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## Territoriality in Investment Arbitration: The Case of Financial Instruments

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# **Territoriality in investment arbitration: the case of financial instruments**

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\* The article is the outcome of close cooperation between the two authors. However, sections 4 and 5 can be attributed to Caroline Kleiner, and sections 1, 2 and 3 to Francesco Costamagna

## I. Introduction

Deterritorialization, i.e. the progressive demise of the role of territoriality as an organizing category on the international stage, has been considered one of the defining features of the globalization process. Distinguished scholars, such as Fischer-Lescano and Teubner, argue that functionality has superseded territoriality as the distinguishing characteristic of the global order.<sup>1</sup> According to this narrative, authority is mainly exercised by bodies or entities working toward a specific goal, be it the liberalization of trade or the protection of foreign investments, rather than operating on a territorial basis. This would entail the inevitable demise of the territorial State because of its inherent incapacity to deal with phenomena that are transnational<sup>2</sup> in nature.

It is certainly true that the globalization process has encroached upon the territorial principle, at least in its ‘modern’ version based on exclusivity in the exercise of public authority on a certain geographical space and a rigid public/private divide.<sup>3</sup> However, the above-outlined narrative is far too dismissive of the role that territoriality, at least in its post-modern forms, still plays in shaping the current global order.<sup>4</sup> In this regard, it has been rightly emphasized that international treaties still take State Parties’ territory as the reference point for their application *ratione loci*.<sup>5</sup> Secondly, the implementation of international law norms is still very much dependent on States’ territorial authority. In this regard, one can fully agree with Tancredi when he writes that “territoriality hugely contribute[s] to the functioning of international law”<sup>6</sup> and, thus, to the shaping of the global order.

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<sup>1</sup> Andreas Fischer-Lescano, Gunther Teubner, “Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2004) 25 *Michigan Journal of International Law* 999, 1009. See also Catherine Brölman, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties* (Hart 2007) 87.

<sup>2</sup> On this notion see Philip Jessup, *Transnational Law* (Yale University Press 1956), 1-2. The author identifies a number of situations that can be defined as being “transnational” in nature because they involve “individuals, corporations, states, organizations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French counsel to advise on the settlement of his client’s estate in France; or the United States Government when negotiating with the Soviet Union regarding the unification of Germany. So does the United Nations when shipping milk for UNICEF or sending a mediator to Palestine. Equally one could mention the International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations”. Likewise, Jessup defines “transnational law” as including “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories”.

<sup>3</sup> On the evolution of territoriality as a criterion for organizing power relations see John Gerard Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations” (1993) 47 *International Organizations* 139, 139-174.

<sup>4</sup> See generally Alessandra Arcuri, Federica Violi, “Reconfiguring Territoriality in International Economic Law” (2017) *Netherlands Yearbook of International Law* 2016

<sup>5</sup> Article 29 *Vienna Convention on the Law of Treaties*, signed on the 23 May 1969. See specifically Menno Kamminga, “Extraterritoriality”, *Max Planck Encyclopedia of Public International Law* (2013) 2.

<sup>6</sup> Antonello Tancredi, “Some Thoughts on Deterritorialization and Effectiveness in International Law”, in Adriana Di Stefano (ed.), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and European Law* (Giappichelli 2015) 52.

This article deals with the continuing relevance of territoriality as a condition that limits the reach of the international regime for the protection of foreign investments. In particular, the analysis focuses on whether it is possible to consider as ‘protected investments’ financial transactions that, due to their immaterial nature, have very weak – if any – territorial roots. The main issue addressed is whether these transactions fulfil the so-called territorial requirement enshrined in the overwhelming majority of international investment agreements (IIAs), and according to which only investments made “in the territory” of the host State fall within their scope of protection.<sup>7</sup> More specifically, the article treats this issue as a jurisdictional requirement in international investment arbitration. Indeed, investment arbitral tribunals have jurisdiction *rationae materiae* over disputes concerning an investment *localized in the territory of the host state*. The article seeks to identify methods for the localization of financial investments with a view to determining jurisdiction.

The application of the requirement of territoriality has proven highly problematic especially with regard to economic activities that do not have a ‘brick and mortar’ nature. This is the case, for instance, of debt instruments: investment arbitration tribunals have not yet convincingly identified what notion of territoriality is implied and should be applied in these cases. This problem has materialized in a number of cases involving holdout creditors of Argentinian bonds. In 2001, Argentina was forced to declare a moratorium on service of its huge external debt, thus making the biggest debt default in history. In the attempt to restructure its debt, in 2005 Argentina offered bondholders a deal whereby they could swap their defaulted bonds with new instruments with a much lower nominal value – 65-75% less – than the original ones. This notwithstanding, approximately 76% of outstanding bondholders accepted the offer. A second exchange took place in 2010 with the participation of 66% of those that had refused to accept the first offer. Only a tiny minority of creditors held out, as participants to these exchanges reached 92.5% of the total. Non-participant creditors pursued litigation in various jurisdictions.<sup>8</sup> In 2006, some 180,000 Italian bondholders filed a request for arbitration with the International Centre for the Settlement of Investment Dispute (ICSID), claiming that Argentina had violated several of its obligations to protect foreign investors by not paying the bonds and restructuring its debts. This claim gave rise to the *Abaclat*,<sup>9</sup> *Ambiente Ufficio*<sup>10</sup> and *Giovanni Alemanni*<sup>11</sup>

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<sup>7</sup> August Reinisch, “Investment Disputes and Their Boundaries”, in *Droit des frontières internationales The Law of International Borders*, Journées franco-allemandes (SFDI/Pedone 2016) 207-230.

<sup>8</sup> For an overview of one of the best-known suits brought in the United States, see Caroline Kleiner, “L’affaire du siècle: NML c/République d’Argentine ou la ‘contribution’ des fonds vautours au droit international”, in *Mélanges offerts à Pierre Mayer* (LGDJ 2015). On the many-tentacled litigation pursued by holdout creditors throughout the world, see Caroline Kleiner, “Les affaires relatives à la dette souveraine argentine – Un contentieux collectif et transnational en quête de règles et de tribunal”, (2015) *Annuaire Français de Droit international* 751, 751-783.

<sup>9</sup> *Abaclat and others v. the Argentine Republic*, ICSID Case No. ARB/07/5, Decision on jurisdiction and admissibility (4 August 2011). This case was terminated following the settlement agreed by the parties and recorded at their request in the form of an award (29 December 2016).

cases. This move sparked a heated debate, mainly because of the negative effects that empowering holdout creditors to sue a State before an international arbitral tribunal might have on the integrity of the sovereign debt restructuring process.<sup>12</sup> Some States are now trying to exclude the possibility of claims related to disputes concerning sovereign debt restructuring.<sup>13</sup>

The article critically engages with the various criteria (*faisceau d'indices*) that have been used in arbitral practice to interpret the territoriality requirement as a condition to determine whether financial instruments and, more specifically, bonds issued by a State – i.e. pure contractual relationships – are protected investments under international investment law. In particular, it proposes a distinction between an interpretative approach that takes physical presence as the decisive factor in locating the investment in the territory of the host State and another approach which focuses on the legal characteristics of the investment and resorts to private international law tools to localize it.

The article is structured as follows. It first examines the provisions contained in international investment agreements (IIAs) that set forth the territorial requirement as a condition to identify protected investments or to limit the scope of standards of protection. Furthermore, it provides an overview of the definition of ‘territory’ given by selected IIAs. Secondly, it considers the criteria commonly used in arbitral practice,

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<sup>10</sup> *Ambiente Ufficio S.P.A. and others v. the Argentine Republic*, ICSID Case No. ARB/08/9, Decision on jurisdiction and admissibility (8 February 2013). This case was discontinued for lack of payment of the required advances (8 May 2015).

<sup>11</sup> *Giovanni Alemanni and others v. the Argentine Republic*, ICSID Case No. ARB/07/8, Decision on jurisdiction and admissibility (17 November 2014). This case was discontinued for lack of payment of the required advances (14 December 2015).

