WEP Warwick Evans Publishing

International Journal of Social Sciences and Public Administration

ISSN: 3005-9836 (Print), ISSN: 3005-9585 (Online) | Volume 7, Number 1, Year 2025
DOI: https://doi.org/10.62051/ijsspa.v7n1.02
Journal homepage: https://ijsspa.org

Research on the Eligibility of Data Asset from the Perspective of International Investment

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ABSTRACT

The development of science and technology and economy has pushed the world into a new era of digital economy. As a key factor of production, data flows frequently in the field of international investment because of its property attributes and investment value, which indicates the trend of transnational investment in the future. For multinational investors who intend to invest in data assets, the first issue to be considered is whether data assets can become eligible investment and be protected by existing international investment entity rules and procedural rules. However, there is still ambiguity in the identification of data investment eligibility in existing investment treaties and practices. As a big country of data resources, China should actively embrace the new era of digital economy and support digital economy enterprises to make rational use of international investment arbitration system to safeguard their rights and interests when dealing with investment disputes. At the same time, we should seize the opportunity of rule-making, promote the revision of the definition of investment in bilateral investment agreements while improving domestic investment and digital legislation, and provide legal protection for accelerating China's digital economy foreign investment cooperation.

KEYWORDS

International Investment; Data Assets; Definition of Investment; Qualified Investment.

1. INTRODUCTION

In the context of today's digital transformation of the global economy, digital technologies and data assets are gradually becoming crucial drivers of economic growth. However, global digital governance remains in a state of disarray, as the international community has yet to establish unified rules and standards to effectively regulate and coordinate cross-border digital economic activities. Particularly in the field of international investment, the scale of data assets is expanding at an unprecedented rate. According to projections by the International Data Corporation (IDC), the global data volume, referred to as the Global DataSphere, is expected to increase to 393.8 zettabytes (ZB) by 2028, representing a 9.8-fold increase compared to 2018. The data generated between 2024 and 2028 alone will be at least 2.2 times the total amount of data produced in the previous decade and approximately 2.9 times the data generated over the past five years. Nevertheless, despite the growing significance and scale of data assets, the role of international investment law in safeguarding cross-border digital enterprises has yet to be fully explored. This gap underscores the urgent need to adapt international legal frameworks to address the unique challenges posed by the digital economy and to ensure the protection of digital investments on a global scale.

International investment law, as a critical legal framework governing cross-border investment activities, has traditionally focused on the protection of tangible assets (such as land, factories, and equipment) and certain intangible assets (such as intellectual property). However, with the rise of the

digital economy, data assets have increasingly become a significant component of corporate value, often serving as the core competitive advantage for many enterprises. For instance, global digital companies such as Google, Amazon, and Alibaba derive much of their core value from the large-scale data they collect, process, and utilize. Nevertheless, whether the existing framework of international investment law can encompass and protect data assets remains a matter of contention. Specifically, whether data assets can be classified as "investments" under international investment law is one of the pressing issues that require resolution in this field. The application of substantive and procedural rules of international investment law to safeguard data assets is not merely a theoretical question but also a pressing practical necessity. Globally, an increasing number of states have adopted stringent data localization policies, imposing restrictions on cross-border data flows. For example, the European Union's General Data Protection Regulation (GDPR) has established strict requirements on data transfer and protection, while China's Data Security Law and Personal Information Protection Law have introduced specific restrictions on cross-border data flows. These regulatory frameworks impose significant compliance obligations on cross-border digital enterprises and simultaneously heighten the potential for investment-related disputes. The intersection of these regulatory dynamics and the protection of data assets under international investment law highlights the urgent need to adapt the legal framework to address the challenges posed by the digital economy.

The application and development of international investment law have become particularly significant in this context. Against the backdrop of the rapid growth of the global digital economy, international investment law must evolve to incorporate data assets within its protective framework. By clarifying the investment eligibility of data assets and establishing corresponding legal norms and dispute resolution mechanisms, international investment law can provide cross-border digital enterprises with a more stable and predictable investment environment. Such advancements not only contribute to the sustainable development of the global digital economy but also equip the international community with legal tools and institutional safeguards to address the challenges of digital governance fragmentation.

