time, there is no exclusivity on either side. To purchase goods from an intermediary, each consumer must create an account containing, among other things, information about their shipping address and credit card details. After they select the product on the site, the consumers choose the method of delivery and place their order. The intermediary processes the order, charges a fee to the credit card, and sends the goods in tangible form by mail or provides access to the goods in intangible form. The intermediary also collects and analyzes consumer data to determine their purchasing habits and preferences, allowing the reseller to make them targeted offers of additional products.

For its part, the operator of a digital marketplace also manages an internet platform that allows its users to buy (or sell) goods or services amongst each

[110] Amazon.com, Inc. is a U.S. company headquartered in Seattle, Washington; its shares are listed on the NASDAQ stock exchange under the symbol "AMZN." *See About Amazon: Investor Relations*, AMAZON, https://ir.aboutamazon.com/faqs/default.aspx (last visited Oct. 29, 2022). Among its business areas, the company operates numerous websites for the retail sale of a wide variety of products designed for individual countries. *See Website (Country/Region)*, AMAZON, https://www.amazon.com/customer-preferences/country (last visited Oct. 29, 2022). Amazon also offers a subscription-based Prime membership, providing a variety of entertainment content and services in exchange for a monthly fee. *Prime*, AMAZON, https://www.amazon.com/amazonprime (last visited Oct. 29, 2022).

[111] Zalando SE is a German online fashion store with its main corporate offices located in Berlin; its shares are listed on the Frankfurt Stock Exchange. *See Zalando: Investor Relations*, ZALANDO https://corporate.zalando.com/en/investor-relations (last visited Oct. 29, 2022). The Company operates individual websites for different countries. *See* ZALANDO, https://www.zalando.com (last visited Oct. 29, 2022).

other. Typical examples of such operators include Airbnb,[112] eBay,[113] and Uber,[114] whose customers, on the one hand, are suppliers of goods (and services), and on the other hand, are consumers of these goods (and services). So, in the case of Airbnb, such service providers would be owners of real estate, while consumers would be potential tenants. Both categories of users must create their own accounts on the platform. After that, individuals looking for rentals for certain dates at a certain location can choose from offers posted on the site by landlords. Once the choice is made, renters can proceed with booking and payment by entering their credit card details. In their turn, Uber customers can use the smartphone app to communicate with the driver of the car, while payment is made using a credit or debit card connected to the application.[115]

The operator of a search engine maintains an internet platform that allows its users to search for web pages. Examples of companies implementing this business model include Google[116] and Yahoo!.[117] Search engines themselves are based on certain algorithms aimed at finding from the hundreds of billions of web pages, those most suitable for a user's query results.[118] Because of the

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[112] Airbnb Inc. is a U.S. company headquartered in San Francisco, California; its shares are listed on the NASDAQ stock exchange under the symbol "ABNB." *See Investor FAQs*, AIRBNB, https://investors.airbnb.com/resources/default.aspx#faqs (last visited Oct 29, 2022). Airbnb offers an online housing market, primarily for family living and tourism. *See* AIRBNB, www.airbnb.com (last visited Oct. 29, 2022).

[113] eBay Inc. is a U.S. company with its main corporate offices located in San Jose, California; its shares are listed on the NASDAQ Stock Exchange under the symbol "EBAY." *See Our History*, EBAY, https://www.ebayinc.com/company/our-history/ (last visited Oct. 29, 2022). Among other things, eBay operates an online auction platform. *See* EBAY, www.ebay.com (last visited Oct. 29, 2022).

[114] Uber Technologies Inc. is a U.S. company with its main corporate offices located in San Francisco, California; its shares are listed on the New York Stock Exchange (NYSE) under the symbol "UBER." *See Uber Investor: FAQ and Resources*, UBER, https://investor.uber.com/faq-resources/default.aspx (last visited Oct. 29, 2022). Among other things, Uber operates online platforms offering rides, *see* UBER, www.uber.com (last visited Oct. 29, 2022), and food delivery services, *see* UBER EATS, www.ubereats.com (last visited Oct. 29, 2022).

[115] DAVE CHAFFEY ET AL., DIGITAL BUSINESS AND E-COMMERCE MANAGEMENT: STRATEGY, IMPLEMENTATION AND PRACTICE 9 (7th ed. 2019).

[116] Google LLC is a U.S. company whose main corporate office is located in Mountain View, California; it is a subsidiary of Alphabet Inc., whose shares are listed on the NASDAQ stock exchange under the symbol "GOOGL." *See Alphabet Investor Relations*, ALPHABET, https://abc.xyz/investor/ (last visited Oct. 29, 2022).

[117] Yahoo! Inc. is a U.S. company headquartered in Sunnyvale, California; it is owned by Apollo Global Management. *See Apollo Funds Complete Acquisition of Yahoo*, APOLLO (Sept. 1, 2021), https://www.apollo.com/media/press-releases/2021/09-01-2021-161530593.

