

# **Unblocking Investment Arbitration: Can Investment in Non-Fungible Tokens obtain the Protection of International Investment Agreement Regime?**

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## **Abstract**

*In this paper, we will attempt to contend that substantive protection of the international investment regime can be provided to foreign investors that invest in Non Fungible Token(NFT). In the next section, we will elaborate on the concept of NFT and our intent to focus on it. Further, we will assess if an NFT can qualify as an investment made by foreign investors under the international investment agreement regime. We will also specifically elaborate on the notion of “pure commercial transaction” and on the question of whether an NFT will fall outside the definition of investment. We will delve into admission and establishment of foreign investment in the final section, before stating my observations.*

**Keywords:** *NFT, Investment, International Investment Regime, Pure Commercial Transaction, Foreign Investment*

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## Introduction

The decentralised cryptosystem was looked upon with pessimism when it first knocked on the doors of the financial sector.<sup>1</sup> However, the fourth industrial revolution that celebrates the abandoned *laissez faire* has changed that order.<sup>2</sup> The system provides a resolution to the disbelief created by conventional banking and envisions to decreasing intermediary control, and transitioning cryptocurrency and assets from an attractive novelty to a possible norm. This transition has seen the remodelling of many financial instruments to generate a fresh and accessible experience.<sup>3</sup> An example of this is the asset exchange that began as a meme market and now attracts over a million dollars.<sup>4</sup> This crypto asset is otherwise known as the non-fungible token or the NFT. The crypto boom that has already attracted foreign investment may steer further due to the unique nature of the NFT. However, crypto assets have been at the mercy of unstable regulatory actions by the states posing complications for foreign investors.<sup>5</sup>

## What are Non-Fungible tokens?

In the era of rising demand for digital assets, one relatively new addition is NFT or non-fungible tokens that are created or “minted” on blockchain platforms that have the capability of incorporating smart contracts devised in their code, such as Ethereum, Solana etc. and can be traded between people.<sup>6</sup> Smart contracts are responsible for assigning ownership of the NFT and managing the future transferability of the NFT. Both NFTs and cryptocurrencies are built on the blockchain by implementing the same technologies and same principles.<sup>7</sup> NFTs can be considered as a subset of the crypto world. Usually, cryptocurrency is required to buy and sell NFTs. Having gained its recent popularity by being used to sell digital art, this digital

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<sup>1</sup>Paradigm, *Crypto Regulation News: Bis Says Defi's Decentralization Is an Illusion*, *Crypto CEOS Hit Capitol...*, MEDIUM(Dec. 13, 2021),<https://medium.com/paradigm-fund/crypto-regulation-news-bis-says-defis-decentralization-is-an-illusion-crypto-ceos-hit-capitol-c73fd39f1987>

<sup>2</sup>Klaus Schwab, *The Fourth Industrial Revolution: What It Means, How to Respond*, WORLDECON. F.,(Jan. 14, 2016) <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/>

<sup>3</sup> Marco Iansiti & Karim R. Lakhani, *The Truth about Blockchain*, HARVARD BUSINESS REVIEW (August 21, 2019) <https://hbr.org/2017/01/the-truth-about-blockchain>

<sup>4</sup>Portion, *The History of NFTs & How They Got Started*, PORTION BLOG(February 9, 2022) <https://blog.portion.io/the-history-of-nfts-how-they-got-started/>

<sup>5</sup> Dimitris Drakopoulos, et. Al., *Crypto Boom Poses New Challenges to Financial Stability*, IMF BLOG (Nov. 2, 2021),<https://blogs.imf.org/2021/10/01/crypto-boom-poses-new-challenges-to-financial-stability>.

<sup>6</sup>*Not Everyone's Cup of NFT*, OSBORNE CLARKE (Feb. 11, 2022),<https://www.osborneclarke.com/insights/not-everyones-cup-nft>.