2. RESEARCH ON THE INVESTMENT ELIGIBILITY OF DATA ASSETS

With the rapid development of the international economy and the deepening of globalization, the composition of international investment capital is increasingly diversified. From traditional tangible assets to intellectual property, financial instruments, and now the rapidly rising data assets, the scope and connotation of capital continue to expand, reflecting the profound transformation of the global economic structure and the strong drive of the digital economy. It is foreseeable that, in the context of the comprehensive arrival of the digital economy era, data has become a new strategic asset, with its economic value and investment potential gradually gaining both theoretical and practical validation. As a new form of contribution, data assets are increasingly attracting attention and importance in the field of international investment.

As early as the early days of the big data era, Tony Fisher, in his work, proposed the view that "data is an asset"[1] based on the characteristics of data assets, clearly pointing out that data not only has economic value but also, through effective management and utilization, can create competitive advantages for businesses. In recent years, this view has been widely recognized and adopted.[2] The quantifiability, tradability, and potential for value appreciation of data endow it with economic attributes similar to other asset types. In fact, in mergers and acquisitions and collaborations between multinational companies, cases of data assets being used as a form of contribution or basis for valuation are increasingly emerging. For example, in 2016, when Microsoft acquired LinkedIn for $26.2 billion, one of the key considerations in the transaction was LinkedIn's vast user data and the commercial value it entailed.[3] Similarly, in 2017, when Google acquired HTC's smartphone business for $1.1 billion, HTC's patent technologies and user data were also regarded as key elements

in the asset evaluation. These cases demonstrate that data assets are not only highly valued in capital flows between enterprises, but their market value is also increasingly recognized.

Given the significance of data assets in the digital economy and their widespread application in international economic activities, it is of great practical importance to conduct an in-depth examination of the investability of data assets from the perspective of international investment. This issue is directly related to whether data assets can be included within the protection scope of international investment treaties and involves the interpretation and application of specific provisions of investment treaties. It will also have a profound impact on international investors, host states, and the entire investor-state dispute settlement (ISDS) system. The issue of the investability of data assets is both an important theoretical topic and an urgent practical need. In the practice of international investment law, two main paths for determining eligible investments have generally emerged: one is based on the provisions of international investment agreements, combining the consent of the parties to the dispute, to determine whether the activities or property involved constitute an eligible investment; the other is based on the practice of the International Centre for Settlement of Investment Disputes (ICSID), relying on the objective standards it has developed to assess the eligibility of investments.

2.1. Investigation on the Eligibility of Data Assets based on International Investment Agreements

2.1.1. Bilateral Investment Treaty (BITs)

The definition of investment in BITs usually adopts two modes: asset-based definition mode and enterprise-based definition mode. Most of the existing BITs adopt an asset-based definition model, which is characterized by a wide list of “various types of assets” to define the scope of investment. One of the representative examples of this model is the 2012 BIT model of the United States. The investment in Article 1 of the model is defined as “all kinds of assets with investment characteristics directly or indirectly owned or controlled by an investor” , and covers a variety of different forms of investment through open enumeration. Investment may include “other tangible or intangible assets, movable or immovable property and related property rights, such as leasing, mortgage, pledge and guarantee”.[4] This definition has strong inclusiveness and can cover various forms of economic activities and property types, thus providing investors with more comprehensive legal protection.

In contrast, the enterprise-based investment definition model pays more attention to the relationship between investment and enterprise activities. Taking the 2012 China-Canada BIT as an example, the agreement revolves around enterprises and identifies various possible forms of investment through exhaustive enumeration. For example, according to the provisions of the agreement, investment includes “an interest in the enterprise that enables the owner to share the income or profit of the enterprise” . The focus of this definition model is to clarify that investment should have the characteristics related to the control and benefit sharing of enterprises, and to emphasize the equity and control rights of investors in the target enterprises.

