ANALYSIS OF THE *WHATSAPP LLC V. UNION OF INDIA* THROUGH THE LENS OF INTERNATIONAL INVESTMENT LAW

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ABSTRACT

This paper examines the tensions between local legislation and International Investment Agreements (IIAs) in the context of cross-border digital platforms, with a focus on the WhatsApp LLC v. Union of India case. As digital services gain prominence in the global economy, traditional investment protections under IIAs are increasingly prone to challenges by state-level regulatory frameworks, particularly those concerning data privacy, localization, and sovereignty. WhatsApp's challenge to India's 2021 Information Technology Rules illustrates the delicate balance between protecting national security and adhering to international investment commitments. This paper analyses whether digital services such as WhatsApp can qualify as protected investments under IIAs and explores potential legal claims, including expropriation and the breach of fair and equitable treatment (FET), that such platforms could pursue in response to restrictive local regulations. Ultimately, it seeks to highlight the need for clearer, updated investment definitions and protections to accommodate the evolving digital economy.

Keywords: International Investment Agreements (IIAs), Cross-border digital platforms, Data privacy and localization, Expropriation and Fair and Equitable Treatment (FET)

INTRODUCTION

In an era dominated by digitisation and cross-border data flows, the framework of International Investment Agreements ("**IIAs**") is being tested. Traditionally, IIAs were designed to protect tangible foreign investments, such as factories and infrastructure. However, the rapid rise of digital platforms and services demands a re-examination of whether these digital assets could qualify as 'investments' under IIAs. This paper investigates the *WhatsApp LLC v. Union of India*[1] case, where the Indian government's data localization and traceability regulations clash with WhatsApp's encryption policies, raising questions about the treatment of digital services under IIAs. The analysis aims to explore the implications of such regulations on international investment law.

International Investment Agreements are of multiple types. They could be a Bilateral Investment Treaty (BITs) or cover a larger number of countries such as EFTA, the Energy Charter Treaty (ECT) and so on. These agreements cover obligations that each party has to fulfil in respect to investors from the country of the other party. These agreements outline what the parties consider to be an investment, who can qualify as an investor, the protections to be granted to investors and most importantly, the forum for resolving a dispute related to the agreement. While there exists an international arbitral body for deciding such disputes, namely the International Centre for Settlement of Investment Disputes (ICSID), States must be a party to the ICSID Convention in order to avail its jurisdiction. Currently, there are 165 countries who are signatories to this convention[2]. Investors are free to get into an investment contract with a country and avail certain protections and obligations privately as well.

EMERGING TREND: SERVICIFICATION AND THE DIGITAL ECONOMY

We are witnessing changing times, a new era of servicification and growing dominance of cross-border digital economy. Traditional foreign direct investment (FDI) patterns, centered on tangible assets, are evolving. Increasingly, international investment agreements (IIAs) now include provisions for digital services and infrastructure. Evidence of this trend can be found in establishment of Digital Free Trade Zones (DFTZs) which are aimed at attracting digital

[1] W.P. (C) 7284/2021.
[2] International Centre for Settlement of Investment Disputes, 'LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (as of August 25, 2024).' https://icsid.worldbank.org/sites/default/files/ICSID%203/2024%20-%20Aug%2025%20-%20ICSID%203%20-%20ENG.pdf.

companies and platforms without any threshold of a greenfield investment or physical presence in order for the companies to get tax benefits and other incentives.[3] Malaysia is a pioneer in this regard and launched its DFTZ in 2016.[4] Recent treaties also reflect this shift. Agreements such as the EU–Organisation of African, Caribbean, and Pacific States Partnership Agreement (2023), the Chile–EU Interim Trade Agreement (2023), and the ASEAN–Australia–New Zealand FTA Second Protocol (2023) incorporate obligations to facilitate the digital economy and promote robust digital trade frameworks.

The World Trade Report of 2018 revealed that demand for ICT services had doubled in 2000-2016 period[5]; thereby, driving unprecedented growth in investment in intangibles like services and intellectual property—outpacing physical capital investments.[6] Similarly, the 2024 World Trade Report emphasized the rising integration of ICT services into key sectors such as transportation, telecommunications, finance, and business services.[7] The Report also highlighted how digital technologies reduce trade costs and facilitate the export of digitally deliverable services, and strengthening global value chains (GVCs). Professional services, in particular, now play a crucial role in export growth and the global economy.

The foreign investors in this sector bring with them the technological know-how, innovation techniques and newer advanced technologies. Developing economies are gaining from the integration of services as these intermediate inputs enhance productivity and constitute a pathway for economic transformation. As a result, the race among host States now revolves around the establishment of innovation hubs, cutting-edge online public service, making funding more readily available to start ups and so on. Nonetheless, both developing and developed countries (especially the latter) have expressed growing concerns regarding the new rapidly evolving, aterritorial and increasingly integrated digital economy.

