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## INVESTOR-STATE ARBITRATION IN THE DIGITAL AGE: EXAMINING THE IMPLICATIONS OF TECHNOLOGY AND DATA SOVEREIGNTY ON INTERNATIONAL INVESTMENT LAW

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### ABSTRACT

Since the process of globalization started, the economic growth of the nations has been greatly dependent upon international investments. Due to this, there was a great need for standard rules and statutes to regulate the process of international investment in order to provide legal protection as incentives for the parties to invest. As a consequence of this process, international investment law has emerged in order to provide a legal framework governing the rights and obligations of the parties, along with dispute resolution mechanisms. The most popular method of dispute resolution being adopted by the parties is investor-state arbitration.

Furthermore, international investment law plays an important role in the promotion as well as protection of the practice of Foreign Direct Investment by providing a set of rules and regulations that specify the rights and obligations of the parties, which include the states and the investors. It provides a legal framework with provisions focusing upon dispute resolution, expropriation, fair and equitable treatments, and investment promotion and protection agreements, inter alia, and thus, provides the investors and states with a stable and predictable environment that promotes economic growth and development.

Amongst the various dispute resolution mechanisms provided under the International Investment laws, investor-state arbitration has become a primary method of resolving conflicts amongst the parties. Before this mechanism was put in place, the investors had to rely on the diplomatic protection that was offered by their home states. However, after the start of the process of globalization and a rise in the practice in foreign investment, this mechanism was found ineffective, and thus, the concept of investor-state arbitration at an international level

emerged, under which the investors can approach a neutral tribunal, which enables them to seek redress directly against the host state for the alleged breaches. These mechanisms are provided at specialized arbitral institutions, which primarily include the International Centre for Settlement of Investment Disputes and other regional mechanisms like the Permanent Court of Arbitration as well as the International Chamber of Commerce.

This research paper aims to analyze the evolution of international investment law and study the practices adopted in the process of investor-state arbitration. By examining this, the researcher further aims to provide ways to address the concerns of the parties in the process and discuss the future of the investor-state arbitration process, and study the impact of Technological advancements on International investment law and Investor-State Arbitration.

### **RESEARCH OBJECTIVES**

- i. To understand the disciplines of international investment law and the remedies provided
- ii. To study the modern system of investor-state arbitration
- iii. To study the impact of Technological advancements on International investment law and Investor-State Arbitration

### **STATEMENT OF PROBLEM**

The proliferation of globalization has engendered a substantial augmentation in global trade, thereby escalating the demand for comprehensive frameworks of international investment law. Nonetheless, akin to any legal construct, the domain of international investment law is not devoid of lacunae. Thus, the imperative is the discernment and elucidation of its fundamental tenets and principles. This research endeavor is dedicated to an exhaustive examination of the cardinal disciplines within international investment law, with a particular focus on the mechanism of investor-state arbitration as a primary mode of dispute resolution. Furthermore, it undertakes a rigorous critique of the extant legal regime to afford a perspicacious appraisal of the prospective trajectory of international investment law.

### **INTRODUCTION TO INTERNATIONAL INVESTMENT LAW**

Investment treaty law and international investment law are the same as the law of investment treaties as interpreted and applied by investment treaty tribunals. Despite having certain private components, international investment law has become a branch of public international law during the past few decades. Along with a few free trade agreements, including the North

American Free Trade Agreement, the discipline consists of several bilateral investment treaties. The Vienna Convention on the Law of Treaties, which codified much of the law of treaties, and a set of draft articles that the International Law Commission adopted in 2001, which codified the law of state responsibility, are other significant sources of general public international law that are referred to in this passage.<sup>1</sup>

The arbitration procedure serves as the foundation for current international investment law. The ability of an investor to use the treaty's mandatory dispute settlement clauses to begin arbitration proceedings against a host state is a typical feature in international investment agreements. This opens up the option of suing for damages if any of the rules of that specific treaty are broken. The ratification of an international investment agreement by a state establishes that state's agreement to arbitrate. A state is not required to acquire consent for each potential conflict individually, though. Both the Arbitration Institute of the Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes have often used arbitration venues in these situations. The agreement itself serves as the foundation for the law and legal provisions that may be implemented in this procedure, which is followed by the state's domestic law and the pertinent principles of general international law.