<sup>12</sup> Annamaria Viterbo, “Sovereign Debt Restructuring and Investment Protection”, in Tullio Treves, Francesco Seatzu, Seline Trevisanut (eds), *Foreign Investments and Common Concerns: An International Law Perspective* (Routledge, 2014), 325-336; Sadie Blanchard, “Ambiente Ufficio and Others v. Argentine Republic” (2014) 15 *Journal of World Investment and Trade* 314, 314-323; Giuseppe Bianco, “The Bitter End of Sovereign Debt Restructuring: the Abaclat v. Argentina Arbitration and the Eurozone Crisis” (2013) 40 *Legal Issues of Economic Integration* 315, 315-338; Felipe Suescun de Roa, “Investor State Arbitration in Sovereign Debt Restructuring: the Role of Holdouts” (2013) 30 *Journal of International Arbitration* 131, 131-154; Lorenza Mola, “Sovereign Immunity, Insolvent States and Private Bondholders: Recent National and International Case Law”, (2012) 11 *The Law and Practice of International Courts and Tribunals* 525, 525-554; Michael Waibel, *Sovereign Defaults Before International Courts and Tribunals* (CUP, 2011), 316-318; Michael Waibel, “Opening Pandora’s Box: Sovereign Bonds in International Arbitration”, (2007) 101 *Am. J. Int’l L.* 711; August Reinisch, “State Insolvency – Consequences and Obligations under Investment Treaties – Comment”, in Rainer Hoffmann, Christian J. Tams (eds), *The International Convention for the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos Publishers, 2007), 175-177. See also *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Juan Pablo Bohoslavsky, submitted pursuant to Human Rights Council resolutions 25/16 and 34/3, 17 July 2017, A/72/153.

<sup>13</sup> See, for instance, *Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)*, Ch. 9, Annex 9D. The provision reads as follows: “[n]o claim that a restructuring of debt issued by a Party breaches an obligation under this Chapter may be submitted to, or if already submitted continue in, arbitration under this Chapter if the restructuring is a negotiated restructuring at the time of submission”.

distinguishing between two different approaches. On the one hand, it criticizes the recourse to the so-called ‘benefit test’, according to which financial transactions can be considered as made “in the territory” of the host State if the latter obtained an economic benefit from the operation. The article proposes that this approach should be abandoned on the grounds that financial transactions can be considered as protected investments only insofar as they have a link with a specific investment project located in the territory of the host State. On the other hand, it considers the role that private international law tools can play in localizing, or delocalizing, the investment. This part critically engages with the refusal by arbitral tribunals to consider a number of factors – such as choice of law and choice of forum clauses, the exercise of sovereign power over the investment and the determination of the *situs* of the financial damage – as factors potentially relevant for the localization of the investment. The purpose of the analysis is to show that private international law tools, if used properly, can contribute to locating the investment. Moreover, this part of the article also looks at the role that domestic law can play in this context. It argues that referring to this element, although it can certainly provide useful insights, may further complicate an already intricate situation. The main points of reference are the three decisions on jurisdiction mentioned above – *Abaclat*, *Ambiente Ufficio* and *Giovanni Alemanni* – concerning cases of holdout creditors of Argentinian bonds. The article criticizes their tendency to adopt an overly broad interpretation of the territorial nexus, thereby unduly expanding the scope of the protection offered to foreign creditors. Overall, this article wishes to transcend the obsolete public/private division in international law. It illustrates how a joint public/private perspective aids understanding of complex situations with an inherently transnational nature.

## II. The territorial requirement in IIAs

The existence of a link with the territory of the host State is an element that contributes to identifying what investments are protected under the majority of IIAs and, thus, to determining the scope of application *ratione materiae* of their provisions.<sup>14</sup> There are other cases where this requirement is contained in provisions setting substantive protection standards, limiting their scope of application. This section explores the different roles that the territorial requirements play in different IIAs, proposing a classification thereof.

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<sup>14</sup> Interestingly, Santiago Torres Bernárdez, in his dissenting opinion in *Ambiente Ufficio*, observes that the issue of territoriality may also concern the definition of the notion of ‘investor’ and thus affect the jurisdiction *ratione personae* of the arbitral tribunal. This is the case of Article 1(2) Argentina-Italy BIT, where “being a holder of a protected investment in the territory of the Argentine Republic at the relevant dates” is one of the requirements to be considered as a protected investor (*Ambiente Ufficio S.P.A. and others v. the Argentine Republic*, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernárdez (2 May 2013), para. 132).

Most IIAs make it clear that they cover only those investments “made in the territory” of the host State.<sup>15</sup> There are only few exceptions in this regard: quite surprisingly, no reference to this requirement can be found in the *Comprehensive Economic and Trade Agreement* concluded between Canada and the EU in 2014, approved by the European Parliament on 15 February 2017 and which entered into force provisionally on 21 September 2017.

In many IIAs, the territorial clause is part of the definition of investment. This is the case of Art. I(2)(a) of the Colombia-UK BIT (2010), which states that “Investment means every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party in the territory of the other Contracting Party, in accordance with the law of the latter [...]”. Similarly, Art 1(2) of the Guatemala-Russia BIT (2013) stipulates “‘Investments’ are all kinds of property assets invested by investors of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the legislation of the State of the latter Contracting Party”.

In other cases, the reference to the territorial requirement is not part of the definition of investment, but an element that identifies investments that are covered by the IIA. For instance, Art. 1101(1)(b) of NAFTA states that Chapter 11 applies to “(b) investments of investors of another Party in the territory of the Party”.<sup>16</sup> The same goes for Art. 10(1) of the ECT, which states that the protection extends to investments made in the Area of a Contracting Party. Likewise, the Preamble of the 2012 US Model BIT clarifies that the focus of the Treaty is on “investment by nationals and enterprises of one Party in the territory of the other Party”. The same applies to the Trans-Pacific Partnership: Art. 9.1 defines ‘covered investment’ as “with respect to a Party, an investment in its territory of an investor of another Party”.<sup>17</sup>

Some IIAs contain both types of territorial clause. For example, Art. 1 of the Burkina Faso-Canada BIT (2015) states that “‘covered investment’ means, with respect to a Party, an investment in its territory that is owned or controlled, directly or indirectly, by an investor of the other Party existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter” and that “‘investment’ means any kind of assets that an investor of a Party owns or controls *in the territory of the other Party* that involves the commitment of capital or other resources, the three expectations of gain or profit, or the assumption of risk”.<sup>18</sup>

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<sup>15</sup> See generally Reinisch (n. 7) 208-210.

<sup>16</sup> This provision has been applied, finding that the investment had not been made in the territory of the Host State, in *Bayview Irrigation District et al v Mexico*, ICSID Case No. ARB/05/1, Award 19 June 2007 and *Canadian Cattlemen for fair Trade v United States*, NAFTA/UNCITRAL, Award on Jurisdiction, 29 January 2008. See Christina Knahr, “Investments ‘in the Territory’ of the Host State”, in Christina Binder, Ursula Kriebaum, August Reinisch (eds) *International Investment Law in the 21st century* (OUP, 2009) pp. 42-53.

<sup>17</sup> The Trans-Pacific Partnership is a trade agreement that, on 4 February 2016, was signed by 12 States: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and United States of America.

<sup>18</sup> Emphasis added.

There are many instances where the reference to the territory is present in the provisions defining the substantive standards of protection. In some cases, this reference simply reiterates that the protection offered by the treaty only extends to certain investments and, in particular, to those being ‘in the territory’ of the host State. For example, the Preamble of the Germany-Sri Lanka BIT (2000) makes it clear that both parties intend “to create favourable conditions for investments by nationals and companies of either State in the territory of the other State”. Art. 3 of this BIT adds that “(1) Neither Contracting State shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting State to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.” And that “(2) Neither Contracting State shall subject nationals or companies of the other Contracting State, as regards their activities in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.”

Conversely, in other IIAs the reference to the territory concerns not the investment, but State Parties’ obligations. Art. II(2) of the Colombia-UK BIT (2010): “Each Contracting Party shall protect within its territory investments made in accordance with its law by investors of the other Contracting Party [...]”. The same goes for Art. 4 of the Japan-Uruguay BIT (2014), which states that “Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities”.

