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INTERNATIONAL INVESTMENT POLICY AND THE COMING WAVE OF DATA-FLOW DISPUTES

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The ability to move digital data internationally has become an asset to countless businesses. Yet an increasing number of countries' data regulations hinder these cross-border data flows. As such, many have speculated that companies could protect their interests in data flows through international investment law, a regime that lets companies sue foreign governments for harm to private assets. Yet the literature has largely been cursory or equivocal about these suits' likely success. This Article argues that, under current law, such suits have a strong—if not unassailable—legal basis. Critically, the reality of global data regulation and digital commerce means such suits are only likely to arise in specific contexts. In those contexts, a close reading of the current law reveals that companies will have well-grounded arguments under the treaties, caselaw, and policy of today's investment regime. The regime's history also bodes well for them. The real viability of these suits has counterintuitive, opposing implications. On the one hand, such suits could bolster the resilience of—and even catalyze—beneficial domestic and international data regulation by solidifying emerging legal norms. On the other, they could deter countries from adopting such regulation. This negative effect results from the risk that international investment law, by superintending data regulation, will become a form of data regulation itself. To prevent this regulatory spillover, investment tribunals in data-flows cases should reinvigorate a longstanding but neglected tool in the international-investment caselaw: the Salini test. A binding application of Salini in data-flows cases can preserve international investment law's ability to strengthen beneficial data regulation while ensuring the investment regime remains centered on its economic domain: capital flows—not data flows.

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INTRODUCTION

Digital data is increasingly valuable to global companies.[1] This truism has only taken on a deeper meaning during the COVID-19 pandemic.[2] Yet it is not only the data itself that is valuable but, crucially, the ability to move that data across borders. Such movements are known as "cross-border data flows." They are assets themselves because companies often need to use or store data in a location different from where the data originates.[3] However, an increasing num-

1. *E.g.*, Steve Lohr, *Calls Mount to Ease Big Tech's Grip on Your Data*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/business/calls-mount-to-ease-big-techs-grip-on-your-data.html (discussing a study that "estimated that the corporate payoff—mainly to big tech companies—from collecting the personal data of Americans online was $76 billion in 2018, and that it would rise sharply in the future").

2. *E.g.*, BDO, COVID-19 IS ACCELERATING THE RISE OF THE DIGITAL ECONOMY 6 (2020) ("Savvy organizations will focus now on leveraging advanced analytics to extract insights from their customer data and continue internal and external data integration efforts to develop a more holistic view."); *Executive Summary: The COVID-19 Pandemic Has Amplified All Aspects of the Digital Transformation*, OECD ILIBRARY, https://www.oecd-ilibrary.org/sites/bb167041-en/index.html?itemId=/content/publication/bb167041-en.

3. *See infra* text accompanying notes 33–38.

ber of state digital data regulations—spurred by concerns ranging from privacy to national security—restrict the transfer of data across borders.[4] In so doing, they can swiftly eviscerate the value of cross-border data flows to firms.[5]

Given this new tension, thinkers on the digital economy have speculated that global corporations will soon use international investment law to protect their interests in data flows.[6] Variously called a "global super court,"[7] "international judicial review,"[8] or the province of a "knowledge elite,"[9] international investment law is a legal regime composed of over 3,000 treaties between different countries (states).[10] These treaties guarantee foreign investors a certain level of treatment when they invest in those states. If investors believe a state has caused harm to their assets in violation of a treaty, they can sue that state for damages before an international tribunal. Such tribunals may award global corporations significant—sometimes billion-dollar—payouts.[11]

If data flows are assets, then this controversial and powerful regime may help companies protect them. Because of international investment law's power, suits against states for data transfer restrictions could influence global data regulation, with ramifications for consumers, their privacy, national security, and the

4. *See infra* Sections I.B, II.A.2, II.D.

5. *See infra* notes 48–52 and accompanying text.

6. *E.g.*, JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 260 (2019) ("Such disputes seem certain to materialize."); Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1514 (2020) (approvingly citing Cohen's assessment); Marion A. Creach, *Assessing the Legality of Data-Localization Requirements: Before the Tribunals or at the Negotiating Table?*, COLUM. FDI PERSPS., June 17, 2019, at 2, https://ccsi.columbia.edu/sites/default/files/content/docs/publications/No-254-Creach-FINAL.pdf (noting that such suits are "just a matter of time"); *see infra* note 60; *see also* Sean Stephenson & Paul M. LaLonde, *The Limits of Data Localization Laws: Trade, Investment, and Data*, DENTONS DATA (Aug. 9, 2019), http://www.dentonsdata.com/the-limits-of-data-localization-laws-trade-investment-and-data ("[S]uch laws and regulations [restricting data flows] may form the basis of an investment claim").

7. Chris Hamby, *How Big Banks Bled a Tiny Island Nation*, BUZZFEED NEWS (Aug. 31, 2016, 6:01 AM), https://www.buzzfeednews.com/article/chrishamby/not-just-a-court-system-its-a-gold-mine (describing the international-investment-law regime as "a form of binding arbitration that was granted exceptional power").

8. Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. 1023, 1024, 1047–48 (2012) (discussing international investment law as part of a broader analysis of forms of international judicial review of domestic law).

9. Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 401–02 (2012) (quoting Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination,* 46 INT'L ORG. 1, 4, 7, 17 (1992)) (arguing that the "epistemic community" of international-investment-law actors and institutions stands in an agency relationship to states as principals).

10. *See International Investment Agreements Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements (last visited June 26, 2022) (aggregating a total of 3,300 bilateral investment treaties or treaties with investment provisions, 2,566 of which are in force).

11. *See* EMMA AISBETT, ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 19 (2018).

global digital economy itself.[12] And yet those who have examined the potential success of such suits have provided piecemeal, cursory, or equivocal analyses. They focus only on one facet of these potential suits without assessing these suits' overall viability[13] or conclude that "[t]he outcome is likely to be highly fact-dependent,"[14] "it is impossible to provide an absolute answer,"[15] and "there is doubt."[16] Apparently, then, we are about to witness a wave of decisive international disputes over data whose results will be a toss-up.

This Article explores these potential suits in depth and argues that, under current law, such suits have a strong—if not unassailable—legal basis. It then evaluates the implications of this finding for global data regulation and its wide-reaching social and economic goals. In so doing, it makes three principal claims.

First, not all these new disputes will raise novel legal issues. Only some will strike at the heart of the question of whether international investment law protects cross-border data flows from data regulation. Moreover, those disputes—what I call "true" disputes—are only likely to occur under limited circumstances, which commentators have so far failed to specify.[17] *Second*, under these circumstances, investors challenging state regulation of data flows will

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12. *See infra* Sections II.D, III.A.

13. *See* Victor Magnusson, Cut Off Cross-Border Data Flow and International Investment Law 9, 47 (2021) (Master's Thesis, Uppsala Universitet), https://www.diva-portal.org/smash/get/diva2:1559830/FULLTEXT01.pdf (addressing only one kind of claim investors could bring but neither defining the data at issue nor analyzing jurisdictional questions); Gaurav Majumdar, Social Media User Data: A "Protected" Investment Under International Investment Law? 5, 54–55 (2021) (Master's Thesis, Uppsala Universitet), https://www.diva-portal.org/smash/get/diva2:1558385/FULLTEXT01.pdf (addressing only the question of whether social media user data qualifies as an investment at the jurisdictional stage of a dispute).

14. Andrew D. Mitchell & Jarrod Hepburn, *Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer*, 19 YALE J.L. & TECH. 182, 216 (2017) (analyzing such potential suits within the context of a broader analysis of international economic law's applicability to cross-border data flows); *see also* ANDREW D. MITCHELL & ELIZABETH SHEARGOLD, PRINCIPLES OF INTERNATIONAL TRADE AND INVESTMENT LAW 171, 178–79, 183, 185, 191 (2021) (discussing, among other things, how international investment law may "generally apply" to restrictions on data flows but offering no definitive appraisal of whether international-investment-law challenges to such restrictions are likely to be successful); Qianwen Zhang & Andrew Mitchell, *Data Localization and the National Treatment Obligation in International Investment Treaties*, WORLD TRADE REV., Nov. 2021, at 20 ("[T]here is no one-size-fits-all answer about whether data localization legislation violates national treatment in [international investment treaties].").

15. Magnusson, *supra* note 13, at 47; *cf.* Majumdar, *supra* note 13, at 8 ("[A]re all kinds of data collected by a social media company protected under international investment law? It is difficult to answer this question in one thesis.").

16. Sheng Zhang, *Protection of Cross-Border Data Flows Under International Investment Law: Scope and Boundaries*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1, 22 (2021), https://www.unescap.org/sites/default/d8files/event-documents/Session%205_Paper_Sheng%20Zhang2021_ReferenceWorkEntry_ProtectionOfCross-BorderDataFl.pdf (exploring the jurisdictional and merits issues such claims could pose).

17. *See infra* Sections II.A–C.

have strong textual, caselaw, and policy arguments in their favor. The historical development of the investment regime thus far also bodes well for them.[18]

Third, such suits can have positive effects, in the right dose. Counterintuitively, international investment law could help *bolster* the resilience and transnational harmonization of state-level data regulation.[19] But there is a catch. Although a general discussion of international investment law's merits and demerits is beyond the scope of this Article, critics of this regime are right to point out that it may have an overdeterrence effect, chilling states from pursuing beneficial regulations.[20] In response, this Article proposes the revival of a neglected test for what assets can be protected under international investment law: the *Salini* test. This test has withered under the investment regime's continual expansion, but a *Salini* renaissance would help prevent the regime from straying too far into the realm of data flows, whose primary regulators should be other state and international laws.[21]

This Article proceeds in three Parts. Part I defines the type of data governed by the state regulations that companies may challenge—personal data—and explains why flows of that data are valuable. It then provides some background on global data-regulatory regimes affecting data flows. Part II first describes the circumstances under which a "true" dispute over data flows would likely arise. Namely, a corporation with minimal assets in a state other than data flows would sue that state for its unpredictable implementation of open-ended standards in data regulations. By examining the international investment regime's varied texts (treaties and caselaw), policy, and history, Part II then explains why investors in "true" disputes would likely have strong arguments at jurisdictional and liability stages. Part III explains that such data-flow disputes—perhaps surprisingly—could have some positive effects on emerging forms of data governance at state and international levels but also warns of deleterious effects. Part III goes on to explain how conceptually distinguishing capital flows from data flows can mitigate these deleterious effects and how a revival of the *Salini* test can help in achieving this beneficial conceptual clarity.

I. THE EXPANDING PATCHWORK OF GLOBAL DATA GOVERNANCE

A. *Personal Data and Data Flows*

"Data" is a notoriously slippery, inherently abstract concept.[22] But "personal data" is something of a term of art. It is the term that the European Union's

18. *See infra* text accompanying notes 138–43, 161–63.

19. *See infra* text accompanying notes 291–94.

20. *See infra* text accompanying notes 283–90.

21. *See infra* Section III.C.

22. *E.g.*, CHRISTINE L. BORGMAN, BIG DATA, LITTLE DATA, NO DATA: SCHOLARSHIP IN THE NETWORKED WORLD 4 (2015) ("'[W]hat are data?' The only agreement on definitions is that no single definition will suffice."); Francesco Banterle, *Data Ownership in the Data Economy:*

widely influential digital data law, the General Data Protection Regulation (GDPR), uses to describe the data it governs.[23] The European Union holds a global standard-setting position when it comes to data regulation, a phenomenon that Anu Bradford has famously dubbed "the Brussels Effect."[24] Accordingly, many other states' data laws resemble the GDPR or its predecessor law[25] to varying degrees. These data laws thus use the words "personal data"[26] or very similar language (e.g., "personal information")[27] to describe the data they govern.

Under the GDPR, "'personal data' means any information relating to an identified or identifiable natural person."[28] The scope of this definition captures, for example, a person's name, their email address, their Internet Protocol address, and even pseudonymized information that can be used to re-identify them.[29] How far this definition extends is an unresolved question. For example, given the ability of increasingly sophisticated data aggregation technology to identify people from ostensibly non-personal data, the point at which non-personal data becomes personal data is unclear.[30] In some contexts, personal da-

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A European Dilemma, *in* EU INTERNET LAW IN THE DIGITAL ERA 199, 202 (Tatiana-Eleni Synodinou et al. eds., 2020) ("[D]efining the concept of data itself is challenging."); *cf.* LUCIANO FLORIDI, INFORMATION: A VERY SHORT INTRODUCTION 23 (2010) ("[A] datum is ultimately reducible to a *lack of uniformity*.").

23. Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 4(1), 2016 O.J. (L 119) 1, 33 [hereinafter GDPR].

24. ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 132 (2020) ("The EU sets the tone globally for privacy and data protection regulation.").

25. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 2(a), 1995 O.J. (L 281) 31, 38.

26. *E.g.*, The Data Protection Act, No. 24 (2019) KENYA GAZETTE SUPPLEMENT No. 181 § 2 (Kenya) (defining "personal data" similarly to how the GDPR does) [hereinafter DPA]; Lei No. 13.709, de 14 de Agosto de 2018, art. 5(I), Diário Oficial da União [D.O.U.] de 15.08.2018 (Braz.) (defining a "personal datum" [*dado pessoal*] similarly to how the GDPR does) [hereinafter LGPD].

27. *E.g.*, Protection of Personal Information Act 4 of 2013 § 1 (S. Afr.) [hereinafter POPIA] (defining "personal information" similarly to the GDPR "personal data" definition but including information about non-natural person entities and providing a nonexclusive list of examples of personal information); Personal Informational Protection Act, art. 2(1) (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=53044&lang=ENG (defining "personal information" similarly to the GDPR "personal data" definition and explicitly including pseudonymized information).

28. GDPR, *supra* note 23, art. 4(1).

29. *What Is Personal Data?*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en.

30. *Cf.* Sandra Wachter & Brent Mittelstadt, *A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI*, 2019 COLUM. BUS. L. REV. 494, 497-99, 517–18, 521 (2019) (describing different views on the circumstances under which the GDPR's definition of "personal data" includes inferences made about people through data analytics); Michèle Finck & Frank Pallas, *They Who Must Not be Identified—Distinguishing Personal from Non-Personal Data under the GDPR*, 10 INT'L DATA PRIVACY L. 11, 11–12, 20 (2020).

ta may be interchangeable with "personally identifiable information," a term used in U.S. privacy law.[31] However, in practice, personal data refers to more kinds of data than personally identifiable information does.[32]

Cross-border data flows are an asset built on data and, specifically here, personal data. They have no independent existence without the business and data they are associated with. Rather, because personal data is valuable to companies in many ways, and because companies' data use or storage often takes place in jurisdictions different from where the data originated, the ability to move data across borders has value to companies.[33] For example, a U.S. company that offers analysis of consumer shopping data to retailers in the European Union may need to store that data in the United States (or elsewhere) to perform its data-analytics services.[34] Or, equivalently, Google's Swedish research and development unit might avoid extra costs by not storing data in Sweden.[35]

The ability to move data is intangible, but it is neither a naturally occurring phenomenon nor an imperceptible one.[36] Although the economic value of cross-

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31. *E.g.*, W. Gregory Voss & Kimberly A. Houser, *Personal Data and the GDPR: Providing a Competitive Advantage for U.S. Companies*, 56 AM. BUS. L.J. 287, 291 (2019) ("Comparing personal data as the term is used in the European Union to *personally identifiable information as the term is used in the United States* is like comparing apples to oranges." (emphasis added)).

32. *E.g.*, *Time to Update Your Privacy Statement for GDPR*, DAVIS WRIGHT TREMAINE LLP (Sept. 27, 2017), https://www.dwt.com/insights/2017/09/time-to-update-your-privacy-statement-for-gdpr (noting this difference); *see also* Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CALIF. L. REV. 877, 881 (2014) (noting, with respect to definitions of "personal data" under EU law preceding the enacted version of the GDPR, that the definition of personal data in the European Union is broader than that of personally identifiable information in the United States).

33. David Nguyen & Marta Paczos, *Measuring the Economic Value of Data and Cross-Border Data Flows: A Business Perspective*, OECD 24 (2020), https://www.oecd-ilibrary.org/science-and-technology/measuring-the-economic-value-of-data-and-cross-border-data-flows_6345995e-en ("[T]he creation of economic value is often very much dependent on the ability to move and aggregate data across a number of locations scattered around the globe."); Diane Coyle & David Nguyen, *Cloud Computing, Cross-Border Data Flows and New Challenges for Measurement in Economics*, 249 NAT'L INST. ECON. REV. R30, R31, R34–R35 (Aug. 2019) (noting that "multinational enterprises . . . rely on cross-border data flows to generate revenues" and discussing the need for measurement of data flows' value to firms).

34. FRONTIER ECON., THE VALUE OF CROSS-BORDER DATA FLOWS TO EUROPE: RISKS AND OPPORTUNITIES 11 (2021), https://www.digitaleurope.org/wp/wp-content/uploads/2021/06/Frontier-DIGITALEUROPE_The-value-of-cross-border-data-flows-to-Europe_Risks-and-opportunities.pdf (providing an example involving a German firm that contracts with an Irish firm for the latter's analytics involving data about consumers in Germany, France, and the United Kingdom); *see infra* text accompanying notes 80–83.

35. NAT'L BD. OF TRADE, NO TRANSFER, NO TRADE: THE IMPORTANCE OF CROSS-BORDER DATA TRANSFERS FOR COMPANIES BASED IN SWEDEN 26 (2014), https://unctad.org/system/files/non-official-document/dtl_ict4d2016c01_Kommerskollegium_en.pdf (discussing Google's internal use of cross-border data flows).

36. The ability to move data may seem to exist naturally in the absence of state intervention, like the flow of a river, *see infra* note 155, but that characterization is misleading, *see* Angelina Fisher & Thomas Streinz, *Confronting Data Inequality* 60 COLUM. J. TRANSNAT'L L. 829, 840–41, 849–51, 865–866 (arguing that this view elides the social reality of data production and explaining

border data flows is hard to quantify, disruptions in companies' ability to transfer data across borders can be enormously costly. Disruptions could even keep businesses out of international markets.[37] This itself demonstrates cross-border data flows' value as an asset.[38]

B. *Global Regulation of Personal Data*

A recent tally reports that 142 states have data privacy laws.[39] As noted, many of these laws resemble the GDPR.[40] Generally, these laws seek to protect data by restricting how those who control or process data can use it. Consider, for example, the GDPR's provision that any "processing" of personal data (e.g., collection of that data) can only take place when it falls under a specific enumerated basis (e.g., a person has specifically consented to such collection).[41] Many other states' laws have analogous provisions.[42] But although the GDPR's influence is vast, there are often nuanced differences between it and the laws that resemble it.[43] Moreover, some states do not follow a GDPR-style approach. The United States[44] and China[45] are notable examples.

Two points about data laws are key to this Article's discussion. First, many of these laws restrict the transfer of personal data outside the state. For example, under the GDPR, an EU company may not transfer personal data to companies in non-EU states unless the data receives a certain level of protection when

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that private interests actively shape the conditions for the flow of data through both technological and legal influence on the production of data itself).

37. U.S. DEP'T OF COMMERCE, MEASURING THE VALUE OF CROSS-BORDER DATA FLOWS 7 (2016) (identifying challenges to measurement); *see infra* note 52.

38. *See* Nguyen & Paczos, *supra* note 33, at 28.

39. Graham Greenleaf & Bertil Cottier, *2020 Ends a Decade of 62 New Data Privacy Laws*, 163 PRIV. L. & BUS. INT'L REP. 24 (2020). For perspective, the United Nations has 193 member states. *About Us*, UNITED NATIONS, https://www.un.org/en/about-us.

40. *See* BRADFORD, *supra* note 24, at 131–33, 147–55, 167–68. *But cf.* Paul M. Schwartz, *Global Data Privacy: The EU Way*, 94 N.Y.U. L. REV. 771, 774, 803 (2019) (suggesting that Bradford may overstate the European Union's unilateral power).

41. GDPR, *supra* note 23, art. 6(1).

42. *E.g.*, LGPD, *supra* note 26, art. 7; DPA, *supra* note 26, § 30(1); POPIA, *supra* note 27, § 11(1)(a).

43. *See infra* notes 99, 203–06 (discussing differences).

44. CONG. RES. SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 2 (Mar. 25, 2019) (describing the United States' sectorial, as opposed to comprehensive, approach to data regulation, which involves a "patchwork" of federal laws).