The vast majority of international investment agreements, including those mentioned above, typically explicitly or implicitly require that investments meet the condition of being “within the territory of the host state” . Some agreements even include this requirement as one of the core elements of the investment definition, such as the China-Congo BIT, which explicitly stipulates that investments must be made “within its territory” . This requirement is generally intended to ensure that investors contribute to the host state’s economy and that the host state is able to effectively regulate investment activities. However, data assets, as an emerging form of investment, possess a non-territorial characteristic, which results in certain discrepancies when compared to traditional, geographically defined investment models.

2.1.2. Investment Chapters of Free Trade Agreements (FTAs)

FTAs usually provide detailed provisions on international investment through special chapters, and generally adopt a wide range of investment definitions. In recent years, the global trade environment is facing severe challenges. The multilateral negotiations under the World Trade Organization (WTO) system have made slow progress, and regional trade agreements have become an alternative and continue to develop. Among them, the more important ones include the 2022 Regional Comprehensive Economic Partnership Agreement (RCEP), the 2018 Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP), and the 2016 EU-Canada Comprehensive Economic and Trade Agreement (CETA). Through the comparative analysis of the investment chapters of CETA, CPTPP and RCEP, it can be found that the three agreements present a similar structural model in the definition of investment, that is, the model of "asset-based investment definition, investment characteristic restriction, investment form enumeration, clear non-investment form" . Taking CETA as an example, Article 10.1 (c) of Chapter 10 of CETA clearly defines the definition of investment and further clarifies the characteristics and specific forms of investment, while "orders or awards in judicial, administrative acts or arbitration proceedings" are clearly excluded from the scope of investment. This exclusion clause is designed to ensure that only activities that are truly investment-specific can enjoy investment protection, and does not include non-economic activities such as government actions or judicial decisions.

In summary, recently BITs and the investment chapters in FTAs have generally adopted a broader definition of investment, aiming to align with the evolving trends of the global economy and to provide extensive legal protection to investors. The broadness of investment definition helps encompass a more diverse range of investment forms, addressing the challenges posed by emerging fields such as the digital economy and financial technology. In this context, data assets, as an emerging asset category, should, in the absence of explicit exclusion, enjoy the same investment protection as traditional assets.

2.2. Investigation on the Eligibility of Data Assets based on ICSID Objective Criteria

The ICSID Convention does not provide a specific definition of "investment" , but instead, over time, an objective standard has been developed through ICSID arbitration panels to identify what constitutes an "investment" . This development process was notably reflected in the *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* case, where the arbitral tribunal articulated four criteria for determining investment, known as the "*Salini Test*". These four criteria include: (1) a capital contribution; (2) a specific duration; (3) the assumption of risk; (4) a contribution to the economic development of the host state.[5] Although the *Salini Test* does not have binding force, it has been widely cited in subsequent cases and provides a theoretical framework for analyzing the eligibility of data assets as investments. For example, in the *Abaclat and others v. Argentine Republic* case, the tribunal further explored the nature of investment, emphasizing the importance of capital contribution, risk assumption, and the expectation of return.[6]

2.2.1. Contributions

The *Salini Test* requires that investment must involve substantial capital contributions, meaning an investment of material assets such as money or physical goods. The acquisition and development of data assets typically involve significant initial investment, including technological infrastructure, data collection, and storage equipment. For instance, when companies establish data centers, they often need to invest millions of dollars in hardware, software, and human resources. According to an Dell' Oro Group latest report, global data center capital expenditures (CAPEX) surged 51 % to $ 455 billion in 2024. This figure not only reflects the scale of data asset investment but also validates that such investments involve real capital input. Furthermore, the generation and maintenance of data assets require continuous financial flow, such as funding for data analysis and the development of machine learning models.

2.2.2. Certain Duration of Performance of the Contract

The second requirement of the *Salini Test* is a certain duration of performance of the contract, meaning that the project should operate over a specific duration. This criterion distinguishes continuous international investments from one-time international trade transactions. The nature of data assets grants them a certain degree of continuity. Unlike traditional assets, data assets are not a one-time investment but require long-term management and updates. Companies need to constantly clean, update, and review data for compliance to ensure its quality and legality. In practice, many companies consider data as their core asset, with tech giants like Google and Amazon relying on continuous data collection and analysis to optimize their business models and improve user experience. When data assets meet the continuity requirement while satisfying other investment characteristics, they can be recognized as eligible investments.