[118] *See How Search Works Overview*, GOOGLE, https://www.google.com/search/howsearchworks/ (last visited Oct. 29, 2022).

considerable degree of control exercised by these and similar operators over the information that can be found and retrieved from the internet, and the resulting dependency of content providers, the operators of this business model are sometimes referred to as "gatekeepers of the internet."[119]

Depending on their objectives, the clients of the search engine operator are traditionally divided into three categories, which are not mutually exclusive.[120] The first category is users in the narrow sense of the word who use a search engine to perform a free internet search to get the information they want. The second category is advertisers who want to deliver their ads to users of the search engine in exchange for paying its operator. In the case of Google, advertisers may rely on, among other things, the AdWords program to create text or display ads, bid money on keywords that will cause their ads to appear in search results, and set monthly budgets for their spending to display those ads.[121] The third category is content providers who want to monetize the content of their websites by accepting the placement of advertisements on these sites in exchange for a reward paid to them by the search engine operator. In the case of Google, they may use, among other things, the AdSense program that allows content providers to add an access code to their websites and automatically receive advertisements related to the content of the site.[122]

Finally, the operator of the social network platform operates an internet platform that allows its users to communicate with each other and share the content they created with other users. Examples of social networks are Facebook[123] and LinkedIn.[124] As is the case of the clients of the "gatekeepers of the internet," the clients of social network operators can also be divided into three categories. The first category, users in the strict sense, create their profiles by uploading content to their user accounts, including photos, videos, information about events, and places they visit. The second category, advertisers, deliver targeted advertising to users through the social network in

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[119] BERND W. WIRTZ, DIGITAL BUSINESS MODELS: CONCEPTS, MODELS AND ALPHABET CASE STUDY 156 (2019).

[120] Org. for Econ. Coop. & Dev. [OECD], *An Introduction to Online Platforms and Their Role in the Digital Transformation*, at 53 (May 13, 2019), https://doi.org/10.1787/53e5f593-en.

[121] *How It Works*, GOOGLE ADS, https://ads.google.com/intl/en_us/home/how-it-works/ (last visited Oct. 29, 2022); OECD, *supra* note 120, at 154.

[122] *Google AdSense*, GOOGLE, https://www.google.com/intl/en_uk/adsense/start/ (last visited Oct. 29, 2022).

[123] The social network Facebook is operated by U.S. company Meta Platforms Inc. Facebook's main corporate office is located in Menlo Park, California. Its shares are listed on the NASDAQ Stock Exchange under the symbol "FB." *See FAQs*, META, https://investor.fb.com/resources/default.aspx (last visited Oct. 29, 2022).

[124] LinkedIn is operated by LinkedIn, a U.S. company headquartered in Sunnyvale, California. It is a subsidiary of Microsoft Corporation. *See About LinkedIn*, LINKEDIN, https://about.linkedin.com/ (last visited Oct. 29, 2022).

exchange for a reward paid to its operator. As in the case of the "gatekeepers of the internet," directed advertising on social networks also relies on the algorithms of their operators, which process user data.[125] The third category, content creators, use tools developed by the social network operator to create social applications and websites that allow users to share their activities with their network's contacts.[126]

B. Added Value for Customers

All four digital business models under consideration create similar added value for their customers. It consists in increasing the number of business opportunities for potential sellers, expanding the choice for consumers, as well as reducing transaction costs.[127] In addition to this, a significant added value of social networks is the facilitation of social interactions. Social networks allow their users, in particular, to stay in touch with their friends, family, colleagues, and customers, as well as with public figures.[128]

C. Source of Profit

The sources of profit of the digital reseller and the digital trading platform operator differ from each other, as well as from the sources of profit of the "gatekeepers of the internet" and social network operators. On the one hand, a digital intermediary's main source of profit is its markup on the sale of goods previously purchased by him from their sellers.[129] On the other hand, regardless of the type of goods sold, the owner of the digital trading platform's primary source of profit is its receipt of a certain percentage of the amount paid by the consumer to the seller (service provider). Finally, the main source of profit for search engine operators and social media operators is advertising.[130]

D. Assets

i. Tangible Assets

Since all four digital business models involve the use of an online platform, as well as the collection and processing of user data, high-performance

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[125] OECD, *supra* note 120, at 137.

[126] *Id.*

[127] *Id.* at 162.

[128] *Id.* at 140.

[129] According to some sources, Uber usually profits 20 to 30% of the price of the trip, depending on local conditions. *See* CHAFFEY ET AL., *supra* note 115, at 9 (7th ed. 2019).

[130] WIRTZ, *supra* note 119, at 213.

computer equipment should be considered a mandatory part of each model's tangible assets. The need to have other types of tangible assets depends primarily on the nature of the business model. For example, in the case of a digital reseller, such assets will also include storage, sorting, and transportation facilities, because their sale requires the prior purchase of goods from their suppliers, as well as their storage, processing, and shipment.

The need to have other types of tangible assets may also depend on the geographical scope of the digital model, in particular, whether the presence of the model's clients in foreign countries requires internet companies that meet certain criteria to register their local branches, representative offices, or subsidiaries in those countries.[131] Since subsidiaries are usually created in the form of corporations that have their own legal identity, the assets of local subsidiaries will be owned by the subsidiaries themselves, rather than the parent.[132] In this case, the tangible assets of the parent company will include only its share in this foreign subsidiary, but not the assets of this subsidiary themselves. On the contrary, although the inclusion of branches and representative offices in the public register confirms their independent economic existence and may even create the appearance of quasi-legal personality, it does not give them an independent legal personality in the sense in which it is possessed by legal entities. Thus, unlike subsidiaries, from a legal point of view, the assets of branches and representative offices of the equipment will be considered as part of the assets of the parent company.

ii. Intangible Assets

The preceding presentation of four digital business models reveals that their activities inevitably involve the presence of a clientele that provides operators of internet platforms with certain information. They also mandatorily involve computer programs that ensure the functioning of these platforms, in particular the collection and analysis of this information, as well as other intellectual property objects, notably trademarks. The term "clientele" is usually understood as a set of clients of a particular business, considered as a group.[133] An essential element of this concept, which makes it possible to distinguish

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[131] *See, e.g.*, Federal'nyi Zakon RF o deyatelnosi inostrannykh lyts v informatsionno-telecommukatsionnoy seit "Internet" na territorii Rossiiskoi Federatsii [Federal Law on the Activities of Foreign Persons in the Information and Telecommunication Network "Internet" on the Territory of the Russian Federation], July 1, 2021, No. 236-FZ, art. 5, ¶ 3.