[3] P. Delimatsis, 'Financial Services Trade in Special Economic Zones' (2021) 24:2 *Journal of International Economic Law* 277.
[4] Harsono, H. (2020) 'The China-Malaysia Digital Free Trade Zone: National Security considerations,' *The Diplomat*, 25 July. https://thediplomat.com/2020/07/the-china-malaysia-digital-free-trade-zone-national-security-considerations/.
[5] WTO, *World Trade Report 2018*, at 111.
[6] J. Haskel and S. Westlake, *Capitalism without Capital: The Rise of Intangible Economy* (Princeton University Press, 2018).
[7] See WTO, *World Trade Report 2024*, at 126.

CONCERNS AND EMERGENCE OF A PROTECTIONIST REGIME

The concerns around this sector are raised by both, the host States and investors.

1. Host States

A primary concern that most States have revolves around data privacy and national security. States fear that the extensive data collection that is undertaken by foreign technology companies pose significant risks to privacy of their citizens and can be potentially misused. Further, as digital technologies are ever advancing, there are unlimited possibilities by these online service providers to overcome local regulatory barriers. In retaliation, measures such as geo blocking or banning are taken up which result in geo- economic fragmentation of the global economic system and the international investment regime.[8] States are being driven to bring in local legislations and interfere in the digital economic space to protect the consumer, which is ultimately their own citizens. Consequently, key strategy implemented by States includes mandating **data localization**, i.e., storing all data within their borders.[9] For regulators (governments), there exists a dual obstacle. They must adequately utilise the positive aspects of introduction of such technology while at the same time protecting existing industry occupants, safeguarding the local innovators' interests and excluding competitors.[10]

Another challenge that the host States must work on mitigating is letting their citizens get locked into foreign technology ecosystems. When foreign digital innovations and breakthroughs are launched in a State, the consumers benefit immensely by the access to newer technology in the short run, however there is a very real possibility that they get locked-in in certain ecosystems. The most infamous example of this is the Microsoft Office 365 ecosystem. Microsoft Office and its accompanying software have become the industry standard in business and education, indirectly mandating that individuals all over the world rely on these. This locking-in in terms of software leaves the consumer with no freedom of choice and adversely affects any smaller player which is trying to enter the market. The same is also a pain point for the governments of the host States as it discourages its citizens from innovating, creating and

[8] Delimatsis, P. (2024) 'TILEC Discussion Paper DP 2024-04 From TikTok to Uber to the Metaverse: Digital Services, Servicification and International Investment Law,' *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.4843381.
[9] A. Chander and U. P. Lê, 'Data Nationalism', 64 *Emory Law Journal* (2015) 677.
[10] Ginsburg, R. (2018) 'Investor-State Dispute Settlement in the Digital Economy: The Case for Structured Proportionality,' *Northwestern Journal of International Law & Business*, 39(2).

developing. A host State would be rendered too vulnerable and dependent on such foreign companies, especially as geopolitical tensions are increasing globally. Consequently, this has heightened host States' apprehension about granting access to foreign digital platforms within their economies in the first place. Primary example of this being the Indian government citing privacy concerns and assuming that Chinese apps pose a threat to India's sovereignty and security while imposing a ban on operation of TikTok in the Indian territory.[11]

As a result of these concerns, a protectionist discourse has emerged, broadening the concept of national security to encompass a wide range of threats, including those posed by non-state actors, non-military challenges, and non-human factors such as economic crises, cybersecurity, terrorism, and climate change. Specifically, a growing number of States are actively widening the definition of national security to encompass economic security, safeguarding vital infrastructure, communications assets, cutting-edge semiconductor or quantum technologies, and most importantly, data.[12]

An illustration of such protectionist policy in play is when the Chinese business Huawei Technologies attempted to acquire the US corporation '3Com' for $2.2 billion. This was rejected in 2008 by the Committee on Foreign Investment in the United States (CFIUS)[13]. Based on speculation, it was assumed that Huawei is connected to the Chinese military and government, while the targeted '3Com' was a bankrupt American technology company. The Treasury Secretary and other US officials claimed that Huawei's purchase of US technology would jeopardise US national security interests[14]. Specifically, the CFIUS stated that it assumed that the Chinese government controlled all big national Chinese enterprises. Thereby implying, that any investments they made in a company owning data could end up being instruments used by the Chinese government to achieve geopolitical and military goals of strategic importance; permitting Huawei to purchase '3Com' would also give China's

[11] Travelli, A. and Raj, S. (2024) 'What Happened When India Pulled the Plug on TikTok,' *The New York Times*, 25 April. https://www.nytimes.com/2024/03/22/business/tiktok-india-ban.html#:~:text=India%20was%20its%20biggest%20market,into%20violence%20at%20their%20border.