### **III. The Role of physical presence in the localization of the investment**

#### *III.1. Beyond physical presence: the contested criterion of the benefit for the host State*

Faced with the action brought by holdout creditors, Argentina challenged the jurisdiction of the arbitral tribunal, contending that, *inter alia*, the security entitlements purchased by Claimants were not “investments” within the meaning of Article 1 of the Argentina-Italy BIT and Article 25 of the ICSID Convention.<sup>19</sup> In particular, it pointed

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<sup>19</sup> Article 25.1 of the ICSID Convention reads as follows: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”. The provision does not include any reference to the territorial requirement, as the only reference to the localization of the investment may be found in the Report of the Executive Directors, which establishes that “adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment *into its territories*, which is the primary purpose of the Convention” (*Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18, 1965, reported in *History of the ICSID Convention* Volume II-2 (ICSID Publication 2006) 1069, para. 12). However, distinguished scholars



to the fact that these transactions did not occur “in the territory” of Argentina. The Tribunal dismissed this challenge, finding that the transactions at stake were to be considered as investments “made in Argentina”.<sup>20</sup> A remarkable feature of the solution adopted in *Abaclat*, *Ambiente Ufficio* and *Giovanni Alemanni* is the attempt to deprive the territoriality requirement of any physical connotation, starting from the assumption that “financial instruments such as bonds/security entitlements are not physical investments”<sup>21</sup> and, thus, there is the need for different criteria to localize them. This emerges also from the choice to avoid any use of the term “in the territory”, referring instead to the fact that the operations were made “in Argentina”.

The operational criterion used by these tribunals for “investments of purely financial nature”<sup>22</sup> is the so-called ‘continuous credit benefit’. According to this doctrine, an investment can be localized within a State if that State obtained an economic benefit from the operation.

This approach recalls the one followed in *Fedax v. Venezuela* award, in a case concerning the possibility to consider as an investment a promissory note issued by Venezuela. Here the Tribunal held that “[t]he important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs. It is not disputed in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs”.<sup>23</sup> Likewise, in the *CSOB v. The Slovak Republic* case<sup>24</sup> the arbitral tribunal emphasized that the objective of the loan agreement – the investment at stake – was to “enable CSOB to exercise fully its role and to develop its activities in both Republics within the framework of a market economy”.<sup>25</sup>

The *Abaclat* and *Ambiente Ufficio* arbitral tribunals applied this criterion, finding that Argentina was the ultimate beneficiary of the investment, because “[t]he whole bond issuing process, notably including the circulation of security entitlements on the secondary market, was devised – and specifically intended by the Respondent itself – to raise money for the budgetary needs of Argentina and thus to further the development of that State”.<sup>26</sup> In their opinion, there was no need to demonstrate a link between these resources and specific enterprises or projects and, thus, “to which extent and in which

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contend that the territorial link – i.e. the need for the investment to be made in the Host State’s territory – is implicit in the provision according to which the jurisdiction of the Center shall extend to any legal dispute arising directly “out of an investment” (see Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention A Commentary* (CUP 2009) 188-198).

<sup>20</sup> *Abaclat*, para. 372-380.

<sup>21</sup> *Abaclat*, para. 374; *Ambiente Ufficio*, para. 498.

<sup>22</sup> *Abaclat*, para. 374.

<sup>23</sup> *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997), para. 41.

<sup>24</sup> *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999).

<sup>25</sup> para. 83.

<sup>26</sup> *Ambiente Ufficio*, para. 500. See also *Abaclat*, para. 378.

ways those funds made available to the Respondent were actually used for promoting the economic development of Argentina”.<sup>27</sup>

This line of reasoning rests on the factual assumption that the issuance of bonds on the primary market and the selling of securities entitlements on the secondary one constitute a single operation. Indeed, as argued in *Abaclat*: “the bonds and the security entitlements are part of one and the same economic operation and they make only sense together”. Therefore, “the funds generated by the purchase of the relevant security entitlements are – *for the purpose of establishing where they were made* – no different than the lump sum payment by the underwriters for the bond”.<sup>28</sup>

The benefit test has also been applied in *Deutsche Bank v. Sri Lanka*. This dispute concerned a hedging agreement concluded between Deutsche Bank and CPC, a petroleum company wholly owned by Sri Lanka, in order to minimize the impacts of fluctuations of oil prices. Questions arose as to the possibility to consider the agreement as a covered investment under the Germany-Sri Lanka BIT. In particular, the Tribunal had to determine whether the hedging agreement was to be considered an investment *in the territory* of Sri Lanka. In this case, the Tribunal first rejected the claim made by Sri Lanka, according to which “in order to qualify for protection the claim must be associated with a separate investment”.<sup>29</sup> This notwithstanding, the Tribunal could not but accept that “the existence of a territorial nexus with Sri Lanka is a condition of its jurisdiction”<sup>30</sup> and it resorted to the ‘benefit test’ elaborated in *Abaclat* to assess whether such link did exist in the case at hand. Arguing that the place of conclusion and payment of the hedging contract were not significant to localize the investment, the Tribunal looked exclusively at the intended<sup>31</sup> benefit and concluded that the condition of a territorial nexus with Sri Lanka was satisfied.<sup>32</sup>

### *III.2. Return to physical presence? Looking at the purpose of the financial operation and at the link between the financial operation and a specific investment project*

#### *i) The shortcomings of the benefit test*

The benefit test, as elaborated in *Abaclat*, is problematic in many respects.

First, the claim according to which financial investments are not like any other investment and, consequently, there is the need for other criteria to assess whether they fulfill the territorial requirement, is legally ungrounded and logically flawed. Indeed,

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<sup>27</sup> *Ambiente Ufficio*, para. 504; *Abaclat*, para. 378.

<sup>28</sup> *Abaclat*, para. 377. See also *Ambiente Ufficio*, para. 429: “the Tribunal is convinced that the process of issuing bonds and their circulation on the retail, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind ‘aris[e] directly out of an investment’ and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT”.

<sup>29</sup> *Deutsche Bank*, para. 286.

<sup>30</sup> *Id.*, para. 287.

<sup>31</sup> To be stressed is that in this case there was no actual benefit for the State.

<sup>32</sup> *Deutsche Bank*, para. 292.

IIAs, including the Argentina-Italy BIT, offer a unitary definition of investment, without providing for a variable application of the conditions that define the scope of protection of the relevant IIA. Therefore, if an asset fails to meet one of these conditions, the solution is not to broaden its interpretation, but rather to exclude the asset from the IIA's scope of application. As pointedly observed by Michael Waibel, "the notion of investment is not infinitively elastic".<sup>33</sup> Therefore, the lack of a sufficiently close tie with the territory of the host State cannot be compensated by overstretching the notion of territoriality as far as to encompass situations where the connection between the investment and the host State is far more tenuous than the required one.

A further question concerns the application of the benefit test to sovereign debt instruments. As seen above, the Tribunal's finding that Argentina benefited from the selling of the security entitlements rests on the assumption that these transactions, which occur on the secondary market, are part of a single operation with the bond issuance taking place on the primary market and involving the State together with the so-called 'underwriters'. This assumption is unfounded, as the two moments are distinct especially with regard to the position of the State and of the benefit that it can obtain therefrom. Indeed, while the State directly obtains the proceeds of the initial issuance of the bond, it does not participate in the transactions taking place in the secondary market. It does not gain any benefit from the flow of funds that goes from the bondholders to the intermediaries. Therefore, even accepting that the benefit for the host State is a valuable proxy for the existence of a territorial connection, in the case of sovereign bonds' security entitlements this link is missing.

Moreover, this line of reasoning transforms the territorial nexus requirement from an element concerning the *localization* of an investment into an item referring to its *attribution*. By considering the beneficiary of an investment (hence a person), it converts the *objective* condition attached to the localization in the territory of the host State into a *subjective* criterion.<sup>34</sup> Ultimately, this approach disaggregates the *ratione loci* requirement so as to expand the scope of protection of IIAs.

Recourse to the benefit test may even generate absurd results. As pointedly observed by Zachary Douglas, if such a loose interpretation of the territoriality requirement should become the general rule, "[t]hen the purchase of Argentine beef from an Argentine State-owned distributor in Italy would be capable of constituting an investment, as would the purchase of a visa to travel to Argentina at its consulate in Rome, as would the purchase of a ticket to fly from Rome to Buenos Aires on Aerolineas Argentinas".<sup>35</sup> This article contends that the application of the benefit test in the sovereign bond cases would lead to results even more absurd than the one

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<sup>33</sup> Michael Waibel (n. 12) 722.

<sup>34</sup> See Caroline Kleiner (n. 8) 751.