45. *See* AMBA KAK & SAMM SACKS, SHIFTING NARRATIVES AND EMERGENT TRENDS IN DATA-GOVERNANCE POLICY 8–11, 14–17 (2021) (discussing enacted and then-pending digital data-related laws in China that overlap and address national security, economic policy, and privacy goals); *China's New Data Security and Personal Information Protection Laws: What They Mean for Multinational Companies*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Nov. 3, 2021), https://www.skadden.com/Insights/Publications/2021/11/Chinas-New-Data-Security-and-Personal-Information-Protection-Laws (discussing the enactment of two new data laws in China, one focused on national security and the other more akin to the GDPR); *infra* note 47.

it gets to those non-EU states. In theory, the motive for such provisions is to ensure that data will not lose the original state's level of protection when it leaves that state.[46] Such data transfer restrictions can also be stricter, taking the form of "data localization."[47] Data localization refers to requirements that companies store or process data within a state.[48] The motive for such requirements emphasizes national security and thwarting foreign intelligence somewhat more than looser GDPR-style restrictions do.[49] Yet, both data localization and looser data transfer restrictions may render moving data across borders prohibited,[50] effectively infeasible,[51] or too costly for certain companies.[52]

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46. GDPR, *supra* note 23, art. 44 (explaining that the GDPR's transfer restrictions aim "to ensure that the level of protection of natural persons guaranteed by [the GDPR] is not undermined"); *id.* art. 45(1), (3) (permitting transfers to states that the European Commission has deemed "ensure[] an adequate level of protection"); *id.* at 46(1) (providing that, where the European Commission has not deemed a state to provide adequate protection, the data exporter must provide safeguards for the data and ensure data subjects can exercise their rights).

47. Rogier Creemers, Paul Triolo & Graham Webster, *Translation: Cybersecurity Law of the People's Republic of China (Effective June 1, 2017)*, NEW AM. (June 29, 2018), https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china (requiring that "[c]ritical information infrastructure operators" store certain personal data within China but providing an exception for business necessity, subject to certain security-assessment measures to be promulgated).

48. Neha Mishra, *Privacy, Cybersecurity, and GATS Article XIV: A New Frontier for Trade and Internet Regulation?*, 19 WORLD TRADE REV. 341, 342 (2019) ("For example, explicit data residency laws requiring data to be stored and/or processed in domestic servers, and even routed within the territory during transit, fall within the scope of data localization."); Emmanuel Pernot-Leplay, *China's Approach on Data Privacy Law: A Third Way Between the U.S. and the E.U.?*, 8 PENN ST. J.L. & INT'L AFF. 49, 103 (2020) (defining data localization as "requiring that at least a copy of personal data should remain within the country's border"). *See generally* Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677 (2015) (discussing various forms of data localization and rationales for them).

49. *See* Pernot-Leplay, *supra* note 48, at 105 ("China's government stance on data localization is that it protects individuals' privacy, but also China's economic development and reduces its exposure to foreign intelligence.").

50. *See supra* notes 46–47 and accompanying text.

51. *See* Theodore Christakis, *"Schrems III"? First Thoughts on the EDPB post-*Schrems II *Recommendations on International Data Transfers (Part 2)*, EUR. L. BLOG (Nov. 16, 2020), https://europeanlawblog.eu/2020/11/16/schrems-iii-first-thoughts-on-the-edpb-post-schrems-ii-recommendations-on-international-data-transfers-part-2 (arguing that draft EU guidance on GDPR transfer restrictions requires data exporters to use impractical technical measures that could render data useless to data importers).

52. *E.g.*, MICHAEL A. KLEINMAN, JASON L. GREENBERG, DR. PETER BRESCHENDORF & KIMBERLY MIHOVICS, FRIED FRANK, EU CROSS-BORDER DATA TRANSFERS AFTER *SCHREMS II*: EU'S HIGHEST COURT SENDS CROSS-BORDER BUSINESS PARTNERS BACK TO THE NEGOTIATING TABLE 3 (2020), https://www.friedfrank.com/siteFiles/Publications/FFTOCEUCrossBorderDateTransfersafterSchremsII08062020.pdf (noting, in response to a recent interpretation of the GDPR by the Court of Justice of the European Union (CJEU), that the "cost to localize [data in the European Union] may be prohibitively expensive" for some companies); Cecilia Bonefeld-Dahl, Schrems II *Ruling Puts European Recovery at Risk*, PARLIAMENT MAG. (Sep. 15, 2020), https://www.theparliamentmagazine.eu/news/article/schrems-ii-ruling-puts-european-recovery-at-risk-22391 (explaining that small businesses face an "impossible task" in complying with EU data protection law as recently interpreted by the CJEU); Anupam Chander, *Is Data Localization a Solution for* Schrems

Second, data laws often have an extraterritorial scope. For example, their data-protection provisions may apply to any company that seeks to process data with some link to the state (e.g., the data was collected there), regardless of where the company or its processing is located.[53] As the next Part examines, data transfer restrictions and potentially extraterritorial-scope provisions could lead to the international-investment-law disputes over data flows that commentators have prophesied.

II. A CLOSE READING OF INTERNATIONAL INVESTMENT LAW FOR THE DATA FLOW ECONOMY

International investment law is a regime of property-like rights for foreign investors.[54] These rights are based on provisions in investment treaties that two or more states have signed as parties.[55] Importantly, though, dispute-settlement mechanisms in most of these treaties permit investors of each state party to enforce these rights by suing other state parties *directly* for damages. These suits take the form of international arbitration initiated by the investor against the state hosting its investment (the host state).[56]

Investors' rights span a wide range of assets. International investment tribunals have held investors to be entitled to compensation for harm to assets anywhere from oil-producing businesses to financial contracts whose value is pegged

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II*?*, 23 J. INT'L ECON. L. 771, 779 (2020) (arguing that the CJEU's recent interpretation of the GDPR's transfer restrictions "disproportionately" disadvantages less-resourced companies and makes them "more likely to avoid transfers at all"); Joshua P. Meltzer, *The Court of Justice of the European Union in* Schrems II: *The Impact of GDPR on Data Flows and National Security*, BROOKINGS (Aug. 5, 2020), https://www.brookings.edu/research/the-court-of-justice-of-the-european-union-in-schrems-ii-the-impact-of-gdpr-on-data-flows-and-national-security ("For many [small companies], setting up in the EU is not an option [after recent interpretations by the CJEU].").

53. *See infra* notes 203–04 and accompanying text (setting out the GDPR and South Africa data law's extraterritorial scopes); *see also, e.g.*, Data Protection Act (2019) § 3(1) (Barb.), https://www.barbadosparliament.com/uploads/bill_resolution/7b81b59260896178b5aa976fdb87bfee.pdf (extending application of Barbados's data law to out-of-state entities processing data in connection with the offering of goods or services in Barbados); LGPD, *supra* note 26, art. 3(III) (extending application to processing of data that was collected in Brazil).

54. Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1, 3 (2019) ("For the most part . . . [international investment law] reflects the basic structure of property protection found in domestic law—at least in market economies."). Indeed, some treaties use the term "property" where other treaties would typically use "asset." *Compare* [Agreement] Between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments, It.-Bangl., art. 1, Mar. 20, 1990, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/374/bangladesh—-italy-bit-1990- (providing that "any kind of property" may be a qualifying investment), *with* Agreement Between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, Japan-Peru, art. I(1), Nov. 21, 2008, 2808 U.N.T.S. 21 (providing that "every kind of asset" may be a qualifying investment) [hereinafter Japan-Peru BIT].

55. *E.g.*, JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 3–4 (2017) ("Most investment treaties are bilateral . . . However, some also involve more parties and issues . . . .").

56. *Id.* at 4.

to movements in oil prices.[57] Indeed, such rights may be more extensive than the property rights foreign investors would otherwise have under the law of the state in which they invest.[58] At its broadest, compensable harm may occur when a state simply disrupts the expectations an investor had about the state's legal system when it invested there.[59]

It makes sense then that commentators have opined that it is "only a matter of time" before we see international-investment-law suits for harm to data flows,[60] even though such suits' likely success is apparently uncertain.[61] State regulations

57. *Compare* Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Final Award, ¶¶ 71, 1579, 1585 (July 18, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf (awarding damages for the forced auction of an oil production subsidiary), *with* Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶¶ 324, 491, 520, 591 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf (awarding damages for noncompliance with and attempted invalidation of a "hedging agreement" involving the exchange of a put option and a call option whereby Deutsche Bank paid Sri Lanka if oil prices rose beyond a predetermined price, and Sri Lanka paid Deutsche Bank if oil prices fell below the predetermined price).

58. Arato, *supra* note 54, at 3, 14–16 (explaining that international investment law "can augment national property forms").

59. *See infra* Section II.C.1.

60. Kapczynski, *supra* note 6, at 1514 (citing COHEN, *supra* note 6, at 237); *see also, e.g.*, Julien Chaisse & Christen Bauer, *Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration*, 21 VAND. J. ENT. & TECH. L. 550, 587 (2019) ("There are many challenges to bringing a digital claim in the international investment law system. . . . [H]owever, future claims are likely to emerge."); Enikő Horváth & Severin Klinkmüller, *The Concept of 'Investment' in the Digital Economy: The Case of Social Media Companies*, 20 J. WORLD INV. & TRADE 577, 617 (2019) ("Arbitrators . . . should not have long to wait before a digital company tests the boundaries of investment treaty protection"); *supra* note 6.

61. *See supra* notes 14–16 and accompanying text; *see also* Horváth & Klinkmüller, *supra* note 60, at 600, 617 (analyzing only the jurisdictional question of whether social media companies' operations or components thereof qualify as protected investments, noting that it is "uncertain" whether those companies' data holdings in isolation are protected, and suggesting a potentially higher likelihood that contracts associated with data are protected). *But cf.* Creach, *supra* note 6 (offering a brief but more optimistic appraisal of such suits). Commentators have analyzed related questions, such as whether digital assets in general or cryptocurrencies may receive protection through various kinds of investor claims. Their analyses have also often been inconclusive. *E.g.*, Eric De Brabandere, *International Investment Law and Arbitration in Cyberspace*, 16–18, 29 (Grotius Ctr., Working Paper No. 2021/095-IEL, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835134 (addressing whether state data regulation may be compensable harm to digital assets in general and concluding that "the general principles applicable to most forms of investment apply" but not offering a more detailed assessment of claims' success); Aashna Agarwal & Ananya Bajpai, *Status of Cryptocurrencies Under Investment Law: Not So Cryptic Anymore?*, 7 INDIAN J. ARB. L. 1, 12 (2019) (concluding that investors' possession of cryptocurrency not issued by a specific entity (e.g., Bitcoin) is probably not a qualifying investment but that possession of cryptocurrency issued by central banks or businesses in a particular state may be); David Collins, *Applying the Full Protection and Security Standard of International Investment Law to Digital Assets*, 12 J. WORLD INV. & TRADE 225, 242 (2011) (analyzing claims for states' failure to protect digital infrastructure in a state (e.g., servers) and finding some such claims "doubtful"); Armand Terrien & Alexandra Kerjean, *Blockchain and Cryptocurrencies: The New Frontier of Investment Arbitration?*, KLUWER ARB. BLOG (Oct. 18, 2018), http://arbitrationblog.kluwerarbitration.com/2018/10/18/blockchain-and-cryptocurrencies-the-new-frontier-of- investment-arbitration (presenting the possibility of claims

that hinder data flows reduce their value as corporate assets. International investment law is a way to recover that lost value.

This Part identifies the circumstances in which such disputes are likely to present themselves and the legal issues they are likely to raise. It then analyzes their legal merits. As the literature suggests,[62] to raise the novel question of whether international investment law protects data flows, a case must present two issues: (1) whether data flows are an investment that qualifies for protection under international investment law (a *jurisdictional* issue) and, if so, (2) whether state regulation affecting data flows is compensable harm (a *liability* issue). This Part first argues that the current state of global data regulation and the reality of the digital economy suggest that disputes raising both issues—which I call "true" disputes—are likely to arise in only a few specific contexts. The balance of this Part then argues that suits in those specific contexts have a strong basis in current law. In so doing, this Part seeks to ameliorate previous commentary's tendency to speak only in broad terms about—and sometimes to misidentify—the jurisdictional and liability questions these suits would raise.

Treaty text, caselaw, and policy form the backbone of my legal analysis. Tribunals invariably consider treaties, because they are the instrument giving investors the rights they claim.[63] They almost always consider previous cases,[64] even if they were decided under different treaties,[65] and even though there is no rule of stare decisis in international investment arbitration.[66] Finally, tribunals

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arising out of both cryptocurrency held in a state and physical cryptocurrency production facilities in a state).

62. *E.g.*, Mitchell & Hepburn, *supra* note 14, at 216 (noting the "preliminary hurdles" of jurisdictional issues and the additional requirement of "ma[king] out" a "violation of an investment treaty guarantee" in response to which states cannot "defend their conduct"); Horváth & Klinkmüller, *supra* note 60, at 581 (analyzing only a "threshold jurisdictional question"); *see* Magnusson, *supra* note 13, at 11 (analyzing only the merits issue of fair and equitable treatment of investors).

63. *E.g.*, *Primer: International Investment Treaties and Investor-State Dispute Settlement*, COLUM. CTR. ON SUSTAINABLE INV. May 2019, at 4 ("Arbitral tribunals look first and foremost at the provisions of the relevant investment treaty in deciding cases.").

64. *See, e.g.*, BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 4, 6 (noting tribunals' reliance on both caselaw and treaty text); Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47, 56 (2019) ("[T]he use of precedent in [international investment arbitration] appears to be entrenched.").

65. *E.g.*, El Paso Energy Int'l v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 5, 243 (Oct. 31, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (quoting Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and on the Merits, Part IV, ch. D, § 7 (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (interpreting the North American Free Trade Agreement); Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf (interpreting an investment treaty between Spain and Mexico)) (interpreting an investment treaty between Argentina and the United States).

66. *E.g.*, Liman Caspian Oil BV v. Republic of Kaz., ICSID Case No. ARB/07/14, Excerpts of Award, ¶ 172 (June 22, 2010), https://www.italaw.com/sites/default/files/case-documents/italaw1429.pdf ("It is in any event clear that the decisions of other tribunals are not binding on this

sometimes, but not always, consider wide-ranging policy goals.[67] Crucially, though, blackletter international law requires tribunals to look to the "context" and "object and purpose" of the treaty, which may mean looking to the treaty's policy background.[68] Additionally, this Part draws some conclusions from the historical trajectory of the investment regime.

Of course, in arguing that such suits see have strong grounds given the law's current state, I am not contending that these suits' success is guaranteed. Far from it. The analyses below remain irreducibly fact specific. Moreover, this Part's argument is not normative; it is merely predictive. It is in Part III that I turn to a normative evaluation of the information presented in this Part.

A. *True Data-Flow Disputes*

For an international-investment-law suit to be premised on harm to data flows, it must raise two questions, as the literature suggests.[69] First, are cross-border data flows a protectable asset under international investment law? Second, do state regulations, by hindering or cutting off those data flows, constitute compensable harm to investors under international investment law? I refer to cases raising both issues as "true" disputes over cross-border data flows. Despite these questions' novelty—no case has addressed them so far—closer examination reveals that the circumstances in which "true" disputes would present themselves are rather narrow.

A preliminary note before moving to the analysis: An international-investment-law suit typically goes through an initial jurisdictional stage, where

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Tribunal."); Chen, *supra* note 64, at 47 ("The treaties themselves do not provide for a doctrine of stare decisis.").

67. *E.g.*, Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 62–63 (Jan. 25, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf (identifying situations in which certain uses of a treaty's nondiscrimination clause would not be permitted because they contravene international law principles or the state parties' expectations, and noting that "[o]ther elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals"); María Blanca Noodt Taquela & Ana María Daza-Clark, *The Role of Global Values in the Evaluation of Public Policy in International Investment and Commercial Arbitration*, *in* LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 112, 127, 137 (Verónica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French eds., 2018) (discussing tribunals' consideration of public policy requirements of good faith where investments are obtained by corruption or in violation of state law).

68. Vienna Convention on the law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *see, e.g.*, Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 307 (July 14, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf (noting the treaty's stated purpose of "stimulat[ing] the flow of private capital" and thus explaining that the tribunal must be "mindful of the objective the parties intended to pursue" (quoting Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993))).

69. *See supra* note 62.

the tribunal determines whether it can hear the case.[70] If it passes that stage, it moves to a liability stage, where the tribunal determines whether the state breached its treaty obligations.[71] As the following discussion sets out in more detail, a tribunal would address the first question above at the jurisdictional stage and the second at the liability stage. Note that a suit could, conceivably, raise the first question but not the second, or vice versa, but such cases would stray from the core issue of protecting data flows under international investment law.[72] I briefly return to this issue in Section II.C below.

1. Data Flows as a Protectable Asset, Without More: An Issue Unlikely to Arise

No case thus far has involved data flows as an asset. But the reality of digital commerce shows us that it would be the rare case in which an investor relies solely on "data flows" as the asset for which a state must pay compensation. The businesses likely to rely on cross-border data flows—e.g., multinational corporations in many industries, social media companies, cloud computing providers, and data analytics companies[73]—will likely have other assets related to the state whose regulation hinders their data flows.[74]

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70. *See, e.g.*, CONG. RES. SERV., R43988, ISSUES IN INTERNATIONAL TRADE: A LEGAL OVERVIEW OF INVESTOR-STATE DISPUTE SETTLEMENT 3 (2015) ("To hear and decide an [international-investment-law] case, a tribunal must have jurisdiction over the dispute between the investor and the respondent state."); Howard Mann, *ISDS: Who Wins More, Investors or States?*, INV. TREATY NEWS, June 2015, https://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf (suggesting that "it is almost certainly true" that "all arbitrations face some form of jurisdictional challenge," leading to a jurisdictional phase).

71. *See, e.g.*, Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Award, ¶¶ 77, 95 (Aug. 27, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf (noting conclusion of the previous jurisdictional phase and proceeding to analyze merits); Mann, *supra* note 70 (explaining that "the jurisdictional phase is the point of entry" for investors).

72. Consider, for example, that a company's assets in a jurisdiction might consist in large part of outbound data flows from people in that jurisdiction (e.g., if it is an out-of-state social media company), but the state regulation it challenges under international investment law might be a tax levied on revenue, as opposed to a regulation of cross-border data flows. *Cf. Digital Services Taxes May Violate Investment Treaty Protections*, GIBSON DUNN (July 24, 2019), https://www.gibsondunn.com/wp-content/uploads/2019/07/digital-services-taxes-may-violate-investment-treaty-protections.pdf (explaining that foreign digital companies may wish to challenge France's Digital Services Tax under international investment law); *infra* Section II.A.1. Unlike a regulation of data that hinders cross-border data flows, which can typically be avoided by storing data in the state, *see, e.g.*, Chander, *supra* note 52, at 777, a tax may have no relationship to, and thus may not be mitigated through, the location of data, *see* U.S. TRADE REPRESENTATIVE, REPORT ON FRANCE'S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, at 12, 22–23, 25 (2019) (setting out the requirements to fall under France's Digital Services Tax, which do not relate to nationality or location of data). An international-investment suit premised on such a tax does not raise the second question above, though it might potentially raise the first. *See* Section II.A.1.

73. *See* Usman Ahmed & Anupam Chander, *Information Goes Global: Protecting Privacy, Security, and the New Economy in a World of Cross-Border Data Flows*, E15 INITIATIVE (Nov. 2015),

Consider a multinational company like Apple, which collects personal data through various products and services it provides.[75] It has offices, stores, and other assets in many states, and some of its international subsidiaries are fully-fledged businesses.[76] Even a relatively U.S.-bound social media company like Snapchat has physical offices[77] and corporate subsidiaries[78] across the world and enters into contracts, its terms of use,[79] with any person that uses its service. For a more minimal example, take a data-analytics company like Neustar. It processes personal data that other companies—its clients—send to it and gives marketing recommendations based on that data.[80] It has far fewer non-U.S. offices than Snapchat[81] and may have no foreign subsidiaries.[82] However, under

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https://e15initiative.org/wp-content/uploads/2015/09/E15-Digital-Chander-and-Ahmed-Final.pdf; *infra* notes 75–83.

74. *Cf.* Horváth & Klinkmüller, *supra* note 60, at 581, 585–89 (noting that social media companies may "only have a digital presence" in states but explaining that such companies may also have rights in physical assets located in some states, in addition to rights in cross-jurisdictional contractual and intellectual-property assets).

75. *Apple Privacy Policy*, APPLE, https://www.apple.com/legal/privacy/en-ww (updated Oct. 27, 2021) ("Apple uses personal data to power our services . . . .").

76. *E.g.*, *Apple Will Invest over 1 Billion Euros in Germany and Plans European Silicon Design Center in Munich*, APPLE (Mar. 10, 2021), https://www.apple.com/uk/newsroom/2021/03/apple-to-invest-over-1-billion-euros-in-germany-with-new-munich-campus; Jesse Drucker & Simon Bowers, *After a Tax Crackdown, Apple Found a New Shelter for Its Profits*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html ("Apple now has about 6,000 employees in Ireland, including customer service and administrative jobs."); *Find a Store*, APPLE, https://www.apple.com/retail.

77. *Find Your Place*, SNAP INC., https://careers.snap.com/offices (listing Snapchat's global offices).

78. Snap Inc., Annual Report, ex. 21.1 (Form 10-K) (Feb. 4, 2022) (listing U.K., French, Australian, Canadian, and German subsidiaries).