<sup>7</sup>*Non-Fungible Tokens (Nfts): When Collecting Meets Crypto, Legal Challenges Abound*, O'MELVENY (Mar. 25, 2021), <https://www.omm.com/resources/alerts-and-publications/alerts/non-fungible-tokens-when-collecting-meets-crypto-legal-challenges-abound/>.

asset, unlike cryptocurrencies, is non-fungible and rather unique. Fungibility allows a commodity to be broken down into smaller individual parts that are interchangeable. As being non-fungible, these assets cannot be replaced or interchanged with other assets, making them unique. Most of the cryptocurrencies such as Bitcoin and the ones developed on the Ethereum ERC-20 standard are fungible in nature because each token is identical and can be easily exchanged for another token. For instance, if the market value of one bitcoin is determined to be 'x', the value of all other bitcoins shall also be 'x' as all Bitcoins are identical and interchangeable. However, when it comes to NFTs, since they are unique and usually limited in number, the value varies depending on interest and demand.<sup>8</sup>

NFTs provide a technique to establish an “original” or “genuine” version of easily replicated digital content or assets. NFTs help establish private ownership of digital assets, without which digital assets would be easy to share but difficult to own. Since the blockchain allows anyone to review the blockchain ledger, NFT ownership can be easily verified and traced. NFTs can be considered as the highly sought-after and collectible blockchain-based digital trading cards.<sup>9</sup> For example, a highly acclaimed cricketer in India might create or mint an NFT of their bat with their autograph. The demand for such a collectible and the popularity of the cricketer would determine the value of the NFT.<sup>10</sup> Similarly, NFTs can be minted by anyone if their creation is treated as ‘unique’ by the blockchain. Anything that can be converted into a digital form can be turned into a non-fungible token which is then traded on the Ethereum blockchain or any other blockchain that supports NFTs. The “original” web source code is then generated and auctioned by the inventor on the internet.<sup>11</sup>

Some NFTs have “smart contracts,” which specify how content interactions might take place, for example, the creator sets a fee or royalty for whenever the digital asset is sold in the future on the secondary market, which turns into a passive income for the creator. The coding is stored on the blockchain as part of the token and executes automatically when certain

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<sup>8</sup>*NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, JONES DAY (Apr. 2021), <https://www.jonesday.com/en/insights/2021/04/nfts-key-us-legal-considerations-for-an-emerging-asset-class>.

<sup>9</sup>Steinwold A, *The History of Non-Fungible Tokens (Nfts)*, MEDIUM (Oct. 7, 2019), <https://medium.com/@Andrew.Steinwold/the-history-of-non-fungible-tokens-nfts-f362ca57ae10#:~:text=As%20the%20trading%20of%20rare,generated%20on%20the%20Ethereum%20blockchain>.

<sup>10</sup>*NFT Gaming and Vietnam*, VIETNAMESE LAW: INDOCHINE COUNSEL (Oct. 10, 2021), <https://www.vietnameselawblog.com/nft-gaming-and-vietnam/>.

<sup>11</sup>*What Are the Legal Issues around Nfts?* OSBORNE CLARKE (Oct. 14, 2021), <https://www.osborneclarke.com/insights/what-are-legal-issues-around-nfts>.

conditions occur. For instance, the smart contract could be set up so that access to the underlying digital asset and certain exclusive perks that come with the ownership of the said asset is only allowed when payment is received.<sup>12</sup>

## **How do NFTs work?**

NFTs would be impractical for users to identify buyers and sellers on an ad hoc basis, it is in fact the NFT marketplaces that have established the de-facto standard for trading NFTs. The NFT marketplaces are almost as diverse as NFTs. They can specialise in specific sorts of assets or be broad, charge different types and amounts of fees, restrict access or be open, and have separate user agreements, licenses, and restrictions. They can exist on different blockchains. Users may or may not be required to create accounts to use a marketplace. They will, however, ask users to link their “blockchain wallet,” effectively attaching their “blockchain account” to the marketplace.<sup>13</sup>

A blockchain account is a blockchain address. It allows the blockchain ledger to link a certain token to a specific user, such as cryptocurrency, an NFT, or another sort of crypto token. Accounts on the blockchain are completely anonymous. An Ethereum account number, for example, begins with the prefix “0x” and is followed by a 40-digit alphanumeric code; no personally identifying information is included. Users can, however, choose to link their blockchain accounts to their social media accounts, losing anonymity.<sup>14</sup>