<sup>35</sup> Zachary Douglas, "Property, Investment and the Scope of Investment Protection Obligations", in Zachary Douglas, Joost Pauwelyn, Jorge Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014), 28.

denounced by Zachary Douglas. Indeed, in the cases of beef, visas, and tickets there is, at least, a flow of money that goes from Italian customers and tourists to Argentina's coffers. Conversely, as seen above, this is not the case with regard to bonds' secondary market transactions, since financial intermediaries, in the transactions at stake, are located outside the territory of Argentina.

The ongoing controversies on tax avoidance furnish another example of such a risk. Multinational companies like Google or Apple undertake their activities in many countries, thus making an 'investment'. However, due to a specific tax scheme, those companies do not pay taxes where their activities are deployed (or only a very small amount), but they do pay tax in a country which has transformed its low taxation policy into a business activity, not only for the activities undertaken in that country. It is clearly the low tax country that benefits from the investment made abroad. At the same time, it is equally clear that this is not the country where the investment can be localized.

*ii) The need for a specific territorial connection*

For all these reasons, one cannot but agree with Judge Abi-Saab who, in his Dissenting Opinion in *Abaclat*, proposed adopting an approach different from the one espoused by the Tribunal's majority.<sup>36</sup> He started by arguing that the immaterial nature of financial operations does not justify circumventing the need to prove the existence of a physical connection with the territory of the host State.<sup>37</sup> Indeed, "a territorial link or nexus is inherent in the concept of 'investment' in article 25 of the ICSID Convention",<sup>38</sup> as well as being explicitly required by the Argentina-Italy BIT.<sup>39</sup> Moving from these premises, Judge Abi-Saab argued that the territorial link can be determined only when the financial operation "can be traced to a specific project, enterprise or activity in that territory that corresponds to the economic meaning of investment in article 25 of the ICSID Convention (i.e. that it contributed to the expansion of the country's productive capacity)".<sup>40</sup>

A textual interpretation<sup>41</sup> of the territorial clause contained in most IIAs calls for the existence of such a specific territorial connection between the investment and the host State. The "in the" part of the formula requires that either the investment is carried out within the territory of the host State or, at least, that it has to be materially connected

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<sup>36</sup> *Abaclat and others v. the Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility (28 October 2011).

<sup>37</sup> The same happened in *Ambiente Ufficio S.P.A. and others v. the Argentine Republic*, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernárdez (2 May 2013).

<sup>38</sup> Ivi, para. 74. See also Michael Waibel (n. 12) 727. The Author maintains that "territorial link represents another typical element of investment under Article 25".

<sup>39</sup> The Preamble of the BIT expresses the Parties' desire to "create favourable conditions for investments by nationals and companies of either States in the territory of the other". Moreover, Art. 1 BIT defines an investment as "any contribution or asset invested or reinvested by physical or legal persons of one Contracting Party in the territory of the other".

<sup>40</sup> *Abaclat*, Dissenting Opinion, para. 95.

<sup>41</sup> See generally Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart 2016), 64-74

with the latter. The existence of a unitary definition of investment, as is the case in the Argentina-Italy BIT, rules out the possibility to exclude purely financial transactions from fulfilling this requirement.

Paradoxically, most the awards generally cited to justify the adoption of a ‘benefit-only’ approach end up by lending their support to the view espoused here.<sup>42</sup> The most egregious example in this regard is *SGS v. Philippines*, where the Tribunal held that “[i]n accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, *however beneficial to it*, would not be covered by the BIT”.<sup>43</sup>

Admittedly, there is a case involving financial instruments that apparently supports *Abaclat*’s majoritarian view. Indeed, in the above-mentioned *Fedax v. Venezuela*, the Tribunal held that, when it comes to determining whether investments of a financial nature are made in the territory of the Host State, the key question is whether the funds were beneficial for the Host State.<sup>44</sup> However, doubts may be raised as to the precedential value of this decision with regard to a case concerning sovereign debt securities traded on the secondary market. Indeed, the *Fedax* decision concerned promissory notes that, as pointedly observed in *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, were considered as investments because they were issued by the Republic of Venezuela *in connection with a contract for the provision of services*.<sup>45</sup> The same applies to the *CSOB v. The Slovak Republic* case, where the tribunal, in finding that the loan agreement could be an investment, pointed out that “the contractual scheme embodied in the Consolidation Agreement shows (...) that the CSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB”.<sup>46</sup> In other words, even one of the arbitral decisions largely regarded as having adopted an overly-broad definition of investment cannot be taken as supporting the view that free-standing financial instruments fall within the scope of protection of international investment law.

Lastly, even the *Deutsche Bank v. Sri Lanka* award goes in the same direction. As seen above, in this case the Tribunal adopted the benefit test, as elaborated in *Abaclat*.

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<sup>42</sup> On this point see Josef Ostransky, “Sovereign Default Disputes in Investment Treaty Arbitration: Jurisdictional Considerations and Policy Implications”, (2015) 3 *Groningen Journal of International Law* 27, 46-47.

<sup>43</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the tribunal on Objections to Jurisdiction (29 January 2004), para. 99 (emphasis added).

<sup>44</sup> *Fedax*, para. 41.

<sup>45</sup> *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015), para. 365. The award did not address the issue of territoriality of the Greek bonds, since it held that these operations were not investments according to the wording of the BIT. See Francesco Montanaro, “Poštova Banka SA and Istrokapital SE v Hellenic Republic: Sovereign Bonds and the Puzzling Definition of “Investment” in International Investment Law” (2015) 30 *ICSID Review: Foreign Investment Law Journal* 549, 549-555

<sup>46</sup> *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999).

In so doing, it highlighted that this test is the one best suited to “[t]he reality of today’s banking business” and the inherently deterritorialized nature of the operations taking place in that context. However, when concluding on the point, the Tribunal found that the Hedging Agreement was to be considered an ‘investment’ not just because the funds were made available to the host State, but also because they “were linked to an activity taking place in Sri Lanka”.<sup>47</sup>

#### **IV. The role of Private International Law in localizing the investment**

International investment law is typically a network of relationships that involve both public law and private law. In the previously recalled definition by Jessup<sup>48</sup>, the relationships at stake in international investments are *transnational* by nature. This justifies attempting to think out of the “public international law” tools and to outsource lines of arguments often used in private international law (PIL), a subject far from being unrelated to international arbitration, as shown by George A. Bermann.<sup>49</sup> This attempt is not completely new. Indeed, recourse to these interpretative tools has already been proposed, although in a quite tentative manner and without obtaining much success. In order to substantiate these proposals better and, thus, to possibly make them more successful in the future, this article distinguishes between an *indirect* approach to locating investment which considers domestic law as the decisive factor and a *direct* approach which refers to directly connecting factors pointing at a specific territory.

Arbitral practice has rarely relied on PIL tools to locate investments. An important example in this regard is the Dissenting Opinion of George Abi Saab in *Abaclat*, which posited that “to answer the question whether the securities in question are located in Argentinean territory, this Tribunal needs to determine the *situs* of the debt – i.e. the alleged investment – using a systematic approach consistent with well-founded and established precedents and drawing on *private international law rules*”.<sup>50</sup> By applying those tools, George Abi-Saab reached the conclusion that neither what he called the ‘legal criteria’<sup>51</sup> nor the “material criteria” lead to the localization of the acquisition of bond instruments by Italian creditors in Argentina.

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<sup>47</sup> *Deutsche Bank*, para. 292.

<sup>48</sup> See footnote 2.

<sup>49</sup> George A. Bermann, *International Arbitration and Private International Law* (The Hague Academy of International Law/Brill 2017): “International arbitration (...) has an obvious home in private international law, for it is populated with all the issues – including international jurisdiction, transnational provisional relief, conflict of laws, and international recognition and enforcement – for which private international law provides the framework of analyses and, on occasion, the tools” (p. 20).

<sup>50</sup> *Abaclat*, Dissenting opinion, para. 82.