[132] The essential element of legal personality is separate patrimony, that is to say, the ability to own assets that are distinct from the property of other persons. *See* Henry Hansmann & Reinier R. Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 7 (Reinier R. Kraakman et al., eds. 2004).

[133] *See Clientele*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

the clientele as an important commercial asset from the simple sum of individual customers, is a certain continuity of relations, manifested in regular or repeated orders placed by customers with a certain seller (service provider).[134] In national laws, the rights of entrepreneurs to the clientele are usually protected by legislation prohibiting unfair competition.[135] In turn, the rights to computer programs are usually protected under copyright law,[136] while trademark rights are protected under general intellectual property laws[137] or specialized laws.[138]

An important element of any modern business activity,[139] customers play a special role in digital business models, as they are directly involved in the process of creating added value by providing data to their operators.[140] This is especially evident in the business model of the social network operator, the existence of which would not be possible at all without the content created by its participants.[141] Since the participants of the network share a common goal of its continued successful operation and to achieve this goal combine their individual efforts consisting in the creation of content and its placement on the network, we can talk about the emergence of a "common enterprise" between the participants and its operator. In addition to providing a technical

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[134] The existence of this element is most clearly manifested in the concept of "customer" in U.S. law, designating a person who regularly or repeatedly makes purchases or has a business relationship with a tradesman or business. *See Customer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[135] For example, under article 9 of the Swiss Federal Act against unfair competition, a person who, as a result of an act of unfair competition, has suffered damage to his clientele, credit or professional reputation, his business or his economic interests in general, or a person who is threatened by this, may apply to a court for the prohibition of such an act, if it is inevitable, with a demand to put an end to it, if it is still ongoing, or with a request that such an act be declared unlawful if the violation he created persists. *See* Loi fédérale contre la concurrence déloyale [LCD] [Federal Law Against Unfair Competition], Dec. 19, 1986, RS 241, art. 9(1) (Switz.).

[136] *See, e.g.*, Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 1261 (Russ.).

[137] *See, e.g.*, *id.* at art. 1477.

[138] For example, in Switzerland, this issue is regulated by a special federal law on the protection of trademarks and places of origin of goods. *See* Loi fédérale sur la protection des marques et des indications de provenance [LPM] [Federal Law on the Protection of Trademarks and Places of Origin of Goods], Aug. 28, 1992, RS 231.11 (Switz.).

[139] ROBERT C. BLATTBERG ET AL., CUSTOMER EQUITY: BUILDING AND MANAGING RELATIONSHIPS AS VALUABLE ASSETS 3–4 (2001); Sunil Gupta & Donald R. Lehmann, *Customers as Assets*, 17 J. INTERACTIVE MKTG. 9, 16 (2003).

[140] ORG. FOR ECON. COOP. & DEV. [OECD], *Digitalisation, Business Models and Value Creation*, *in* TAX CHALLENGES ARISING FROM DIGITALIZATION – INTERIM REPORT 2018: INCLUSIVE FRAMEWORK ON BEPS 24, 53 (2008) (not using the term "customer," but explaining that the use, collection and analysis of user data is becoming an integral part of the business models of the most digitalised firms).

[141] *Id.*

basis for the functioning of the network, the operator's contribution to this enterprise is the creation and implementation of the rules for its functioning, which from the outside may resemble the contract of the participants in a simple partnership. Given that such a "common enterprise" exists without the creation of a new legal entity, from a legal point of view it can be qualified as a contractual joint venture.[142] From this perspective, the intangible assets of the social network operator also include its share in such a contractual joint venture.

Unlike such assets as clientele, computer programs, and trademarks, which can be universally regarded as intangible assets of digital business models, any definitive answer to the question of whether to including data into this category is not possible at the present time. Although information about users of internet platforms can be of significant economic value for its operators, the existing legal regulation of its use has so far focused on issues of confidentiality and protection of personal data.[143] Moreover, despite years of academic debate, any general notion of ownership of information has yet to gain universal acceptance.[144] Thus, since the legal status of information in individual countries can vary considerably, the question of whether it can be recognized as an intangible asset of digital business models in each specific case will require an in-depth analysis of the relevant national legislation and its application practices.[145]

IV. THE INTANGIBLE ASSETS OF DIGITAL BUSINESS MODELS AS "INVESTMENTS"

A. Clientele

The ability to recognize the clientele of a digital business model as an "investment" depends on the way in which this concept is used in the relevant investment treaty. From this point of view, all existing treaties can be divided into three groups. The treaties of the first group explicitly include "clientele" in their definitions of "investments," equating it with the so-called "goodwill"

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[142] IAN HEWITT, HEWITT ON JOINT VENTURES 54–55 (5th ed. 2011).

[143] Enikő Hovárth & Severin Klinkmüller, *The Concept of "Investment" in the Digital Economy: The Case of Social Media Companies*, 20 J. WORLD INV. & TRADE 577, 606 (2019).