2.2.3. Participation in the Risks of the Transaction

Investment inherently involves assuming risks related to uncertain future returns, and there are no business investments without risks.[7] Data asset investments face various risks, including those related to data breaches, compliance risks, and technological obsolescence, all of which can negatively impact the value of data assets. According to IBM's 2024 Data Breach Report, the average cost of a data breach has reached $4.88 million, highlighting the risks that businesses must consider when investing in data assets. Additionally, the value of data assets may fluctuate due to technological advancements and changes in market demand. If data assets do not yield the expected commercial benefits, they can result in significant losses. When investing in data assets, companies must assess how market changes will impact the value of their data, and this uncertainty is a reflection of the risks assumed.

2.2.4. the Contribution to the Economic Development of the Host State

The final requirement of the *Salini Test* is that the investment should contribute to the economic development of the host state. In the digital economy era, data assets have increasingly become a key driver of economic growth. Foreign investors, by introducing data assets into the host state, can accelerate the development of digital infrastructure, enhance the utilization of data by local businesses, and foster the digital transformation of the economy. Multinational companies such as Google and Microsoft have invested in data centers in various countries, boosting the information technology industries in these countries and indirectly contributing to increased employment and tax revenue.

Data, as a critical foundation for innovation, is also increasingly applied in technological research, product design, and market analysis. By attracting foreign investment in data assets, host states can leverage foreign expertise, management experience, and market insight to improve their domestic innovation environment, strengthen the innovative capacity of local businesses, and promote long-term sustainable economic development.

Under the four criteria established in the *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* case, data assets demonstrate a high degree of applicability. It is evident that the inflow of data assets into the host state aligns with the host state's national interests and satisfies the requirement of contributing to the economic development of the host state. Data assets can also meet the criteria of capital contribution, continuity, and risk assumption in specific contexts. Therefore, data assets have the potential to be recognized as eligible investments under the *Salini Test*.

3. CHALLENGES IN THE QUALIFICATION OF DATA ASSETS

Although the arguments based on the above two paths provide a theoretical foundation for recognizing data assets as eligible investments, in practice, existing international investment rules are primarily designed to address traditional tangible investments, which presents certain challenges in confirming the eligibility of data assets.

3.1. Investment Definition Clauses Do Not Explicitly Cover Data Assets

Through the examination of international investment agreements discussed above, it becomes evident that very few agreements explicitly include data assets as a recognized form of investment in their investment definition clauses. While it can be broadly interpreted that the investment definitions in most agreements may encompass data assets, in practice, such broad interpretations increase the difficulty for arbitral tribunals in determining whether data assets fall within the scope of investment protection. The lack of a clear provision for data assets as a form of investment creates uncertainty in some cases regarding whether specific data-driven investments can be included under the protection of investment treaties. For instance, in the *Philip Morris International Inc. and others v. Ukraine* case, the tribunal primarily focused on the protection of tangible assets, while the potential value of data assets was not sufficiently addressed.[8] This suggests that the current investment definitions have not fully adapted to the demands of the digital economy era. Such ambiguity not only introduces uncertainty for investors but also presents challenges for host states in how to apply the relevant investment agreements.

With the rapid development of the digital economy, some countries and regions have begun to gradually incorporate cross-border data flows into their investment rules, signaling a growing trend within the international community to consider including data assets in the investment definition. For example, the European Union's General Data Protection Regulation (GDPR) and its concept of data sovereignty reflect an increasing recognition of data as an economically valuable asset, which is becoming an important issue within international investment rules. By integrating data flow provisions with investment clauses, some regions have begun to realize the strategic significance of data assets and are attempting to provide relevant protection within their international investment frameworks.