<sup>51</sup> When referring to “legal criteria”, professor George Abi Saab made reference to the place where the bonds were sold and to the choice of law and forum selection clauses subjecting the acquisition to laws that are foreign to Argentina. See *Abaclat*, Dissenting opinion, para. 78

#### *IV.1 Indirect approach to locating the investment: Reliance upon domestic law to localize the investment – conflict-of-laws method*

A possible method for the territorial localization of an investment, albeit not one that has ever been used in arbitral practice, would be to rely upon substantive law applicable to the investment. This corresponds to the traditional *conflict-of-laws* approach, which does not provide for a substantive solution, but rather designates the legal order within which such a solution should be taken. This method is well known and has been applied by domestic courts and also the Court of Justice of the European Union, when jurisdiction of a domestic court depends on the localization of a legal act or fact. For instance, in contractual matters, according to the Brussels I recast Regulation, in the absence of a jurisdiction agreement, the jurisdiction of a tribunal of a Member State depends on the localization of the main obligation of the contract.<sup>52</sup> However, Brussels I recast Regulation does not clarify how to localize “the place of performance of the obligation” set forth in article 7 (1) (a). Hence, the Court of Justice, when asked to answer a preliminary question relating to the interpretation of this expression, decided that the *place of performance* should be determined by the substantive law applicable to the contract.<sup>53</sup> Such substantive law is determined according to the choice-of-law rules of the court whose jurisdiction is sought. The Court of Justice decided thus, given the differences between national laws of contract on the issue of localization of the place of performance. This solution has then been applied by various courts of Member States.<sup>54</sup>

Even if an investment is different from a contract, the same reasoning could be applied to its localization, given the fact that upon this notion depends also the jurisdiction of arbitral tribunals. It must be admitted, however, that determination of the jurisdiction of an arbitral tribunal is something different from determination of the jurisdiction of a domestic court. Where the rules of jurisdiction, especially in the context of the EU, aim also at allocating jurisdiction between Member States’ tribunals, the determination of jurisdiction of an arbitral tribunal concerns only this very same tribunal. In the same vein, while jurisdiction of a national court may exist without consent, the latter is the key issue of jurisdiction of investment tribunals.

Although touching upon key aspects, these differences do not, at least on paper, prevent international arbitrators from adopting what can be dubbed an ‘indirect’ definition of the territorial nexus. By so doing, they could refer to national legal orders

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<sup>52</sup> Art. 7(1)(a) of Brussels I Regulation (recast) (Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) provides that “A person domiciled in a Contracting State may, in another Contracting State, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question”. Art. 5 (1) (a) of Brussels I Regulation (Regulation (EC) No 44/2001 of 22 December 2000) and art. 5 of the Brussels Convention 1968 contained the same wording.

<sup>53</sup> Case 12/76 *Tessili v. Dunlop* (ECJ 10 Oct. 1976); Case C-288/92, *Custom Made Commercial Ltd. v. Stawa Metallbau GmbH* (ECJ 29 June 1994); Case C-440/97, *GIE Groupe Concorde v The Suhadiwarno Panjan* (ECJ 28 Sept. 1999).

<sup>54</sup> See in France: Court of Cassation (1st Chamber) 25 Sept. 2013, No 10-25069 ; 12 Jan. 2011, No 09-67210. See also Peter Mankowski in Ulrich Magnus, Peter Mankowski (eds) *Brussels I Regulation 2<sup>nd</sup>* Revised Edition (Sellier European Law Publishers 2012), Art. 5, para. 96 and ff.

in order to localize the investment, instead of directly identifying those elements that are relevant to assessing the linkage with the territory of the Host state.

Following this approach, in the *Abaclat* case, as well as in the other subsequent cases concerning the Argentinian debt, the acquisition of each bond series – the so-called investment – should, in our view, have been treated separately according to the law applicable to the titles. In that case, designating the substantive law applicable to the bonds was an easy task, since the issuance of Argentinian bonds included a choice of law clause. A similar line of reasoning was followed by the District Court of New York when it refused to certify a class action brought by some of the claimants in the *Abaclat* case on the grounds that the series of bonds at stake were governed by different laws and that these discrepancies were a hurdle to the certification of a class.<sup>55</sup> As a consequence, the acquisition of titles of sovereign debts – if it corresponds to an investment – could be localized in various countries depending on the applicable law chosen in such titles.

This approach might be rightly criticized for complicating an already complex situation.<sup>56</sup> Indeed, conflict-of-law analysis adds a further step to the reasoning by requiring first to determine which legal order governs the substantive solution. Moreover, a more serious criticism is the one touching upon the differentiation between treaty claims and contract claims. Relying upon this distinction, Claimants in the *Abaclat* case argued that international law may only determine the issues at stake and, in particular, international law would only be applicable to determination of the jurisdiction of the arbitral tribunal, for which the localization of the investment is an issue.<sup>57</sup> This line of argument, espoused by the arbitral tribunal, is questionable from two main perspectives.

First, the distinction between contract claims and treaty claims in those cases is not immune from criticism.<sup>58</sup> Since the basis of the claims in the Argentinian cases was the lack of payment of the bonds, it is difficult to deny that they also had a contractual nature. Second, even if such claims could be qualified as treaty claims, this does not mean that rules of law different from those of international law have no role to play in this context.<sup>59</sup> Indeed, several arbitral tribunals have applied domestic law to specific

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<sup>55</sup> *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, (S.D.N.Y. May 12, 2003).

<sup>56</sup> The *Tessili* case itself – relating to an issue of international jurisdiction of a municipal tribunal, has not been immune to criticisms by a wide range of private international lawyers. See for instance: Vincent Heuzé, “De quelques infirmités congénitales du droit uniforme: l’exemple de l’article 5-1 de la Convention de Bruxelles du 27 septembre 1968”, (2000) *Rev. crit. DIP*, 595; Bernard Audit and Louis d’Avout, *Droit international privé* (Economica 2013) 587; A-G Y. Bot, opinion in the Case *Color Drack GmbH v. Lexx International Vertriebs GmbH*, C-386/05, par. 69.

<sup>57</sup> *Abaclat*, para. 316 ff.

<sup>58</sup> Caroline Kleiner (n. 8) 764; Anna de Luca, “Collective Actions in ICSID arbitration: the Argentine bonds case”, (2011) *XXI Italian Yearbook of International Law* 211, 215.

<sup>59</sup> See Claire Crépet Daigremont, “L’arbitrage international des contrats d’investissement, entre droit international public et droit international privé”, in *Mélanges offerts à Charles Leben, Droit international et Culture juridique* (Pedone 2015) 290.



issues relating to their jurisdiction. As noted by Christoph H. Schreuer, “Some questions that are relevant to a tribunal’s jurisdiction are governed by domestic law. In investment treaty arbitration this is usually the consequence of a reference to domestic law in the treaty providing for jurisdiction”.<sup>60</sup> Well known examples are the nationality of the investor,<sup>61</sup> or the legality of the investment (an investment made in compliance with the host state).<sup>62</sup> In those cases, arbitral tribunals refer to domestic law of the Host State. The same reasoning could be adopted when assessing the territoriality of the investment, since it is, again, an issue of characterization of the investment, in the framework of the BIT.

Hence, from a methodological point of view, reliance upon the national law applicable to the investment could be an interesting solution. However, it cannot be ignored that domestic law will hardly ever localize investment, especially when it concerns investment of an immaterial nature. A broad survey of various national laws on financial titles has shown that no national law provides for their localization; nor do they state what signs should be used to localize them. Therefore, despite its appealing intellectual character, the orthodox way of reasoning in private international law – reliance on the substantive applicable law – does not seem to be a viable method for the purpose of localizing investments of an immaterial nature like financial instruments.

#### *IV.2. Direct approaches to localization*

When the investment is of an immaterial nature, such as the acquisition of financial titles, its localization is always an intellectual operation. The same is true for the localization of contractual operations, such as the purchase of financial titles.

A contract, as noted more than twenty years ago by Pierre Mayer, is not, by itself, localized in a specific territory.<sup>63</sup> In other words, its localization is not *geographic* or *territorial* but *legal*. The localization of a contract in a territory is made through a range of factors, such as the domicile of the parties, the place of conclusion or performance of the contract. While those factors would not be of much help in answering the issue

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<sup>60</sup> Ch. Christoph Schreuer, “Jurisdiction and Applicable Law in Investment Treaty Arbitration”, (2014) 1 *McGill Journal of Dispute Resolution*, 1.

<sup>61</sup> See for instance: *Champion Trading Company v Egypt*, ICSID Case No. ARB/02/9, Decision on jurisdiction (21 October 2003), para. 3.4.1; *Soufraki v UAE*, ICSID Case No. ARB/02/7, Award (7 July 2004), para 55; *Micula v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction (24 September 2008), paras 86, 101.