79. *Snap Group Limited Terms of Service*, SNAP INC., https://snap.com/en-US/terms#terms-row ("In order to use Snapchat, Bitmoji, or any of our other products or services that link to these Terms . . . you must have accepted our Terms and Privacy Policy . . . Of course, if you don't accept them, then don't use the Services.").

80. *E.g.*, NEUSTAR, CONVERT MORE PROSPECTS WITH SMARTER RE-ENGAGEMENT ACROSS CHANNELS 2 (2017), https://ns-cdn.neustar.biz/creative_services/biz/neustar/www/resources/product-literature/marketing/neustar-omnichannel-remarketing-solution-sheet.pdf (stating, among other things, that clients can give Neustar customer phone numbers and "we'll do all the work. Within 24 hours of receiving your phone log, Neustar will have your campaign up and running delivering targeted promotions to the qualified prospects that matter most."); NEUSTAR, TURN ANONYMITY INTO OPPORTUNITY 2–3 (2017), https://ns-cdn.neustar.biz/creative_services/biz/neustar/www/resources/product-literature/marketing/pageadvisor-solution-sheet.pdf (explaining how Neustar uses data collected by its clients, along with other data to which it has access, to provide marketing advice to its clients); NEUSTAR, THE NEUSTAR IDMP (2017), https://ns-cdn.neustar.biz/creative_services/biz/neustar/www/resources/product-literature/marketing/neustar-idmp-solution-sheet.pdf (same).

81. *See Contact Us*, NEUSTAR, https://www.home.neustar/about-us/contact-us (listing offices in Bangalore, Costa Rica, Hyderabad, and London).

82. *Cf.* Neustar, Annual Report, ex. 21.1 (Form 10-K) (March 1, 2017) (listing no foreign subsidiaries).

contracts with its clients, Neustar receives flows of data from clients in states where it has no offices (e.g., EU states).[83]

Thus, data flows will rarely be the only asset at issue in a case.[84] An investor will likely be able to point to, at a minimum, contracts related to a state it is suing and, sometimes, physical assets or subsidiaries in that state.[85] As detailed below, tribunals have held physical assets, subsidiaries, and services contracts protectable under international investment law.[86] Therefore, the first question above—whether data flows qualify for protection—will probably only arise in a multiple-asset context. Moreover, its novelty is a matter of degree. The closer an investor is to relying *only* on data flows, as opposed to other assets that tribunals have held protectable, the more unprecedented the issue.

2. State Regulation as Harm: Various Issues Investors Are Unlikely to Raise

Similarly, the second question above—whether data regulation is compensable harm—is only likely to arise in limited circumstances. To be sure, data regulations contain numerous requirements. Some are costly to comply with or may reduce the value of data to firms (e.g., the GDPR's requirement that companies give people a copy of their data upon request).[87] As one early commentator suggested, some of these restrictions could conceivably trigger an international-investment-law suit merely due to the compliance costs or the reduction in data holdings' value that they impose.[88]

But the state of data regulation today probably precludes such challenges. As further explained below, investors will have the greatest chance of prevailing in such a suit when they can show that a state has contravened their legiti-

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83. *Data Transfers Pursuant to Article 46 of the GDPR Following* Schrems II, NEUSTAR (last modified Dec. 1, 2021), https://www.home.neustar/privacy/schrems-response (describing measures Neustar takes with EU customers to legally transfer data to non-EU jurisdictions).

84. The focus on data *in isolation* that commentators have sometimes taken thus seems misguided. *Cf.* Horváth & Klinkmüller, *supra* note 60, at 609 ("In the absence of a more developed domestic and/or international legal framework on rights over data, it is unlikely that data . . . would qualify as an 'investment' [protectable under treaties].").

85. *See supra* notes 75–83 and accompanying text.

86. *See infra* notes 122–26, 145–47 and accompanying text.

87. *See* GDPR, *supra* note 23, art. 20(1) (providing for this right); *see also* Michiel van Schaijck, *GDPR Top Ten #1: Data Portability*, DELOITTE, https://www2.deloitte.com/ch/en/pages/risk/articles/gdpr-data-portability.html (last visited Aug. 25, 2021) (noting that this right "could lead to considerable costs to organisations"); *How to Prepare for Global Data Compliance*, ERNST & YOUNG GLOB. LTD. (May 4, 2021), https://www.ey.com/en_gl/consulting/how-to-prepare-for-global-data-compliance (discussing high compliance costs associated with data regulation); *cf.* Daniel L. Rubinfeld, *Data Portability*, COMPETITION POL'Y INT'L (Nov. 26, 2020), https://www.competitionpolicyinternational.com/data-portability/#_edn8 (noting that private actors that benefit from exclusive access to data might seek to prevent data sharing).

88. Vishaka Ramesh, *Data Protection Principles Around the World: Do They Violate International Investment Law?*, VÖLKERRECHTSBLOG (Oct. 8, 2018), https://voelkerrechtsblog.org/de/data-protection-principles-around-the-world (discussing requirements to only collect a minimal amount of data and delete unnecessary data).

mate expectations about its legal environment.[89] This requires some unpredictable legal change. Today, as noted above, a very high number of states have GDPR-style data laws on the books.[90] Consequently, the number of states that will adopt a data-regulation regime, where none existed before, grows smaller each year. Moreover, multinational corporations are by now well-acquainted with the general requirements such laws place on in-state companies and cannot claim their content is unexpected.[91] A challenge to *the mere implementation of GDPR-style regulation* is thus unlikely.

Rather, companies with interests in data flows are most likely to challenge states' actions in a narrower area already mentioned above: data transfer restrictions. After all, these restrictions specifically affect data's ability to flow out-of-state. But, again, not all such restrictions are equally vulnerable. Recall that some restrictions may involve "data localization." For example, Russia's data regulations require storage of certain personal data in Russia and prohibit out-of-state processing, subject to certain exceptions.[92] Commentators have suggested that companies will sue states for such data localization mandates, because they force companies to bear the cost of using in-state data storage and thus can obviate the efficiencies of transferring data across borders.[93] But, by now, the states that impose such strict restrictions have a well-known history of seeking to keep data in-state.[94] Voluminous resources exist for companies to

89. *See infra* Section II.C.1.

90. *See supra* text accompanying note 39.

91. *See* David Uberti, *How Big Data Turned into Big Business for Cyber and Privacy Lawyer*s, WALL ST. J. (Dec. 9, 2020), https://www.wsj.com/articles/how-big-data-turned-into-big-business-for-cyber-and-privacy-lawyers-11607509801 (explaining that privacy law-related services have become a large field due to high private-sector demand); *cf.* BRADFORD, *supra* note 24, at 143–44 (describing companies' significant interest in GDPR compliance and their use of the GDPR as a template for global privacy compliance).

92. *See* LOCALIZATION OF PERSONAL DATA PROCESSING IN RUSSIA: THE CLARIFICATIONS OF THE MINISTRY OF TELECOM AND MASS COMMUNICATIONS (2015), https://iapp.org/media/pdf/resource_center/Alert%20The%20Ministry%20of%20Telecom%20and%20Mass%20Communications%20clarifies%20the%20requirements%20for%20localization%20of%20personal%20data%20in%20Russia.pdf; Morgan, Lewis & Bockius LLP, *Data Protection and Privacy in Russia*, LEXOLOGY (Aug. 27, 2019), https://www.lexology.com/library/detail.aspx?g=7dc3ad4f-8e9c-4f1d-be26-14dd77238a9f (listing exceptions for "data processing for the purposes of achieving the objectives of international treaties, for the purposes of implementation of an operator's statutory powers and duties, for professional activities of journalists or the lawful activities of mass media, or scientific, literary or other creative activities"). These data-flow restrictions are intertwined with geopolitical tensions that have become even more salient in the wake of Russia's invasion of Ukraine in early 2022. *See* Jessica Brandt & Justin Sherman, *Will Russia Chase Out Big Tech?*, FOREIGN POL'Y (Mar. 15, 2022, 12:12 PM), https://foreignpolicy.com/2022/03/15/russia-ukraine-war-facebook-meta-twitter-youtube-block-censorship (linking Russia's "draconian internet monitoring regime and strict data localization rules" to the Russian government's "broader goal [of] denting the appeal of the open internet" and thereby solidifying its domestic power).

93. *E.g.*, Zhang, *supra* note 16, at 11; Ramesh, *supra* note 88; *see also* Magnusson, *supra* note 13, at 38, 40.

94. *Cf.* Adrian Shahbaz, *The Rise of Digital Authoritarianism*, FREEDOM HOUSE (2018), https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism (describing China's "two decades" of interest in securing control over the Internet); KPMG, THE "LOCALISATION" OF

evaluate, at a general level, how restrictive a state's data policy is before entering that state.[95] Investors, then, cannot claim their expectations were flouted.[96] To be sure, it is possible that a state with moderate restrictions on cross-border data flows will suddenly adopt full-bore data localization.[97] But path dependency suggests otherwise.

Rather, suits are likelier where there is less certainty. As noted above, looser GDPR-style transfer restrictions permit data storage and processing outside the state. However, the data must receive an approved level of protection in the other state it goes to.[98] As discussed below, there is significant confusion and opacity as to what this level of protection is. The varying interpretation of such provisions can unexpectedly increase the cost of data transfers or render them infeasible, creating potential for international-investment-law suits.

Challenges to extraterritorial-scope provisions are also possible. These provisions often require nuanced analysis to interpret and vary—dramatically and subtly—across laws.[99] Their interpretation could thus also result in unexpected costs for businesses that may render cross-border transfers impractical.[100]

RUSSIAN CITIZENS' PERSONAL DATA (2018), https://assets.kpmg/content/dam/kpmg/be/pdf/2018/09/ADV-factsheet-localisation-of-russian-personnal-data-uk-LR.pdf (describing Russia's data localization requirement, effective since 2015, as "well-known").

95. *E.g.*, MARTINA FRANCESCA FERRACANE, HOSUK LEE-MAKIYAMA & ERIK VAN DER MAREL, EUR. CTR. FOR INT'L POL. ECON., DIGITAL TRADE RESTRICTIVENESS INDEX 4 (2018) (presenting a metric that measures states' digital trade restrictiveness); Janos Ferencz, *The OECD Digital Services Trade Restrictiveness Index*, OECD TRADE POL'Y PAPERS NO. 221, at 4, 9, 13 (2019); *Data Protection Laws of the World*, DLA PIPER, https://www.dlapiperdataprotection.com (providing information on states' data protection laws, including on transfer restrictions).

96. *Cf.* Magnusson, *supra* note 13, at 40, 45 (noting that investors might take into account the European Centre for International Political Economy's Digital Trade Restrictiveness Index).

97. *See infra* text accompanying notes 224–25 (explaining why this falls outside of this Article's scope).

98. *E.g.*, Eur. Data Prot. Bd., *Recommendations 01/2020 on Measures that Supplement Transfer Tools to Ensure Compliance with the EU Level of Protection of Personal Data* 9 (v. 2.0 2021), https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf (noting that under the GDPR's transfer restrictions personal data must receive "essentially equivalent protection" in the state to which it goes) [hereinafter GDPR Supplementary Measures Recommendations].

99. *Compare* Eur. Data Prot. Bd., *Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3)* 16 (v. 2.1 2020), https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_0.pdf (explaining that the GDPR might not apply in some circumstances even if a foreign data processor processes data about a person located in the European Union) [hereinafter GDPR Territorial Scope Guidelines], *with* DPA, *supra* note 26, § 4(b)(ii) (providing that Kenya's data law applies whenever a data controller or processor processes data about a person located in Kenya); *infra* notes 203–07 and accompanying text.

100. *Cf.* Alex Hern & Jim Waterson, *Sites Block Users, Shut Down Activities and Flood Inboxes as GDPR Rules Loom*, GUARDIAN (May 24, 2018, 12:59 EDT), https://www.theguardian.com/technology/2018/may/24/sites-block-eu-users-before-gdpr-takes-effect (discussing certain non-EU companies' attempts to avoid GDPR noncompliance by blocking EU users from access to their services upon the GDPR's entry into force); NAT'L BD. OF TRADE, *supra* note 35, at 26 (explaining how certain data regulation requirements are in tension with Google's data practices); Ernst & Young Glob. Ltd., *supra* note 87.

This conceivably creates the potential for international-investment-law suits, although these are likely to be weaker suits, for reasons explained below.

Suits against states that seem to be gradually clarifying their legal requirements in these areas, like EU states, are unlikely. Indeed, as explained below, investors' expectations are more likely to be *based on* EU laws and guidance in this area than *contravened by* those laws and guidance.[101]

B. *The Tribunal's Jurisdiction*

Having identified when data-flow disputes are likely to arise, this Part now shifts toward analyzing how such suits are likely to fare before tribunals. As most international-investment-law suits do,[102] it begins with jurisdictional considerations.

The first jurisdictional question raised by "true" disputes—whether data flows qualify for protection—breaks down into two more specific questions: (1) Does the investor's interest in data flows qualify as a treaty-protected "investment"? (2) If so, does that investment have a sufficient territorial nexus to the state being sued? This Section considers these questions in turn.

1. The Existence of an Investment

Generally, investment tribunals only have jurisdiction over a dispute when it involves action by the host state that harms an "investment."[103] The first relevant definition of "investment" is found in the text of the treaty under which the claimant sued. Typically, it defines "investment" with capacious language, such as "every kind of asset" or "every kind of investment," accompanied by a nonexhaustive list of things that may be investments (e.g., tangible and intangible property, shares of stock).[104] Other, often newer, treaties may adopt nar-

101. Relatedly, it is not clear that investors suing under treaties with EU states to which the European Union is not a party could viably allege that those states are liable for harm caused by EU laws. *Cf.* Ruggiero Cafari Panico, *Recent Developments in EU Investment Agreements*, TRANSNAT'L NOTES (July 14, 2014), https://blogs.law.nyu.edu/transnational/2014/07/recent-developments-in-eu-investment-agreements (observing that, where harm to an investor results from compliance with EU law, "it is not unlikely that the international responsibility and consequent financial responsibility may be attributable to the EU").

102. *See supra* note 70.

103. *See, e.g.*, Phoenix Action, Ltd. v. Czech, ICSID Case No. ARB/06/5, Award, ¶¶ 52, 74 (Apr. 15, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf (noting that the tribunal must have jurisdiction over an "investment" as defined by the treaties relevant to the dispute between the parties). *But see infra* note 107.

104. *E.g.*, Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1991) ("every kind of investment") [hereinafter U.S.-Argentina BIT]; Agreement Between the Slovak Republic and the Republic of Singapore on the Promotion and Reciprocal Protection of Investments, art. I(1), Slovk.-Sing., Oct. 13, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2257/download ("every kind of asset").

rower definitions.[105] Tribunals have given broad definitions of "investment" commensurately broad interpretations, and they generally take a holistic approach under which a transaction, taken as a whole, may be an investment even if no single part of the transaction may qualify as an investment on its own.[106] As such, tribunals can exercise jurisdiction over individual parts of those transactions even if those parts themselves are not investments.[107]

Additionally, investors often—but not always—sue before a tribunal of the International Centre for the Settlement of Investment Disputes (ICSID).[108] When using the ICSID forum, the investor will need to show that the investment also falls within the meaning of the word "investment" as it is used in Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).[109] The ICSID Convention leaves "investment" undefined, so its meaning is unclear.[110] As such, some tribunals hold that it means whatever states agree is an investment—that is, it cross-references the investment treaty between the states.[111]

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105. *E.g.*, Japan-Peru BIT, *supra* note 54, art. 1(1)(c), (i)–(j) (exempting certain debt instruments, certain financing transactions, and certain claims to money); *see also* Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments, art. 1 n.1, Indon.-Sing., Oct. 11, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6179/download (containing no exclusions but providing that an investment must have certain characteristics, "includ[ing] the commitment of capital, the expectation of gain or profit, the assumption of risk or certain duration").

106. *E.g.*, Magyar Farming Co. Ltd. v. Hung., ICSID Case No. ARB/17/27, Award, ¶¶ 274–75 (Nov. 13, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10914.pdf (treating this proposition as "well established").

107. *E.g.*, *id.* Similarly, in some treaties, the state's obligations toward investors may apply to activities "associated" with, or related to, investment. This permits a tribunal to exercise jurisdiction over a dispute about a transaction that may not be an investment, so long as a related transaction is an investment. *See* Bosca v. The Republic of Lithuania, PCA Case No. 2011-05, Award, ¶ 166 (May 17, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf. It is not clear that in-state activities associated with an investment *outside the territory of the state* are acceptable.

108. ICSID is a widely used forum that is part of the World Bank Group. *See About ICSID*, ICSID, https://icsid.worldbank.org/about (last visited Feb. 17, 2022).

109. Phoenix Action, Ltd. v. Czech, ICSID Case No. ARB/06/5, Award, ¶ 74 (Apr. 15, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf (noting this requirement). *See generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 174.

110. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB /10/7, Decision on Jurisdiction, ¶ 196 (July 2, 2013), https://www.italaw.com/sites/default/files /case-documents/italaw1531.pdf ("The controversy regarding the term 'investment' shown by various arbitral decisions and doctrinal writings reveals that the meaning of the term is far from settled.").

111. *See, e.g.*, Hassan Awdi v. Romania, ICSID Case No. ARB/10/13, Award, ¶¶ 198–199 (March 2, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4208.pdf; *see also* Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 312, 301, 315 (2010) (arguing that this means ICSID tribunals should defer almost entirely to states' definitions of "investment" in the investment treaty between the states).

By contrast, other tribunals hold that "investment" in the ICSID Convention has independent meaning that claimants must satisfy. Some tribunals find this meaning in the so-called "*Salini* criteria." These criteria are (1) a contribution of money or assets (2) for a certain duration (typically, two years suffices), (3) an assumption of risk, and (4) a contribution to the development of the host state.[112] Sometimes the regularity, or the expectation, of profit is cited as an additional criterion, although it is not clear how much independent content this tack-on criterion has.[113] Additionally, tribunals often omit the fourth criterion.[114] In fact, recent caselaw and scholarship suggest that today's tribunals virtually do not apply *Salini* at all. If they do, it is not as a binding requirement.[115] Some tribunals accept that the ICSID Convention's use of the word "investment" has "outer limits" but simply hold that the *Sailni* criteria do not define them.[116] Indeed, more than *Salini*, tribunals seem to rely on a "negative defini-

112. Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 52, 54 (July 23, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf.

113. *E.g.*, Joy Mining Mach. Ltd. v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶¶ 53, 57 (Aug. 6, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0441.pdf (citing this criterion but finding it was not met because the duration criterion was not met); Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 5.43 (Nov. 30, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf (citing *Joy Mining*, ICSID Case No. ARB/03/11 at ¶ 53) ("The expectation of profit and return which is sometimes viewed as a separate component of an investment must rather be considered as included in the element of risk, since every investment runs the risk of reaping no profit at all.").

114. *E.g.*, *Electrabel*, ICSID Case No. ARB/07/19 at ¶ 5.43 (citing Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 111 (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf) (not applying the fourth criterion); Jeremy Marc Exelbert, Note, *Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End*, 85 FORDHAM L. REV. 1243, 1258 (2016) (noting tribunals often remove the criterion).

115. *E.g.*, *Philip Morris*, ICSID Case No. ARB/10/7 at ¶ 206 (rejecting *Salini* as a required test under the ICSID Convention); *Awdi*, ICSID Case No. ARB/10/13 at ¶ 197 (same); Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶ 311 (Nov. 8, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C108/DC1751_En.pdf (same); Inmaris Perestroika Sailing Maritime Servs. GmbH v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶¶ 129–31 (March 8, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0427.pdf (same); Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf ("These [*Salini*] criteria are not fixed or mandatory as a matter of law."); Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 90 (May 24, 1999), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C160/DC556_En.pdf (rejecting a test substantially similar to *Salini*); Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 YALE J. INT'L L. 69, 95–96 (2020) (identifying cases that ostensibly apply *Salini* but in fact apply a different test hinging on whether the putative investment is an ordinary commercial transaction).

116. *E.g.*, *Philip Morris*, ICSID Case No. ARB/10/7 at ¶¶ 199–206.

tion" of investment as something that is not an ordinary commercial transaction (e.g., a one-off sale).[117]

Applying these considerations to data flows is complex, especially where the data flows are intermingled with other assets. Recall that corporations with interests in data flows will virtually always have other assets related to the state. For the sake of simplicity, then, consider the most minimal case: an out-of-state data analytics company that receives data flows from in-state companies, under contracts for marketing intelligence services. Is this an investment?

First, a tribunal will look to the treaty. Most treaties' very broad language would theoretically capture data flows, an "asset" that is neither expressly included nor expressly excluded by that language.[118] That language also may capture a data analytics company's contracts with its clients, because those contracts—claims to payment for services—are assets too.[119] True, a handful of treaties with more specific language provide that "claims to money that arise solely from commercial contracts for the sale of . . . services" cannot be an investment.[120] These provisions might preclude claims based on data analytics contracts themselves, although it is not clear these provisions seek to exclude the continuing, individually tailored business relationship created by such contracts.[121] Yet tribunals' holistic approach makes it unlikely that they would focus narrowly on these contracts' consideration—i.e., "claims to money"—when the core asset at issue is the ability to receive data.