3.2. Incompatibility of Data Assets with the "Within the Territory of the Host State" Requirement

Within the current framework of international investment agreements, most agreements typically include, either directly or indirectly, the requirement that investments must occur "within the territory of the host state". In investment arbitration cases under ICSID jurisdiction, if the international investment agreement explicitly stipulates that the investment must take place within the territory of a contracting state, the tribunal is obligated to examine whether the investment activity in question has a sufficient territorial connection to that state. In other words, whether the investment activity is substantially linked to the territory of the host state is a critical factor in determining whether the investment meets the definition set forth by the agreement. In practice, arbitral tribunals have repeatedly emphasized that the "territorial connection" of the investment is a prerequisite for determining ICSID jurisdiction. For example, in *Fedax N.V. v. Republic of Venezuela* case, the tribunal analyzed whether a bond investment had a sufficient territorial link with the host state.[9] Although bonds are inherently cross-border transactions, the tribunal confirmed that, by examining the issuance, payment, and ultimate use of the bonds, there was a substantive connection between the investment activity and the host state. Similarly, in *Abaclat and others v. Argentine Republic* case, the tribunal further explored whether cross-border financial instruments met the territorial connection requirement and ultimately determined that the effects of these instruments had a sufficient connection to the host state's economy, thus qualifying them as investments.[10]

However, when the form of investment shifts from traditional tangible assets (such as land, factories, or machinery) to intangible assets (such as data, intellectual property, or technology), determining the "territorial connection" becomes a more complex issue.[11] This is especially the case in the field of data investments, where the non-territorial, cross-border nature of data means that its connection to the territory of the host state is not as immediately apparent as with traditional investments. This non-territorial characteristic may conflict with the territorial requirements set forth in international

investment agreements. For example, in international investment arbitration, the tribunal may need to consider multiple factors such as the location of data storage, the site of data processing, and the impact of data on the host state's economy, in order to determine whether the data investment satisfies the "territorial connection" requirement. In this regard, the tribunal may draw upon the analytical approach in *Tokios Tokelés v. Ukraine* case, where the tribunal, after considering the substantive impact and geographical links of the investment, determined whether the "within the territory of the host state" requirement was met.[12]

The connection between data investment and the territory of the host state is an important objective standard for recognizing it as a legitimate investment. Although data assets, due to their non-territorial nature, may not fully align with traditional territorial connection standards in certain instances, by analyzing factors such as data storage, processing, and its impact on the host state's economy, arbitral tribunals can still make determinations that are consistent with the agreement's requirements in specific cases. This analysis not only demonstrates the flexibility of international investment law but also reflects its adaptability to emerging investment forms in the digital economy.

4. CHINA RESPONSE TO THE ELIGIBILITY OF DATA ASSETS

Whether data assets can be protected through international investment arbitration is a key issue that must be considered when digital economy enterprises in various countries invest abroad. As a major player in the digital economy, China is actively adapting to these changes and making strategic responses to the evolving pattern of global economic development.

4.1. Position of China

With the rapid development of the digital economy, China places significant emphasis on the strategic position of the digital economy as a new engine for economic growth. The 14th Five-Year Plan and the 2035 Vision Outline explicitly states the need to accelerate the development of the digital economy, deeply integrating digital technologies with the real economy, and promoting the digital transformation of industries. As a new type of asset, data's legal status and investment attributes have become focal points of legislative and policy attention in China. Article 127 of the Civil Code of the People's Republic of China explicitly protects data and network virtual property under the law for the first time. This provision establishes data's legal status as a novel form of property, laying the foundation for its application in the investment domain. Additionally, the Data Security Law further emphasizes the economic value of data, explicitly advocating for the promotion of data development and utilization, as well as the transformation of data resources into data assets. According to Article 21 of the Data Security Law, data is categorized into ordinary, important, and core data based on its significance and sensitivity.[13] Different types of data are subject to varying levels of protection and regulatory requirements, which holds significant implications for the use of data assets and cross-border investments.

Through a series of laws, regulations, and policy documents, China has clarified the basic attributes of data assets, affirming their value while seeking to align with international cooperation and investment rules. Under the RCEP, China has committed to facilitating the cross-border flow of data while retaining its regulatory authority over data security. China is willing to participate in the standardized development of data asset investment within the framework of international rules, adhering to the protection of national data sovereignty and security interests. However, in the international investment agreements it has signed, there is yet to be a unified rule regarding the definition of "investment" and the classification of data assets. This inconsistency could place China in a passive position in future international investment arbitrations, losing the proactive interpretative authority over relevant concepts and rules. Furthermore, this lack of uniformity also weakens the ability of Chinese digital economy enterprises to protect their legal rights in overseas investment

activities, making it more difficult for them to effectively address potential legal risks and disputes in a complex international environment.