[144] Josef Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access*, MAX PLANCK INST. FOR INNOVATION & COMPETITION RSCH. PAPER NO. 16-13, at 29 (2016); Jeffrey Ritter & Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward*, 16 DUKE L. & TECH. REV. 220, 223 (2018).

[145] Eur. Comm'n, Directorate-General for Commc'n Networks, Content & Tech., *Legal Study on Ownership and Access to Data* 6–7 (2016).

of the investor.[146] On the contrary, the treaties of the second group expressly exclude from their definitions of "investment" the concept of "goodwill," as well as the concept of "market share," which is close in meaning to the concept of "clientele."[147] Finally, the treaties of the third group occupy an intermediate position between these two opposite approaches, as they do not explicitly include, but at the same time do not explicitly exclude, the term "clientele" from their definitions.[148]

In the case of the first group of treaties, digital business model clientele can be recognized as an "investment." First, the explicit reference to "clientele" in an agreement clearly indicates the intention of its parties to provide protection for this category of assets. Second, the clientele of digital business models meets the three criteria of the *Salini* test, as well as the three characteristics of "investment" in recent U.S. treaties.[149] Thus, from the point of view of the operator of the internet platform, his clientele represents a "contribution," since its acquisition required material effort from him, and its existence is associated with the expectation of profit. Since an essential element of the concept of "clientele" is a certain continuity of relations with the seller (i.e., the service provider), the criteria of the "duration" of the contribution can also be considered as met. In addition, from the point of view of the platform's clientele, the purchase of similar goods (services) from a competing operator literally "is a mouse-click away."[150] Given the low cost of changing operators of digital business models, by their nature, their clientele is associated with

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[146] Accord entre la Confédération suisse et la République d'El Salvador concernant la promotion et la protection réciproque des investissements [Agreement Between Swiss Confederation and the Republic of El Salvador Concerning the Promotion and Reciprocal Protection of Investments], art. 1(2)(d), El Sal.-Switz., Dec. 8, 1994, RO 1998 2647 (Switz.); Accord entre le Gouvernement de la Confédération suisse et le Gouvernement de la République du Panama concernant la promotion et la protection des investissements [Agreement Between Swiss Confederation and the Republic of Panama Concerning the Promotion and Reciprocal Protection of Investments], art. 8(c)(iv), Pan.-Switz., Oct. 19, 1983, RS 0.975.262.7 (Switz.). The term "goodwill" in the literature is usually understood as the prestige, business reputation, contacts, customers and personnel of the company as its asset, which can be valued and recorded in a special account (the value of the company in excess of its book assets), has no independent market value, and plays a role mainly in mergers and acquisitions. *See, e.g.*, *Goodwill*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[147] Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India, art. 2.4.1(vi), Braz.-India, Jan. 25, 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download [hereinafter Brazil-India BIT] (not entered into force).

[148] *See, e.g.*, UK-USSR BIT, *supra* note 10.

[149] 2004 U.S. Model BIT, *supra* note 12, at art. 1; 2012 U.S. Model BIT, *supra* note 12, at art. 1; U.S.-Rwanda BIT, *supra* note 13, at art. 1; U.S.-Uruguay BIT, *supra* note 13, at art. 1; Salini Constr. S.p.A & Italtrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 400 (2004).

[150] Gupta & Lehmann, *supra* note 139, at 16.

increased risks of loss compared with the so-called "real clientele" based on the user's attachment to a particular product and the associated significant costs for its replacement.[151] In view of the presence of such a risk, the third element of the *Salini* test, namely "participation in the risk of the transaction,"[152] can also be considered satisfied.

Finally, from a legal point of view, the existence of a clientele can be considered as a set of contractual jural relations between the operator of the internet platform and its individual users, having a certain duration. Since the recognition of a set of individual customers as a business asset requires the presence of regular or repeated orders, the characteristic performance in these jural relations consists of the actions of customers placing such orders. Since the customers themselves are located in the territory of the host State, the condition of the existence of a territorial connection can also be considered to be met.

As to the second group treaties, the express exclusion from the definition of "investment" of "goodwill" and "market share," similar in meaning to the concept of "clientele," clearly demonstrates the intention of the contracting parties to exclude protection for this category of assets. Therefore, the clientele of digital business model operators will not be protected under such treaties. Finally, in the case of the third group of treaties, the clientele of the internet platform operator may be recognized as an "investment." Given that the illustrative list of individual categories of assets recognized as possible forms of "investments" is not exhaustive, the absence of an explicit mention of an asset in this list does not in itself constitute a bar to its recognition as an investment if the asset meets the three elements of the *Salini* test or the three "investment" characteristics provided for in recent U.S. investment treaties. Since the clientele of digital business model operators meets these criteria (possesses these characteristics), it can be considered an "investment" under the third group of treaties.

This conclusion is supported by existing arbitration practice related to the possibility of recognizing "goodwill" as an "investment" under investment treaties that do not explicitly mention the concept. By way of example, in *Methanex Corporation v. United States*, the arbitral tribunal came to the conclusion that the absence of explicit references to "customer base," "goodwill," and "market share" in Article 1139 of the North American Free Trade Agreement (NAFTA)[153] in the exhaustive list of categories of "investment" did not

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[151] In the literature, the difficulty of changing the seller (provider) of services in the case of a "real clientele" is usually described using the concept of "customer lock-in." *See* TIM KOLLER ET AL., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 62 (5th ed. 2010).