In the present times, the practice of the states is to respond to concerns regarding the fairness of compulsory arbitration by refusing to take part in the arbitration process. On the other hand, other states have also terminated their consent to dispute settlement in specific arbitration forums.

There are various sources of international investment law, including treaties, conventions, customs, etc. However, the primary sources can be categorized as follows:

#### ***A. BILATERAL TREATIES***

In the field of international investment law, which is dominated by bilateral treaties, custom and general principles are limited to concretizing and providing interpretive background for treaty norms. As such, they could be viewed as the antithesis of multilateralism, a highly fragmented patchwork of bilateral agreements. International investment agreements' dispute resolution protocols contribute to the multilateralization of international investment law. Arbitrators chosen from a relatively small pool of arbitration specialists who are appointed in

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<sup>1</sup> Report of the International Law Commission, 53rd Sess, Supp No 10, UN Doc a/56/10 (2001).

a sizable portion of cases arbitrate matters in accordance with the treaties.<sup>2</sup> Despite having differing opinions on many points of international investment law, this particular panel of arbitrators shares a common understanding of the core structural components and substantive ideas of the field, which promotes the convergence that characterizes a multilateral regime.

### ***B. ARBITRAL PRECEDENT***

Article 38 (1) (d) of the ICJ Statute states that judicial rulings are “subsidiary means for the determination of rules of law,” not sources in and of themselves. The same is true of decisions made by investment treaty tribunals, which are not sources in the traditional sense but rather instruments for evaluating the content of international investment law. Their lower status in the hierarchy of sources should not, however, conceal the fact that arbitral tribunal decisions regarding the rights and obligations under international investment law are becoming more and more the main source for defining these rights and obligations. Therefore, the manner in which these frequently ambiguous norms and concepts in international investment agreements have been used, molded, and expanded upon by investment treaty courts in previous instances is what ultimately determines the result of investor-state conflicts. Put differently, arbitral precedent becomes the primary source of reference for determining the substance of international investment law.

The statement of the Tribunal in *Saipem v Bangladesh* is representative of a position that has widely taken hold among investment arbitrators:

*“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals.*

*It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”<sup>3</sup>*

### ***C. COMPARATIVE LAW***

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<sup>2</sup> Sergio Puig, Social Capital in the Arbitration Market, 25 EJIL 387, 424 (2014); *See also* Joost Pauwelyn, The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus, 109 AJIL, 761, 805 (2015).

<sup>3</sup> *Saipem SpA v. People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Provisional Measures, para 67 (2007).

In addition to giving arbitral precedent more weight, the inclusion of mandated dispute resolution procedures in international investment law also has an impact on the process of resolving investment conflicts by influencing the integration of sources beyond the conventional canon of sources. Notable progress in this area has been made by applying comparative law to comprehend and implement investment accords. *Lemire v. Ukraine*, which examined, in a rather selective and disorganized manner, the application of similar requirements in a variety of domestic legal systems of third countries to determine whether the requirement to radio-broadcast a certain percentage of Ukrainian music was in violation of FET, is an example of a haphazard application of comparative law.<sup>4</sup> Article 38 (1) (c) of the ICJ Statute must be taken into consideration when interpreting international investment agreements as “relevant rules of international law applicable in the relations between the parties,” as per Article 31 (3) (c) of the Vienna Convention on the Law of Treaties. Notwithstanding these diverse functions, comparative law’s potential impact on international investment law is limited by the degree of interpretative discretion afforded by the relevant treaty regulations.