Indeed, tribunals have held many services contracts to be investments.[122] Particularly on point is the case of *Bosca v. Lithuania*, in which a tribunal held

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117. Pahis, *supra* note 115, at 72, 86 ("As measured by the number of negative jurisdictional holdings it has justified, the commercial transaction test has had an effect equal to or greater than the far more scrutinized and debated *Salini* test.")

118. *Cf.* Zhang, *supra* note 16, at 10 ("When faced with a broad definition, some tribunals have adopted a straightforward definition of investment in which digital assets are clearly covered.").

119. *See* Mahnaz Malik, *Definition of Investment in International Investment Agreements*, INT'L INST. FOR SUSTAINABLE DEV. (Aug. 2009), https://www.iisd.org/system/files/publications/best_practices_bulletin_1.pdf (noting that broad investment definitions "potentially cover[] a variety of commercial contracts and transactions . . . which are not commonly associated with [foreign direct investment]"); *see also infra* notes 122–26.

120. Comprehensive Economic and Trade Agreement, art. 8.1, Can.-EU, Oct. 30, 2016, 2017 O.J. (L 11) 23, 52 [hereinafter CETA].

121. Michael Hwang S.C. & Jennifer Fong Lee Cheng, *Definition of "Investment"—A Voice from the Eye of the Storm*, 1 ASIAN J. INT'L L. 99, 120–23 (suggesting states have adopted such language "[i]n response to the debate" over to what extent "ordinary commercial transaction[s]" are covered under the ICSID Convention); *see supra* note 117.

122. *E.g.*, Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 5, 92, 95 (June 16, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf (canal dredging operations); Malaysian Historical Salvors SDN BHD v. The Gov't of Malay., ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 2–5, 80 (April 16, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf (marine salvage services); Helnan Int'l Hotels A/S v. The Arab Republic of Egypt, ICSID Case No. ARB 05/19, Decision of the Tribunal on Objection to Jurisdiction, ¶ 1(Oct. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0398_0.pdf (hotel management and operation contract); *see also* Mortenson, *supra* note 111, at 278 (collecting cases).

that a services agreement for the transfer of "know-how" to a private company was an investment.[123] The contract in *Bosca* required the claimant to give the company intangible business information, much like a data analytics contract requires the provider of marketing intelligence to provide intangible business information.[124] And under tribunals' typical, holistic analysis, if this transactional relationship is an investment, and the data flows are part of the transaction, then the tribunal will have jurisdiction over the data flows as well.[125] Granted, some cases have found even complex services contracts not to constitute investments. But these decisions were in tension with treaty text, and some were later annulled.[126]

Data flows themselves have fewer analogues in past cases. As noted, they are an asset that is only valuable in conjunction with the underlying data's value to a business.[127] Perhaps the best analogue can be found in financial rights. Consider *British Caribbean Bank v. Belize*, where the tribunal took jurisdiction over the bank's security interest in corporate stock[128]—an intangible right in collateral that was only valuable in conjunction with the bank's loan.

Because of its decline, *Salini* is unlikely to be an obstacle to this hypothetical data analytics company. Also, investors can mostly avoid *Salini* by litigating outside of ICSID.[129] Even if *Salini* applies, data analytics contracts seem to implicate the necessary risk (risk of a continuing business relationship that is not a one-off sale), contribution (provision of services), and, depending on the

123. Bosca v. The Republic of Lith., PCA Case No. 2011-05, Award, ¶ 168 (May 17, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf.

124. *See* Michiel M. van Notten, *Know-How Licensing in the Common Market*, 38 N.Y.U. L. REV. 525, 526–27 (1963) (noting that know-how may include secret and non-secret business information); *supra* note 80 and accompanying text.

125. *See supra* notes 106–07 and accompanying text.

126. *E.g.*, Malaysian Historical Salvors SDN BHD v. The Gov't of Malay., ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 38, 145 (May 17, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0496.pdf (finding marine salvage contract was not an investment); Joy Mining Mach. Ltd. v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶¶ 15, 53, 57 (Aug. 6, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0441.pdf (finding contract for provision of mining system and related services not to be an investment). *But see* Malaysian Historical Salvors SDN BHD v. The Gov't of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 80, 83 (April 16, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf (annulling the previous tribunal's decision on jurisdiction due to, among other things, failure to consider the treaty's broad investment definition); Mortenson, *supra* note 111, at 315–16 (arguing that in cases like *Joy Mining* tribunals should defer to the relevant investment's treaty's text).

127. *See supra* notes 33–38 and accompanying text.

128. British Caribbean Bank Ltd. v. The Gov't of Belize, PCA Case No. 2010-18, Award, ¶¶ 73–77, 80–82, 200 (Dec. 19, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4190.pdf.

129. *But see* Romak v. The Republic of Uzb., PCA Case No. AA280, Award, ¶¶ 207, 212, https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf (applying *Salini* in a non-ICSID arbitration).

tribunal's view, duration.[130] By contrast, data flows, in isolation, are not a *contribution* of resources to the state but, rather, an *extraction* of resources from it. Thus, they also involve no risk.[131] But because the data flows are an essential part of the contracts, the *Salini* criteria are probably met under a holistic analysis—unless, perhaps, the duration of the analytics services is so short as to resemble a one-off transaction.[132]

Yet it is policy that likely provides the most support for accepting this type of transaction as an investment. As former investment treaty negotiator Kenneth Vandevelde explains, broad investment definitions advance core investment-regime goals. For one, they promote the "rule of law" in states because they prevent states from "arbitrarily" protecting some assets and not others.[133] Indeed, because "economies evolve and new forms of investment are created and acquire economic importance over time," a broad definition is necessary to avoid such arbitrariness.[134] For the same reason, a broad definition helps stimulate foreign investment by assuring investors that treaties' protection will cover all, not just some, of their assets.[135] To be sure, some recent treaties' narrower definitions of investment—and less overtly free-market tone[136]—might reveal a different "object and purpose."[137] But the default policy background against which tribunals operate favors a permissive view of what may be an investment.

This policy background points to another relevant consideration: history. The current investment treaty regime began in the late 1950s and picked up speed in the '80s, with the United States becoming a major exponent of the economically liberal ideology underlying these treaties.[138] In 1975, tangible assets

130. *See* Helnan Int'l Hotels A/S v. The Arab Republic of Egypt, ICSID Case No. ARB 05/19, Decision of the Tribunal on Objection to Jurisdiction, ¶ 77 (Oct. 12, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0398_0.pdf (finding the "risk of no commercial success" in the operation of a hotel to meet the risk criterion); cases cited *infra* notes 314, 316–18.

131. *See* KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 115 (2010) (describing the *Salini* test as looking, in part, to whether "a contribution of capital . . . is placed at risk"). Although "data are at risk of being regulated," which can "increase costs to foreign investors," Zhang & Mitchell, *supra* note 14, at 5, this line of reasoning conflates data flows and capital flows in a manner that this Article argues is wrong as a matter of economic reality, *see infra* Section III.B.

132. *Cf.* Romak, PCA Case No. AA280, ¶¶ 226–27 (finding that a five-month contract resembled a one-off transaction and thus did not satisfy the duration criterion).

133. VANDEVELDE, *supra* note 131, at 105.

134. *Id.* at 108.

135. *Id.* at 106–07.

136. *See, e.g.*, CETA, *supra* note 120, at pmbl. ("[T]he provisions of this Agreement protect investments . . . *without undermining the right of the Parties to regulate in the public interest* . . . ." (emphasis added)).

137. *See supra* text accompanying note 68.

138. *See* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005) ("In 1959, Germany concluded the first two bilateral investment treaties, one with Pakistan and the other with the Dominican Republic."); Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 629,

composed 83% of the value of the S&P 500. By 2018, it was *intangible* assets that accounted for 84% of the index's value,[139] and the COVID-19 pandemic has only intensified this shift toward intangible assets.[140] Yet as the nature of the global economy has changed, the scope of international investment law has grown to fit it, for better or for worse.[141] Companies recently have used the current regime to protect intangible assets that were less salient, if not inconceivable, at the incipiency of the investment regime. Consider financial derivatives. Until around the 1970s, derivatives markets were small, somewhat provincial, and "unimportant."[142] Today, derivatives are globally transacted, highly valuable assets and have been held by a tribunal to be investments.[143] If history is any indication, the regime will likely stretch to bring new asset classes within its protective ambit, consistent with the policy motives behind broad investment definitions.

Similar logic applies to other businesses: for example, social media companies that enter into terms of use with in-state users and receive data flows from the state.[144] Moreover, the analysis gets easier if the suing corporation has other

633–34, 638 (1993) (describing the United States as "anxious to endorse and facilitate" trends toward "democratic government and free market economics" during its late '80s negotiations).

139. PONEMON INST. LLC, 2019 INTANGIBLE ASSETS FINANCIAL STATEMENT IMPACT COMPARISON REPORT 1 fig.A (2019), https://www.aon.com/getmedia/60fbb49a-c7a5-4027-ba98-0553b29dc89f/Ponemon-Report-V24.aspx (setting out these proportions).

140. Sarah Ponczek, *Epic S&P 500 Rally Is Powered by Assets You Can't See or Touch*, BLOOMBERG (Oct. 21, 2020, 6:00 AM EDT), https://www.bloomberg.com/news/articles/2020-10-21/epic-s-p-500-rally-is-powered-by-assets-you-can-t-see-or-touch (discussing this effect).

141. *See* Hamby, *supra* note 7 ("[C]orporate attorneys have stretched the parameters of [investor-state dispute settlement], allowing banks, hedge funds, and private equity firms to shatter the careful bargain that participating nations thought they had made . . . .").

142. ROBERT JARROW & ARKADEV CHATTERJEA, AN INTRODUCTION TO DERIVATIVE SECURITIES, FINANCIAL MARKETS, AND RISK MANAGEMENT 3 (2d ed. 2019); APANARD (PENNY) PRABHA ET AL., MILKEN INST., DERIVING THE ECONOMIC IMPACT OF DERIVATIVES: GROWTH THROUGH RISK MANAGEMENT 22 (2013), https://milkeninstitute.org/sites/default/files/reports-pdf/Derivatives-Report.pdf.

143. *See* Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶¶ 285, 312 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf; sources cited *supra* note 142; *see also* Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES (Dec. 11, 2011), https://www.nytimes.com/2010/12/12/business/12advantage.html.

144. In the case of a social media company that has no in-state physical assets or subsidiaries, tribunals would probably view the terms-of-use contracts and the related data flows as interlinked components of a services-based transaction, under the same analysis presented above. True, if we consider each such consumer contract in isolation, their potentially short duration and the lack of a close business relationship between the consumers and the company could suggest these contracts are closer to one-off sales. *Cf.* Horváth & Klinkmüller, *supra* note 60, at 585–86. The same may be true for social media companies' contracts with in-state firms that advertise on their platforms. *Cf. id.* at 586. But a social media company seeking to protect valuable data flows is likely to have more than one such contract in a state. In fact, given the network effects fueling social media, it may well have more in-state contracts than a data analytics provider. *See infra* note 302. As discussed, a tribunal is not likely to look to each contract in isolation but, rather, will consider a company's assets in the aggregate and can find an investment even if no single asset constitutes one on its own.

assets in the state, beyond just contracts and data flows. As mentioned, tribunals often aggregate multiple assets in their analysis of whether there is an investment, and they will do so even if the claimed harm relates mostly to one particular asset.[145] Thus a company with physical offices or plants in a state can parlay these assets into a finding that the aggregate of their activities in the state is an investment, since it is not controversial that traditional, brick-and-mortar assets are "investments."[146] The same likely goes for a company with an in-state subsidiary or other equity interest.[147] In sum, the chances of establishing jurisdiction only get better the more that an investor can point to in-state assets that tribunals have widely recognized as investments.

2. The Existence of a Territorial Nexus

The existence of an investment, however, is not the only requirement for jurisdiction. Treaties typically also require that the investment have a territorial nexus to the state the investor is suing. This requirement lacks uniformity across treaties, and it can arise in various places in them.[148] Indeed, tribunals

145. *See* Magyar Farming Co. Ltd. v. Hung., ICSID Case No. ARB/17/27, Award ¶¶ 274–75 (Nov. 13, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10914.pdf; *cf.* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 8, 183, 210 (July 2, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf (accepting jurisdiction where it was not disputed that the claimant had multiple in-state physical and other assets, even though the harm complained of related primarily to its goodwill).

146. *See* Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, ¶¶ 3.04, 3.08, 5.15, 7.16 (Feb. 21, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf (awarding damages for physical property owned by foreign company subsidiary); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 8 (3d ed. 2010) ("There can be no doubt that the transfer of physical property . . . constitute[s] foreign direct investment."); *cf.* Horváth & Klinkmüller, *supra* note 60, at 611 (arguing that "[v]iewed as an integrated undertaking," social media companies' operations "may qualify as a protected 'investment' . . . . But much will depend on the specific legal and operational framework that the social media company has put in place.").

147. *E.g.*, Cont'l Cas. Co. v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶ 86 (Feb. 22, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0227.pdf; Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. PA. J. INT'L L. 189, 194–95 (2019) ("Depending on the treaty, not only a controlling or majority shareholder, but even a minority shareholder may be able to bring a claim in investor-state arbitration." (footnotes omitted)); *see also* GAMI Inv., Inc. v. The Gov't of the United Mexican States, Final Award, ¶¶ 1, 5, 37 (Nov. 15, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf (accepting jurisdiction over a claim based on a 14.18% interest in company that had an unaffiliated 64.2% shareholder). A few treaties may limit minority shareholders' ability to bring claims. *See* Julian Arato, Kathleen Claussen, Jaemin Lee & Giovanni Zarra, *Reforming Shareholder Claims in ISDS* 10 & 10 n.50 (Acad. F. on ISDS Concept Paper No. 2019/9), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/arato-reforming-shareholder-claims-isds-af-9-2019.pdf (noting some treaties' use of a minimum of ten percent of the company's stock).

148. *Compare* U.S.-Argentina BIT, *supra* note 104, art. I(1) (defining investments as "in the territory" of the relevant state), *with* Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments, arts.

may infer that qualifying investments must have some territorial connection to the state—even if this requirement appears neither in the definition of investment in the treaty nor in each one of its substantive provisions.[149]

However, tribunals also take a holistic view of this requirement. Even if various activities connected to the investment occur outside the state, the investment still may have a sufficient nexus to the state when at least *some* activities occur within it.[150] In fact, although the territorial requirement is often signaled by language referring to an investment "in the territory" of the state, tribunals do not necessarily require that *any* assets be physically located in the state.[151] Still, tribunals will reject cases for lack of a territorial nexus if the investment is "wholly confined" to another state and only incidentally affected by actions of the host state.[152]

It is not entirely clear where some digital services, like analyzing data or providing a social media platform, are rendered. The various corporate actors involved, and the data those actors use, may be located in various different states, none of which is the state from which the data flows.[153] This may pose a challenge for claimants. Conceivably, by looking to the situs of performance—

1(1), 2, 3, 4, Ger.-Nepal, Oct. 20, 1986, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1378/download (not including any territory reference in its definition of investment but specifying that a state's obligations apply "in its territory" or similar formulations) [hereinafter Germany-Nepal BIT].

149. *Compare* Fedax N.V. v. The Republic of Venez., ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 41 (July 11, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf (inferring a territorial nexus requirement in the investment treaty between Venezuela and the Netherlands), *with* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, arts. 1(a), 3, 6, Neth.-Venez., Oct. 22, 1991, 1788 UNTS 45, 70–73 (not explicitly containing such a requirement).

150. *See* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak., ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 11–14, 136 (Aug. 6, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf (accepting jurisdiction over services contract involving mostly out-of-state performance when the investor made some expenditures in-state).

151. *See Fedax*, ICSID Case No. ARB/96/3 at ¶ 41(rejecting a strict requirement of physical location in the state in a case involving a sovereign-issued promissory note).

152. *E.g.*, Bayview Irrigation Dist. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, ¶¶ 91, 103–04, 124 (June 19, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C246/DC653_En.pdf (rejecting jurisdiction over claims against Mexico by U.S. nationals who alleged that Mexico's actions had changed the flow of the Rio Grande, on which their Texas-based businesses depended).

153. For instance, a data analytics company might process data in a state different from the states (1) in which the people the data is about are located and (2) in which the business that commissioned the data analytics service is located. FRONTIER ECON., *supra* note 34, at 11 (considering a hypothetical transaction in which this is the case). Note also that the use of cloud computing may require storage of the data in various states. *See* Chander & Lê, *supra* note 48, at 719, 728 (explaining that data localization interferes with cloud computing, on which various companies may rely for efficient storage).

as tribunals have in some services-contract cases[154]—a tribunal might find digital services "wholly confined" to the states where a company stores or processes data. On that view, the investment, in the aggregate, could lack connections to the host state, despite its being the origin of the data flows.[155]

However, cases involving contracts have tended to focus on the location of the effects of an investor's activity, rather than the location of the activity itself. For example, in *Alpha v. Ukraine*, the investment consisted of various financing and construction agreements. Although under these agreements the out-of-state investor's capital flowed to an entity also located outside of Ukraine, the tribunal found a sufficient territorial nexus by emphasizing the purpose of those capital contributions: the renovation of a hotel in Ukraine.[156] Analogously, a data analytics company, for example, seeks to create economic value via the effects of its marketing intelligence in the states of its clients. By *Alpha*'s logic, the focus should be on where the services provide value, not on where they are rendered.

Similarly, a long line of cases dealing with financial contracts situates the territorial nexus in the location of the benefit of the transaction. For example, in *Fedax v. Venezuela*, the tribunal accepted jurisdiction over a promissory note issued by Venezuela and held by a Dutch investor. Even though the investor's only connection to Venezuela was buying the note from a Venezuelan company, the note nonetheless represented credit, which yielded benefits in Venezuela.[157] Accordingly, some commentators have suggested the activities of a social media company or similar entity may be analogous. After all, the benefits of the digital service that the entity provides are felt in the state.[158]

This is quite true, but cases like *Fedax* are not that remarkable. They simply underscore tribunals' tendency to look to where the effects of investors' activity take place, as in *Alpha*. These cases are, however, particularly controversial because holders of financial instruments (e.g., foreign banks holding tradable

154. 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, ¶ 102 (Jan. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf (accepting jurisdiction but noting that "the position might have been different" had "[a] substantial and non-severable aspect of the overall service" not been provided in the state).

155. That is, a state might argue that a company's reliance on data flows is analogous to the *Bayview v. Mexico* investors' dependence on water that flowed from Mexico to support their investments occurring outside of Mexico. *See Bayview*, ICSID Case No. ARB(AF)/05/1 at ¶¶ 104, 113.

156. *E.g.*, Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶¶ 46–47, 51, 80–96, 114–16, 275–81 (Nov. 8, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C108/DC1751_En.pdf (describing the numerous transactions at issue, involving payment from the investor to an out-of-state entity that was to undertake the renovations).

157. Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 18, 39–41 (July 11, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf.

158. *See, e.g.*, Chaisse & Bauer, *supra* note 60, at 566–67; Ramesh, *supra* note 88; *see also* Horváth & Klinkmüller, *supra* note 60, at 598 (noting this argument); Mitchell & Hepburn, *supra* note 14, at 220 (same).

bonds)[159] might have acquired those instruments in out-of-state markets, obviating any link to the state other than the instrument itself.[160] This reveals a potentially powerful argument: a data analytics or social media company that enters into a contract with a customer in a particular state might have a much greater, direct connection to the state than an investor buying financial instruments on a secondary market. If the latter can invoke jurisdiction, the former should be able to as well.

Policy and history hint in the same direction. Various decisions in financial instruments cases have noted that the nature of the territorial link required depends on the nature of the investment.[161] They then proceed to adopt a pragmatic interpretation of the territoriality requirement that includes the investment at issue, even when the connection to the host state is indirect and mediated by a third party.[162] Such interpretations seem motived by the same policy and historical trajectory that drives expansive interpretations of "investment": a tendency to stretch international investment law to fit a wide range of forms of economic value, which evolve over time.[163] These cases suggest that, when an investment of a novel "nature" is at issue, tribunals will avoid restrictive interpretations of territoriality, so long as there is some colorable economic connection to the host state.

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159. *E.g.*, Abaclat v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 50, 380 (Aug. 4, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C95/DS10925_En.pdf; Andrea Carlevaris & Rocío Digón, *The Argentinian Bonds Saga: An International Investment Law Perspective*, *in* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA: PROBLEMS AND PROSPECTS 605, 610 (Attila Tanzi, Alessandra Asteriti, Rodrigo Polanco Lazo & Paolo Turrini eds., 2016) (noting that Italian banks were the central claimants in *Abaclat*).