[12] J. Benton Heath, 'The New National Security Challenge to the Economic Order' (2019) 129 Yale L.J. 1020, 1024.

[13] Wayne M, Morrison, Cong. Research Serv. RL33536, China U.S. Trade Issues 3, (Current Politics and Economics of Northern and Western Asia 20.3, 2011).

[14] Tina Lam, *The Legal Hurdles Preventing a U.S. China Bilateral Investment Treaty: Problems With National Security, Environmental and Labor Standards, and Investor State Dispute Settlement Mechanisms* (Florida Coastal Law Review, 2014).

authorities a way to obtain sensitive data. This case highlights how economic security and national security are becoming deeply intertwined in digital investment policies.

2. Foreign Investors

Investors in this sector face regulatory uncertainty and risk of forced technology transfer in addition to the usual political, cultural, social, commercial and long-term financial risks. As the digital sector is still evolving, so are the policies surrounding it. Investors in the software, e-commerce, and telecommunications sectors of the digital technology are faced with erratic regulatory frameworks in the countries where they operate. The host States may implement abrupt changes in digital legislation, such as taxation, content control, or data protection laws. Investors face this new, pressing conundrum when they decide to invest technology in a new country; *What happens if the host State introduces laws that severely restrict their operations after investments are made?* Their concerns, unsurprisingly, are not without cause.

One example of regulatory uncertainty is Uber's entry into the Chinese market in 2010. Upon entering the Chinese market, Uber's operations were not hindered as there was a lack of government regulations for ride-sharing services. The host government quickly established regulations that obstructed Uber's ability to operate as planned. Under the new regulations, Uber's collected data would fall under government oversight. Subsidies would be eliminated, and market prices would be applied. Uber would need approval from both provincial and national regulators for its operations across China, with online and offline services being regulated separately. Additionally, foreign companies like Uber would face stricter regulations than local competitors.[15] Despite Uber's registration as a local entity, its national platform would be treated differently. While the industry would be standardized, local governments would still have the authority to issue "ride-hailing service driver's licenses" and determine who qualifies as a driver and what types of vehicles can be used. Uber, consequently, had to opt to withdraw its multibillion dollar investment in China and sell its interests to a local competitor.[16]

[15] Zheping Huang, *China Finally Made Ride-Hailing Legal, in a Way that Could Destroy Uber's Business Model*, QUARTZ, (July 29, 2016), https://qz.com/745337/china- finally-made-ride-hailing-legal-in-a-way-that-could-destroy-ubers-business-model/; William C. Kirby, *The Real Reason Uber is Giving Up in China*, HARV. BUS. REV., Aug. 2, 2016, https://hbr.org/2016/08/the-real-reason-uber-is-giving-up-in-china.
[16] Id.

Forced technology transfer is when a country's government compels foreign companies to share their technology before authorising them to enter the market. China is notoriously known for using investment laws to induce the same[17]. Its most well-known FTT policy involves de facto technology transfers from international corporations to their Chinese partners through the use of foreign ownership restrictions. In the case of Uber in China, the Chinese government recommended merging of Uber with local competitors in order to operate effectively.[18] The local regulations generally mandate that foreign companies wishing to invest in specific industries enter into cooperative agreements, such as joint venture agreements, with Chinese partners, even though foreign businesses typically prefer to invest in China through the structure of a wholly owned foreign enterprise. These restrictions have made it easier for Chinese businesses to get access to proprietary data and foreign technologies[19]. This was also the outcome in the Uber in China example. Uber had announced it was selling its Chinese operations to Didi Chuxing, its rival in the Chinese market. As part of the agreement, Cheng Wei will join Uber's board, while Kalanick will take a position on Didi Chuxing's board. In exchange, Uber will receive a 20% stake in Didi Chuxing, which will continue to operate Uber's Chinese business under its own brand.[20]

The central issue surrounding investments in cross border digital platforms and digital assets is whether they are even protected under existing treaties and agreements to mitigate aforementioned risks. The same requires an investigation into whether these would firstly even qualify as 'investments'. If the answer to such an inquiry is in the positive, the next issue would be whether digital investments are technically 'in the territory' of the contracting parties. Fulfilment of the requirement of an investor would vary from case to case depending on the specific facts, therefore the paper does not delve into the same.