#### ***D. SOFT LAW***

Comparative law is just one non-traditional source that influences how investment treaties are interpreted, and investment disputes are resolved. Non-binding soft law instruments created by a variety of parties, including private, non-governmental organizations, and intergovernmental and international organizations, also have an influence on modern international investment law. When it comes to managing investor-state conflict settlement, soft law tools are very crucial.

The first category of soft law consists of instruments related to the arbitral procedure. Rather than trying to affect the fundamental rights and duties under International Invest, these instruments largely deal with procedural legal technicalities and serve managerial reasons. In addition to this, the International Bar Association (IBA), a legal professional association whose members are national bar associations, has also established a number of regulations and recommendations.<sup>5</sup>

### **SETTLEMENT OF DISPUTES UNDER INTERNATIONAL INVESTMENT LAW**

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<sup>4</sup> Joseph Charles Lemire v. Ukraine, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, para 506, (2010).

<sup>5</sup> IBA Guidelines on Party Representation in International Arbitration (5<sup>th</sup> June 2024) [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

The terms “international investment law disciplines” relate to the obligations that the agreements place on the host state about its interactions with foreign investors and the firms that it is accountable for. These disciplines are based on the text of the particular treaty; however, all international investment agreements often share a fundamental element. Such core contents may be listed as:

- i. Non-arbitrary and Non-discriminatory treatment
- ii. National treatment
- iii. Most favoured Nation Treatment
- iv. Minimum Standard of Treatment and the fair and equitable treatment standard:
- v. Duty not to Expropriate
- vi. Full protection and Security
- vii. Domestic Requirements
- viii. Umbrella Clause

#### ***A. REMEDIES PROVIDED TO THE PARTIES***

When a tribunal finds that a host state has disregarded its obligations under an international investment agreement, it must deal with the question of remedies. The relevant law may address the remedy problem, even if international investment agreements frequently omit it. When such constraints are not imposed by the agreements, arbitral courts exercise their remedial powers in conformity with fundamental principles of international law. In international arbitration, there are basically two types of remedies available.

#### **RESTITUTION**

In international law, restitution is a common form of reparation. Placing the claimant in the same circumstances as before to the worldwide wrongful behavior is known as restoring the status quo ante. reparation is the chosen method of reparation under international law. According to the ILC’s draft articles on the law of state responsibility, restitution should be given “provided and to the extent that” it is not “materially impossible,” and it shouldn’t unfairly burden the state that committed the internationally wrongful act relative to the potential benefit to the injured state. Restitution may thus be granted in addition to compensation or satisfaction if an order for restitution does not meet the criteria for complete repair.

#### **COMPENSATION**

Compensation is the appropriate form of restitution in cases where repayment in Integrum is not practical. The only restriction on compensation as a sufficient form of reparation is the need for the injury to be “financially assessable.” This phrase includes both pecuniary and ethical losses—such as property damage and psychological distress—caused by internationally illegal behavior. Like restitution, awards of compensation must “re-establish the situation which would, in all probability, have existed” prior to the international misconduct. Therefore, financial compensation must accurately reflect the loss that the victim of the internationally wrongful activity really suffered, both generally and specifically in the context of international investment law.

### ***B. PROTECTION THROUGH PEACEFUL MEANS OF SETTLEMENT OF DISPUTES***

The development of peaceful conflict resolution techniques, such as international arbitration, has gradually drawn the focus of the world community. The original idea was to use these techniques to resolve disputes between states. Nonetheless, a system of resolving disputes between governments and private citizens emerged. States originally created international claims commissions, also known as mixed claims commissions, wherein claims submitted on behalf of their own citizens or by two States against each other may be heard.

These commissions, which were frequently set up in the wake of major historical events like revolutions, also made it possible for the claims of private persons to be widely supported because individual endorsements were rare. This was before the States could be sued directly by private individuals. Perhaps the first successful attempt to create the basic structure of a system that would later be greatly altered to be used in disputes between States and foreigners was the Permanent Court of Arbitration, which was founded by the Hague Peace Conferences in 1899 and 1907. Based on arbitration clauses in important contracts, the first wave of arbitral lawsuits against the Soviet Union in the early 1920s probably corresponded with the creation of the PCA.