160. *See, e.g.*, *Abaclat*, ICSID Case No. ARB/07/5 at ¶ 50 (explaining that the bonds at issue in the case were issued in international capital markets); *Abaclat*, ICSID Case No. ARB/07/5, Dissenting Opinion, ¶¶ 78, 119 (Prof. Abi-Saab), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C95/DC5313_En.pdf ("[T]he financial securities instruments . . . have been sold in international financial markets, outside Argentina . . . . There is no way then to say (and no legal basis for saying) that they are legally located in Argentina.").

161. *E.g.*, *Abaclat*, ICSID Case No. ARB/07/5 at ¶ 374; *Fedax*, ICSID Case No. ARB/96/3 at ¶ 41; *see also* Ambiente Ufficio S.p.A. v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 498, 502 (Feb. 8, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C340/DC2992_En.pdf (citing *Abaclat*, ICSID Case No. ARB/07/5 at ¶ 374) (emphasizing financial instrument's nature as an asset); Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶¶ 288–89, 291–92 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf (citing *Abaclat*, ICSID Case No. ARB/07/5 at ¶ 374) (same).

162. *E.g.*, *Abaclat*, ICSID Case No. ARB/07/5 at ¶¶ 376, 380 (finding that underwriters' role as direct source of capital to Argentina in bond issuance did not negate the territorial nexus); *see supra* note 160 and accompanying text.

163. *See supra* notes 133–43; *cf. Deutsche*, ICSID Case No. ARB/09/02 at ¶ 291 (relying on "[t]he reality of today's banking business" to support finding of territorial nexus between derivatives transaction and state).

Note, finally, that showing a territorial nexus may be easier when an investor has in-state physical assets,[164] and it is more straightforward where the investor has an in-state subsidiary.[165] Thus, such assets make establishing a territorial nexus easier, just as they make establishing an investment easier.[166]

C. *The Investor's Claims*

International investment law affords investors a bevy of claims. Like determining when data flows are likely to be a central asset at issue, unpacking which claims investors are likely to bring in "true" disputes over data flows—and how they will fare—requires looking to the realities of the digital economy and the current regulatory environment. This Section first examines claims based on the requirement that states give investors "fair and equitable treatment" (FET), the most important type of claim in modern international investment law. This Section then turns to other claims.

1. Fair and Equitable Treatment

It seems virtually certain that if an investor wins one of these disputes, its claim will be based on FET. This is the most flexible and most investor-friendly kind of claim.[167] It is also the "most common general absolute standard of treatment"[168] in treaties and the "most important (in theory and in practice) of those general principles" by which tribunals judge states' actions.[169]

Most FET provisions in treaties are laconic and broad. They state something like: "Investment shall at all times be accorded fair and equitable treatment . . . and shall in no case be accorded treatment less than that required by international law."[170] By contrast, some FET provisions in newer treaties may

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164. *See* SGS Société Générale de Surveillance S.A v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 101 (Jan. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf (noting that "a substantial office" in the state "organized" the services rendered).

165. *See* Gold Rsrv. Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 256, 258, 272 (Sept. 22, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf (rejecting state's argument that a holding company's indirect interest in an in-state subsidiary lacked a territorial nexus).

166. *See supra* text accompanying notes 145–47.

167. *See* BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 108 (noting that FET clauses "provide[] broad interpretive discretion to investment tribunals"); Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 J. INT'L ECON. L. 27, 33 (2016) ("Fair and equitable treatment is the most frequently invoked and most often successfully argued standard of investment protection.").

168. VANDEVELDE, *supra* note 131, at 163.

169. Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225, 268 (2015).

170. U.S.-Argentina BIT, *supra* note 104, art. II(2)(a). Note that some treaties may, instead, provide that FET is already included in this baseline, "minimum" level of treatment of foreigners "required by international law." VANDEVELDE, *supra* note 131, at 164 (citing North American Free

be detailed, providing that only acts within certain enumerated categories—e.g., a "fundamental breach of due process," "manifest arbitrariness," "targeted discrimination"—constitute violations of FET.[171] However, although such detailed provisions do curtail FET's investor-favoring vagueness, these enumerated categories remain palpably broad.[172]

The caselaw interpreting FET is similarly open-ended. Commentators have identified various, overlapping dimensions of FET that tribunals will look to—e.g., "reasonableness," "consistency," "nondiscrimination," "transparency."[173] In practice, though, the caselaw uses somewhat more specific tests to determine whether a state has breached its FET obligations.[174] Further, some, though not most, tribunals may balance the state's regulatory interests with the investor's interests by examining the "proportionality" of the state's measures.[175] FET may not inherently contain such a balancing requirement,[176] but legitimate state

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Trade Agreement, art. 1105(1), Dec. 17, 1992, 32 I.L.M. 605 (1993) (chs. 10–22)). The minimum level of treatment has in the past been viewed as less favorable to investors than FET as an independent standard. *See* Glamis Gold, Ltd. v. United States, Award, ¶¶ 627, 830 (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (holding that violating FET requires conduct that is "sufficiently egregious or shocking" so as to violate customary international law and rejecting investor's FET claim). Nowadays, though, the distinction between FET as an independent standard and the minimum level of treatment appears almost entirely immaterial in practice. *See Gold Rsrv. Inc.*, ICSID Case No. ARB(AF)/09/1 at ¶¶ 567, 615 (holding that the baseline standard has evolved to require a less demanding level of conduct and finding a breach of FET); *see also* VANDEVELDE, *supra* note 131, at 165 ("Most tribunals, however, have found no need to address the relationship between the two standards.").

171. CETA, *supra* note 120, art. 8.10(1).

172. *See* Henckels, *supra* note 167, at 36–40 (pointing out that some of these grounds, including "manifest arbitrariness," remain subject to varying interpretations).

173. Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43, 50–52 (2010) (identifying these dimensions); *see also* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 16–17, 31 (2013) (identifying various facets of FET, including "good faith," the investor's "legitimate expectations," and "acting for cause, [the avoidance of] arbitrary treatment").

174. *E.g.*, Saluka Invs. BV (Neth.) v. Czech, Partial Award, ¶ 309 (Perm. Ct. Arb. 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (interpreting FET to require (1) treatment consistent with investors' legitimate expectations, balanced with the state's right to regulate, and (2) the avoidance of "manifestly inconsistent, non-transparent, unreasonable . . . or discriminatory" conduct).

175. *E.g.*, Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Award, ¶¶ 166, 179 (Nov. 25, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf.

176. *See* GEBHARD BÜCHELER, PROPORTIONALITY IN INVESTOR-STATE ARBITRATION 198 (2015) ("[P]roportionality analysis is not as yet firmly established in arbitral jurisprudence related to FET . . . ."); Eric De Brabandere & Paula Baldini Miranda da Cruz, *The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective*, 89 NORDIC J. INT'L L. 471, 486 (2020) ("[A]bsent an explicit inclusion of a proportionality assessment in treaty provisions containing FET clauses, the application of a proportionality test *as a matter of international investment law* is not automatic."); *id.* at 491 ("[T]here is no general rule that [investment treaties] must be balanced as a requirement of law."); *infra* note 248. Of course, a tribunal might consider states' reasons for their conduct to determine, for instance, whether state conduct was arbitrary or unreasonable. The point is that *weighing* those interests, and their implementation, as a separate countervailing consideration may or may not be part of FET. *Cf.* Enron Corp. Ponderosa Assets,

interests are central when it comes to states' defenses. Thus, I defer an analysis of states' regulatory interests to the discussion of defenses in Section II.D.

The broadest FET test is whether the state has contravened the investor's "legitimate expectations."[177] This test is linked to states' obligations to be consistent, reasonable, and transparent.[178] For example, in *Occidental Petroleum v. Ecuador I*, a tribunal found liability when Ecuador abruptly decided that certain taxes the investor paid were no longer reimbursable.[179] However, an investor's expectations must be reasonable given its knowledge about the state. For example, in *Olguín v. Paraguay*, the investor knew of the unstable Paraguayan legal and financial system before he invested. Thus, when he lost his investment precisely due to legal and financial instabilities in Paraguay, this could not have contravened his reasonable expectations.[180]

When it comes to data flow regulation, the investor expectations test is investors' clearest pathway to a favorable outcome. To see how this plays out concretely, recall that many data laws provide that in-state companies cannot transfer data to an out-of-state company if the data will not receive an approved level of protection in the receiving state. Provisions on this issue are often open-ended, vary widely, and invite subtle judgments.

Because of the GDPR's similarity to other laws, the trajectory of its provisions in this area illustrates how FET claims might arise, even though, as noted, investors are unlikely to challenge the GDPR itself. There are two primary ways to engage in a transfer to another state under the GDPR. First, an in-state company (an exporter) can transfer personal data to an out-of-state company (an importer) in a state whose laws the European Commission has deemed provide adequate data protection.[181] So far, only fourteen jurisdictions have received this status.[182] The second, more widely applicable way to transfer data is by having the data importer itself ensure that the data receives protection that is

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L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 268 (May 22, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf (finding an FET breach "[e]ven assuming that the [state] was guided by the best of intentions").

177. *Saluka*, ¶ 302; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 330–31 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

178. *Saluka*, ¶ 309 (linking the investor's expectations to the state's obligation "not act in a way that is manifestly inconsistent, non-transparent, unreasonable . . . or discriminatory").

179. Occidental Expl. & Prod. Co. v. The Republic of Ecuador (*Occidental I*), ¶¶ 1–3, 32, 183–87, LCIA Case No. UN 3467 (July 21, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf. *But cf.* BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 112 (calling *Occidental I*'s understanding of legitimate expectations "an outlying view").

180. Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, ¶ 65 (July 26, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0587.pdf.

181. GDPR, *supra* note 23, arts. 44, 45(1), (3).

182. *Adequacy Decisions*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en.

"essentially equivalent" to protection in the European Union.[183] Data exporters and data importers often achieve this by including EU-approved language—called Standard Contractual Clauses (SCCs)—in contracts between them.[184]

The data flows between the European Union and the United States are the largest in the world.[185] However, the European Union does not currently recognize the United States as providing adequate data protection. Thus, U.S. companies must rely on the second way to transfer data noted above.[186] Importantly, at two earlier points in time, U.S.-EU transfers took place under special transfer frameworks negotiated between these two jurisdictions and approved by the European Commission, and, recently, the United States and the European Commission have agreed "in principle" to a third, similar framework, which they have not yet legally formalized.[187] As for the first framework, the Court of Justice of the European Union (CJEU) invalidated it in the 2015 *Schrems I* case.[188] After the United States and the European Union adopted the second framework, the CJEU invalidated it as well in the 2020 *Schrems II* decision.[189] By sharply cutting off this existing avenue for data transfer, *Schrems II* threw companies into ongoing legal uncertainty, leaving them to scramble to adopt uncertain alternatives for continued transfers or forgo transfers entirely. To say these new costs upset companies' expectations would be an understatement.[190]

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183. GDPR Supplementary Measures Recommendations, *supra* note 98, at 3, 9; *see* GDPR, *supra* note 23, art. 46(1)–(3). Note that companies could also transfer data across borders under enumerated "derogations" from the two primary ways of achieving such transfers, *see* GDPR, *supra* note 23, art. 49(1), but the applicability of such derogations is narrowly construed, Eur. Data Prot. Bd., *Guidelines 2/2018 on Derogations of Article 49 under Regulation 2016/679*, at 4 (May 25, 2018), https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

184. *E.g.*, Chander, *supra* note 52, at 774 ("[A] large fraction of data exports from the EU rely on SCCs.").

185. DANIEL S. HAMILTON & JOSEPH P. QUINLAN, THE TRANSATLANTIC ECONOMY 2018: ANNUAL SURVEY OF JOBS, TRADE AND INVESTMENT BETWEEN THE UNITED STATES AND EUROPE at v (2018), http://www.amchameu.eu/sites/default/files/publications/files/transatlantic_economy_report_2018.pdf.

186. *See* Chander, *supra* note 52, at 775.

187. CONG. RES. SERV., R46724, EU DATA TRANSFER REQUIREMENTS AND U.S. INTELLIGENCE LAWS: UNDERSTANDING *SCHREMS II* AND ITS IMPACT ON THE EU-U.S. PRIVACY SHIELD (2021) 3–4 (discussing the approval of the second framework, the "Privacy Shield"); MARTIN A. WEISS & KRISTIN ARCHICK, CONG. RES. SERV., R44257, U.S.-EU DATA PRIVACY: FROM SAFE HARBOR TO PRIVACY SHIELD 1, 5, 8–11 (2016) (discussing the negotiation and approval of the first framework, the "Safe Harbor," and negotiations regarding the Privacy Shield); *Fact Sheet: United States and European Commission Announce Trans-Atlantic Data Privacy Framework*, WHITE HOUSE (Mar. 25, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-trans-atlantic-data-privacy-framework (broadly outlining "[t]his deal in principle").

188. Case C-362/14, Schrems v. Data Prot. Comm'r (*Schrems I*), ECLI:EU:C:2015:650, ¶ 106 (Oct. 6, 2015).

189. Case C-311/18, Data Prot. Comm'r v. Facebook Ir. Ltd. (*Schrems II*), ECLI:EU:C:2020:559, ¶ 201 (July 16, 2020).

190. *E.g.*, Oliver Bevan, Daniel Mikkelsen, Henning Soller & Malin Strandell-Jansson, *International Personal-Data Transfer amid Regulatory Upheaval*, MCKINSEY & CO. (Mar. 31, 2021), https://

Today, many data importers and exporters have turned to SCCs to continue their transfers.[191] However, under extensive EU guidance, these companies must now undertake independent inquiries into whether the laws of the jurisdiction to which data is flowing threaten EU-grade data protection.[192] These inquires hinge on case-specific, sometimes philosophical questions such as whether that jurisdiction's laws requiring companies to disclose personal data to that jurisdiction's government are "necessary and proportionate measures in a democratic society."[193] Moreover, the guidance's recommendations of technical measures that can mitigate the risks created by the receiving state's laws may render data transfers impracticable—a concern compounded by EU authorities' subsequent interpretations of *Schrems II* in the context of widely used data analytics services.[194] There is thus a continuing risk of new regulatory developments that further block off the remaining avenues for data transfer.[195]

The *Schrems* saga shows that such transfer restrictions are open to varying interpretations that are hard to anticipate. After all, the CJEU repeatedly overturned frameworks deemed adequate by other EU organs, and EU authorities

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www.mckinsey.com/business-functions/risk-and-resilience/our-insights/international-personal-data-transfer-amid-regulatory-upheaval ("[*Schrems II*] has upended many companies' data-protection policies and practices concerning data transfers and has led to significant uncertainty.").

191. *See* Reagan Bachman, Nitin Gupta & David Manek, Ankura Cybersecurity & Data Priv., *11 Months After Schrems II - How Are Organizations Addressing Risk?*, JD SUPRA (June 1, 2021), https://www.jdsupra.com/legalnews/11-months-after-schrems-ii-how-are-6422287 ("SCCs are the most common mechanism for cross-border data transfers.").

192. *See* GDPR Supplementary Measures Recommendations, *supra* note 98, at 14 ("You will need to look into the characteristics of each of your transfers and determine whether the domestic legal order and/or practices in force of the country to which data is transferred . . . affect your transfers.").

193. *Id.* at 15.

194. *See id.* at 34–36 (explaining that, if the receiving state's "problematic legislation" applies, and the importer needs to read the data, transport encryption and data-at-rest encryption are insufficient protection); Christakis, *supra* note 51; *The Austrian Data Protection Authority Ground-Breaking Google Analytics Decision: Analysis and Key Takeaways*, ORRICK HERRINGTON & SUTCLIFFE LLP (Feb. 2, 2022), https://www.orrick.com/Insights/2022/02/The-Austrian-Data-Protection-Authority-Groundbreaking-Google-Analytics-Decision (explaining certain EU authorities' position that anonymizing IP addresses does not provide sufficient data protection in the context of websites' use of Google Analytics); Kirk J. Nahra et al., *The French Data Protection Authority Joins the Austrian Data Protection Authority in Ruling that the Use of Google Analytics Violates the GDPR*, WILMERHALE: WILMERHALE PRIV. & CYBERSECURITY L. (Feb. 16, 2022), https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20220216-the-french-data-protection-authority-joins-the-austrian-data-protection-authority-in-ruling-that-the-use-of-google-analytics-violates-the-gdpr (discussing certain EU authorities' understanding that the "widely used web analytics tool" Google Analytics is not compliant with *Schrems II*).

195. Caitlin Fennessy, *The Austrian Google Analytics Decision: The Race is On*, IAPP (Feb. 7, 2022), https://iapp.org/news/a/the-austrian-google-analytics-decision-the-race-is-on/ (describing a recent decision by the Austrian data protection authority that takes "a narrow view of what qualifies as adequate safeguards" as potentially "the start of something much bigger"); Tanguy Van Overstraeten, *Cross-Border Data Flows: A Necessary Part of Global Trade*, AMCHAM EU (June 11, 2021), http://www.amchameu.eu/blog/cross-border-data-flows-necessary-part-global-trade ("[R]estrictions of data flows are increasing.").

have made the practical implementation of transfer restrictions difficult or unclear. Naturally, similar laws in other states are subject to similar uncertainty. It is thus very plausible that, somewhere along the road, an investor's reasonable expectations about these laws could turn out to be opposed to what a state ultimately says the law is.

Besides open-endedness, other characteristics of data transfer restrictions support this conclusion. First, the global law of transfer restrictions is only in its inchoate stage, and it is likely to become increasingly stringent as it develops.[196] Depending on how suddenly or unexpectedly states ratchet up their requirements, companies may be entirely unprepared to comply with new legal or technical standards. Second, jurisdictions with GDPR-style laws may not follow EU guidance, despite expectations that they will.[197] They may instead go in different, varying directions. Indeed, EU authorities themselves have been known to diverge in their GDPR interpretations, illustrating this point.[198] Thus, while companies may interpret a jurisdiction's GDPR-style language as requiring the standards elaborated under the GDPR itself, a state could ultimately adopt different, novel requirements.[199] In short, whether a state follows EU guidance or not, if a state's interpretations of its law represent jarring, *Schrems*-like changes, companies will have compelling grounds to pursue expectation-based FET claims.

Moreover, not all transfer restriction provisions mirror the GDPR. For example, Kenya's data law contains transfer restrictions that resemble the GDPR to some extent. But, notably, a company can only transfer "sensitive personal data"—a category that the GDPR does not use—if it receives the consent of the

196. *See* Christakis, *supra* note 51; *supra* notes 194–95.

197. *See, e.g.*, Ian Jacobsberg & Matthew Davis, *International Data Transfers: What Are the 'Adequate Levels of Protection' Required by POPIA?*, TABACKS (Aug. 6, 2020), https://www.tabacks.com/news-and-insights/2020/8/international-data-transfers-what-are-the-adequate-levels-of-protection-required-by-popia (suggesting the *Schrems II* case as guidance in interpreting data transfer restrictions in South African law "in the absence of binding case law in South Africa"); Lucinde Rhoodie & Kara Meiring, *POPI and the Defense of Legitimate Interest*, CLIFFE DEKKER HOFMEYR (June 30, 2020), https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/popi-bumper-special-alert-30-june-POPI-and-the-defense-of-legitimate-interest.html (discussing the view that South Africa's data authority will interpret the term "legitimate interests" in South Africa's law in accordance with GDPR interpretations but also noting other possibilities).

198. *See* Zia Ilyichsha Maharaj, Karl Laureau, Jean Van Wyk & Calli Schroeder, *How Does GDPR Apply to Clinical Trial Sponsors Outside EEA? Views of EEA DPAs*, IAPP (Jan. 26, 2021), https://iapp.org/news/a/how-does-the-gdpr-apply-to-clinical-trial-sponsors-outside-the-eea-views-of-eea-dpas (setting out divergent interpretations on extraterritorial scope); Jennifer Bryant, *3 Years In, GDPR Highlights Privacy in Global Landscape*, IAPP (May 25, 2021), https://iapp.org/news/a/three-years-in-gdpr-highlights-privacy-in-global-landscape/ (relating a privacy professional's view that "supervisory authorities differ in their interpretations of the regulation").

199. *Cf.* Rhoodie & Meiring, *supra* note 197 (discussing the GDPR as one source, among multiple sources, that South Africa's data authority may consult in interpreting language in South Africa's data law).

person the data is about and implements "appropriate safeguards."[200] Kenyan regulators have promulgated regulations outlining the safeguards required for transfers in general. Yet these regulations lack specificity, create uncertain exceptions to the requirement of appropriate safeguards, and, depending on interpretation, are unclear as to the extent to which such exceptions apply to "sensitive personal data" transfers.[201] Regardless, Kenya's Data Commissioner has a statutory right to unilaterally block data transfers "to protect the rights and fundamental freedoms of data subjects."[202] This illustrates a third avenue for unpredictability: instead of (1) mirroring the uncertainty in EU guidance or (2) diverging from that guidance, states could *also* (3) interpret their own idiosyncratic requirements in an unpredictable manner. This too could provide strong grounds for an expectations-based FET claim.