<sup>62</sup> See for instance: *Consortio Groupement LESI-DIPENTA v Algeria*, ICSID Case No. ARB/03/8, Award (10 January 2005), para II. 24 (iii); *Bayindir Insaat Turizm Ticaret ve Sanayi AŞ v Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 105-110; *SGS Société Générale de Surveillance SA v Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010), paras 118-123; *Metal-Tech v Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), paras 372-373.

<sup>63</sup> See Pierre Mayer, “La délocalisation du contrat”, in *Travaux de l'Association Henri Capitant, La relativité du contrat*, tome IV (LGDJ 1999).

addressed in this study, there are others, of an eminently legal nature,<sup>64</sup> that are potentially relevant to our purpose. In particular, as explained below, some of these factors prove the *delocalization* of the investment from the territory of the host State, while others work as *connecting factors*, contributing to the localization of the investment.

*(i) Delocalization through choice of law and choice of forum clause*

Various elements set forth in financial contracts<sup>65</sup> may be used to localize the investment. The applicable law chosen by the parties as well as the choice of forum clause certainly belong among these elements.

As well known, these clauses may be used to *delocalize* the contract, i.e. to submit the contractual relationship to a “neutral” legal system.<sup>66</sup> Indeed, such clauses are included in a contract in order to avoid the application of the conflict-of-law rule and rule of jurisdiction which are applied in the absence of such choices. These rules, as a matter of principle, would designate the substantive law of the country that has the closest link with the relationship and would give jurisdiction to the tribunal that has some connection with the relationship. The fact that these clauses, which are based on party autonomy, are almost universally accepted shows the relativity of the need of a material localization. It is commonly accepted that parties to an international contract may choose the law applicable to it<sup>67</sup> and the jurisdiction within which a dispute arising out of it should be settled.<sup>68</sup> The effect of these clauses on the localization of the contract is all the more important when parties choose a law and a jurisdiction that, without the election, would not be applicable or would not have had jurisdiction (prorogatory effect of the clause). Then, we may reasonably infer that when the *choice of law* and *choice of forum* clauses both designate a State other than the host State, it should be considered as the exclusion expressed by the parties that the investment is not *legally localized* in the host country. For instance, when parties – one situated in Germany and the other one in Spain – to a contract, to be performed in Morocco, elect English law and the English jurisdictions to settle their future disputes, this election

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<sup>64</sup> A different approach to localization according to the rules of Private International Law has been proposed by Ostransky (n. 42) 27-58.

<sup>65</sup> The term should not be understood in its strict technical meaning, as defined, for instance, in article 4 and Section C of Annex I of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.

<sup>66</sup> See also P. Franzina, “Sovereign Bonds and the Conflict of Laws: a European Perspective”, in Studi in onore di Luigi Costato, Jovene editore 2014, p. 520.

<sup>67</sup> See, for instance, The Hague Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015 (<https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>) and, among others: Art. 3 of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations); Art. 41 of the Chinese Act on the Application of Laws over Foreign-related Civil Relationships adopted on 28 October 2010; Art. 3 (3) of the Japan’s New Act on International Jurisdiction; Art. 3148 (3) of the Quebec’s Civil code; Art. 5 of the Tunisian Code of Private International Law; Art. 40 (2) of the 1998 Venezuela’s Act of Private International Law.

<sup>68</sup> See, for instance, The Hague Convention of 30 June 2005 on Choice of Court Agreements, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>

show a clear intent to *delocalize* the contract from the home State of both parties and from the place of performance. This is even more evident when the choice of court agreement is not exclusive. Indeed, it is not rare to find jurisdictional clauses in international contracts designating two or more state jurisdictions.

However, arbitral tribunals have to date rejected the idea that jurisdictional clauses should be considered as a mean to *delocalize* the contract which is at the basis of the investment. In *Abaclat*, the Tribunal dismissed the Respondent's claim according to which forum selection clauses can be relevant in this regard.<sup>69</sup> This line of argument was rejected for two reasons: a) the place of the selected forum is not the place of performance; b) even if it may influence the place of performance, the forum selection clauses are contractual clauses and they cannot affect treaty claims.

Both arguments may be criticized. The first argument is aporetic. Indeed, choice of forum clauses may very well designate a forum other than the State where the contract should be performed. The very objective of such contractual clauses is to pull the contract away from the place of performance, since in the absence of such a clause, the place of performance of the contractual obligations constitutes in many jurisdictions the basis upon which the jurisdiction of domestic tribunals is grounded.<sup>70</sup> The second argument aims at drawing a clear distinction between contract claims and treaty claims; a distinction that is in reality artificial. First, it has to be noted that the tribunal concedes that the forum selection clause "may influence the place of performance". This undermines the first part of its answer. Second, the claim brought by Claimants in that case rests on an agreement – the Fiscal Agency Agreement – and it is, thus, a contractual claim.

In *Ambiente Ufficio*, the Tribunal followed the very same reasoning when it held that "the Tribunal would not attribute particular significance to the fact that the different contracts involved in the complex machinery and on the different levels of the bonds issuing process are governed by non-Argentine laws and enforceable in non-Argentine jurisdictions. The Claimants' argument that an investment project physically located in the Respondent's territory but in case of which the relevant contracts contain choice of law and forum clauses pointing to other legal orders than that of Argentina, would still be considered an investment project in the territory of the Respondent, is persuasive in the eyes of the Tribunal".<sup>71</sup> But again, the arbitral tribunal used the beneficiary test to be convinced that the "investment" was physically located in Argentina. Lastly, in *Giovanni Alemanni*, the Tribunal considered the localization issue to be "so intimately

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<sup>69</sup> *Abaclat*, para. 379.

<sup>70</sup> See among others: art. 7 (1) of the Brussels I recast Regulation; Art. 113 of the Swiss Private International Law Act; Art. 40 (2) of the Venezuelan Law on Private International Law (1998); Art. 3-3 (i) of the Japanese Law of International Jurisdiction (2011, Act for the Partial Amendment of the Code of Civil Procedure and the Civil Interim Relief Act).

<sup>71</sup> *Ambiente Ufficio*, para. 506.

linked with the question of the exact nature and classification of the property rights of the individual Claimants that (...) this examination must be postponed to the merits”.<sup>72</sup>

This question has also been addressed in the above-mentioned *Deutsche Bank AG*, case. There, the Tribunal disregarded the localization method through the choice of law and choice of jurisdiction clause as if it was a senseless proposition: “The fact that various Deutsche Bank branches all over the world, (...) participated in the preparation and finalization of the investment, does not alter this conclusion. *Nor does the fact that the parties selected English law and English jurisdictions in their agreement. It is a reality of modern banking that London is the world’s first financial place. Its courts have great experience in financial transactions and its law in that area offers great security to bankers and investors. It is the reason why, notwithstanding the territory where the investment takes place, parties to financial transactions often select English law and the English courts in their agreements*”.<sup>73</sup> This statement is in itself quite surprising, since the Tribunal seems to be confused on the matter. While it intended to determine which approach it should adopt to localize the investment, it showed its own predetermined opinion about where the investment had taken place. In that case, the Respondent did not contest the fact that parties to a financial contract usually choose English law and English courts because of their expertise in this area of law, but argued that these choices meant, at the very least, that the investment could *not* be located in Sri Lanka.

This line of argument should not be misunderstood. We do not contend that choice of law clauses and choice of forum clauses determine where the investment takes place. However, we suggest that these clauses should be used in the framework of the *faisceau d’indices* method used in private international law, when the issue of localization of the investment is not a *factual* question but a *legal* one, i.e. when the substance of the investment is a *legal* title.

The only opinion that backed the use of a legal and direct approach to the localization of the investment is to be found in the dissenting opinion of George Abi-Saab in the *Abaclat* case. In particular, he argued that “a systematic approach consistent with well founded and established precedents and drawing on private international law rules” should be used in order to answer the question whether the securities in question are located in Argentinean territory.<sup>74</sup> He rejected the idea that the method used to determine the *situs* of an investment should depend on the *nature* of such investment.<sup>75</sup> Analyzing the forum selection clause and other connecting factors pointing to other

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<sup>72</sup> Giovanni Alemanni, para. 297.