It is nearly impossible for a user to understand the blockchain because it is a ledger comprising millions of entries (Ethereum presently performs over one million transactions daily) between 40-digit account identifiers. Blockchain wallets are applications and computer codes that read the blockchain and display the assets identified as owned by the user’s blockchain account to the user. The wallet also allows the user to make purchases. No crypto tokens are stored in blockchain wallets. Instead, if a blockchain account is like a bank

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<sup>12</sup>*Supra* note 7 and 10.

<sup>13</sup>*Non-Fungible Tokens in Vietnam*, VIETNAMESELAW BLOG: INDOCHINECOUNSEL (Aug.29, 2021),<https://www.vietnameselawblog.com/non-fungible-tokens-in-vietnam/>.

<sup>14</sup>Rossolillo N, *A Complete Guide to Minting Nfts*, THEMOTLEYFOOL (Dec. 9, 2021),<https://www.fool.com/investing/stock-market/market-sectors/financials/non-fungible-tokens/nft-minting/>.

account (a number on a ledger), a blockchain wallet is like a bank's smartphone app (giving the user access to see what is in the account).<sup>15</sup>

### **Revenue Generation Model**

NFTs can help businesses commercialise unique assets that would otherwise be difficult to sell or prove ownership of, as well as create totally new digital product lines and revenue streams. Some NFTs, like many other digital assets, can “fractionalise” ownership of the underlying asset, i.e., split ownership so that each purchaser of an NFT benefits from the underlying asset in proportion to the fraction they own, which can enable new ownership structures that proponents claim have the potential to democratise ownership of assets that have previously been considered inaccessible.<sup>16</sup> Other NFTs, on the contrary, are indivisible.

The processes for minting and selling NFTs differ as many NFT makers are “crypto natives” with Distributed Ledger Technology (DLT) experience who develop or own the underlying artwork or any other asset to which the NFT is attached, as well as issue the NFT themselves. A third party may issue the NFT on behalf of the content creator/owner if the content creator/owner is not a crypto native (e.g., a celebrity, musician, athlete, sports club, or other business). The underlying technological platform for minting and selling the NFTs could be provided by a third party, or another platform provider could be involved. The revenue-sharing mechanisms used by the various players vary significantly, and they should be carefully studied.<sup>17</sup>

### **Investment of NFT**

There are a few things to keep in mind before going on a shopping binge. In order to buy an NFT, one needs a digital wallet to keep it in. The most widely recognised cryptocurrency by NFT providers is Ethereum (ETH). ETH can be bought straight from the website that provides the NFT or transferred from any cryptocurrency exchange. Rarible, Foundation, OpenSea.io, and others are also some of the websites that sell NFTs. There are two

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<sup>15</sup>*China Practice Newsletter*, HOLLAND&KNIGHT, (Sept. 2021), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiqqZjBsb3AhUI4HMBHSirCT4QFnoECACQAQ&url=https%3A%2F%2Fwww.jdsupra.com%2Fpost%2FfileServer.aspx%3FName%3D0d4ccce9-8fce-40a4-afed-5be2cb1bdf3b.pdf&usg=AOvVaw0f-8VjRHYd3qGeNpPPVcj5>.

<sup>16</sup>Wolfson R, *Beyond the NFT Hype: Creating Lasting Business Models for Artists*, COINTELEGRAPH (Nov. 1, 2021), <https://cointelegraph.com/news/beyond-the-nft-hype-creating-lasting-business-models-for-artists>.