[152] *Salini*, 6 ICSID Rep. 400, ¶ 52.

[153] *See* North American Free Trade Agreement (NAFTA), art. 1139, Dec. 17, 1992, 32 I.L.M. 289.

in itself constitute an obstacle to their recognition as such.[154] In substantiating its conclusion, the arbitral tribunal referred to an award in another case, *Pope & Talbot Inc. v. Canada,* according to which an investor's access to the U.S. market was a property interest protected under Article 1110 of NAFTA.[155] The arbitral tribunal also noted that the restrictive notion of property as a material "thing" was obsolete and had ceded its place to a contemporary conception which included managerial control over the components of a process which was wealth-producing.[156] Items such as "goodwill" and "market share" could "constitute an element of the value of an enterprise and as such may have been covered by some compensation payments."[157] Although, in the end, the arbitral tribunal did not recognize "goodwill" and "market share" as "investments" in *Methanex* due to their "standalone" nature, it did allow for such a possibility in principle.[158]

Except for the possible cases of mandatory registration of subsidiaries, branches, or representative offices in the host State, operators of digital business models generally do not have any physical presence there. Thus, by its nature, their clientele may also be considered as a "standalone" asset. However, unlike the "goodwill" and "market share" that were considered in *Methanex* as a traditional element of the value of an enterprise, the clientele of internet platform operators is an independent asset directly involved in the process of creating added value. Therefore, in the light of the *Methanex* award, which allows for the possibility of recognizing as an "investment" an asset not appearing on their exhaustive list in Article 1139 of the NAFTA, the "clientele" of internet platform operators can all the more be recognized as an "investment" under treaties that do not provide for an exhaustive list of their possible forms.

B. Interest in a Contractual Joint Venture

The interest of a social network operator in a contractual joint venture with its participants located in the territory of the host State can be recognized as an "investment" regardless of the definition of this concept in the relevant treaty since such an interest meets all three criteria of the *Salini* test, and also has all three characteristics of "investment" in recent U.S. treaties. First, the social network operator contributes to this joint venture. This contribution

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[154] Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits (Aug 3, 2005) 44 I.L.M. 1345, 1457, at pt. IV(3), ¶¶ 16–17.

[155] *Id.* ¶ 17 (citing Pope & Talbot, Inc. v. Government of Canada, Interim Award, ¶ 96 (2000), https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf).

[156] *Id.*

[157] *Id.* ¶ 18 (citing GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961)).

[158] *Id.*

includes providing its participants with the opportunity to use the platform, as well as carrying out activities aimed at commercializing the content they provide, in particular by attracting advertisers. Second, given the long-term nature of the existence of a social network, this contribution of its operator has a certain duration. Third, despite the best efforts of the operator, there is a possibility that the activities of the social network will not bring him profit or, even worse, will result in a loss. Thereby, the operator assumes the risk of losing or reducing the value of its contribution.

C. Data

Operators of digital business models wishing to recognize as an "investment" the data that they have received from their users (including their personal data) may currently face significant difficulties. First, unless the host State requires that the personal data of its nationals be stored on a server located in that State,[159] the data received by the operator is likely to be located outside that State. In such cases, regardless of whether the information can be recognized as a "contribution," the requirement that there be a territorial link between the asset and the host State would not be satisfied. Second, as noted in the literature, it may be difficult for the operator of a digital business model to convince the arbitral tribunal that the information has the element of "risk" required for the existence of the "investment" according to the *Salini* test.[160] Since arbitrators may require the presence of all elements of this test for all categories of investments, including intellectual property objects, the operator may encounter a similar difficulty even if he tried to characterize the information as one of these objects.[161] In view of the foregoing, the most attractive approach for the operator of digital platforms today may be the "unity of investment" approach used by the arbitral tribunal in *Československa Obchodní Banka, A.S. v. Slovak Republic*.[162] Although this approach does not account for the fact that the logical structure of the definition of "investment" in existing investment treaties is based on individual categories of assets rather than on the idea of a set of business transactions, convincing the arbitral tribunal

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[159] *See, e.g.*, Federal'nyi Zakon RF O personalnykh dannykh No. 152-FZ [Federal Law of the Russian Federation on Personal Data], ROSSIYSKAYA GAZETA [ROS. GAZ.] June 27, 2006, art. 18, § 5 (Russ.).

[160] Hovárth & Klinkmüller, *supra* note 143, at 607; Salini Constr. S.p.A & Italtrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 31, 2001), 6 ICSID Rep. 400 (2004).

[161] Henning Grosse Ruse-Khan, *Investment Law and Intellectual Property Rights*, *in* INTERNATIONAL INVESTMENT LAW, *supra* note 6, at 1692, 1699.

[162] Československa Obchodní Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 72 (May 24, 1999), 5 ICSID Rep. 330, 352 (2002).

of the validity of its use may allow the operator to protect information located in the territory of the host State as one of the key elements of its overall activities.[163] Moreover, given the emerging trend of the recognition of data as an independent object of property,[164] it may be expected in the foreseeable future that the arbitral tribunals will explicitly recognize data as a new category of "investment."