In the aftermath of World War I, the Permanent Court of International Justice was created in the context of the creation of the League of Nations. Some cases involving investment disputes, most prominently the Chorzow Factory and Mavrommatis Palestine Concession,<sup>6</sup> were decided by this court. Both cases, however, were submitted through espousal. After World War II, the

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<sup>6</sup> The Mavrommatis Palestine Concessions, 2 P.C.J.I., ser. A 1924, (2018).

successor to the Permanent Court of International Justice, the International Court of Justice has since ruled on a limited number of cases involving foreign investment, including the 1953 Anglo Iranian Oil Co. Case,<sup>7</sup> the Barcelona Traction Case,<sup>8</sup> and the 1987 Case Concerning Elettronica Sicala S.P.A. (ELSI).<sup>9</sup>

## **SYSTEM OF INVESTOR-STATE ARBITRATION**

In the pursuit of enhancing coherence and lucidity within the prevailing apparatus of international investment law, several scholars have diligently endeavored to furnish exhaustive expositions thereof. For instance, Dolzer and Schreuer contend that the delineation of a discrete category of principles within international investment law is largely a matter of semantics, given their profound entrenchment within the broader ambit of international economic law. Nevertheless, the inherent nature, organizational structure, and overarching objective of international investment law manifest as inherently distinct within the overarching international legal framework. Zachary Douglas perceives this legal regime as possessing a “hybrid” character owing to the intricate interplay between domestic jurisprudence and public international law.

Conversely, Kingsbury and Schill posit its integration into an evolving global administrative law paradigm, while Santiago Montt characterizes it as a variant of international administrative law. Gus van Harten classifies the system as a manifestation of public law. Thomas Wälde underscores the centrality of the State-individual dichotomy in shaping every instance of investment treaty adjudication, advocating for an interdisciplinary approach drawing analogies from cognate legal domains to foster comprehension and refinement of the system, viewing it ultimately as a mechanism for fostering external discipline and promoting good governance. Stephan Schill advances the notion that bilateral investment treaties serve as precursors to a unified, comprehensive multilateral investment framework, with particular emphasis on the function of most-favored-nation provisions.

Certain key aspects of the Investor-State Arbitration Process are:

### ***A. ARBITRAL RULES AND ORGANIZATION OF PROCESS***

The terms of the bilateral investment treaty, which are frequently accepted by the claimant when it makes its case, govern the arbitration process. The most often used rules in ad hoc

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<sup>7</sup> Anglo-Iranian Oil Co. U.K. v. Iran, 93 I.C.J. 21 (1952).

<sup>8</sup> Barcelona Traction Light and Power (Belg. v. Spain) 6 I.C.J. 63 (1964).

<sup>9</sup> Elettronica Sicala S.p.A. (ELSI) (U.S. v. It.), 15 I.C.J. 11 (1989).

arbitration are those of the International Centre for Settlement of Investment Disputes and UNCITRAL Arbitration. The methodologies of both sets of legislation are adaptable. All aspects of a dispute, including the annulment of awards, are handled in compliance with the International Centre for Settlement of Investment Disputes regulations under the self-contained International Centre for Settlement of Investment Disputes Convention. This might be the main difference. In contrast, the 1958 New York Convention's ruling might be overturned or revoked under the UNCITRAL Arbitration Rules without resorting to local courts.