<sup>17</sup>See note 14 at 6, 7 and 8.

approaches of marketing NFTs. One can do it by owning an NFT. NFT can also be minted by the person selling it. NFTs can be created on sites like OpenSea, SolSea, and others. After minting the NFT, it can be listed for sale on any of the sites.<sup>18</sup>

While investing in NFTs, certain fees must be considered, such as ‘Gas Fee’. Gas Fee is paid towards any digital asset on the blockchain to pay for the energy being used by the computerised systems to mint the asset and the transaction costs. Gas prices can be exceedingly high and fluctuate substantially.<sup>19</sup> The cost of gas to mint an NFT on Ethereum started at a few dollars but has subsequently risen to hundreds of dollars per NFT. This is because gas pricing is dynamic, meaning that the busier a blockchain (such as Ethereum), the higher the gas prices. In other words, you need to pay more to ensure your transaction gets processed. Furthermore, gas is paid in the blockchain’s cryptocurrency, which is subject to changes in exchange rates against traditional currencies such as the dollar.

Other expenses include transaction fee which might be charged by marketplaces. Fees may be levied against either the vendor or the customer, or both. In addition, there might be fees levied up ahead, such as a listing fee or deducted from the transaction revenues. Other marketplaces charge a setup fee as well, or limit access to the marketplace to just applicants such as NiftyGateway and SuperRare, which require creators to apply to create NFTs on their marketplaces. These marketplaces are frequently attempting to curate the NFTs for sale to improve quality and lower the risk of scams.<sup>20</sup>

Lastly, some markets such as NBA TopShot limit users’ ability to withdraw money from the selling of NFTs. They may, for example, impose withdrawal fees and/or limit the timing and quantity of withdrawals.

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<sup>18</sup>*Non-Fungible Tokens: The Global Legal Impact*, CLIFFORD CHANCE (June 2021), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/non-fungible-tokens-the-global-legal-impact.pdf>.

<sup>19</sup>*Supra* note 17.

<sup>20</sup>*Supra* note 15 at 6; note 18

## Could a Non-Fungible Token Qualify as an Investment?

International organisations such as OECD<sup>21</sup> and UNCTAD<sup>22</sup> have facilitated robust discussions on cyber risk and digital assets. In addition to these attempts, scholars have contended that the concern of cyber risk can be mitigated using bilateral investment treaties that provide enforceable remedies.<sup>23</sup> Hence, providing considerable literature for the qualification of a digital asset as an investment.<sup>24</sup> However, the literature for international legal protection of crypto assets or NFTs as an investment remains unclear. This grey area requires a separate analysis as the uncertainty is not merely confined to the security of assets, but also the crypto asset marketplace and speculative trading. This is exposed to participation from institutional investors, multinational corporations, and banks.<sup>25</sup> Therefore, making the assessment imperative to avail the protection of an international investment agreement.

The definition of investment stipulates the jurisdiction for an arbitration and the scope of protection under the relevant instrument. While there exists no standard definition of investment, characteristics can be drawn from investment agreements and arbitral practice.

### Investment Agreement Practice

Most bilateral investment treaties comprise of a definition of investment. For a foreign investor to obtain the protection of an investment treaty, the NFT must satisfy the criteria of investment stated in it. Therefore, jurisdiction *ratione materiae* can only be engaged if the asset fits the box provided by the relevant instrument. These definitions are often similarly structured and usually expansive. A vast majority of investment treaties contain the asset-based definition, which specifies a non-exhaustive list of protected assets.<sup>26</sup> Traditionally,

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<sup>21</sup>Organization for Economic Cooperation and Development, OECD 2016 Ministerial Meeting on the Digital Economy: Innovation growth and social prosperity: Background Paper (2016)

<sup>22</sup>U.N. Conference on Trade and Development, UNCTAD Series on issues in International Investment Agreements II: Scope and Definitions, at 24, U.N. Sales No. 11.II.D.9 (2011). and UNCTAD, 'World Investment Report 2017 – Investment and the Digital Economy' (2017)

<sup>23</sup>David Collins, *Applying the Full Protection and Security Standard of International Investment Law to Digital Assets*, 12 J. WORLD INV. & TRADE 225, 225–27 (2011) and Eric J. Hyla, Note, *Corporate Cybersecurity: The International Threat to Private Networks and How Regulations Can Mitigate It*, 21 VAND. J. ENT. & TECH. L. 309, 310–11 (2018).