V. TOWARDS A NEW UNDERSTANDING OF PROTECTED INVESTMENTS IN THE DIGITAL AGE?

A. Probable Directions of Development of Arbitration Practice

The promotion and protection of foreign investment have traditionally been regarded as the main objectives of investment treaties.[165] From the point of view of the possible promotion of these goals in the era of the digital economy, the existing definitions of the concept of "investment," formulated in the previous period, have both clear advantages and significant disadvantages. Among the key advantages of these definitions is the lack of an exhaustive list of possible forms of investment. Thus, while a certain investment treaty may have been drafted even before the advent of the internet, the illustrative nature of these lists does not create a fundamental obstacle to extending its scope to new, previously unknown, forms of investment without the need to amend the treaty accordingly each time such new form appears.[166]

On the other hand, the lack of clear criteria in these definitions to distinguish between "investment" and "non-investment," combined with the lack of precedent value of arbitral awards for arbitrators subsequently considering similar issues, may lead to uncertainty in the legal status of digital business model assets as "investments." Such uncertainty may prevent digital business model operators from determining in advance whether they will be able to rely upon an investment treaty to protect their rights in the event of actions on the part of the host State that adversely affect their rights and economic interests (for example, the introduction of "digital taxes" or the imposition of fines on

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[163] *See* Nikita Kondrashov, *New Challenges to the Territorial Requirements of Investment Treaties: Can Social Platforms Be Protected?* WALTERS KLUWER: KLUWER ARB. BLOG (Jun. 22, 2018), http://arbitrationblog.kluwerarbitration.com/2018/06/22/challenge-arbitral-awards-bikram.

[164] *See, e.g.*, Ivan Stepanov, *Introducing a Property Right Over Data in the EU: The Data Producer's Right – An Evaluation*, 34 INT'L REV. LAW, COMPUTS. & TECH. 65, 65–66 (2020).

[165] *See*, *e.g.*, DOLZER ET AL., *supra* note 9, at 134–35.

[166] *Cf.* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 208–14 (3rd ed. 2021) (referring to broad asset-based definitions of investments with an illustrative list of investment forms as recognition of the constant evolution of the investment forms and reflection of the necessity to cover their wide and potentially expanding spectrum).

internet companies). It can also be assumed that the lack of clarity on this issue can, in turn, lead to the reluctance of digital business model operators to carry out their activities in the State concerned. Among other things, their reluctance could manifest in the imposition by such operators of restrictions on the access of this State's residents to its internet platform.

One possible way to address this problem would be to explicitly include "clientele" and "information" as separate assets in the definition of "investment" in future investment treaties. Nevertheless, given the experience of India, where the 2016 model investment treaty defines an investment as an "enterprise in the host State,"[167] and whose recent agreements expressly exclude "clientele" from these definitions, in practice, such a solution seems unlikely.[168] While the long-standing debate on the exact impact of investment agreements on attracting foreign investment is still ongoing,[169] it is reasonable to assume that, from the perspective of host States, the expectation of capital inflows is an integral part of the global deal associated with in their entry into these treaties.[170]

On the one end of this bargain, the host State assumes the additional burden of undertaking the obligation to apply to foreign investors from the other contracting State certain substantive standards for the protection of investments. The host State must also waive the competence of its national courts to resolve related disputes by means of giving its prior consent to their referral to international arbitral tribunals. In exchange for these potentially costly

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[167] Model Text for the Indian Bilateral Investment Treaty, art. 1.6, GOV'T OF INDIA, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [hereinafter Model Indian BIT]; Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1, 19–22 (2017). The Model Indian BIT defines "enterprise" as: "(i) any legal entity constituted, organized, and operated in compliance with the Law of the Host State, including any company, corporation, limited liability partnership, or a joint venture; and (ii) having its management and real and substantial business operations in the territory of the Host State." Model Indian BIT, at art. 1.2.

[168] Brazil-India BIT, *supra* note 147, at art. 2.4.1(vi); Bilateral Investment Treaty Between the Government of the Republic of Kyrgyzstan and the Government of the Republic of India, Kyrgyzstan-India, art. 1, § 1.4, June 14, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download (not entered into force).

[169] *See, e.g.*, DOLZER ET AL., *supra* note 9, at 28–30; KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES. HISTORY, POLICY, AND INTERPRETATION 115–20 (2010).

[170] Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 109, 120 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

obligations,[171] at the other end of the same bargain, the host State has the right to at least expect an influx of tangible capital. In view of the existence of this global bargain, if the activities of a foreign entity or natural person in the host State do not involve any inflow of tangible capital, the second part of the bargain is absent. Accordingly, from the point of view of the host State, it should not be required or even reasonably expected to comply with its first part.

Potential consequences of such host State logic can be illustrated using the example of the operator of a search engine to which there is universal access. This operator can be considered as carrying out its activities simultaneously in all States in which users of the system are located. Although, from the operator's point of view, its clientele in each of these States may certainly be regarded as its "investment" to be protected under the applicable investment treaty, from the perspective of the host State, there is no additional inflow of tangible capital. Therefore, where the activities of a digital business model operator in a particular State are limited to enabling its residents to use the internet platform, that State may not be interested in providing protection to its clientele and information as an "investment" by introducing two new categories of assets in the definition of the term.

Accordingly, it can be expected that, in order to protect clientele and information, operators of digital business models will try to use the theory of "unity of investment" developed by arbitration practice. In addition, where the host State requires foreign internet companies to establish branches, representative offices, or subsidiaries in them, it may also be expected that they will also attempt to take advantage of the "place of investor activities" approach, which considers the establishment of local offices and the costs associated with them as one of the arguments for recognizing the overall service as an "investment." Although both approaches raise conceptual objections from the point of view of their compatibility with the existing definitions of "investment," it can be expected that the reliance on them by operators of digital business models to justify the application of investment treaties will only increase in the future.