### ***B. SELECTION AND CHALLENGE OF ARBITRATORS***

A fundamental idea in arbitration is the independence and impartiality of all arbitrators, and it is considered that they all possess these qualities. Naturally, parties will often select an arbitrator who shares their doctrinal views or who they perceive to be biased in Favor of them due to their legal or cultural background. This inclination is not a qualifying quality as long as the arbiter is conscious of it and does not allow it to affect his professional judgment.<sup>10</sup> After selection, the arbitrator's involvement is essential to the procedure. The parties must function independently in order to ensure that they get equitable treatment throughout the arbitration. To guarantee the arbitrator's independence, the parties require the arbitrator to reveal any facts and circumstances that may reasonably lead to the arbitrator's disqualification, such as any legal advice or expert opinion on the dispute provided to a party.<sup>11</sup>

One of the grounds invoked for disqualification is the repeated appointment of an arbitrator by a party. In *Burlington v. Ecuador*, the defendant claimed that "the lack of disclosure of the arbitrator's repeated appointment by the claimant's law firm was a ground for recusal."<sup>12</sup> However, it was the arbitrator's conduct in response to Ecuador's questioning during the disqualification procedure that resulted in his removal. In another case, *Tidewater v. Venezuela*, the claimant's request for "the disqualification of an arbitrator was rejected after

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<sup>10</sup> R. Doak Bishop & Lucy Reed, Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration, 2 Arb. Int'l 14 (1998). <http://www.nadr.co.uk/articles/published/arbitration/SelectingArbitrators.pdf>.

<sup>11</sup> International Bar Association (IBA) Guidelines on Conflicts of Interests in International Arbitration, Section 2.1.1. Waivable Red List (2014).

<sup>12</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña.

finding that, although the arbitrator failed to disclose repeated appointments by Venezuela, the arbitrator had rendered decisions against Venezuela in previous cases.”<sup>13</sup>

### ***C. GOVERNING LAW, INTERPRETATION TOOLS AND ROLE OF PRECEDENTS***

Choice of law clauses, found in several investment treaties, specify the sources of law to be consulted, including international law, host State law, and any other relevant agreements. Article 42 of the ICSID Convention states that in the absence of such provisions, international law and the law selected by the parties in an ICSID arbitration- or, in the absence of such a choice, the law of the Contracting State party to the dispute- must be applied. In a UNCITRAL case, the issue will be settled in line with Article 33, which specifies that the tribunal will apply the appropriate laws if the parties cannot agree on anything.

### ***D. JURISDICTION***

The main criterion for establishing jurisdiction is the parties’ consent. Furthermore, in order to establish a claim, a foreign investor must show that (1) their investment satisfies the requirements set out in the bilateral investment treaty, and (2) they are eligible to be investors under the provisions of the treaty. If the claim is brought to the International Centre for Settlement of Investment Disputes, the investor must further fulfill the requirements of the International Centre for Settlement of Investment Disputes Convention.

### ***E. LEGALITY OF INVESTMENTS***

It may seem axiomatic that for investments to enjoy the benefits of a treaty, they must first have been created in accordance with relevant domestic laws. Some investment treaties spell out this requirement, and arbitral tribunals such as *Incense v. El Salvador*<sup>14</sup> relying on such clauses, have “dismissed cases where foreign investors had circumvented the local laws. Related to that are implications of corruption and the applicability of the doctrine of unclean hand in investment treaty arbitration”

### ***F. INVESTORS***

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<sup>13</sup> Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator.

<sup>14</sup> Alasdair Ross Anderson and Others v. Costa Rica, ICSID Case No ARB(AF)/07/3, IIC 437.

Article 25 of the International Centre for Settlement of Investment Disputes Convention and contemporary investment treaties define an investor as both a natural and a legal person, including businesses, state-owned enterprises, sovereign wealth funds, and even nonprofit organizations. The phenomenon of “treaty shopping” and “forum shopping,” in which foreign investors establish corporations of convenience to satisfy the nationality requirement of various BITs in order to benefit from a treaty, has been a persistent problem for host States over the past few years.<sup>15</sup> The employment of different businesses and people in the ownership chain by investors to file several claims against the host State of the investment is a similar problem. A case has occasionally been rejected by arbitral tribunals on the basis that these methods have been deemed abusive. But it’s unclear exactly when these kinds of assertions ought to be rejected. As seen in the *Phoenix v. Czech Republic* case, logic and principles of international law, such as rationed temporis limitations, seem to dictate that restructuring for the purpose of bringing claims that are foreseeable should be considered abusive and impermissible.<sup>16</sup> But so far, no consistent practice has been developed on this issue.