<sup>24</sup>Chaisse, J. and C. Bauer., *Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration* Vanderbilt Journal of Entertainment & Technology Law 21 (3): 549–89 (2019).

<sup>25</sup>Auer, R. and S. Claessens, *Regulating Cryptocurrencies: Assessing Market Reactions*, BIS QUARTERLY REVIEW (Sept.23, 2018).

<sup>26</sup>Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2015) 176.

such a definition only extends to the term asset or a physical asset and/or movable property.<sup>27</sup> A conventional example of this is the 2006 Mexico-United Kingdom (UK) Bilateral Investment Treaty (BIT)<sup>28</sup> which defines investment as an asset acquired in accordance with the law. However, with the transformation of foreign investment, the definition has evolved and often, the list contains immovable property, shares, intellectual property rights, claims for money, etc.<sup>29</sup> The 2012 China-Japan-Korea, Republic of Trilateral Investment Agreement<sup>30</sup>, for example, provides a non-exhaustive list of assets. Interestingly, the treaty also includes amounts yielded from royalties.

A few treaties, though, restrict the scope of the expansive definition to a legal entity that must be constituted, organised, and operated in accordance with the laws of the host State. The enterprise-based definition hence requires an asset to be associated with an enterprise for it to qualify as an investment. The 2020 Brazil-India BIT<sup>31</sup> poses this restriction. A few other treaties have enhanced the scope of the broad definition by inserting substantive characteristics of an investment. These often include a certain duration of investment, assumption of risk, and commitment of capital for an asset to qualify as an investment. The 2020 Brazil-India BIT<sup>32</sup> and the 2012 China-Japan-Korea Trilateral Investment Agreement<sup>33</sup> provide these features while defining the scope of investment. The 2018 USMCA<sup>34</sup> tweaks this threshold to include the terms “expectation of gain or profit”, which is also construed as an essential feature of the term investment. Besides these restrictions, certain treaties also exclude specific assets such as sovereign debt instruments and portfolio investments. The 2020 Brazil-India BIT<sup>35</sup> provides a comprehensive list of assets that cannot be construed as investments and stands as a good example of this aspect.

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<sup>27</sup>M. Sornarajah, *The International Law on Foreign Investment* 205–06 n.4 (4th ed. 2017).

<sup>28</sup>Article 1 of Mexico-UK BIT.

<sup>29</sup>Julien Chaisse & Puneeth Nagaraj, *Changing Lanes: Intellectual Property Rights, Trade and Investment*, 37 HASTINGS INT'L & COMP. L. REV. 223, 225 (2014).

<sup>30</sup>Article 1(1) of China-Japan-Korea TIT.

<sup>31</sup>Article 2.4 of Brazil-India BIT.

<sup>32</sup>*Supra* note 31

<sup>33</sup>*Supra* note 30

<sup>34</sup>Article 14.1 of USMCA.

<sup>35</sup>Article 2.4.1 of Brazil-India BIT and *Energoalians v. Moldova Ad hoc Arbitration*, Judgment of the Grand Chamber of the CJEU (2 September 2021) Para: 79-81.



As stated above, most investment treaties follow a similar approach to defining investment, but the instruments are not identical and provide scope for flexibility and nuance.<sup>36</sup> Therefore, simplification of the descriptions of investment is harmful. Tribunals have often concluded that the intent of the broad asset-based definitions is to provide a panoramic scope for the determination of investments and include assets with economic value. Hence, the non-exhaustive list merely stands as examples of investments that require assessment by tribunals.

However, the notion can be confined by two aspects. One, there is concurrence on the position that commercial transactions that include claims for money will not fall within the definition of investment unless otherwise provided by an instrument. This limitation was recognised by the World Bank during the internal consideration of the first draft of the ICSID Convention (Convention)<sup>37</sup>. The negotiations proposed an implied outer limit restricting the scope of investment. Although, this did not translate to the text of the Convention, and it was decided that the definition of investment would be kept open.<sup>38</sup> This will be discussed in the second subsection. Two, many international investment instruments require the investment to be made within the territory of the host State to engage the jurisdiction.