B. Distinguishing Between Investment and Commercial Transactions in the Digital Sphere

Although the list of assets in the definition of "investment" usually includes claims to money and claims to performance under contract having a financial value,[172] the awards of some arbitral tribunals excluded purely

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[171] JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 78–84 (2011).

[172] *See e.g.*, UK-USSR BIT, *supra* note 10, at art. I(a)(iii).

commercial transactions from this category.[173] To distinguish such transactions from investments, in the pre-digital era arbitrators used the criteria of contribution; duration and assumption of risk;[174] the possibility of recognizing a single transaction as one complex investment;[175] or, where the applicable investment agreement provided that such requirements should be related to an investment,[176] the presence or absence of such a link.[177]

Applying these approaches to operators of digital business models reveals a tendency to blur the distinction between investment and commercial transactions in the course of their activities. Even if each individual transaction a digital platform operator concludes with each of its clients may not necessarily satisfy all three elements of the *Salini* test, these clients are directly involved in the process of creating added value by providing data to this operator. From this point of view, each of these individual transactions can be considered as a necessary element of a complex investment operation. In other words, the aggregate of such transactions represents qualitatively more than a simple sum of individual commercial transactions. Therefore, despite the possible inconsistency with the existing structure of the definition of "investment" based on individual categories of assets, it can be expected that in the field of the digital economy the idea of a "unity of operations" will be actively used to protect the interests of foreign investors. With the passage of time, this could gain universal recognition.

C. Emerging Regulatory Role of the Concept of "Investment" in the Digital Era

In the era of the digital economy, the concept of "investment" can become one of the key elements in the emerging system of international regulation of the use of the internet. Up to the present, no universal legal act regulating the

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[173] Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award, ¶ 242 (Perm. Ct. Arb. 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf; Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004), 13 ICSID Rep. 123, 134–35 (2008); Julian Davis Mortenson, *The Meaning of 'Investment': ICSIDs Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 316 (2010).

[174] *Romak S.A.*, PCA Case No. AA2280, ¶¶ 213–32.

[175] Inmaris Perestroika Sailing Mar. Serv. GmbH & Others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶ 92 (Mar. 8, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0427.pdf.

[176] *See, e.g.*, Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, Ukr.-U.S., March 4, 1994, S. TREATY DOC. NO. 103-37, at art. I(1)(a)(iii).

[177] Glob. Trading Res. Corp. & Globex Int'l, Inc. v. Ukraine, ICSID Case ARB/09/11, Award, ¶ 51 (Dec. 1, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0379.pdf.

implementation of state sovereignty in virtual space, similar, for example, to the U.N. Convention on the Law of the Sea,[178] has been adopted. The absence of such an instrument has allowed individual States to act in this area almost at their own discretion, relying as a possible justification on their own competence to adopt unilateral legislative acts, administrative measures, and judicial decisions on the so-called "effects doctrine."[179] This doctrine gives States competence over persons who have committed acts outside their territory if the effect of those acts has occurred in their territory.[180] Since operators of digital business models can operate on a global scale, the application of this doctrine may expose them to conflicting, or even mutually exclusive, requirements of national laws and judicial decisions of different jurisdictions at the same time.[181]

The use of investment agreements by digital business model operators to protect their interests in the event of the adoption of such measures by the States in which they operate may lead to the formation of a system of checks and balances in the field of internet regulation. Under this system, the exercise by States of their standard-setting and enforcement functions, which leads to negative consequences for persons outside their territories, will be subject to control by the arbitral tribunals for the observance by these States of the standards of protection of foreign investors contained in applicable investment treaties. Figuratively speaking, investment treaties can be presented as a dam on the flow of government regulations in the domain of the internet, whereas the concept of "investment" may be considered as a kind of gateway that allows one to increase or decrease the strength of this flow. By interpreting the content of this concept more broadly or more narrowly, arbitral tribunals thereby would be acting as operators of such a gateway.

The arbitral tribunals' application of such a "gateway" may also lead to the establishment of boundaries between the exercise by one State of its regulatory function over intangible assets of the digital business models that it intends to regulate and the exercise of a similar function by other States. Based

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[178] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397; Patrick W. Franzese, *Sovereignty in Cyberspace: Can It Exist?* 64 A.F.L. REV. 1, 18 (2009).

[179] Wolff Heintschel von Heinegg, *Territorial Sovereignty and Neutrality in Cyberspace*, 89 INT'L L. STUD. 123, 133 (2013).

[180] *Id.* at 133–34 (citing Joined Cases 89, 104, 114, 116, 117, & 125 to 129/85, A. Ahlström Osakeyhtiö & Others v. Comm'n of the Eur. Communities, 1988 E.C.R. 5793, 5217, ¶¶ 19–21).