#### ***G. STATE DEFENCES***

In order to defend their disregard for their international commitments, host governments may invoke a number of defenses. These defenses mostly stem from the “circumstances precluding wrongfulness” listed in the International Law Commission’s Articles on State Responsibility, which include force majeure, distress, and necessity. In the charges brought against it during the 2001–2002 financial crisis, Argentina specifically used the definition of need. Investment treaties may also include clauses that restrict the obligation of the State in the event of conflict, war, or other issues. In the context of the same set of instances, Argentina utilized these clauses. In investment treaty arbitration, there is limited opportunity for host States to bring counterclaims, even though, in theory, all arbitration rules allow counterclaims so long as the claim is within the scope of the parties’ consent to arbitration.

#### ***H. COMPENSATION, DAMAGES, AND VALUATION***

Since it requires tight coordination and participation from valuation and economic professionals, determining damages in an international arbitration is arguably the most difficult part of the process. When it comes to compensation in expropriation circumstances, investment treaties frequently require payment of fair market value, as assessed just before to

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<sup>15</sup> *Venezuela Holdings v. Venezuela*, ICSID Case No. ARB/07/27, Decision on jurisdiction.

<sup>16</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.

expropriation. The Chorzów Factory case is most commonly cited as the source of the concept of damages related to other aspects of bilateral investment treaties, such as fair and equitable treatment and national treatment and compensation for unlawful expropriation. The Permanent Court of International Justice held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”

### ***I. ANNULMENT AND ENFORCEMENT***

After an award has been made, the losing party may attempt to change or reverse the decision. There are few grounds for contesting arbitral verdicts under the International Centre for Settlement of Investment Disputes Convention and the New York Convention that are applicable in non-ICSID matters, with the main emphasis being on whether the arbitral procedure was carried out correctly rather than on the merits. Therefore, it is commonly accepted that procedures for nullifying investment treaty arbitration verdicts are not appeals. In exceptional circumstances, however, arbitration awards and commentators consider annulling an award for manifest errors of law that are not dissimilar to an appeal.<sup>17</sup>

### **IMPLICATIONS OF TECHNOLOGY AND DATA SOVEREIGNTY ON INVESTOR-STATE ARBITRATION**

The implications of technology and data sovereignty on investor-state arbitration are multifaceted, touching upon definitions of protected investments and investors, territorial nexus, and standards of treatment and protection within International Investment Agreements.

Firstly, the definition of “investment” under International Investment Agreements has traditionally been broad, often encompassing “every kind of asset,” including movable and immovable property, shares, claims, business concessions, and intellectual property rights<sup>18</sup>. This breadth allows digital assets, such as cryptocurrencies, digital shares, and tokenized rights, to potentially fall within the scope of protected investments, provided they meet certain characteristics, such as the commitment of resources, a certain duration, and an element of risk. For instance, Switzerland’s Distributed Ledger Technology law has facilitated the tokenization

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<sup>17</sup> Occidental v. Ecuador, 2015.

<sup>18</sup> Yannaca-Small & Liberti, *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD 46 (2008).

of rights and financial instruments, thereby including digital shares within the scope of protected investments<sup>19</sup>.

In the context of data sovereignty, data localization requirements pose significant challenges. Some countries mandate that data generated within their borders be stored locally. This can conflict with International Investment Agreements' national treatment provisions, which require that foreign investors be treated no less favorably than domestic investors. Data localization can lead to disputes if foreign digital service providers feel discriminated against<sup>20</sup>.

The territorial nexus of digital investments further complicates matters. Traditional International Investment Agreements require a physical presence within the host state to establish a territorial link. However, digital investments often lack a physical presence, making it difficult to ascertain where the investment is "located"<sup>21</sup>. For instance, cloud computing and data processing may occur in multiple jurisdictions simultaneously, challenging the traditional notion of territoriality<sup>22</sup>.