### **Territorial link**

Territoriality has been recognised as a tacit and essential feature of investment under the Convention.<sup>39</sup> Though, jurisprudence has developed due to the embedded reference to territorial links in investment treaties.<sup>40</sup> An example of this is the 1991 Argentina-US BIT which defines investments as “*every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party*”<sup>41</sup>. International Investment Agreements can also delimit the scope of investment basis the construction of the definition. The 2019 Myanmar-Singapore BIT,<sup>42</sup> for example, illustrates that investment is every asset owned by a foreign investor in the territory of the host State. The nexus between

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<sup>36</sup>De Brabandere E, *International Investment Law and Arbitration in Cyberspace*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND PEACE (Edward Elgar Publishing 2019) at 185.

<sup>37</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

<sup>38</sup>Julian Davis Mortenson, *The Meaning of ‘Investment’: ICSID’s Travaux and the Domain of International Investment Law* (2010) 51 Harvard International Law Journal 257 at 281–2.

<sup>39</sup>Dolzer and C. Schreuer, *Principles of International Investment Law* (2012) at 137 and Schreuer, C, *The ICSID Convention: A Commentary*, Cambridge University Press, 2009, p. 125.

<sup>40</sup>Zhend, C.R., *The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*, Singapore Law Review, 2016 at 139-140.

<sup>41</sup>Article 1 of Argentina-US BIT.

<sup>42</sup>Article 1 of 2019 Myanmar-Singapore BIT.

territory and a tangible asset can be drawn conveniently, however, the concern for intangible assets like NFTs is more complicated.

Nonetheless, tribunals have opined that a nexus can be created by assessing the definition as a whole and applying the object and purpose test.<sup>43</sup> For example, in the *AIIY v. Czech Republic*<sup>44</sup> case, the tribunal assessed the definition of investment under the relevant treaty and was not concerned with the limitation of territoriality. Therefore, if an asset meets substantive legal characteristics and ultimately benefits the host State, a link could be drawn between the territory and investment. *Abaclat and others v. Argentina*<sup>45</sup> is increasingly discussed in this regard. The tribunal, in its decision, stated that the determination of the place of investment depends on the nature of such investment. It has also been put forth that this relation will exist even if no “*physical transfer of funds*” is made to the host States, which was first determined in the decision for *FEDAX v. Venezuela*<sup>46</sup>. Further, the Tribunal in *Guaracachi v. Bolivia*<sup>47</sup> awarded that both direct or remote foreign investment in shares or equity of the company will satisfy the requirement.

Hence, if intangible assets such as financial instruments and contractual rights satisfy the substantive features provided in the treaty and cause benefit to the host State by direct or indirect investment, the argument for territoriality can be defended.

### **ICSID Arbitration Practice**

Satisfaction of an asset as an investment is also a determinant for the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) tribunal. Article 25(1)<sup>48</sup> of the Convention defines the jurisdiction of the tribunal. Jurisdiction *ratione materiae* extends to all legal disputes that arise directly out of an investment. However, the term has

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<sup>43</sup> FEDAX N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of Jurisdiction (9 March 1998) para: 41.

<sup>44</sup> AIIY LTD. v. Czech Republic, ICSID Case No. UNCT/15/1, Final Award (29 June 2018) para: 137.

<sup>45</sup> Abaclat and others (formerly Giovanna A. Beccara and Ors.) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision of Jurisdiction (29 Dec 2016) para:374.

<sup>46</sup>Supra note 42

<sup>47</sup> Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, PCA Case No. 2011-17, Award (31 January 2014) para: 358-359

<sup>48</sup>Supra note 37

not been defined which has resulted in two approaches. This includes the objective test of the double keyhole approach and the subjective test.<sup>49</sup>