Extraterritorial-scope provisions may have a similar effect. Generally, if an out-of-state company targets consumers in a state, that state's data law probably applies to it.[203] However, not all extraterritorial-scope provisions work this way. In fact, some laws (e.g., South Africa's) appear to exempt an out-of-state company from the law so long as it processes data outside the state.[204] Yet, like

200. DPA, *supra* note 26, § 49(1) (setting out the transfer restriction); *id.* § 2 (defining "sensitive personal data").

201. The Data Protection (General) Regulations, 2021, Legal Notice No. 263 (2021) KENYA GAZETTE SUPPLEMENT NO. 236 §§ 39–46. As to these uncertain exceptions, transfers of personal data may occur on the basis of necessity, for example. DPA, *supra* note 26, § 48(c). The basis of necessity includes several broad circumstances in which transfers are permissible. *Id.* (permitting, for example, transfers necessary "for any matter of public interest"). However, the regulations require—on top of these broad circumstances—that (a) the transfer be "strictly necessary" and (b) "there are no fundamental rights and freedoms of the data subject concerned that override the public interest necessitating the transfer." The Data Protection (General) Regulations, 2021, § 45(2). Aside from the vague language of (b), it is unclear whether (b) applies to any of the broad circumstances constituting necessity or only necessity based on "any matter of public interest." DPA, *supra* note 26, § 48(c). As to "sensitive personal data" transfers, one section of the regulations makes reference to the section of Kenya's data law governing out-of-state processing of "sensitive data," section 49(1); however, this section of the regulations appears to apply to transfers in general, not just "sensitive personal data" transfers. The Data Protection (General) Regulations, 2021, § 42 (addressing "data protection safeguards anticipated under section 49 (1) of the [data law] *and these Regulations*" (emphasis added)). The regulations also regard consent as an appropriate basis for transfers in general, in accordance with section 25(g) of Kenya's data law, which states that personal data will "not [be] transferred outside Kenya, unless there is proof of adequate data protection safeguards *or consent from the data subject*." DPA, *supra* note 26, § 25(g) (emphasis added); *see* The Data Protection (General) Regulations, 2021, § 40 (listing consent as a basis for transfer). Because of this use of consent as a broad exception to the presence of safeguards, and because the regulations are not clear as to the extent to which they set out requirements for "sensitive personal data" transfers, the regulations arguably suggest that consent is not just necessary, but may be sufficient, for transfers of sensitive personal data.

202. DPA, *supra* note 26, § 49(3).

203. *E.g.*, GDPR, *supra* note 23, art. 3(1)–(2) (extending to a company's data processing "in the context of the activities of an establishment" in the European Union and when it is related to the company's targeting of individuals in the European Union).

204. *See* POPIA, *supra* note 27, § 3 (applying to processing only if it is in South Africa or "makes use of automated or non-automated means in" South Africa).

data transfer restrictions, these provisions are often broad and open-ended.[205] They may even be ambiguous.[206] If an out-of-state company forms a textually justified expectation that it is exempt from the law—perhaps supported by practices under similar laws in other jurisdictions[207]—a sudden interpretation to the contrary might provide a basis for an FET claim, albeit a weaker basis.[208]

To be sure, none of this necessarily means investors will win. Their expectations must still be reasonable. Moreover, to show reasonableness, some tribunals have required that those expectations be based on specific representations by the state.[209] Virtually all tribunals note that specific representations can be implicit—i.e., based on the present state of the state's regulatory environment[210]—but some of them suggest that tribunals are most likely to consider implicit representations when the state creates a regulatory environment to encourage foreign investment (e.g., incentives for investment).[211] In the absence of

205. *See* GDPR Territorial Scope Guidelines, *supra* note 99, at 5 (noting that any interpretation of the GDPR's extraterritorial applicability must be undertaken "*in concreto*"); Andreas T. Kaltsounis, *Re-Examining the GDPR's Territorial Scope*, 37 COMPUT. & INTERNET L. 1, 4 (2020), https://www.bakerlaw.com/webfiles/Privacy/2020/Articles/Kaltsounis.pdf (observing that a "nuanced analysis" is needed when interpreting the GDPR's territorial scope).

206. For instance, Brazil's law states that it applies to data processing outside Brazil when "*the processing activity has as its objective* the offering or provision of goods or services or *processing of data of individuals located in Brazil's territory*." LGPD, *supra* note 26, art. 3(I) (my translation; emphasis added). A broad, commonsensical interpretation of the italicized text is that the law applies whenever an out-of-state entity processes the data of individuals in Brazil. A narrower interpretation would be that the law applies only when the out-of-state entity offers or provides the processing of data of individuals in Brazil—i.e., when such processing is provided as a service.

207. For instance, Mexican regulations have interpreted the extraterritorial scope of Mexico's data law to follow a similar logic. Reglamento de la Ley Federal de Protección de Datos Personales en Posesión de los Particulares, art. 4, Diario Oficial de la Federación [DOF] 21-12-2011 (Mex.) (exempting an out-of-state firm that does not use "means situated in" Mexico so long as it is not processing on behalf of a Mexican controller and Mexican law does not otherwise apply).

208. *See infra* text accompanying notes 266–68 (explaining the viability of states' defenses here).

209. *E.g.*, Crystallex Int'l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 547 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.

210. *E.g.*, Antaris GmbH v. Czech, PCA Case No. 2014-01, Award, ¶ 366 (May 2, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf; *see also* Andrew Larkin, Note, *Good Governance, Local Governments, and Legitimate Expectations: Accommodating Federalism in Investor-State Arbitration*, 49 N.Y.U. J. INT'L L. & POL. 499, 511 (2017) ("[M]any [tribunals] are permissive about what constitutes a specific representation.").

211. *See, e.g.*, 9REN Holding S.à.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award, ¶¶ 294–95 (May 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf (noting that regulation may count as a specific representation "where (as here) such a commitment is made for the purpose of inducing investment"). In this vein, some newer treaties may specifically permit a finding of an FET violation where a state "made a specific representation to an investor to induce a covered investment," CETA, *supra* note 120, art. 8.10(4), a basis for liability that seems to exclude, by implication, specific representations that do not seek to incentivize investment, *cf.* Henckels, *supra* note 167, at 38 (adopting that reading).

a government contract or a large multi-asset operation,[212] it is unlikely that a firm with interests in data flows would be in contact with government agencies such that it would receive an explicit representation of any kind from the government. Thus, implicit representations will probably be at issue, and transfer restriction provisions do not seem explicitly designed to attract foreign investment.[213] Thus, states have an argument that these laws cannot constitute a specific representation.

However, as others have pointed out, the fundamental logic driving the specific-representations theory is the logic of promissory estoppel: "the notion that statements or conduct of varying levels of specificity and legitimacy by a promisor can give rise to enforceable rights in a promise *when the promisor's conduct is foreseeably and reasonably relied on to the detriment of the promisee* . . . ."[214] It is doubtless reasonably foreseeable that out-of-state firms will form expectations based on such laws when investing. The laws are *aimed at* out-of-state firms.[215] And, as noted above, when states use language in their data laws that is imported from other jurisdictions, investors and their counsel will naturally form their expectations based on how that language has been interpreted in those other jurisdictions.[216] From this perspective, tribunals might find that, by importing language that the exporting jurisdiction has interpreted to mean *X*, a state implicitly gives investors a reasonable expectation that the language means *X*. A deviation from *X* might, therefore, contravene an implicit representation. But even if this argument does not persuade a tribunal, claims based on general changes to the regulatory framework still appear to be available under a specific-representations theory. In such claims, though, the investors' expectations may be given less weight in comparison to the state's interests,[217] discussed further below.

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212. *See supra* Section II.A.1. But a data law may require that firms register with the government. DPA, *supra* note 26, § 18.

213. They might paradoxically create foreign investment, though. *See infra* text accompanying note 235.

214. Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights*, UCLA L. REV. DISCOURSE (Feb. 28, 2018) (emphasis added) ("[P]rotection of specific-commitment-backed expectations . . . effectively allows investors and investments to apply the doctrine of estoppel against their host governments."); Larkin, *supra* note 210, at 510 (citing OKO Pankkii Ojy v. Rep. of Est., ICSID Case No. ARB/04/6, Award, ¶ 248 (Nov. 19, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0583.pdf; RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 145 (2d ed. 2012)).

215. *Cf.* Duncan Robinson, *EU Removes Carrot but Keeps Stick in Data Laws*, FIN. TIMES (Jan. 20, 2016), https://www.ft.com/content/9d774734-a4b1-11e5-a91e-162b86790c58 ("[T]he EU wants to set standards online, making its regulatory footprint as big as possible."). *See generally* BRADFORD, *supra* note 24, at 131–55.

216. *See supra* note 197.

217. *See* Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Award, ¶¶ 155, 165–66 (Nov. 25, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf (noting that "a specific representation is not always indispensable" but "might simply make a difference in

Here, policy concerns seem equipoise. The policy objectives underlying FET are the policy objectives of the investment regime itself:[218] e.g., promoting the rule of law[219] and providing a "stable framework for investment."[220] Digital assets, like other assets, are subject to states' laws, so these considerations seem to apply with equal force to them. Similarly, new uses of FET in the digital economy will also be subject to the extensive criticism FET has faced as a synecdoche for the whole investment regime. Most prominent has been the argument that FET insures investors against mere "regulatory change," overriding potentially beneficial state regulation,[221] an issue to which I return in Part III.

Finally, as noted, FET has various other aspects—for example, nondiscrimination and procedural due process. They are important but fall outside the scope of this Article because there is nothing peculiar to data regulation about, say, applying a data regulation discriminatorily to similarly situated investors.[222] It may well lead to a valid FET claim,[223] but it fails to raise the question whether data law provisions *themselves* breach FET. Thus, it does not implicate a "true" dispute. So too with utterly dramatic changes that go beyond the general uncertainty of data transfer restrictions or extraterritorial-scope provisions (e.g., an unannounced shift from GDPR-style laws to Russia-inspired data localiza-

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the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectations" and proceeding to balance the state's interests).

218. *See* VANDEVELDE, *supra* note 131, at 163 ("[FET] defines the nature of the relationship between the host state and covered investment.").

219. *Id.* at 166 ("[FET] instantiates the role of [bilateral investment treaties] in promoting the rule of law."); *see also* BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 112 (noting that FET is the "most important, albeit controversial, substantive guarantee in the modern investment treaty regime" and that proponents of FET believe it "embodies the rule of law in the investment treaty regime").

220. In construing the content of the FET obligation, tribunals have cited this stock phrase, which often appears in treaties' preambles. *E.g.*, U.S.-Argentina BIT, *supra* note 104, at pmbl.; Agreement Between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment, pmbl., Japan-Geor., Jan. 1, 2021, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6078/download; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 360 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf (inferring from the FET provision and preamble's language that "[FET] should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment").

221. Lise Johnson & Oleksandr Volkov, *State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law*, IISD (Jan. 6, 2014), http://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law; *see* BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 112.

222. *See* Vandevelde, *supra* note 173, at 52 (deriving the nondiscrimination facet of FET from the propositions that "[l]ike cases shall be treated in a like manner. . . . Further, the legal consequence arises with respect to persons regardless of their individual identity."). For discussion of alternative discrimination theories, *see infra* notes 233, 236 and accompanying text.

223. *See* Saluka Invs. BV v. Czech, Partial Award, ¶ 446 (Mar. 17, 2006) https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (explaining that a state must not treat investors discriminatorily).

tion).[224] Again, an FET claim is possible, but this applies to regulatory whipsawing in any area,[225] not just data.

2. Other Claims

Commentators have suggested many claims investors could bring on the same facts as FET claims.[226] But most of these claims seem unlikely to arise or, if they do, succeed. This is primarily because they have narrower requirements and implicate greater consideration of states' legitimate policy objectives than FET.

For example, most investment treaties contain prohibitions against uncompensated expropriation.[227] This need not be a direct taking but can be "indirect expropriation" by regulation.[228] But an indirect expropriation claim would require that a shift in data regulation cause a "substantial deprivation" of the value of data flow-related assets—a higher bar than a failure of FET.[229] More important, the policy furthered by the regulation is almost always relevant to uncompensated-expropriation claims.[230] Especially when it comes to GDPR-style laws, states can point to privacy, consumer protection, and national security objectives furthered by restrictions on use of personal data about their citizens as a

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224. *See supra* text accompanying notes 47–49, 92.

225. *E.g.*, SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, ¶¶ 462–63 (July 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10836.pdf (finding the state liable for a breach of FET when it "suddenly and unexpectedly" abolished regulations providing a stable tariff to clean energy investors and replaced them with regulations providing a lower, variable, return).

226. *See, e.g.*, Creach, *supra* note 6 (suggesting discrimination-based claims are viable); Mitchell & Hepburn, *supra* note 14, at 223–25 (suggesting claims based on FET and antidiscrimination obligations could conceivably be viable); Ramesh, *supra* note 88 (suggesting claims based on antidiscrimination and FET are viable); Zhang, *supra* note 16, at 11 (suggesting claims for discrimination, performance requirements, FET violations, and possibly indirect expropriation might be viable). *But cf.* Magnusson, *supra* note 13, at 11 (only analyzing FET).

227. BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 94 fig.4.1 (showing that 95% of treaties in a compilation of 1,602 treaties had such a provision).

228. *See id.* at 106; Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75, 90 (Stephan W. Schill ed., 2010) ("Indirect expropriation can also occur based on regulatory acts of the host state.").

229. BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 106, 108 (noting that investors may rely on FET where they cannot show a substantial deprivation); *see, e.g.*, Zhang, *supra* note 16, at 14 (suggesting data localization may amount to expropriation); Ramesh, *supra* note 88 (same).

230. Kingsbury & Schill, *supra* note 228, at 90–91 (observing that the "majority of tribunals" look to a state's regulatory interests under the "police power doctrine"). Some treaties in fact require consideration of state policy by including it in the criteria to which tribunals must look. Often, these criteria include the factors enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978): the "economic impact" on the investor, the investor's "investment-backed expectations," and the regulation's "character." *See* Henckels, *supra* note 167, at 40–43 (discussing this, as well as the police power doctrine's ability to justify state action in regulatory expropriation cases).

defense.[231] Although, as detailed below, invoking such interests is not an automatic win for a state, tribunals will almost certainly consider such interests legitimate.[232]

The same logic extends to other claims. For example, treaties generally prohibit discriminating among investors based on their nationality.[233] Additionally, under some treaties, an investor may sue a state for imposing "performance requirements" on a foreign investor as a condition to making, or maintaining, its investment (e.g., a requirement to buy products in-state).[234] In theory, hinderances on extracting data from a state could require a corporation to either build or buy in-state storage for its data, which may disproportionately disadvantage it relative to in-state entities (and thus have a discriminatory effect) or amount to a mandate to buy in-state products like data storage services (and thus resemble a performance requirement).[235]

However, as with expropriation, tribunals must weigh states' policy objectives under nondiscrimination provisions.[236] They also tend to do the same under anti-performance requirement provisions, especially if the measure at issue pushes investors toward, but does not technically *require*, payments to in-state entities.[237] Moreover, anti-performance requirement provisions are often lim-

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231. *See infra* note 246 and accompanying text.

232. *See infra* note 245.

233. This includes "national treatment" obligations, by which one state party to the treaty cannot treat investors of the other state party worse than domestic investors, and "most favored nation" obligations, by which one state party cannot treat investors of the other state party worse than investors from non-party states. BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 95. There is overlap between these obligations and other common treaty provisions, including FET. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 195 (2d ed. 2012) (noting, with respect to general antidiscrimination provisions in treaties, that "most of the practice dealing with discrimination focuses on nationality"); Vandevelde, *supra* note 173, at 104 (noting that the "practical significance" of FET's nondiscrimination aspect is limited to nationality discrimination).

234. VANDEVELDE, *supra* note 131, at 354.

235. *E.g.*, Alan McQuinn & Daniel Castro, *How Law Enforcement Should Access Data Across Borders* , INFO. TECH. & INNOVATION FOUND., July 2017, at 2, 14, http://www2.itif.org/2017-law-enforcement-data-borders.pdf; Zhang, *supra* note 16, at 11–13; Creach, *supra* note 6.

236. *See* Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 371 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf (explaining that a state's justification for discrimination will obviate a claim for lack of most-favored-nation treatment); DOLZER & SCHREUER, *supra* note 233, at 202–03 (explaining that applying national treatment provisions requires looking to whether discriminatory treatment is justified); VANDEVELDE, *supra* note 131, at 285 ("[T]he principle of nondiscrimination prohibits unreasonable discriminations. A discrimination is unreasonable if it is unrelated to a legitimate regulatory interest."). Indeed, those who have contemplated whether certain data transfer restrictions violate national treatment have had to engage at length with the ability of states' legitimate policy objectives to neutralize any potential violation. *See* Zhang & Mitchell, *supra* note 14, at 10–16 (extensively discussing how a state's regulatory objectives may justify data localization's differential treatment of foreign investors).

237. *E.g.*, Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 505–11 (Jan. 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0453.pdf (deciding that a requirement that half of a radio station's content be Ukraine-related

ited in scope and appear in only a few treaties.[238] However, this could be irrelevant if investors can use nondiscrimination provisions in treaties to borrow, and thus sue on, substantive provisions from other treaties to which states are parties. That is often possible.[239] In sum, investors may well pursue other claims besides FET, but they are less attractive or available and thus less likely.

D. *The State's Defenses*

By their nature as international obligations, investment treaties limit the actions states can permissibly take through their domestic law.[240] But the investment regime tempers the rights it grants to investors by looking to states' interests in various ways. Two are particularly relevant here: First, as noted, claims available to investors typically incorporate some consideration of a state's legitimate regulatory purposes. FET is often an exception to this, but not always. Second, some treaties have freestanding, general "exceptions" to states' obligations.

1. Legitimate State Purposes and Proportionality

This first kind of defense is probably the most flexible. In evaluating FET claims, some tribunals have engaged in an analysis of whether the limits on the investor's rights are "proportional" to a legitimate state objective.[241] Tribunals have accepted wide-ranging objectives as legitimate and proportionately implemented, including protecting a community's sacred sites,[242] stabilizing consumer electricity prices,[243] and avoiding instability in the state's financial system.[244]

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music did not violate a prohibition on performance requirements because (1) the requirement's cultural aims did not contravene the prohibition's trade-barrier-related purpose, and (2) such music did not necessarily have to be produced in Ukraine).

238. VANDEVELDE, *supra* note 131, at 354; *see, e.g.*, Acuerdo entre el Gobierno de la República del Perú y el Gobierno de la República de El Salvador para la promoción y protección recíproca de las inversiones, art. 5, Peru-El Sal., June 13, 1996, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1135/download (limiting anti-performance requirement obligations to a broad yet closed list of actions taken once investments are already made in the states' territories, subject to various exceptions for legitimate state interests).

239. Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873, 882 (2017) ("[I]t it is almost always assumed that the importation of substantive standards of treatment [from other treaties] . . . is permitted by the MFN clause.").

240. *See* VCLT, *supra* note 68, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

241. *E.g.*, Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Award, ¶ 179 (Nov. 25, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf ("The test for proportionality . . . requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.").

242. Glamis Gold, Ltd. v. United States, Award, ¶¶ 779, 781, 805 (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf.

243. Antaris GmbH v. Czech, PCA Case No. 2014-01, Award, ¶ 444 (May 2, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf.

Data regulation—especially GDPR-style regulation—seeks to further similarly legitimate state objectives.[245] These include protecting consumers from invasions of their privacy and the illicit exploitation of their data, reducing negative externalities of data processing, and protecting sensitive data or data with national-security implications from other states' espionage.[246] If states can argue that their regulatory actions proportionately further these objectives, they may have a viable defense, regardless of whatever investor expectations they may have created.[247] However, not all tribunals adopt a proportionality approach to FET. Most in fact do not.[248] And even assuming a tribunal does adopt a proportionality analysis, states are likely to face several problems.

Proportionality requires, first, a regulation that is suitable to a legitimate purpose. It further requires the regulation to be both (1) necessary to achieve that legitimate purpose and (2) not excessive in relation to the purpose and the interests it impinges on.[249] Data transfer restrictions raise questions on all these

244. Marfin Inv. Grp. Holdings S.A. v. Republic of Cyprus, ICSID Case No. ARB/13/27, Award, ¶¶ 907, 1228 (July 26, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10149.pdf.

245. *See* Kingsbury & Schill, *supra* note 228, at 86 ("[M]ost ordinary public purposes of state action will be legitimate purposes . . . .").