BACKGROUND OF WHATSAPP V. UNION OF INDIA

The case of *WhatsApp LLC v. Union of India*[21] centres on a clash between WhatsApp's dedication to protecting user privacy with end-to-end encryption and the Indian government's

[17] Ross P. Buckley & Weihuan Zhou, *Navigating Adroitly: China's Interaction with the Global Trade, Investment, and Financial Regimes*, 9 E. ASIA L. REV. (2013).
[18] *supra* note 16.
[19] Max von Zedtwitz, *Managing "Forced" Technology Transfer in Emerging Markets: The Case of China*, 25 J. INT'L MGMT at 7 (2019)
[20] Solomon, B. (2016) *Everything we know about Uber's blockbuster China deal.* https://www.forbes.com/sites/briansolomon/2016/08/01/uber-china-didi-chuxing-merger-sale-travis-kalanick/.
[21] W.P. (C) 7284/2021.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. WhatsApp's encryption prevents any third party, including WhatsApp, from accessing messages, allowing only the parties involved in the conversation to read them. With a user base of more than 500 million in India[22], the platform highlights the importance of robust encryption in safeguarding personal and professional communications against unauthorized access and surveillance.

During February 2021, the Indian government implemented these fresh IT Rules that mandated digital platforms, such as WhatsApp, to adhere to major regulatory modifications. Two of the most disputed clauses are the identification of creators and methods for addressing complaints. The rule on traceability requires platforms to reveal the original sender of a message when asked by authorities. This would essentially mean WhatsApp would have to violate its privacy policies by decrypting and monitoring messages. Furthermore, platforms must establish systems for handling user complaints, designate compliance officers, and promptly delete illegal content.

WhatsApp responded by taking legal action in August 2021, by filing a lawsuit in the Delhi High Court, questioning the legality of the traceability mandate. The platform contends that this infringes upon the right to privacy, a fundamental right upheld by India's Supreme Court in the significant *K.S. Puttaswamy v. Union of India*[23] case. WhatsApp argues that the traceability rule could weaken the security offered by end-to-end encryption, putting users at risk of privacy violations and surveillance. Requiring WhatsApp to trace message origins could compromise encryptions for all users, not just those being investigated, putting the privacy and security of millions at risk.

The WhatsApp case will serve as a crucial evaluation of the equilibrium between privacy rights and government regulation in the digital era in India. If the Indian government is successful, it may lead to more stringent rules on technology platforms. On the other hand, if WhatsApp wins, it could uphold the significance of encryption and online privacy, establishing a powerful example for privacy protections globally.

[22] ETtech (2023) 'WhatsApp Channels surpasses 500 million monthly active users,' *The Economic Times*, 15 November. https://economictimes.indiatimes.com/tech/technology/whatsapp-channels-crosses-500-mn-monthly-active-users/articleshow/105241047.cms?from=mdr.
[23] AIR 2018 SC (SUPP) 1841.

This case also warrants an analysis through the lens of international investment law, assuming a hypothetical standard investment agreement exists between India and the United States which contains substantive protections that are similarly worded as other standard IIAs. This paper aims to hypothesise how the such a dispute involving a foreign cross border digital platform and digital asset might unfold under such a framework. Specifically, the inquiry centres on whether Meta Platforms, Inc., the parent company of WhatsApp, could initiate a claim against India under a standard IIA and the potential remedies available to it in that context.

INVESTMENT

The qualification of digital technologies as investments is still debated amongst scholars. More and more products apprehensively walk the tightrope between commodities and services as the Internet of Things (IoT) takes over consumer markets with things like connected automobiles and smart devices, making the dichotomy between the two unsustainable[24]. Newer BITs and similar agreements have attempted to narrow down the definition of investment however there are still agreements in place that have a sweeping definition of investment that include catch-all phrases as such as 'every kind', or 'any other types or kinds' or are similarly open worded. An example of this is the Canada-EU CETA[25]. In addition to the definition of investment, IIAs usually require as a condition that such assets are invested in accordance with the laws and regulations of the host State in order to be 'protected' investments.

First we must understand what cross border digital platforms and digital assets entail. A digital platform facilitating communication, data exchange, or services across national boundaries is a cross border digital platform.[26] WhatsApp operates as a global communication platform with users in almost every country. It enables seamless exchange of messages, files, and calls, transcending geographic and regulatory boundaries. Therefore, it is a cross border digital platform.

[24] Delimatsis, P. (2024) 'TILEC Discussion Paper DP 2024-04 From TikTok to Uber to the Metaverse: Digital Services, Servicification and International Investment Law,' *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.4843381.
[25] Art. X.2 Canada-EU CETA.
[26] Yang, Y., Chen, N. and Chen, H. (2023) 'The digital platform, enterprise digital transformation, and enterprise performance of Cross-Border E-Commerce—From the perspective of digital transformation and data elements,' *Journal of Theoretical and Applied Electronic Commerce Research*, 18(2), pp. 777–794. https://doi.org/10.3390/jtaer18020040.

Digital assets on the other hand, generally refer to anything created and stored in a digital format that is identifiable, discoverable, and possesses or provides value.[27] These are of diverse forms including emails, social media accounts, electronic media such as music, videos, and books, software in source or object code, compilations of data, domain names, designs, trade secrets, and digital currencies. WhatsApp represents a valuable digital asset for its parent company, Meta Platforms, Inc., due to its intellectual property (software and algorithms), extensive user base, and data processing capabilities. The platform generates value indirectly through its integration with other Meta services and targeted advertising.