4.2. Recommendations for China

4.2.1. Develop a Model BIT to Establish Standards for Chinese Data Investment

The investment definition within Bilateral Investment Treaties (BITs) directly reflects the types and scope of capital flows that the contracting parties wish to protect, and it also indicates their support or restrictions regarding specific economic activities. For China, the choice of a broad or narrow investment definition in BITs significantly impacts the legal status and protection scope of Chinese digital economy enterprises in international investment disputes, as well as the government's actual involvement in such disputes. The protection of data assets in international investment agreements remains in an exploratory phase, with most treaties failing to explicitly categorize data as a protected investment type. In formulating a model BIT, China should consider both domestic and international trends in digital economy development and legal practices, thereby creating a regulatory framework that accommodates new forms of economic activity. This framework should provide effective tools for safeguarding Chinese overseas investments and investor interests. It is essential to adopt a broad investment definition in the BIT model, encompassing new economic elements such as data assets, algorithms, and digital platforms within the protective scope. This approach not only reflects the actual needs of Chinese digital economy enterprises in global investments but also promotes the dissemination and application of advanced legal concepts from China in international rules, contributing Chinese wisdom and solutions to the governance of the global digital economy.[14]

4.2.2. Utilize International Investment Arbitration to Safeguard the Rights of Digital Economy Enterprises

With the rapid development of the global digital economy, Chinese digital economy enterprises have significantly enhanced their comprehensive strength in technological innovation, market scale, and capital output, leading to an increasing international competitiveness. However, the swift expansion of the digital economy in the international investment arena has given rise to new legal issues and risks. Currently, international investment treaties lag behind in terms of the protection scope for new asset types, and data assets have not been comprehensively included within the purview of investment protection. This regulatory gap exposes Chinese digital economy enterprises to potential improper interference, discriminatory regulation, or unfair treatment by host countries during foreign investments, thereby increasing legal uncertainties in overseas operations and capital returns.

When facing such challenges, enterprises are typically required to exhaust domestic remedies in the host country, such as seeking resolution through local judicial or administrative procedures. If the legal system of the host country exhibits bias or if the remedy pathways are excessively time-consuming, it may be difficult for enterprises to effectively protect their rights. Moreover, seeking diplomatic assistance is highly contingent upon the political and economic relations between states, introducing considerable uncertainty. In contrast, international investment arbitration serves as a legal-based dispute resolution mechanism that offers investors a more neutral and enforceable avenue for relief. Chinese digital economy enterprises should pay close attention to the relevant provisions regarding data assets in international investment agreements during foreign investments and adopt diversified legal and policy responses. This entails not only strengthening research on the legal and policy environments of target investment countries-particularly regarding compliance management in areas such as data localization, data flow, and privacy protection-but also actively leveraging the ICSID arbitration procedures to safeguard their legitimate investment interests.

5. CONCLUSION

With the accelerating digital transformation of the global economy and the widespread adoption of data-driven business models, the significance of data assets as a novel form of capital contribution has become increasingly prominent. Data assets not only serve as a core factor of production in the digital economy but have also gradually emerged as a critical component of international investment practices. This trend has been shaped not only by the continuous deepening of theoretical research but also by the steady advancement of international investment practices, injecting new momentum into the sustainable development of the global economy. However, significant challenges remain in establishing the legal framework necessary to recognize the investment attributes of data assets, particularly in utilizing international investment law to safeguard the legitimate rights and interests of data assets in cross-border economic activities. Questions of how to effectively regulate and protect data assets, as well as how to leverage international investment law to provide legal guarantees for the cross-border flow of data assets, have become pressing issues for states and the international community. China, along with other major economies, should play an active role in this process by contributing to the development and internationalization of rules for the protection of data assets. Such efforts would not only strengthen the legal protection of data assets but also foster greater certainty and stability in the global digital economy.

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