246. *See, e.g.*, ARINDRAJIT BASU, ELONNAI HICKOK & ADITYA SINGH CHAWLA, THE LOCALISATION GAMBIT: UNPACKING POLICY MEASURES FOR SOVEREIGN CONTROL OF DATA IN INDIA 37 (Pranav M. Bidare, Vipul Kharbanda & Amber Sinha eds., 2019), https://cis-india.org/internet-governance/resources/the-localisation-gambit.pdf/view (discussing the concern that data about Indian citizens that is "of heightened national interest" may be transferred to states whose laws permit surveillance of that data); Svetlana Yakovleva & Kristina Irion, *Pitching Trade Against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade*, 10 INT'L DATA PRIV. L. 201, 207 (2020) (addressing privacy, consumer protection, and reduction of externalities); Svetlana Yakovleva, *Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy*, 74 U. MIAMI L. REV. 416, 505–06 (2020) (noting that the *Schrems I* ruling "embodied the European discontent with U.S. foreign surveillance practices").

247. *Cf. Antaris GmbH*, PCA Case No. 2014-01 at ¶ 445 (holding that a measure taxing what a state viewed as windfall profits generated by its own prior regulations was proportionate).

248. *See* Valentina Vadi, *Crisis, Continuity, and Change in International Investment Law and Arbitration*, 42 MICH. J. INT'L L. 321, 332 (2021) ("Most tribunals do not employ proportionality type of reasoning for evaluating the breach of [FET]."); *see also* Kate Mitchell, *Philip Morris v Uruguay: An Affirmation of 'Police Powers' and 'Regulatory Power in the Public Interest' in International Investment Law*, EJIL:TALK! (July 28, 2016), https://www.ejiltalk.org/philip-morris-v-uruguay-an-affirmation-of-police-powers-and-regulatory-power-in-the-public-interest-in-international-investment-law ("[C]onsideration of the extent to which the FET standard limits States' regulatory powers to enact laws in pursuit of public interest objectives is less developed and less consistent [than consideration of police power in expropriation analyses]."). Note, however, that the recent Comprehensive Economic and Trade Agreement between Canada and the European Union explicitly affirms the "right to regulate" to advance "consumer protection." CETA, *supra* note 120, art. 8.9(1). Similarly, the investment treaty between Singapore and the European Union, which is not yet in force at the time of this writing, affirms the "right to regulate" to advance "social or consumer protection privacy and data protection [sic]." Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part, art. 2.2(1), EU-Sing., Oct. 15, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download. Thus, the text of such treaties would prompt tribunals to consider those interests.

249. Kingsbury & Schill, *supra* note 228, at 86–88.

fronts. Commentators on data localization and similar practices have shown that such measures either fail to advance their purported objectives or actively hamper those objectives.[250] This casts doubt on whether they are suitable, let alone necessary or not excessive.[251] For example, transfer restrictions work against privacy interests by preventing companies from splitting up data and locating it across various jurisdictions, a practice that makes data less vulnerable to unauthorized intrusion.[252] Similarly, transfer restrictions do little to protect sensitive data from other governments' espionage, because a government can still spy on data without having that data in its jurisdiction.[253]

True, tribunals may not require that the regulation be the most effective way to meet the state's objective.[254] This means that states can still argue that some such measures are, loosely speaking, suitable and necessary because they further state objectives to some extent. But such measures may still be excessive. They have a minimal—if not counterproductive—relationship to their objectives yet place a significant burden on cross-border transfers, often rising to the level of disincentivizing them entirely.[255] When the burden on investors so thoroughly eclipses the benefit to the state, the state may be liable under a proportionality analysis.[256]

For a specific example, consider technical measures mandated for cross-border transfer. Depending on the regulatory situation in the receiving state, current EU guidance categorically prevents in-state companies from giving out-of-state companies the key to decrypt data that is encrypted for security.[257] This

250. The ineffectiveness of restrictions on data flows in achieving their various stated goals is widely appreciated. For helpful analyses, see Chander & Lê, *supra* note 48, at 714–35; Chander, *supra* note 52, at 778–84; Erica Fraser, *Data Localization and the Balkanisation of the Internet*, 13 SCRIPTED 359, 363–65, 367–68 (2016); Joshua P. Meltzer & Peter Lovelock, *Regulating for a Digital Economy: Understanding the Importance of Cross-Border Data Flows in Asia* v–viii (Glob. Econ. & Dev. Working Paper No. 113, 2018), https://www.brookings.edu/wp-content/uploads/2018/03/digital-economy_meltzer_lovelock_web.pdf.

251. *See* Kingsbury & Schill, *supra* note 228, at 86 ("[O]nly very few measures will not [be deemed to pursue a legitimate objective suitably], as good faith actions by governments will *usually* not involve the use of means that are wholly ineffective in pursuing the stated purpose." (emphasis added)).

252. *E.g.*, Chander & Lê, *supra* note 48, at 719; Fraser, *supra* note 250, at 363.

253. *E.g.*, Chander & Lê, *supra* note 48, at 715–16; Fraser, *supra* note 250, at 364–65.

254. *See* Glamis Gold, Ltd. v. United States, Award, ¶ 805 (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (requiring only that the government "had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy").

255. *See supra* notes 51–52.

256. *See* Total S.A. v. Argentina, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 333 (Dec. 27, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0868.pdf (finding that the state's decision to set unprofitably low returns for energy utilities to be disproportionate, despite the state's interests, given the significant negative impact on investors in a high-fixed-cost industry).

257. *See* GDPR Supplementary Measures Recommendations, *supra* note 98, at 34–36 (prohibiting this for both cloud service and remote business access when they require "data in the clear" and the power granted to public authorities in the receiving state "goes beyond what is necessary and proportionate in a democratic society").

obviates a commonly used data transfer method and could even prevent certain companies (e.g., data analytics companies) from performing the services they offer.[258] This seems unsuitable, unnecessary, and excessive. The European Union's stated purpose is to mitigate the risk of mandatory requests for data by the government in the receiving state, which the European Union may regard as a disproportionate exercise of governmental power.[259] But, elsewhere, the guidance itself notes that this risk will vary between companies and industries.[260] Therefore, a one-size-fits-all approach is inconsistent with the guidance's own acknowledgement that the variety of economic activity covered and the cross-jurisdictional considerations involved require a holistic analysis.[261] It also appears to go beyond what is necessary to mitigate the relatively specific risk of espionage. As Theodore Christakis noted with respect to earlier, similar guidance, it is "incompatible with the respect of the principle of proportionality."[262]

Moreover, as noted, proportionality requires that the regulation have a legitimate purpose. Favoring local businesses at the expense of foreign investors—i.e., protectionism—is not a permissible objective.[263] One prevalent view of data regulations (especially transfer restrictions) holds that they are often a pretext for insulating in-state businesses from international competition.[264] To the ex-

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258. *See* Sarah Pearce, & Ashley Webber, *EDPB Publishes Version 2 of the Supplemental Measures for International Transfers*, PAUL HASTINGS (June 22, 2021), https://www.paulhastings.com/insights/client-alerts/edpb-publishes-version-2-of-the-supplemental-measures-for-international (explaining that, under the final guidance, this means transfers effectively cannot occur if access to decrypted data is required); Christakis, *supra* note 51.

259. *See* Case C-311/18, Data Prot. Comm'r v. Facebook Ir. Ltd. (*Schrems II*), ECLI:EU:C:2020:559, ¶¶ 179–201 (July 16, 2020) (explaining that U.S. surveillance measures that grant the government access to data about EU persons stored in the United States are inconsistent with EU law and therefore invalidate an existing framework for EU-to-U.S. data transfers); GDPR Supplementary Measures Recommendations, *supra* note 98, at 8 (noting that this present EU guidance was promulgated to define requirements set out by the *Schrems II* decision).

260. *See id.* at 15, 19 (noting that the "[s]ector in which the transfer occurs" is relevant and likewise noting that whether the importer has experienced "prior instances of requests for access received from public authorities in the third country" is relevant, though not dispositive).

261. *See id.* at 14–17 (explaining that an analysis of the receiving state's law, along with various factors—e.g., types of entities involved, the data's encryption or pseudonymization—is required).

262. Christakis, *supra* note 51.

263. *See* SD Myers, Inc. v. Government of Canada, Partial Award, ¶¶ 251, 255–56, 269 (Nov. 13, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (finding that the state breached its nondiscrimination obligations by taking actions with protectionist motives and effects and, accordingly, breached its FET obligations as well).

264. This is also a widely appreciated feature of data transfer restrictions. *See, e.g.*, Chander & Lê, *supra* note 48, at 721–22; Fraser, *supra* note 250, at 367–68; Matthew Newton, *Russian Data Localization Laws: Enriching "Security" & the Economy*, HENRY M. JACKSON SCH. INT'L STUD. (Feb. 28, 2018), https://jsis.washington.edu/news/russian-data-localization-enriching-security-economy (discussing the protectionist motives behind, or results of, Russia data regulation); Meltzer & Lovelock, *supra* note 250, at 23; *see supra* note 235. Data transfer restrictions sometimes advance even less savory goals, like domestic surveillance and political oppression, which states seem unlikely to cite as motives. *See* Jennifer Daskal, *Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues*, 8 J. NAT'L SECURITY L. & POL'Y 473, 473 (2016); *see also* Brandt

tent this motive underpins a state's actions, a tribunal is unlikely to credit the state's purpose as legitimate.[265]

By contrast, a proportionality analysis would seem to nullify challenges to extraterritorial-scope provisions. As noted above, such provisions could come under fire if an out-of-state company that receives data flows from in-state entities reasonably believes it is not subject to a data law, but a state suddenly determines that it is.[266] Unlike data transfer restrictions, extraterritorial-scope provisions do not *directly* hinder transfers. Rather, they merely subject the company to the normal costs that any company must bear under the state's data law (e.g., compliance costs, the risks of significant fines for noncompliance). True, those costs could cause the company to cease its transfers from that jurisdiction.[267] But if a company (e.g., a social media company) is receiving benefits from providing services in a jurisdiction, it seems both necessary and non-excessive that it would be subject to that jurisdiction's laws. This challenge is weak because it disputes not the law itself, but the unexpected application of the law in circumstances where that application is otherwise foreseeable.[268]

2. Treaty Exceptions

The second way states can defend themselves, through exceptions to their obligations, may be similarly problematic. As an initial matter, not all treaties have such exceptions, and these exceptions may not apply to all of the obligations that states have under them.[269] One of most common exceptions in treaties allows states to breach their obligations if necessary to protect their "essential security interests."[270] For example, some investment tribunals found that Argentina's turn-of-the-century financial crisis—involving a liquidity crunch, a steep drop in gross domestic product, a possible run on the banks, and wide-

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& Sherman, *supra* note 92; Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 753 (2016); Adrian Shahbaz, Allie Funk & Andrea Hackl, *User Privacy or Cyber Sovereignty?*, FREEDOM HOUSE (2020), https://freedomhouse.org/report/special-report/2020/user-privacy-or-cyber-sovereignty.

265. *Cf.* ROLAND KLÄGER, FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW 207 (2011) (noting, in the context of FET's nondiscrimination facet, that a "clearly protectionist intent" is unlikely to justify discriminatory conduct).

266. *See supra* text accompanying notes 203-09.

267. *See supra* note 100.

268. In a well-known case dealing with a state court's personal jurisdiction over out-of-state defendants, the United States Supreme Court set out this common-sense proposition: "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations . . . ." Int'l Shoe Co. v. Wash., 326 U.S. 310, 319 (1945).

269. *See, e.g.*, Kenneth J. Vandevelde, *Rebalancing Through Exceptions*, 17 LEWIS & CLARK L. REV. 449, 449–51 (2013); Germany-Nepal BIT, *supra* note 148 (containing no general exceptions).

270. U.S.-Argentina BIT, *supra* note 104, art. XI; *see also* Japan-Peru BIT, *supra* note 54, art. 19(d) (allocating the decision of what is "necessary" to the state).

spread poverty and social unrest "approach[ing] anarchy"—constituted a threat to Argentina's essential security, satisfying this defense.[271] By comparison, the national security dimensions of data regulation (e.g., general counterespionage) may be too "diffuse" to represent a similarly overwhelming threat.[272] Additionally, despite the powerful rhetorical resonance of "national security," the measures must be necessary and, if the treaty allocates the determination of what is necessary to the state, the state must make that determination in good faith.[273] As noted, commentators have widely shown that data regulations may not in fact further national security goals.[274] Combined with transfer restrictions' protectionist tinge, this leaves states exposed to the argument that the measures are unnecessary and that their belief to the contrary is not in good faith.

Treaties also contain various other exceptions, though less frequently. Among the relevant state interests that exceptions may reference are "public order," "human . . . life or health," "prevention of deceptive and fraudulent practices," and even the privacy of personal data specifically.[275] The protection of data in order to respect consumer privacy and prevent its illicit exploitation may fall into some of the above categories. At the very least, it will fall into the last one.

But if states' invocation of these interests would already persuade the tribunal under a proportionality analysis, then these exceptions are superfluous. Conversely, if states' proportionality arguments are unpersuasive, or if the tribunal forgoes a proportionality analysis, it is unclear that considering these interests as defenses is materially different from considering them as part of the FET analysis itself. Indeed, such defenses mirror the FET proportionality analysis in various respects. For example, these exceptions require that state action based on these interests be "necessary" and not be a "disguised restriction" on cross-border investment—i.e., a protectionist measure.[276] Yet the more practical objection to the relevance of such exceptions is how rare they are. The overwhelming majority of treaties do not feature them.[277] Regardless, investors'

271. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 229, 232–35 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

272. Mitchell & Hepburn, *supra* note 14, at 227.

273. *See* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1066–67 (2020) (citing VCLT, *supra* note 68, arts. 26, 31(1)).

274. *See supra* notes 250, 253 and accompanying text.

275. *E.g.*, Japan-Peru BIT, *supra* note 54, art. 19(a)–(c). Andrew D. Mitchell and Jarrod Hepburn report that "only a few" investment treaties incorporate Article XIV(c)(ii) of the General Agreement on Trade in Services, the source of this "privacy" exception. Mitchell & Hepburn, *supra* note 14, at 226 & 226 n.192. For a discussion of the potential applicability of exceptions for state regulation advancing "public morals," see Zhang & Mitchell, *supra* note 14, at 14–16.

276. Japan-Peru BIT, *supra* note 54, art. 19(a)–(c).

277. Mitchell & Hepburn, *supra* note 14, at 225–26; *see also* Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties* 4 (Ottawa Fac. of L., Working Paper No. 2018-22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237053

counsel will inevitably be skilled at structuring cross-border assets and disputes about them to avoid an unfavorable treaty.[278]

As a final note, customary international law also may permit states to breach treaty obligations under certain exigent circumstances.[279] But the relevant standards are probably too stringent for most data regulation to meet them.[280] Other forms of customary-international-law deference to state interests will simply suffuse the proportionality analysis discussed above.[281]

III. REGULATORY ALIGNMENT BY DISAGGREGATING DATA FROM CAPITAL

The upshot of the previous Part is that, in the disputes over data flows we are likely to see, investors will have a strong—though by no means incontestable—basis in current law for their claims. This Part turns to the normative implications of such suits.

A. *The Likely Effects of True Data-Flow Disputes*

International investment law is an extraordinarily contested area of law. A discussion of the ongoing debate about its merits is beyond this Article's

(estimating that about 3.5% of bilateral investment treaties feature a "general public policy exceptions" provision).

278. *See* Chaisse, *supra* note 169, at 228 (explaining that investors may structure their assets so that they can avail themselves of an investment treaty, if one was previously unavailable to them, or of a more favorable treaty, if a less favorable one was previously available); *cf.* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 154 (2019) ("Powerful holders of global capital with the help of their lawyers have . . . concocted their own world of law, stitched together from different domestic legal systems with international or bilateral treaty law thrown into the mix.").

279. *See* DOLZER & SCHREUER, *supra* note 233, at 184 (discussing relevant customary grounds, including necessity, force majeure, and distress). Necessity requires that a state's action be "the only way for the State to safeguard an essential interest against a grave and imminent peril." G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 25 (Jan. 28, 2002). Necessity is the customary ground that states seem likeliest to invoke in defending data-regulatory measures. *Cf.* Mitchell & Hepburn, *supra* note 14, at 228 (citing this defense); Zhang, *supra* note 16, at 18 (same). Other customary grounds, such as force majeure or distress, seem to require unforeseeable or exigent circumstances to an even greater extent than necessity, making them accordingly less relevant. *See* G.A. Res. 56/83, *supra*, arts. 23–24.

280. Mitchell & Hepburn, *supra* note 14, at 228–29 (noting that the customary defense of necessity is "intended only for extreme cases"); Zhang, *supra* note 16, at 18–19 (making similar observations). Generally applicable, non-emergency data regulation—what I analyze here—seems unlikely to meet the high bar that commentators have found necessity to be.

281. Specifically, the customary doctrine of police power, *see supra* notes 230, 248, involves considerations that are very similar to those employed in the FET proportionality analysis, *see* Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 291, 307, 388, 398–99 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf (centering its analyses of both the state's police power and FET proportionality on the state's interest in public health); *see also* Mitchell, *supra* note 248 (explaining that the police power doctrine and the proportionality analysis are similar but noting that the *Philip Morris v. Uruguay* decision was careful not to collapse them).

scope.[282] However, some of the criticisms raised against it, and some of the defenses adduced in its favor, can help us understand the probable effects of the coming wave of data flow disputes.

Specifically, these disputes can be expected to have two primary negative effects on states' regulation of the digital economy. First, they could make states less likely to make beneficial changes to their data regulations that would advance their privacy, consumer protection, externality reduction, and national security objectives. Although it is hard to know empirically whether international investment law has an inhibiting effect on state regulation,[283] this argument has patent intuitive appeal.[284] States will probably be more conservative if they believe tightening protections for data flowing to other states may put them on the hook for untold sums. Even an ultimately unsuccessful international-investment-law suit might have this effect.[285]

The second effect is similar but would take place at the international level. In recent years, states have begun to conclude new international agreements (which I will call "digital-economy treaties") that, among other things, prevent states from restricting outbound data flows to other parties to these agreements, subject to certain exceptions.[286] One way of thinking about these digital-economy treaties is that they instantiate a form of the FET proportionality analysis discussed above, albeit in a different, non-investment context. Applying to

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282. For an analysis of some of the arguments made against current international investment law, see BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 233–60. *See also* AISBETT ET AL., *supra* note 11, at 28–34 (summarizing critiques).

283. For an inquiry into various empirical difficulties, see BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 238–44.

284. *See* AISBETT ET AL., *supra* note 11, at 28, 46.

285. *See* Valentina S. Vadi, *Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law*, 48 STAN. J INT'L L. 93, 97 (2012) (noting a possible chilling effect on specific regulation); *see also* PISTOR, *supra* note 278, at 142 (discussing substantial litigation expenses involved in an investment suit against Canada, "which may have persuaded governments with fewer resources to settle the case early," despite the fact that Canada ultimately won).

286. *See, e.g.*, Agreement Concerning Digital Trade, art. 11, Japan-U.S., Oct. 7, 2019, Office of the U.S. Trade Representative, https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf [hereinafter USJDTA]. These agreements are often part of larger, comprehensive agreements. *See* Agreement Between the United States of America, the United Mexican States, and Canada, ch. 19, Nov. 30, 2018, Office of the U.S. Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (existing in a separate chapter entitled "Digital Trade"); Comprehensive and Progressive Agreement for Trans-Pacific Partnership, ch. 14, Mar. 8, 2018, N.Z. Ministry of Foreign Affs. & Trade, https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources (existing in a separate chapter entitled "Electronic Commerce") [hereinafter CPTPP]. States that are less sanguine about liberalizing data flows have broadened the exceptions to such prohibitions in the treaties they have signed. *See* Fisher & Streinz, *supra* note 36, at 928 & 928 n.449 (discussing China's accession to the Regional Comprehensive Economic Partnership, which is more lenient in this respect).

all data flows—not just those in which investors have an interest—these treaties let states pursue data regulation for legitimate purposes but prohibit the discriminatory favoring of local industry and require means not "greater than are necessary" to meet the state's objectives.[287] By, on the one hand, accounting for states' regulatory interests and, on the other, seeking to avoid hampering international economic activity and cross-border competition, digital-economy treaties may be a valuable way to further balanced global data policy.[288]

Yet investors' use of international investment law to pursue data flow-based claims against states could discourage states from entering into such new treaties. If international investment law already prevents states from restricting data flows for protectionist reasons or in disproportionate ways,[289] entering into *yet another* treaty that does the same may have little practical effect. Recall, moreover, that international-investment-law claims may not always incorporate a proportionality analysis, and that tribunals, historically, have tended to emphasize the investment regime's goals of promoting and protecting investment.[290] If the standard under international investment law leaves states with *less* regulatory leeway than the standard under these new digital-economy treaties, then the latter are not only redundant; their guarantees of some regulatory freedom may be practically useless.

Yet, by the same token, data flow disputes could have a positive effect by acting as a catalyzing force in international law. Consider protectionism. Although policymakers have sometimes sought to use data laws to stimulate domestic industry by putting up barriers to international competitors,[291] the emerging treaty practice, as shown above, and the weight of the commentary on the

287. USJDTA, *supra* note 286, art. 11(2)(b); *see also* CPTPP, *supra* note 286, art. 14.11 (prohibiting "restrictions on transfers of information greater than are required to achieve the objective").