Nevertheless, Mills has pointed out the 'structural challenges' in using IIAs for ICT due to their composition and definition. She argues that the agreements have conflicting terms and insufficient coverage, especially for investments in intellectual property and digital assets in the ICT sector.[28] Although definitions of investment in IIAs are often broad and asset-based, typically not explicitly encompassing digital assets, claimants must prove these assets are protected investments to be considered as such. Qualifying something as an asset may also be possible by demonstrating that investing in gathering and collecting data is beneficial. In various instances, the Court of Justice of the European Union (CJEU) has clarified that 'investment' refers to the resources allocated towards finding, confirming, or organizing the data in a database, excluding the resources used to create the actual materials in the database.[29]

For WhatsApp to qualify as an investment by Meta Platforms, Inc it must fulfil the requirements under the specific BIT and it should also meet the jurisdiction *ratione materiae* as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Article 25 of the Convention only states that it has jurisdiction over 'legal disputes arising out of an investment'.[30] The drafters of the convention have left this article broad and vague, however, the Salini test has been developed by the tribunal in the case of *Salini Costruttori S.P.A. and Italstrade S.P.A. V. Morocco*[31] which is followed as a common practice and has now, explicitly become part of multiple investment agreements. The criteria that must be satisfied for there to be a 'investment' for the purposes

[27] Investopedia Team. (2024) *Digital Asset: Meaning, types, and importance*. https://www.investopedia.com/terms/d/digital-asset-framework.asp.
[28] Ivory Mills*, Emergent Challenges in International Investment Law: Investing in ICT*, in HUMAN RIGHTS AND TECHNOLOGY: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT 33 (Mariateresa Garrido V. ed., 2017).
[29] Daniel J. Gervais, *TRIPS Meets Big Data*, in BIG DATA AND GLOB. TRADE L. 160–76, 169 (Mira Burri ed., 2021) (citing C-46/02, Fixtures Marketing Ltd v. Oy Veikkaus Ab (2004), -ECLI-:-EU-:C:2004:694; C-203/02).
[30] *ICSID Convention*, art. 25, Mar. 18, 1965, 575 U.N.T.S. 159.
[31] ICSID Case No. ARB/00/4.

of Art. 25 of the Convention is (1) contributions, (2) certain duration of performance of the contract, (3) a participation in the risks of the transaction, and (4) the contribution to the economic development of the host State. As there exists no actual agreement between US and India, the *Salini* criteria is applied to determine whether Meta Platforms, Inc. has made an investment in India.

1. **Contribution:**

WhatsApp, mainly via offering digital services, has contributed significantly to India's economy. Among these contributions is also the creation of a tangible technological infrastructure; in order to run its messaging service at scale in India, WhatsApp has made investments in servers, data storage, and software. It has also created and registered its local subsidiary under the name of Facebook India Online Services Pvt. Ltd. with its registered office in Hyderabad, Telangana. It has directly and indirectly helped job creation through partnerships, advertising, and content moderation. As of November 2022, Meta Platforms, which owns WhatsApp, had an estimated 300 to 400 employees in India working across its various platforms, including Facebook, WhatsApp, and Instagram. Among this workforce, the WhatsApp team was the smallest, consisting of over 60 staff members.[32] In addition to its direct workforce, WhatsApp has played a major role in job creation within India's gig economy. The platform has been key in organizing and connecting gig workers, especially women, improving their communication and coordination.[33] This empowerment has enabled workers to push for better working conditions and salaries, thereby indirectly aiding job opportunities and advancements in the gig sector.

Although there are limited figures regarding the total jobs generated by WhatsApp in India, its contributions to improving communication and organization within the gig economy highlight its indirect influence on employment in the nation. Despite providing a free service, WhatsApp also makes money through targeted advertising via Meta's larger advertising ecosystem (on Facebook and Instagram), which depends on user engagement and data.

[32] 'Meta's India staff on edge after US firm fires 11,000 globally,' *The Times of India*, 9 November, 2022. https://timesofindia.indiatimes.com/business/india-business/metas-india-staff-on-edge-after-us-firm-fires-11000-globally/articleshow/95410202.cms.

[33] Chandaran, R. (2023) *India's women gig workers organise with WhatsApp, secret meetings*. https://www.reuters.com/article/technology/feature-india-s-women-gig-workers-organise-with-whatsapp-secret-meetings-idUSL8N39K06F/.

2. Certain duration of performance of the contract:

Since its introduction in 2010, WhatsApp has been operating in India; therefore, this is not a temporary arrangement. WhatsApp has grown to have over 500 million users in India over the last 10 years, making it an essential component of the country's digital ecosystem. Its long-term operations, including with ongoing enhancements, upgrades, and customer support can be said to meet the performance criteria of a specific period.