Moreover, the standard of treatment, particularly Fair and Equitable Treatment and Full Protection and Security, also needs adaptation to address digital threats like cyber-attacks. Tribunals have traditionally interpreted Full Protection and Security to cover physical protection, but there is growing advocacy for its extension to legal and digital security, given the increasing significance of digital assets<sup>23</sup>.

Additionally, investor definitions in International Investment Agreements may need revision to accommodate digital identities. The rise of e-residency programs, such as those in Estonia and Ukraine, which allow individuals to establish and manage businesses online, challenges the traditional understanding of investor nationality and permanent residency<sup>24</sup>. These programs grant digital identities without physical residency, raising questions about the eligibility of e-residents for protections under International Investment Agreements<sup>25</sup>.

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<sup>19</sup> Chaisse & Bauer, *Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration*, 21 VJETL 559 (2019).

<sup>20</sup> Zhang & Mitchell, *Data Localization and the National Treatment Obligation in International Investment Treaties*, WTR 4 (2021).

<sup>21</sup> Horváth & Klinkmüller, *The Concept of 'Investment' in the Digital Economy: The Case of Social Media Companies*, 20 JWIT 581 (2019).

<sup>22</sup> Polanco, *The Impact of Digitalization on International Investment Law: Are Investment Treaties Analogue or Digital?*, 24 GLJ 583 (2023).

<sup>23</sup> Chaisse & Bauer *Supra*, p. 576.

<sup>24</sup> Alschner, Elsig, & Polanco, *Introducing the Electronic Database of Investment Treaties The Genesis of a New Database and Its Use*, 20 WTR 73 (2020).

<sup>25</sup> Polanco *Supra*, p. 581.

## CONCLUSION

Thus, it may be concluded that with the rise in the process of globalization, there has been an increase in international commerce, and consequentially, international investment law has to be developed in order to regulate and control such processes. The primary sources of the law are Bilateral treaties, soft law, arbitral precedents, and comparative law. However, there are other sources of the international investment law as well. There are some primary disciplines upon which the whole process of international investment is based, which include principles such as fair and equitable treatment, non-arbitrary treatments, most favored nation treatment, and so on. These are subject to some restrictions as well.

Furthermore, the remedies provided under the international investment law may be primarily categorized as compensation and restitution, which can be achieved through the process of investor-state arbitration. The key aspects of the process include the unique arbitral rules and organization of the process, the neutrality of the arbitrator and challenge of the appointment of arbitrator on various grounds, including the same weightage given to the arbitral precedents in the process, the primacy given to the parties in the selection of jurisdiction and the legality of instruments, among others.

Hence, as the process of globalization is only increasing due to improved connectivity, it may be said that international investment law is going to be increasingly important in such circumstances due to cross-nation trade and investment. Therefore, it is important to remove the anomalies present in the law and make it easy for the parties to approach the various international institutions in order to solve disputes.

Furthermore, while IIAs are primarily designed for “brick-and-mortar” investments, their broadly defined protections can extend to digital assets if interpreted flexibly. However, the lack of explicit provisions for digital investments necessitates the cautious inclusion of digital transformation commitments in IIAs to avoid increased investor-state disputes. As digitalization progresses, the investment law regime must evolve, balancing the need for investor protection with states’ regulatory autonomy in the digital economy.

Balancing the incorporation of technology and data sovereignty within investor-state arbitration necessitates a nuanced interpretation of IIAs. Originally crafted for traditional investments, these agreements must now extend their broad definitions to encompass digital assets, reflecting the complexities of the digital era. Meticulous consideration is required to prevent an escalation of disputes. Harmonizing robust protection for digital investments with

the sovereign regulatory prerogatives of states is imperative. As international investment law adapts to the exigencies of digitalization, addressing these challenges will be paramount to preserving the system's efficacy and equity.