[181] For example, the Supreme Court of British Columbia in *Equustek Solutions Inc. v. Jack* was unconcerned with Google's concerns that the services of its search services could fall under the jurisdiction of any state in the world under the effects doctrine. As the Court noted, this was a natural consequence of Google's conduct of business on a global scale, rather than the result of an omission in the process of analyzing territorial jurisdiction. *See* Equustek Solutions Inc. v. Jack, 2014 BCSC 1063, ¶ 64 (Can.).

on the "effects doctrine," individual States may seek to extend the scope of their laws and judicial decisions to operators located outside their national territory. One of the ways such regulatory expansion could be accomplished is by sending public authority requests to force foreign operators of search engines and social networks to remove content posted on their platforms,[182] or make those operators comply with other regulatory requirements.[183] If the operator does not comply with such requirements, the State can impose a fine on it,[184] or, in case of non-payment, slow down or even block access to the site in its territory.[185] To the extent that such actions of the host State affect the protected investments of a platform operator in its territory, and in particular, have a negative effect on its clientele, the operator can use the applicable investment protection treaty to challenge them. In other words, the host State would be able to regulate the internet as long as its actions do not affect assets protected as "investments" under applicable investment treaties. This would create a kind of deterrent effect on such governmental regulation in the virtual domain.

This emerging system of checks and balances could benefit foreign operators of digital business models. Using this system, they could be able, for example, to subject to an independent international assessment the legitimacy of the introduction by the legislation of the host State of the requirement to locate user data in its territory in terms of a possible violation of the requirement to grant national treatment. [186] They could also be able to similarly assess the so-

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[182] *See, e.g.*, Government Requests to Remove Content, GOOGLE, https://transparencyreport.google.com/government-removals/overview?hl=en (last visited Nov. 2, 2022).

[183] *See, e.g.*, Michael Birnbaum & Brian Fung, *E.U. Fines Google a Record $2.7 Billion in Antitrust Case Over Search Results*, WASH. POST (Jun. 27, 2017), https://www.washingtonpost.com/world/eu-announces-record-27-billion-antitrust-fine-on-google-over-search-results/2017/06/27/1f7c475e-5b20-11e7-8e2f-ef443171f6bd_story.html.

[184] *See, e.g.*, Catherine Stupp, *France Fines Google, Facebook for Privacy Violations*, WALL ST. J. (Jan. 6, 2022), https://www.wsj.com/articles/france-fines-google-facebook-for-privacy-violations-11641500981; Adam Satariano, *Google Losses Appeal of $2.8 Billion Fine in E.U. Antitrust Case*, N.Y. TIMES (Nov. 10, 2021), https://www.nytimes.com/2021/11/10/business/google-eu-appeal-antitrust.html; Facebook vyplatil 17 millionov rublei shtrafa za otkaz udalit zapresheniy content [Facebook Paid a Fine of 17 Million Rubles for Refusing to Remove Prohibited Content], TASS (Dec. 19, 2021), https://tass.ru/obschestvo/13240345; Twitter grozit novyi shtraf do 4 mln. rub za otkaz udalyat zapreshenniy v RF content [Twitter Faces a New Fine of Up to 4 Million Rubles for Refusing to Remove Content Prohibited in the Russian Federation], INTERFAX (Dec. 2, 2021), https://www.interfax.ru/russia/806189.

[185] *See, e.g.*, Sotsset LinkedIn zablokiruyut v Rossii [Social Network LinkedIn Will be Blocked in Russia], TASS (Nov. 10, 2016), https://tass.ru/obschestvo/3774252.

[186] Sheng Zhang, *Protection of Cross-Border Data Flows Under International Investment Law: Scope and Boundaries*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 209, 219–20 (Julien Chaisse et al. eds., 2021).

called "digital taxes," aimed mainly at large foreign multinational companies, in terms of a possible violation of the requirement of national treatment or the requirement to grant fair and equitable treatment.[187] It follows that, in the absence of an international treaty, the concept of "investment" would allow one to determine the degree of international control over the activities of States in the field of regulating the digital economy and Internet as a whole. In the short term, possible differences between awards of various tribunals could add ammunition to the critics of the existing system of settlement of investment disputes and fuel the backlash against this system in general, notably, as concerns the perceived inconsistency of outcomes and unpredictability of results.[188] However, in the medium-term, States may be pushed towards the elaboration of such a treaty. From this point of view, the existing concept of "investment," with all its advantages and disadvantages, could certainly play a positive role in the development of an international regulatory framework for the digital economy.

VI. CONCLUSION

The preceding analysis shows the absence of conceptual obstacles to the recognition of intangible assets of digital business models as "investments" within the existing concept formed long before the advent of the digital era. The possibility of such recognition is based on a non-exhaustive list of categories of investments in the existing definitions of this term in investment treaties. At the same time, the absence of clear criteria allowing one to distinguish "investments" from "non-investments," as well as to establish the presence of a territorial link between investments and the host State, combined with the lack of precedent value of arbitral awards, could lead to significant uncertainly in this area. Foreign investors and host States may consider such uncertainty the price to pay for the absence of the need to amend the existing broad definitions of "investments" each time a new category of assets emerges in the process of digital transformation of economic and social life. In its turn, this uncertainty exposed operators of digital business models to potentially adverse actions of the host States that could potentially hinder the development of new technologies. A possible solution to address this uncertainty in the medium term could be an elaboration of an intranational treaty governing

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[187] Gibson, Dunn & Crutcher, *Digital Services Taxes May Violate Investment Treaty Protections*, MONDAQ (July 30, 2019), https://www.mondaq.com/uk/sales-taxes-vat-gst/831318/digital-services-taxes-may-violate-investment-treaty-protections.

[188] *See, e.g.*, Susan D. Frank & Lindsay E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 469, 474–76 (2015); Louis T. Wells, *Backlash to Investment Arbitration: Three Causes*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 341, 342 (Michael Waibel et al. eds., 2020).

the activities of States in the field of regulating the digital economy and the internet as a whole.