3. Participation in the risks of the transaction:

India's data localisation laws and developing privacy laws, like the Digital Personal Data Protection Act, 2023 and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, pose significant regulatory risks for WhatsApp as highlighted in the WhatsApp case. Given how much WhatsApp depends on end-to-end encryption for its operations, the traceability requirement may jeopardise that strategy. WhatsApp's reliance on user data for targeted advertising as a free service is at risk. If WhatsApp's user base in India shrinks due to regulatory restrictions, its value to Meta's advertising business would decline. This is particularly significant given that India is WhatsApp's largest market, with over 500 million users. WhatsApp's financial sustainability may also be severely impacted by shifts in user behaviour, increased competition, or governmental limitations on data use. Further, WhatsApp Pay and its Unified Payments Interface (UPI) based payment service in India, represents an emerging revenue stream. Regulatory decisions, such as limiting the number of transactions or users (as seen in the National Payments Corporation of India's decision to cap UPI market share at 30%)[34], could impede the financial viability of this service.[35]

4. Contribution to the Economic Development of the Host State:

WhatsApp Pay is a digital payment solution that connects with UPI. By facilitating simple, safe peer-to-peer payments, this service contributes to the expansion of financial inclusion, particularly in rural areas with sparse banking infrastructure. WhatsApp connects millions of individuals and promotes communication in this diverse and densely populated nation by

[34] 'Relief for PhonePe, Google Pay as NPCI extends proposed 30% UPI market share cap deadline to end-2026,' *The Economic Times*, 1 January, 2025. https://economictimes.indiatimes.com/tech/technology/npci-extends-upi-volume-cap-timeline-by-2-more-years/articleshow/116829131.cms?from=mdr

[35] HT News Desk (2024) 'WhatsApp Pay gets NPCI nod for nationwide UPI user expansion,' *Hindustan Times*, 31 December. https://www.hindustantimes.com/business/whatsapp-pay-gets-npci-nod-for-nationwide-upi-user-expansion-101735651390335.html.

offering a free, safe, and easily accessible messaging network. It has grown to be an essential tool for people to communicate with each other, with businesses, and even with government agencies as proven by the example of the recent coordinated protest by women in gig sector. WhatsApp is also an important tool for digital entrepreneurship, as many small businesses use it to connect with clients. WhatsApp Business is a separate app launched by the same parent company for the Small and Medium Sized Enterprises (SMEs). By providing certain tools through this application, WhatsApp contributes to their growth. In India, over 15 million businesses reportedly use the WhatsApp Business app to connect with customers, process orders, and deliver services.[36]

Therefore, it can be said that WhatsApp would qualify as an investment as per the *Salini* criteria, however it would still be subject to the specific criteria under a BIT. Additionally, the same criteria has been abandoned or rejected in cases such as *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*[37] *(Award, 2008)* and *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia (Decision on Annulment, 2009)*[38]. In Biwater case, the tribunal noted that "contribution to development" is not an independent, mandatory requirement under the ICSID framework. Modern tribunals have adopted a more flexible approach, recognizing the diversity of investment forms, especially in technology and digital sectors. The abandonment of the Salini criteria reflects the evolution of international investment law toward broader, treaty-specific, and context-sensitive approaches. While Salini's principles remain relevant in some instances, modern IIL practice prioritizes the specific terms of investment treaties, rendering the rigid application of the Salini test less common.

TERRITORIALTY

Investment treaties generally contain specifications of the 'territory' or 'area' in which investments are located. The issue is whether an individual or a business can possess an 'investment' in a state with solely an online presence (e.g., an Internet presence). According to certain ISDS precedents, as long as these actions can be attributed to the investment meant for the host country, it would be enough to satisfy the territoriality rule.

[36] Raj, A. (2023) *WhatsApp for Business targets Indian enterprises*. https://techwireasia.com/2023/09/why-is-whatsapp-for-business-bringing-payment-tech-to-indian-enterprises/.
[37] ICSID Case No. ARB/05/22.
[38] ICSID Case No. ARB/05/10.

In *CSOB v. Slovakia*[39], a case concerning loan obligations, the tribunal held that "a transaction can qualify as an investment even in the absence of a physical transfer of funds." Similarly, in *SGS v. Paraguay*[40], the tribunal stated that the BIT does not imply that investments within the State's territory are restricted solely to those the State mandates to be made there. Instead, it encompasses any qualifying investments located within the territory. The tribunal further noted that contractual services, even if involving elements both within and outside the territory, are inseparable and should be treated as a unified whole. In the case of *Abaclat v. Argentina*[41], it was ruled that the location of an investment is determined by its nature; for investments that are solely financial, the key factors should be where and for whom the funds are actually utilized, rather than where the funds were initially disbursed or transferred. Therefore, the important inquiry is where the invested money was eventually provided to the Host State and if it aided in the latter's economic growth. The court *in British Caribbean Bank Ltd. v. The Government of Belize*[42] definitively ruled that the location of a financial instrument is determined by the location of the investment's benefit, stating that a loan agreement's benefit is where the funds were issued. Other cases have also emphasized that an investment can benefit a host State even without a direct transfer of funds to that territory.