<sup>73</sup> *Deutsche Bank*, para. 291.

<sup>74</sup> para. 82.

<sup>75</sup> In his dissenting opinion in the *Ambiente Ufficio* case, Santiago Torres Bernárdez criticized the Majority Decision which declared at the outset that “the decisive criterion to determine the fulfillment of the territoriality requirement cannot be the *physical location in Argentina* of the purportedly contributions concerned”. In doing so, the majority mixed the words of both treaties that it had to apply and violated articles 31 to 33 of the 1969 VCLT. See paras 298 and ff.

States than Argentina, he concluded that contractual rights in this case – the basis of the claims – had been “purposefully located outside Argentina”.<sup>76</sup>

Furthermore, one should also note the fallacious argument used by the arbitral Tribunal in *Ambiente Ufficio* when it points out that “[i]n regard to the bonds/security entitlements at stake, the only alternative conclusion (to the localization in Argentina) to be drawn would be to state that those have their situs nowhere, as the Respondent could not point to any other jurisdiction that would have closer links to the investments at issue.”<sup>77</sup> It is not because the bonds do not have any particular link with another country that they should necessarily have closer ties with the issuing State. This reasoning consists of no more than creating a presumption in favor of the localization of the investment in the Host State, hence increasing the burden of proof of the Host State denying that the litigious investment took place in its territory.

A first conclusion may thus be drawn. If *legal* clauses, such as the jurisdiction clause or choice of law clause, do not localize the object of the contract (the so-called ‘investment’) in the selected jurisdictions, it should at least be considered as a *delocalization tool* from the territory of the (so-called) Host State.

*(ii) Delocalization through the potential exercise of sovereign right/power over the investment*

Another potentially relevant aspect to directly localizing the investment by means of an objective approach is the potential exercise of sovereign right over the investment. Indeed, in *Ambiente Ufficio*, Argentina contested the fact that the investment could be situated in Argentina since it was outside the reach of its sovereign power.<sup>78</sup> Italian claimants’ security entitlements were governed by foreign municipal law. Argentina had no jurisdiction over the security entitlements and could not exercise its legislative, administrative power. The Tribunal disagreed with that statement, holding that, in any case, the possible exercise of sovereign power by a State was not a requirement under the ICSID Convention or in the applicable BIT. On that issue, the Tribunal adopted a narrow interpretation of the relevant provisions, whereas it opted for a broader one in most of the other cases. There cannot be a strict correlation between the localization of an investment in the Host State and the capacity of that State to exercise its sovereign power over the alleged investment. However, when a State may exercise its sovereign power over an investment – be it a change in the legislation applicable to the investment, or the seizure or expropriation of such investment – these elements might be an indication that the investment is located in its territory. By contrast, when a State cannot exercise such power, this should be an indication that the investment is not located in its territory.

In light of the above, the key question is whether Argentina could exercise such

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<sup>76</sup> Para. 84.

<sup>77</sup> para. 509.

<sup>78</sup> para. 341.

rights in the disputed cases. As a matter of fact, different legislative acts were adopted after the outburst of the economic crisis that induced the Argentinian government to pay only those creditors that had accepted to participate in the restructuring programme, and ceased to pay the interests on its non-renegotiated debt instruments. Those actions could be understood as the exercise of its sovereign power to legislate and expropriate. However, if we consider those actions more closely, such conclusion calls for a revision. A comparison with the management of the Greek debt crisis situation is instructive in this regard. Contrary to the Argentinian bonds, the majority of the Greek bonds sold on financial markets were governed by Greek law. The adoption of Greek Act No 4050/2012, which introduced collective action clauses with a retroactive effect, changing the contractual terms of bonds that had already been issued on the markets, is a clear example of the exercise of a sovereign power to unilaterally modify contractual terms, which, in French terms, would be likened to a ‘*pouvoir exorbitant*’. However, this attitude has not been considered a *iure imperii* act by the European Court of Justice<sup>79</sup>, which had been asked to give a preliminary ruling on the question whether the situation where a creditor was forced to accept an exchange of State bonds (which entailed a financial loss) pertains to the notion of “civil and commercial matters” in the perspective of the application of Regulation 1393/2007.<sup>80</sup> More specifically, the European Court of Justice decided that even if “Law No 4050/2012 falls within the framework of the management of public finances and, more specifically, the restructuring of the public debt, in order to deal with a severe financial crisis, and it is for those purposes that it introduced the possibility of exchanging the securities in the contracts concerned” (§55), “it must be observed in that regard, first, that the fact that that possibility was introduced by a law is not, in itself, decisive in order to conclude that the State acted in the exercise of State authority (§56)”. In other words, the fact that the Hellenic Republic adopted a Law that had the power to force some creditors to accept the new terms of the bonds does not correspond to the exercise of a sovereign power. The reasoning of the European Court of Justice differs greatly from the analysis conducted by arbitral tribunals on similar issues. If the adoption of Greek law was a *iure gestionis* act and not a *iure imperii* act, it implies, in the Court’s view, that such an act does not fall within the Sovereign exercise of jurisdiction. Hence, it shows the remoteness between the Sovereign jurisdiction and the localization of the bonds.

(iii) *Localization method borrowed from private international law grounds of jurisdiction in tort actions for financial damage*

Another possible influence that private international law may exert on the localization of the investment could be sought in the determination of the *situs* of the

<sup>79</sup> Case C-578/13, *Fahnenbrock and others v. Hellenische Republic* (ECJ 11 June 2015). See S. Grund “Enforcing Sovereign Debt in Court – A Comparative Litigation and Arbitration Following the Greek Debt Restructuring of 2012”, *University of Vienna Law Review*, Vol. 1 (2017), pp. 34-90.

<sup>80</sup> Regulation (EC) No 1393/2007 of 13 November 2007 *on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)*.

financial damage for the purpose of determining the jurisdiction of State courts in tort, delict or quasi-delict actions. What justifies such possible influence? The parallelism is not too far fetched. In our understanding, under international investment law an investment is not a mere contract which has to be performed somewhere. The legal relationship has a nature different from that of a contractual one. An investment – be it the construction of a high speed road, the extraction and distribution of gas or the supply of water – creates a network of contracts which are not necessarily all interdependent. Indeed, in the three Argentinian ICSID cases at stake, the Italian “investors” had not bought their bonds directly from the Argentinian government, but on the secondary market, through financial intermediaries which were their contractual counterparts. Moreover, they were not the owners of the bonds, but benefited from the rights of security entitlements towards the bonds. The relationships between the Italian claimants and Argentina could then be qualified as being of a non-contractual nature. In this sense, it does not appear too remote to be inspired by the method according to which the *situs of financial damage* is determined for the purpose of assessing international jurisdiction, in EU private international law.

Two cases decided by the Court of Justice of the EU help better to clarify the suggested approach. In both cases, the Court of Justice was asked to interpret article 5(3) of Brussels I Regulation (*forum delicti*), which states that: “a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”.<sup>81</sup>

For the sake of clarity, these cases will be briefly summarized before closer examination is made of the solutions that have been reached and which could be useful for the purpose of localizing the so-called “investment”, i.e. in the country where the financial loss has been suffered by the Italian claimants.

The *Kronhofer* case<sup>82</sup> concerned proceedings brought by Mr Kronhofer, domiciled in Austria, against four defendants, each domiciled in Germany, in which Mr Kronhofer sought to recover damages for financial loss which he claimed to have suffered as a result of the wrongful conduct of the defendants as directors or investment consultants of the company Protectas Vermögensverwaltungs GmbH, which also has its registered office in Germany. Mr Kronhofer had in fact invested, after having been persuaded to do so by telephone, 82 500 USD in an investment account with Protectas, a sum which was then used to subscribe for highly speculative call options on the London Stock Exchange. Mr Kronhofer lost a part of his investment in this operation. Wanting to recover the total amount, he brought the case in front of an Austrian judge, on the basis that the harmful event from which he had suffered occurred in Austria, where he has his assets.

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<sup>81</sup> The same wording has been used in the Brussels I recast Regulation (Regulation 1215/2012) in Article 7(2).

<sup>82</sup> Case C-168/02, *Kronhofer* (ECJ 10 June 2004).