The tribunal in its decision of *Salini v. Morocco*<sup>50</sup> established an objective definition that exhibits the inherent characteristics of an investment. This necessary list of characteristics operates to distinguish the term investment from ordinary commercial operations and is popularly known as the *Salini* test. However, these characteristics have been criticised and are not accepted as a unanimous threshold. Three of the original test criteria have continued as the core elements of this approach. These are: duration, Assumption of risk and Contribution of capital.<sup>51</sup> On the contrary, the subjective approach relies on the definition of investment as provided in the investment treaty which is the subject matter of the dispute. Therefore, ensuring party autonomy which was a core element of the negotiating history of the Convention. Nevertheless, as discussed above, both approaches dismiss one-time pure commercial transactions from the definition of investment.<sup>52</sup>

### **Pure Commercial Transactions**

The wide scope of Article 25 to encompass all plausible economic activities is inconsistent with the notion of commercial transactions eventually defining an outer limit of investment. ICSID Tribunals have hence often refused to institute proceedings because the asset could not refute the assertion of pure commercial transactions. As a matter of fact, this jurisprudence has also been widely accessed by non-ICSID tribunals. Yet, tribunals have not discussed the scope and nature of commercial transactions and have assessed them in accordance with the nature of the claim. The magnitude of economic activity or asset, however, may be assessed in accordance with the substantive characteristics. For example, the tribunal decided in the matter of *Ambiente Ufficio and others v. Argentina*<sup>53</sup> that sovereign bonds will not classify as commercial transactions as they involve participation in risk. Hence, an asset or economic activity will not amount to a commercial transaction if it can be associated with a key characteristic. This evaluation is not necessary if an investment treaty allows for claims for

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<sup>49</sup> J.E.L.Timmer, 'The Meaning of 'Investment' as a Requirement for Jurisdiction *Ratione Materiae* of the ICSID Centre', (2012) 29 *Journal of International Arbitration* 363, at 363-364.

<sup>50</sup> *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICC Case No. 16550/ND, Award (05 December 2011).

<sup>51</sup> *FEDAX N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of Jurisdiction (9 March 1998) para: 21-23.

<sup>52</sup> F. Yala, *The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement? Some "Un-conventional" Thoughts on Salini, SGS and Mihaly*, (2005) 22 *Journal of International Arbitration*, 106.

<sup>53</sup> *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para: 470-471 and 476.

money. For example, the 2012 China-Japan-Korea Trilateral Investment Agreement<sup>54</sup> which broadens the scope of investment for claims to money and performance under the contract.

### **Analysis**

Many States have opened their doors to the mining of crypto assets which also includes NFTs. To name a few Siberia, Ukraine, and Kazakhstan have received investment for setting up mining farms. Mining farms require a lease of land, servers, and a constant flow of electricity. These assets are physical and movable properties that can be associated with an enterprise and include a certain duration of investment, assumption of risk, and commitment of capital. A mining farm can also yield profits to a State as it improves employment opportunities, and the expansion of the mining community fosters auxiliary investment, hence satisfying the aspects indicated by the *Salini* test. These facets mimic a standard plant or workshop and will undoubtedly qualify as an investment. Coming to the question of the hour, can NFT's qualify as an investment? Three key features of the NFT are relevant to this analysis. These are:

- a) unique nature
- b) stored on the blockchain
- c) contains an agreement with rights and obligations

The crypto market now identifies NFTs as assets that can be permanently stored on the blockchain and have a unique value that is determined by the smart contract. It should be noted here that the value of NFTs rests in the smart contract as it can be sculpted to include art, membership to a club, and even stocks of a company. The international order is in for a treat if these key features can pass the test laid down by the regime.

As we have already learned, the asset-based definitions are broad and expansive. The intent of the broad definition is to be permissive and not restrictive. It is the relevant treaty, however which determines the scope and limitation of the definition. In this regard, recent legal scholarship has contended that crypto assets have diverse classifications. These include commodities, securities, and collectibles, and have concluded that the definition of investment can encompass them. This determination falters if the scope of investment is limited to the association with an enterprise. NFTs will meet their fate in this regard unless

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<sup>54</sup>*Supra* note 30.

the host State otherwise allows the development of an exchange platform for NFTs or crypto assets.