WhatsApp contributes significantly to the host State, India. WhatsApp's presence in India includes aiding in communication, small business dealings, and transactions through WhatsApp Pay, contributing significantly to the economy and society of the host country. The primary reasons for these benefits are data and digital services, which are increasingly important assets in the worldwide economy. Although there is an absence of physical transfer, the afore discussed cases suggest that as long as the financial benefits from the investment go to the host country, the territorial criteria can still be met, even if WhatsApp does not have physical infrastructure in India. Even though WhatsApp's servers are not located in India, the services and data it manages are important parts of the country's digital infrastructure. This could be seen as similar to an investment that boosts economic activity in the host country, particularly considering the important role WhatsApp has in enabling communication and emerging digital businesses in India.

[39] Decision of the Tribunal on Objections to Jurisdiction, §78 (May 24, 1999).
[40] Decision on Jurisdiction, §114 (Feb. 12, 2010).
[41] Decision on Jurisdiction and Admissibility, §374 (Aug. 4, 2011).
[42] Award, §206–207 (Dec. 19, 2014).

Therefore, a concrete argument can be made that WhatsApp is an investment in the territory of India.

PROTECTIONS THAT CAN BE AVAILED

1. Fair and Equitable Treatment ("FET") protection

FET is the most invoked claim by investors in Investor-State disputes.[43] FET is not properly defined as essentially, the purpose of the clause as used in BIT practice is to fil gaps that may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.[44] A comprehensive definition has been provided by the tribunal in the case of *TECMED v. Mexico Award, 29 May 2003*.[45] The same is commonly cited. The tribunal defined FET standard as requiring host States to act consistently (or provide stability), transparently, free from ambiguities and operate in a way wherein the investors can predict and form their expectations from the host State government.

In the present case, a potential claim can be brought against the Indian state as WhatsApp's operations in India have faced unforeseen regulatory challenges. The FET principle requires host states to provide a stable and transparent legal framework that allows foreign investors to make informed decisions. Regulatory changes, such as the push for local data storage and forced compliance with new privacy laws, could create an unpredictable environment that contravenes this protection, especially as there is virtually no jurisprudence regarding the same in India. In the case of *El Paso v. Argentina*[46], the tribunal ruled that Argentina's actions violated the FET standard by creating an unpredictable environment for foreign investors. The changes in regulatory measures in the course of an economic crisis (including restrictions on transfers, rescheduling of cash deposits and pesification of US dollar deposits) were alleged to have affected the claimant's investment and frustrated the investor's ability to hedge against the risk of the devaluation of the pesos. The same were found to be abrupt and lacking transparency, which adversely affected El Paso's investments in the country. Similar arguments could be

[43] Dolzer R, Schreuer C (2012) Principles of International Investment Law, 2nd Edn. Oxford University Press, Oxford, p. 130.
[44] Dolzer, R., Kriebaum, U. and Schreuer, C. (2022) *Principles of International Investment Law*. Oxford: Oxford University Press.
[45] Award, 29 May 2003, 43 ILM (2004) 13 at para 154.
[46] ICSID Case No. ARB/03/15.

made in WhatsApp's context, where abrupt regulatory changes could undermine its operational framework in India.

However, India has moved away from traditional BIT models and adopted a more state-centric approach in its investment treaty framework. The 2016 Model BIT, which serves as the foundation for India's recent BIT negotiations, significantly narrows the scope of investor protections. Unlike earlier BITs that provided broad FET protections, the 2016 Model BIT limits FET claims to specific circumstances, such as denial of justice, fundamental procedural breaches, and targeted discrimination[47]. This means that WhatsApp's claim of regulatory unpredictability may not be sufficient under India's revised BIT approach, as India no longer recognizes a broad "legitimate expectations" standard like the one applied in *El Paso v. Argentina*[48].

Additionally, India's 2016 Model BIT mandates the exhaustion of local remedies (ELR) before an investor can initiate arbitration[49]. Article 15.1 of the Model BIT states that an investor must pursue all available domestic legal remedies for at least five years before resorting to international arbitration[50]. In the context of WhatsApp, this would mean that Meta Platforms Inc. would first have to challenge India's IT Rules before Indian courts; delaying any investment claim. This contrasts with traditional BITs, particularly U.S. or European BITs, which do not impose strict ELR requirements and allow direct access to arbitration[51].

These provisions reflect India's increasing emphasis on regulatory sovereignty and reducing exposure to ISDS claims. If WhatsApp were to challenge India under an existing BIT, the jurisdictional barriers created by the ELR requirement and the restrictive interpretation of FET could significantly limit its chances of success.

2. Indirect Expropriation

Another claim that could be brought is expropriation. Expropriation is not always illegal as usually there is a local law dealing with the requirements that are to be met before the

[47] Ministry of Finance, Gov't of India, *Model Text for the Indian Bilateral Investment Treaty* (2016), https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.
[48] ICSID Case No. ARB/03/15, Award (31 October 2011).
[49] Prabhash Ranjan, *India's 2016 Model BIT and Its Implications for Investment Protection,* 33 ICSID Rev. 427, 429 (2018).
[50] Ministry of Finance, *supra* note 47, art. 15.1.
[51] Lauge Poulsen, *Investment Treaties and the Global South*, Oxford University Press, 134 (2020).

government can expropriate one's private property. Host State's right to expropriate is generally recognised under customary international law, provided that such expropriation meets certain standard requirements including public purpose, non-discrimination, due process and 'prompt, effective and adequate compensation'[52]. Expropriation could be direct or indirect.

An indirect expropriation occurs where the totality of a State's actions constitutes a 'taking' of an asset by substantially depriving the investor of the ability to benefit from an investment in a meaningful way.[53] The central issue to be resolved for a claim of illegal expropriation is whether the forced sharing of data and data localisation under India's regulatory regime could be seen as substantially depriving WhatsApp of its economic benefits from its investment in India. WhatsApp relies heavily on user data to provide and monetize its services, any regulation that diminishes its ability to benefit from this data, such as strict data-sharing mandates or compulsory access to encrypted data, could qualify as an indirect expropriation. The core argument would be that the regulation substantially deprives WhatsApp of its ability to economically benefit from the data, mirroring the *Theodore D. Einarsson and others v. Canada*[54] case, where the sharing of seismic data led to a loss of licensing revenue.

However, the viability of a claim of expropriation remains doubtful as Indian government could justify the new regulations as being necessary for national security, public order and to prevent cybercrimes.

CONCLUSION

The clash between local legislation and international investment obligations, as seen in the WhatsApp LLC v. Union of India case, underscores the growing legal uncertainties faced by cross-border digital platforms. While IIAs were originally designed to protect tangible investments, the rise of intangible digital assets requires a rethinking of what constitutes an investment in the digital age. WhatsApp's challenge to India's data localization and traceability

[52] As per the Hull rule which was upheld in ADC Affiliate Limited & ADC & ADMC Management Limited v. Hungary (ICSID Case No. ARB/03/16).
[53] CME Czech Republic B.V. v. Czech, UNCITRAL Arbitral Trib., Partial Award, 604 (Sept. 24, 2024), https://icsid.worldbank.org/sites/default/files/parties_publications/C9734/D%20-%20Statement%20of%20Claim%20-%2006.10.%202022/Legal%20Authorities/CL-0072-ENG%20-%20CME%20v%20Czech%20Republic%20-%20Partial%20Award.pdf
[54] ICSID Case No. UNCT/20/6.

regulations highlights the vulnerabilities of digital platforms operating in countries with stringent data laws.

This issue is not unique to WhatsApp. A similar regulatory conflict arose in *X Corp. v. Union of India*[55], where Twitter challenged the Indian government's content takedown orders under the IT Act. The case exemplified how stringent domestic regulations can compel foreign digital platforms to comply with directives that may conflict with their global operational policies, investor expectations, or even free speech principles. Such legal uncertainties increase the regulatory risks for digital investors, leading to compliance burdens, potential expropriation claims, and deterrence of future investments, highlighting the increasing need to protect investments in the digital space.

While platforms like WhatsApp could potentially qualify as investments under certain IIAs, their protection remains ambiguous due to the lack of specific language addressing digital services. Furthermore, claims of expropriation or breaches of FET could be difficult to sustain, as host states increasingly justify their regulations on grounds of national security and public interest. This case demonstrates the need for IIAs to evolve and incorporate clearer protections for digital assets, ensuring a fair balance between investor rights and state regulatory sovereignty.

The paper also suggests that as the digital economy continues to expand, international bodies and states must collaborate to update investment treaties, ensuring they are equipped to handle the complexities of digital services. Without such reforms, the risk of investment disputes in the digital sector will continue to rise, potentially stifling innovation and investment in the global digital economy. Countries must strike a balance between fostering technological growth and protecting national security, ensuring that both local and foreign stakeholders can thrive in an increasingly interconnected world.

[55] Writ Petition No. 13710 / 2022 (GM-RES) [Karnataka High Court; Judgment dated 30.06.2023]