In the *Kolassa* case<sup>83</sup>, an investor (Mr Kolassa) domiciled in Vienna invested in bonds issued by the German branch of Barclays Bank, a bank established in London, through the intermediation of an Austrian Bank, Direktanlage.at. The certificates issued by Barclays Bank were initially sold to institutional investors, who sold them on to investors on the secondary market. However, Direktanlage.at held the certificates in its own name on a securities account opened in Munich, on behalf of Mr. Kolassa. When the bonds value fell close to zero, claimant, Mr Kolassa alleged that his financial loss was due to violation of the certificates' terms and conditions and to the breach of precontractual duties of care and information (contractual claims) and false information declared by Barclays Bank in the prospectus, approved by the German Bafin,<sup>84</sup> which was also distributed in Austria under the passport regime of Directive 2003/71/EC (tort actions). He brought an action against Barclays Bank before an Austrian tribunal on the basis of article 15 (consumer contract) or article 5(1) (contractual matters) and article 5 (3) of the Brussels I Regulation (tort action).

The *Kolassa* case is interesting because the claimant brought an action not against his direct intermediary, but against the issuer of bonds. As a result, the Court of Justice had first to assess the legal relationship between the investor and the issuer, i.e., whether it was a contractual or extra-contractual relationship. In the decision, the relationship between the investor and the issuer was described thus: "the holder of the bond [is not Mr Kolassa], but the third party, instructed to acquire the securities for the applicant, it being understood that, in accordance with the terms agreed, that third party keeps the security in its own name on trust for the applicant, and the latter may claim only delivery of the security under the law of obligations".<sup>85</sup> Referring to the autonomous notion of a contractual relationship as a "legal obligation freely consented to by one person towards another and on which the claimant's action is based", the Court briefly concluded that "such a legal obligation freely consented to by Barclays Bank with respect to Mr Kolassa is lacking on the facts of the case in the main proceedings, even if, under the national law applicable, Barclays Bank has certain obligations towards Mr Kolassa".<sup>86</sup> Since the concept of "matters relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of Regulation No 44/2001 covers all actions which seek to establish the liability of a defendant and do not concern "matters relating to a contract", the action brought by Mr Kolassa against the issuer falls within article 5(3).

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<sup>83</sup> Case C-375/13, *Kolassa and Barclays Bank* (ECJ 28 January 2015).

<sup>84</sup> Bundesanstalt für Finanzdienstleistungsaufsicht, the authority equivalent to the Securities Exchange Commission in the United States, the Financial Conduct Authority (FCA) in the United Kingdom or the AMF (Autorité des marchés financiers) in France.

<sup>85</sup> For a clear explanation of the different methods of intermediation by banks or other financial market participants, see Matteo Gargantini, "Jurisdictional issues in the circulation and holding of (intermediated) securities: the advocate general's opinion in *Kolassa v. Barclays*" (2014) *Riv. dir. int. priv. e proc.* 1095. See also Matthias Lehmann, "Where does economic loss occur?" (2011) *Journal of Private International Law* 527.

<sup>86</sup> Para. 40.



The second step was then to localize the place where the financial damage had occurred.

It should be specified at the outset of this demonstration that when a damage is suffered in a Member State different from that in which the harmful event occurred, the claimant may bring – at his discretion – his action either before the jurisdiction of the Member State where the damage occurred or before the one where the event giving rise to it occurred. However, the Court clarified in the *Marinari* case<sup>87</sup> that when the damage consists merely in a decrease of the victim's assets, only the *direct* damage is relevant. In brief, when the financial damage is the result of another damage suffered elsewhere (in another State), the localization of the subsequent financial damage is irrelevant. In other words, when the damage has been suffered in a Member State, the fact that adverse consequences of this damage are felt in another Member State should not be taken into consideration for the purpose of jurisdiction. The fear of the recognition of a *forum actori* is explicitly mentioned in the reasoning of the Court.<sup>88</sup> The *Kronhofer* case completes this reasoning by explicitly excluding the place where the claimant is domiciled or where 'his assets are concentrated' as a ground for jurisdiction, when the financial damage suffered there results from the loss of part of his assets which arose and was incurred in another Contracting State.

Then comes the *Kolassa* decision, which delved deeply – albeit not very clearly – into the localization of financial damages. The Court decided that the claimant's domicile should be a ground of jurisdiction “if the applicant's domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred”.<sup>89</sup> Why was the loss deemed to have taken place in the State of the plaintiff's domicile in this case? Probably because Mr Kolassa, who was not the holder of the bonds, could not have suffered the damage where the bonds were registered (in the securities account held in Munich) but could have suffered the financial loss only where his assets would have to compensate that loss, i.e. where he had his bank account.<sup>90</sup> In a subsequent case – the *Universal Music* case<sup>91</sup> – the Court specified the role that the “place of a bank account” had to play. Without departing from the *Kolassa* decision, the Court further explained that “purely financial damage which occurs directly in the applicant's bank account cannot, in itself, be qualified as a ‘relevant connecting factor’, pursuant to Article 5(3) of Regulation No 44/2001”.<sup>92</sup> It does so notably because creditors, or victims, may have different bank accounts localized in different countries. The Court then added that “It is only where the other circumstances specific to the case also

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<sup>87</sup> Case C-364/93, *Marinari and Llyods Bank plc*, (ECJ 19 Sept. 1995).

<sup>88</sup> Para 13. Indeed, the concept “where the damage occurred” may not be extended beyond the particular circumstances that justify it; in particular, it should not lead to recognition of the jurisdiction of the courts of the plaintiff's domicile, a solution rejected in the EU.

<sup>89</sup> Para. 50.

<sup>90</sup> Para. 54 and 55.

<sup>91</sup> Case C-12/15, *Universal Music*, (ECJ 16 June 2016).

<sup>92</sup> Para. 38.

contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place (of his bank account”<sup>93</sup> but it remained silent as to what the “other circumstances specific to the case” might be).

Anyhow, this idea could be relied upon also in the Argentinian cases. Claimants seeking the reimbursement of their bonds, and the payment of the interests, had simply lost their investments, which could very well be localized where they suffered the loss, i.e. in their securities account in Italy or elsewhere.

This is actually a line of argument with which Argentina flirted, when it argued that foreign “investors” should sue their intermediary banks, the ones that sold them the financial titles. In the three ICSID cases, Argentina maintained that claimants should sue their financial intermediaries for the loss that they had suffered, instead of bringing an action against Argentina for violating the obligations stemming from the BIT between Italy and Argentina. In so doing, Argentina inferred that the localization of the investment should be drawn from the place where claimants suffered the financial loss, most probably where the securities were held.

## **V. Conclusion**

The main finding of the analysis is that there is no need to introduce new criteria to assess whether financial instruments satisfy the territoriality requirement and, thus, fall within the scope of protection of IIAs. Conversely, there is the need for a more consistent use of already existing interpretive criteria that can be drawn from both private international law and international public law.

First, the article has argued that, in order to be considered as covered investments, financial transactions need to have a strong link with the territory, and the economy, of the host State. In this regard, the adoption of a test based on the existence of a connection between the financial instrument and a specific project or activity seems coherent with the objective of the territorial clause. Indeed, this approach has the merit of reconciling the functioning of the clause with the provision that places also immaterial assets, such as financial instruments, within the scope of application of IIAs. Conversely, the benefit test dilutes the territoriality clause to the point of making it meaningless; it thus over-expands international investment law’s scope of protection. This is especially the case if the benefit test is applied, as done in *Abaclat*, to sovereign bonds’ securities that are totally disconnected from the territory and that, if one rejects the preposterous claim that purchases on the secondary market form a single economic operation with the issuance of bonds, do not bring any real advantage to its economy.

Second, arbitral tribunals should pay closer attention to those legal elements that demonstrate the willingness of the parties – the host State and the foreign investor – to

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<sup>93</sup> Para. 39.

delocalize the investment, at least from a legal perspective. This is the case of choice of law and choice of forum clauses that, as was the case in *Abaclat* and its progeny, pointed toward other countries and not Argentina. Furthermore, the analysis highlighted the need to reconsider the importance of the host State's capacity to exercise its sovereign powers over the investment for its localization.

Finally, arbitral tribunals even when applying rules of public international law, should not keep private international law tools at a distance. Rather, arbitral tribunals should resort to the particular methods developed for international private relationships when the issues they have to deal with – localization of immaterial facts – are the staple food of private international law.