Nonetheless, these facets of the NFTs are an easy match for the substantive legal characteristics and the *Salini* test as contribution and commitment to capital is made by investing in the NFT through the exchange of tokens or fiat. However, the problem lies with the determination of the legality of the token exchange as it is regulated by the domestic norms of the host State. The process hence includes risk as NFTs are susceptible to regulatory uncertainty and fluctuations of the market and demand information asymmetry. NFTs, like most other financial instruments, are only invested in for a short duration, but scholars have asserted that arbitral tribunals are less likely to object to this condition. Hence, it can be concluded that NFTs will largely satisfy the conditions of jurisdiction *ratione materiae*. Though, this conclusion is empty without the assessment of territoriality and discreditation of the concept of pure commercial transactions.

NFTs may fulfill the features stated above for territorial links. To draw from the decision in *FEDAX v. Venezuela*<sup>55</sup>, an intangible asset that causes benefit to the host State is the key factor to draw the nexus. NFTs exist on the blockchain which is a decentralised system, and hence even though the location of the NFT is known it cannot be traced to a single territory. Although, a transaction of NFT benefits many members minting in the market, the substantial profit is received by the creator hence accruing a benefit to a single host State. This also clarifies that investment in NFT is not merely a commercial transaction as NFTs, even though made once, satisfy substantial legal characteristics, and accrue a benefit for the host State, which is necessary to defend the contention of ‘pure commercial transactions’.

### **Legality of Non-Fungible Tokens as an Investment**

International Investment Agreements may comprise of the fulfilment of ‘admission’ and ‘establishment’ to seek the legal protection provided by the instruments. These two prerequisites limit the definition and subsistence of an investment.<sup>56</sup> The permission conditions provide the requirement for introduction of the investment in the host economy and highlight the conditions and prerequisites that permit the investor to conduct business during the investment period. Therefore, admission and establishment are compulsions

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<sup>55</sup> ICSID Case No ARB/96/3.

<sup>56</sup>Supra note 36 at 190-191.

afforded by an investment agreement to warrant compliance with the laws of the host State before and after the establishment. Accordingly, the instrument does not offer a right to entry of foreign investment and imposes post-entry treatment.<sup>57</sup> However, a treaty may contain a narrow right to admission for national treatment and to the establishment for most favoured nations. These standards safeguard the investment and investor from less favourable treatment than what is accorded to domestic or national investors.

When it comes to the digital economy, admitting and authorising foreign investors to invest in the host economy may present certain issues that usually come up when a foreign investment happens in critical industries such as defence, strategic economic sectors etc.<sup>58</sup> Another dilemma that persists is that NFTs as a crypto asset is not regulated by the first wave of regulations. Therefore, an exchange for investment in NFT might be innately illegal if the domestic regulations from the first wave are patently applied for all other crypto assets. The hope lies with the post-entry standards, which may assist in ensuring that such steps are not taken.

## Final Observations

NFTs specifically have the scope of enlargement in the legal diaspora as it contains a smart contract which can enable different actions allowing a diverse future for investment. The prospect of NFTs is more important than its current use, as it has the capability to create ownership without oversight and hindrance. Creating a possible legal exchange that may even avail further ancillary rights and financial benefits would not come as a surprise. The crypto market, however, has not been received at an equal footing from all nation States. There is a constant change that manifestly impacts the future of NFTs. Regulatory actions of the States can overindulge and expand beyond the realm of obligations put forth by the investment treaty. This obviously divulges from the principle of protecting investments and investors. All key substantive legal issues are at play with regards to the NFTs, which may cause substantial harm to the investors. At this juncture, hence it is imperative to construct literature and caution foreign investors. As noted above, NFTs may classify as an investment, however, it is plausible for States to amend or fine-tune the investment agreement to ensure that the same

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<sup>57</sup> *Supra note 36* at 191.

<sup>58</sup> Lu Wang, *Chinese SOE Investments and the National Security Protection under IIAs* in Julien Chaisse, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP 2019) 67–86.

does not gain the protection of the instrument. It is also probable that investment arbitration tribunals construct further characteristics that may sustain its growth. However, if legally permitted as a valid transaction, security and protection can be drawn from post-entry thresholds.