288. *Cf.* Thomas Streinz, *Digital Megaregulation Continued: The Regulation of Cross-Border Data Flows in International Economic Law*, JAPAN SPOTLIGHT (Jul./Aug. 2020), https://www.jef.or.jp/journal/pdf/232nd_Cover_Story_11.pdf ("The [Trans-Pacific Partnership, which was ultimately concluded as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership] created a new template of rules for the digital economy.").

289. *See supra* text accompanying notes 249–65.

290. *See supra* text accompanying notes 133–43. A later-in-time treaty between the same parties supersedes incompatible provisions in earlier treaties on the same subject matter. VCLT, *supra* note 68, art. 30. But even assuming all states with investment agreements between them also concluded digital-economy treaties (far from the current reality), it is not clear FET (1) is necessarily incompatible with digital-economy treaties' regulatory leeway or (2) even relates to the same subject matter as digital-economy treaties, which are not investment centered. *See supra* text accompanying notes 286–87.

291. *See supra* notes 235, 264 and accompanying text; *cf.* FRANCES G. BURWELL & KENNETH PROPP, ATL. COUNCIL, THE EUROPEAN UNION AND THE SEARCH FOR DIGITAL SOVEREIGNTY: BUILDING "FORTRESS EUROPE" OR PREPARING FOR A NEW WORLD? 2 (2020), https://www.atlanticcouncil.org/wp-content/uploads/2020/06/The-European-Union-and-the-Search-for-Digital-Sovereignty-Building-Fortress-Europe-or-Preparing-for-a-New-World.pdf ("At the heart of all these proposals [to strengthen "digital sovereignty" in the European Union] was a desire to strengthen EU competitiveness vis-à-vis dominant players in the digital space . . . while ensuring that the rights of EU citizens are protected.").

issue do not accept protectionism as a legitimate objective.[292] International investment law can be effective in rooting out state measures adopted for protectionist reasons.[293] But while the investment regime regulates many states, far fewer states are parties to digital-economy treaties. Because the investment regime's demands are similar to those of digital-economy treaties, international investment law can bring state practice into line with emerging international norms.

Put otherwise, international investment law's wider influence can help solidify the policies new digital-economy treaties pursue. Perhaps it would, furthermore, provide a set of assumptions about permissible state action on which states can later build in new multilateral agreements. Some digital-economy agreements in fact seem to invite such a cross-regime interplay.[294] The challenge in responding to data-flow disputes, then, will be to ensure international investment law can play this positive, generative role without chilling beneficial state regulatory action at the domestic or international levels.

B. *The Conflation of Data and Capital*

The pitfalls of data flow disputes identified above result, at least in part, from the reality that international investment law does not just narrowly regulate investment. In theory, a data-flow dispute only arises in the concrete context of an investor with interests in data flows that the state has restricted. But, as noted above, the threat or reality of an international-investment-law suit may superintend how a state chooses to regulate data at a domestic level and what commitments it chooses to make at an international level as well.[295] This is perhaps inevitable to some extent. For better or worse, the groundwork of the investment regime is engineered to "bind [states] to the mast" of the rule of law in furtherance of economically liberal principles and, perhaps, even liberal de-

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292. *E.g.*, Meltzer & Lovelock, *supra* note 250, at 23 (recommending that countries "avoid[] narrow protectionist responses such as data localization"); Mitchell & Hepburn, *supra* note 14, at 186 (criticizing the potential protectionist motives underlying data transfer restrictions); Mishra, *supra* note 48, at 345–46 (explaining that the protectionist effects of data localization reduce economic efficiency in various ways); Nithin Coca, *China's Digital Protectionism Puts the Future of the Global Internet at Risk*, WASH. POST (Feb. 25, 2019), https://www.washingtonpost.com/outlook/2019/02/25/chinas-digital-protectionism-puts-future-global-internet-risk (criticizing protectionist aspects of China's data policy); *see also supra* note 264.

293. *See* Alan O. Sykes, *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, 113 AM. J. INT'L L. 482, 488–90 (2019) (explaining that international investment treaties can mitigate inefficiencies created by cross-border capital flow restrictions, which may be prompted by protectionism); *supra* note 263.

294. *Cf.* CPTPP, *supra* note 286, arts. 14.2(4), 14.2(5) (clarifying, among other things, that "measures affecting the supply of a service delivered or performed electronically" and the treaty's prohibition on restrictions on cross-border data flows are subject to the provisions of certain other chapters in this treaty, including its investment chapter).

295. *See supra* text accompanying note 283–88.

mocracy.[296] These are broad ideological ambitions, not necessarily investment-specific concerns.

Importantly, though, the economic justification for international investment law is much narrower. By contrast to the principles-based account above, it holds that the investment regime's purpose is to maximize global welfare by giving investors greater certainty that states will not devalue foreign investments.[297] This reduces states' cost of capital, making a larger number of value-enhancing cross-border investments feasible.[298] On this account, international investment law is principally—perhaps exclusively—a regulator of capital as it flows from state to state.

Of course, several different goals may underpin international investment law, including economic and principles-based ones, along with others.[299] But the nature of the digital economy makes it very easy for international investment law to become entirely unhinged from its economic basis. This can happen if tribunals or other lawmakers confuse data flows (a regulatory area unto themselves) with capital flows (international investment law's economic domain) and impose the regulation of the latter onto the former.

Such conflation requires only a tiny conceptual slip. Data flows and capital flows are densely interlinked. Yet they are not the same. For instance, a social media company that builds a new office in a state is doubtless contributing capital to that state: the value of the office.[300] A data analytics company that provides

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296. José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 225 (2011); *see* VANDEVELDE, *supra* note 131, at 103 (explaining that investment treaties' rule-of-law aims "may serve to commit host countries to principles that . . . will strengthen liberal democracy within those countries"); *supra* notes 133, 138, 218–19; *cf.* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 337, 372 (2006) (explaining that international investment adjudication may "provide a useful model for national decisionmakers," furthering adherence to the ideal of impartial administration of justice).

297. *E.g.*, Anne van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1, 13 (2008) ("As firms anticipate a possible later expropriation or unfair treatment, they may refrain from investment, leading to the socially undesired result of less investment."); Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS 73, 80 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) ("The firm . . . wants to achieve the greatest possible return and will invest in the host country only if that country offers conditions that will produce the greatest anticipated profit."). *See generally* Sykes, *supra* note 293, at 498–503 (providing sustained analysis of this point).

298. *E.g.*, Jeswald W. Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 HARV. INT'L L.J. 127, 136–137 (2017) (explaining that lowering the risk that states will devalue investments reduces cost of capital to states); Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 642–43 (2005) (same).

299. *E.g.*, U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE, at 125, U.N. Sales No. E.15.II.D.5 (2015), https://unctad.org/system/files/official-document/wir2015_en.pdf (citing stability of investment environments, depoliticizing investment disputes, improvement of local governance, risk reduction, and promoting investment and economic integration as goals of the investment regime).

300. *Cf. supra* note 146.

marketing intelligence services to clients in a state is probably contributing capital to that state because its efforts require a use of resources to produce a benefit in the state.[301] But a different situation presents itself when, say, a social media company's application suddenly becomes popular in a state not by its own efforts but simply because it is available for download there and people have decided to use it.[302] The company may now be receiving valuable data flows from that state. But it is hard to identify capital that the company concertedly dedicated to its activities there.

Yet the company now has assets in that state. And under the analysis in Section II.B, it is conceivable that such a firm—which allocates minimal or no capital to creating contracts and outbound data flows in a state—would, nonetheless, have made an "investment" there under international investment law. Accordingly, a tribunal could accept jurisdiction over the case. This is arguably an unnecessary excursion into regulating data flows with no connection to the investment regime's economic concerns. After all, if the putative investor has made no intentional decision to enter that state's market, the cost of capital for that state is irrelevant to it, and any reduction achieved by international investment law is also irrelevant.[303]

This theoretical inconsistency exacerbates the bad outcomes identified above. International investment law is only relevant to regulators' decisions when their actions are likely to trigger an international-investment-law suit.[304] If tribunals accept jurisdiction over data-flow cases that do not significantly im-

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301. *Cf. supra* notes 159–60.

302. The rapid global spread of the U.S. social media application Clubhouse provides an example. *E.g.*, Sam Shead, *Buzzy New Social Media App Clubhouse Appears to Have Been Blocked in China*, CNBC (Feb. 8, 2021, 6:48 PM), https://www.cnbc.com/2021/02/08/clubhouse-appears-to-have-been-blocked-in-china.html (describing how Clubhouse rapidly gained popularity in China, despite the fact that it was not "available to download from the Chinese App Store, [requiring] people in China . . . to get it by using overseas Apple IDs"); Vivian Yee & Farnaz Fassihi, *Clubhouse App Creates Space for Open Talk in Middle East*, N.Y. TIMES (May 2, 2021), https://www.nytimes.com/2021/05/02/world/middleeast/clubhouse-iran-egypt-mideast.html. It does not appear that Clubhouse was initially targeted at markets beyond the United States. *Cf.* Press Release, Hamburg Comm'r for Data Prot. & Freedom of Info., Hamburg DPA Demands Information About Privacy Protection from the Operators of the Clubhouse App (Feb. 2, 2021), https://datenschutz-hamburg.de/assets/pdf/2021-02-02-press-release-clubhouse.pdf (explaining that Clubhouse became widely used in the European Union while seemingly noncompliant with the GDPR); Eric Griffith, *What Is Clubhouse? The Invite-Only Chat App Explained*, PCMAG (Feb. 2, 2021), https://web.archive.org/web/20210202204519/https://www.pcmag.com/how-to/what-is-clubhouse-app (explaining that Clubhouse did not initially have an Android application, even though Android operating systems are more common globally, because "[t]he developers wanted to scale up slowly").

303. *Cf.* Sykes, *supra* note 298, at 642 (noting that "[i]nvestors . . . will require a risk premium on their investments to ensure themselves an expected competitive rate of return" and that credible limits on states' unilateral actions will reduce that premium).

304. *See* BONNITCHA, POULSEN & WAIBEL, *supra* note 55, at 241 ("[W]e do have evidence [of regulatory chill] on at least some occasions. . . . New Zealand delayed the implementation of tobacco plain packaging for several years while the investment treaty arbitration arising from Australia's tobacco plain packaging legislation remained pending."); *see supra* text accompanying notes 283–85.

plicate capital flows, they will be expanding, case by case, the set of suits investors can bring. This, in turn, makes international investment law increasingly relevant to regulators' considerations, magnifying the chilling effects on domestic and international regulation discussed above.

C. *A Proposal for a Salini Renaissance*

The incidental harm that results from conflating capital flows and data flows is entirely unnecessary from an economic point of view.[305] And, indeed, avoiding this harm is largely a question of paying attention to economic reality. In theory, tribunals could do this at any stage of a dispute. As it turns out, however, tribunals already have a device for doing this at the threshold, jurisdictional stage.

Recall the *Salini* test, discussed above in Section II.B.1. Some tribunals have used the *Salini* test to determine whether a claimant's assets meet the definition of "investment" in the ICSID Convention and, therefore, are subject to the tribunal's jurisdiction. To reprise, the test requires (1) a contribution of money or assets (2) for a certain duration and (3) an assumption of risk.[306] An additional, controversial element of the test requires (4) a contribution to the state's economic development, although tribunals almost never apply this criterion.[307] Some tribunals will also require the regularity, or the expectation, of profit, which is largely redundant in relation to criteria (1) through (3).[308] As previously noted, today's tribunals rarely apply the *Salini* test as a binding requirement—if they apply it at all.[309]

And yet the *Salini* test provides a sensible vehicle for disaggregating capital flows from data flows. Its first and third factors—a contribution of capital, placed at risk—are the most important for our purposes.[310] Where a company begins to receive data flows from a state through no efforts of its own, it has directed no (or minimal) resources to entering that market and therefore taken on no risk with respect to that market.[311] Applying the *Salini* test as a binding requirement excludes these situations from international investment tribunals' do-

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305. *Cf.* Guzman, *supra* note 297, at 92 ("Subject only to transaction costs, a [bilateral investment treaty] regime will cause *capital* to be invested where it stands to earn the greatest return. . . . [such treaties], therefore, yield an efficient allocation of *capital*." (emphasis added)).

306. Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf.

307. *See id.*; *supra* note 114.

308. *See supra* note 113.

309. *See supra* notes 115–17.

310. *Cf.* VANDEVELDE, *supra* note 131, at 115 ("[T]he presence of capital and an expected return would seem to be core elements of an investment . . . .").

311. *See supra* note 131; *cf.* VANDEVELDE, *supra* note 131, at 111 ("[M]any definitions of investment assume that the concept of an investment entails the assumption of risk."); Horváth & Klinkmüller, *supra* note 60, at 612 (noting digital goods can be "supplied at essentially zero marginal cost").

main, tethering their influence to capital flows and preventing it from unnecessarily extending into the domain of data flows alone.

Still, the *Salini* test can and should be flexibly applied.[312] This is particularly true with regard to its second factor, a certain duration. Although the *Salini* case itself suggested that two years is the minimum permissible duration for a qualifying investment,[313] other cases have counseled against a strict interpretation of *Salini*'s duration element and accepted jurisdiction over transactions with shorter durations (e.g., only, or potentially less than, a year).[314] Moreover, commentators have noted that tribunals should be willing to accept very short durations in the digital economy given the greater rapidity with which data-driven business relationships are established and grow.[315]

The same is true of the contribution and risk prongs of the test. Qualifying contributions can be modest;[316] they may even include the existing, verifiable promise of *future* contributions.[317] As for risk, tribunals have adopted broad interpretations of this criterion, perhaps because virtually any transaction involves

312. *Cf.* RSM Prod. Corp. v. Grenada, ICSID Case No. ARB/05/14, Award, ¶ 241 (Mar. 13, 2009), https://www.italaw.com/sites/default/files/case-documents/italaw10246.pdf ("[P]roponents or users [of the *Salini* criteria] rightly insist on the flexibility with which they should be used.").

313. *Salini*, ICSID Case No. ARB/00/4 at ¶ 54.

314. *See* Saipem S.p.A. v. The People's Republic of Bangl., ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures, ¶ 102 (Mar. 21, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0733.pdf (rejecting the argument that the one-year duration of work under the contract showed it was not an investment); Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 133 (Nov. 14, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0074.pdf (stating that "one cannot place the bar very high" when it comes to duration of construction contracts); Petrobart Ltd. v. The Kyrgyz Republic, Arbitral Award, ¶¶ 4–7, 69, 71–72 (Mar. 29, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0628.pdf (accepting jurisdiction over a one-year contract under which actual performance lasted roughly a month and a subsequent court judgment issued less than a year after entry into the contract); *see also* Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 13, 16, 92, 94–95, 94 n.26 (June 16, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf (holding that a contract lasting roughly twenty-two months from signing to the state's recognition of completion met the duration criterion, though not rejecting the possibility that the investment lasted slightly more than two years).

315. *See* Helena Jung Engfeldt, *Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media? Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction*, 32 BERKLEY J. INT'L L. 44, 48–49, 59–61 (2014) (arguing that "activities fueled by information sharing on social media" will typically have a shorter duration than investments involving physical assets and arguing that this should not preclude satisfaction of the duration criterion, given "the realities of certain industries").

316. *See RSM*, ICSID Case No. ARB/05/14 at ¶ 249 (citing Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 51 (Mar. 15, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0532.pdf) ("[T]here seems to be a wide acceptance . . . of the idea that the existence of an investment as a requirement for jurisdiction is not dependant [sic] on the amounts actually spent by the alleged investor . . . .").

317. *See id.* ¶¶ 243–44, 246–47, 252, 266 (accepting jurisdiction over a concession contract even before the oil producer incurred substantial expenses under it, "the relevant criterion being the *commitment* to bring in resources").

some risk.[318] In effect, the risk criterion may be just another way of expressing the core of the *Salini* test, embodied in its first factor: whether the investor has intentionally put assets in the state.

To be sure, the *Salini* test has weathered significant criticism. That is largely because (1) tribunals and commentators consider the *Salini* test a requirement that tribunals have unjustifiably imposed on the ICSID Convention, which does not define "investment," and on investment treaties, which generally define "investment" more broadly;[319] (2) the *Salini* criteria, collectively or individually, are inconsistent or unwieldy;[320] and (3) *Salini*'s fourth criterion is overly restrictive.[321]

None of these objections, though, counsel against my proposal to use the *Salini* criteria in data-flow cases. I am not proposing the use of the *Salini* criteria to interpret what "investment" means in the ICSID Convention or other treaties. Nor am I proposing that tribunals apply *Salini* to all cases. Rather, I am proposing that, when economic activity involving data flows is at issue, tribunals use *Salini* to ensure that they are exercising jurisdiction over inbound capital flows—not merely outbound data flows—and thus acting consistently with the economic justifications for the investment regime.

Thus, this intervention is focused solely on the digital economy. It is an argument for *declining* jurisdiction based on policy, *not* an argument about the actual scope of tribunals' jurisdiction. As a matter of pure doctrine, tribunals may

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318. *E.g.*, Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 40 (July 11, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf ("[T]he very existence of a dispute as to the payment of the principal and interest [on Venezuela's note] evidences the risk that the holder of the notes has taken."); *Saipem*, ICSID Case No. ARB/05/07 at ¶ 109 (considering "the inherent risks in long-term contracts"); *Bayindir*, ICSID Case No. ARB/03/29 at ¶ 136 (same); Pahis, *supra* note 115, at 84 ("[L]iterally every human activity . . . entails some risk.").

319. *E.g.*, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶¶ 312–14 (July 24, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf (opining that "[i]t is difficult to see why the ICSID Convention ought to be read more narrowly" than "very substantial numbers" of investment treaties); Mortenson, *supra* note 111, at 301 (arguing that ICSID tribunals should defer to state definitions of investment in light of the goals and drafting history of the ICSID Convention).

320. *E.g.*, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶ 306 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf (calling the fourth criterion "unworkable"); W. Michael Reisman & Anna Vinnik, *What Constitutes an Investment and Who Decides?*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 50, 60, 69–70 (2010) (noting that *Salini* cases have provided "no objective meaning to investment" and suggesting a rejection of this "incoherent" test); Pahis, *supra* note 115, at 108–114 (arguing that the *Salini* contribution, risk, and duration criteria, when used to distinguish investments from ordinary commercial transactions, are inconsistent and flawed as a matter of economic theory).

321. *E.g.*, VANDEVELDE, *supra* note 131, at 115 (noting that if an actual contribution to development is required, this implies an unjustifiable protection of only those investments that succeed); *see* Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 111 (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf (suggesting the same understanding of this criterion and rejecting it).

indeed have jurisdiction over some disputes I contend they should decline to hear. In fact, that is the point: *when tribunals have jurisdiction*, cases involving data flows as assets may still pose special risks of abandoning the incentive-focused, economic basis for international investment law. Finally, I do not propose the use of *Salini*'s maligned fourth criterion, which is not necessary to the policy function I contend *Salini* should serve in the digital economy.[322] Although my proposal does suggest that *Salini* ought to be used in non-ICSID cases, that would be nothing new. Tribunals have already done this.[323]

CONCLUSION

We should expect that businesses will soon use international investment law to protect their interests in cross-border data flows against some forms of state data regulation. But not all of these international-investment-law suits will both (1) seek protection for data flows specifically as assets and (2) contend that state laws restricting data flows are compensable harm to those assets. Raising both questions is necessary if international investment law is to protect data flows as a new, uniquely regulated asset class. Moreover, even when both questions are raised, these lawsuits are only likely to arise in limited circumstances, whether due to the realities of the digital economy or companies' likely appraisal of their chances of success.

Under such circumstances, companies will have strong arguments in their favor. This does not mean they will necessarily win. But regardless of whether they prevail, these lawsuits will affect states' approach toward data regulation at the domestic and international levels—in both positive and negative ways. On one hand, the threat of such lawsuits could chill states' implementation of data regulation that proportionately pursues important goals like privacy, consumer protection, and national security. On the other, such lawsuits could make both domestic and international data regulation more resilient and build a long-term foundation for multilateral cooperation. If tribunals in data-flow cases disaggregate capital flows from data flows—and prudentially limit their jurisdiction to the former—they could mitigate the negative effects of such suits by reducing the looming influence of international investment law on regulators' decisions. This kind of conceptual disaggregation is consistent with the economic basis for international investment law. At the same time, it leaves room for international investment law to achieve positive change by concretizing emerging norms for states as they build the groundwork for the regulation of the global digital economy.

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322. For defenses of the fourth criterion, see Alex Grabowski, Comment, *The Definition of Investment Under the ICSID Convention: A Defense of* Salini, 15 CHI. J. INT'L L. 287, 302–03 (2014); Exelbert, *supra* note 114, at 1246–47, 1271.

323. *E.g.*, Romak v. The Republic of Uzbekistan, PCA Case No. AA280, Award, ¶¶ 207, 212 (Nov. 26, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf.