

IN-DEPTH

# Investment Treaty Arbitration

INFORMATION AND COMMUNICATION



LEXOLOGY

# Investment Treaty Arbitration

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# Information and Communication

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## I Introduction

The information and communication (IC) industry is at the forefront of global demand and innovation. By its nature, the IC sector underpins the functionality of our global economy and impacts our daily lives. The power and influence of multinational IC companies has skyrocketed over the past few decades, as individuals and businesses around the world depend on the internet to conduct business, communicate and gather data. The capacity of the IC industry to both enhance and threaten individual and national security rights is becoming increasingly apparent – while it offers new ways of connecting markets and accessing information, it also creates vulnerabilities for surveillance, data breaches and the spread of misinformation. In turn, this can attract new, stricter forms of government regulation.

As a result, IC companies have a vested interest in understanding possible avenues to challenge government measures affecting their business, which includes evaluating investment treaties protections. In this chapter, we provide an overview of the history of IC sector investment arbitration cases, consider how the traditional framework of investment treaty protections applies in an increasingly digital economy, and discuss the limits of applicable protections offered by treaties in this sector. We also discuss the evolution of treaties in the era of digitisation and the relevance of investment treaty protections in relation to digital assets, social media and cryptocurrencies.

## II Evolution of disputes in the information and communication sector

Due to their control over critical infrastructure and channels of communication, IC companies hold significant power in sovereign states. Governments therefore closely monitor the IC sector and often seek to regulate it. IC companies have historically taken issue with regulation that impinges on their operations, and have resorted to investment treaties to enforce their rights against arbitrary, discriminatory or unfair treatment. This section illustrates the broad range of investment treaty disputes and related issues arising in the IC sector.

### Disputes relating to a state seizing ownership of an IC company

A common scenario that has generated a significant number of IC sector investment treaty disputes has involved a state seizing control, or forcing the transfer of ownership, of an investment. One of the earliest cases arising in this sector was *Victor Pey Casado et al v. Chile*, initiated in 1998. That dispute related to the confiscation and transfer of a newspaper company to Chile following a coup d'état in the 1970s.<sup>[1]</sup> Chile was ultimately found to have breached its obligations under Chile–Spain BIT (1991).<sup>[2]</sup> Another example is *Dick Fernando Abanto Ishivata v. Venezuela*, which was initiated in 2018.<sup>[3]</sup> The claimant in that case alleged that Venezuelan officials violated the Peru–Venezuela BIT (1996) by physically taking over his telecommunications company, stripping the board of its powers and ejecting employees from the building. The company was later signed over to a private company, alleged by the claimant to have close ties to the Venezuelan Government,

and was subsequently dismantled. An ICSID tribunal found by majority that Venezuela's conduct amounted to unlawful expropriation.<sup>[4]</sup>

In many of these cases, the motivation of national governments to seize control of an IC company is motivated by a desire to nationalise telecommunications assets.<sup>[5]</sup> For example, after assuming control of the country's telecommunications sector in 2009, the Belizean Government proceeded to compulsorily acquire the 94 per cent foreign-owned shareholding of a major telecommunications company.<sup>[6]</sup> Foreign investors in the company (one of which owned a 71 per cent shareholding and another that was a creditor) subsequently brought successful claims (at least in part) against Belize under the Belize–United Kingdom BIT (1982).<sup>[7]</sup> Similarly, an American company unsuccessfully brought a claim against Venezuela in 2008 alleging that the government had undercompensated it for its stake in Venezuela's largest telecommunications company, which had been nationalised.<sup>[8]</sup>

Other cases have involved the forced transfer or sale of shares in local telecommunications companies or entities. A Kuwaiti firm and a French telecommunications company brought investment claims against Iraq after the telecommunications regulator and local courts determined in 2014 that the foreign investors' joint venture purchase of a 44 per cent stake in a local telecommunications operator in 2011 had not satisfied certain change of control conditions.<sup>[9]</sup> The regulator ordered the unwinding of the share transfer, with the shares being returned to their original Iraqi owners.<sup>[10]</sup> The claimants argued that they never received compensation for their shares and made allegations of corruption between the regulator and the Iraqi owners of the telecommunications operator.<sup>[11]</sup> In an earlier case of *Rumeli Telekom v. Kazakhstan*, an ICSID tribunal in 2008 found that the forced sale of the claimants' shares in a joint venture project with a local mobile telephone network operator had been set at a price that was 'manifestly and grossly inadequate'.<sup>[12]</sup>

## Disputes relating to state regulation of the IC market

A sizeable body of investor–state disputes in the IC sector concern state regulatory measures such as suspending, revoking or refusing to renew a licence (or a concession), and implementing tax policy. An early example of a dispute falling into this category is *France Telecom v. Lebanon*, which was initiated in 2002 and related to Lebanon's termination of a contract with France Telecom to operate a mobile network.<sup>[13]</sup> Another early dispute was *Lemire v. Ukraine*, initiated in 1998 and settled in 2000, which related to Ukraine's treatment of different radio licence bids by the claimant.<sup>[14]</sup>

There has been a series of disputes in respect of spectrum allocation in particular. The Supreme Court of India's revocation of 120 2G licences that had been allocated via a process that, according to the court, was 'wholly arbitrary, capricious and contrary to public interest' led a Mauritian investor in a local telecommunications operator (which had 21 of their 22 licences revoked) to bring a claim against India in 2013.<sup>[15]</sup> In *Global Telecom Holding v. Canada*, which was initiated in 2016, the claimant unsuccessfully challenged regulations introduced by Canada which allowed a government agency to conduct reviews of license transfers for the purpose of preventing spectrum concentration in a single entity.<sup>[16]</sup> The tribunal found that Canada did not breach its obligation to provide fair and equitable treatment (FET) in its adoption and implementation of this 'Transfer Framework' because the claimant could not establish that Canada frustrated its legitimate expectations. Further, Canada did not engage in treatment that was 'arbitrary,

unreasonable, non-transparent, politically motivated or without any legitimate policy objective'.<sup>[17]</sup> Elsewhere, Mexico's requirement that satellite capacity was reserved for use by the state led a French company (which had acquired 100 per cent of the shares in a Mexican satellite company) to bring a treaty claim in 2017.<sup>[18]</sup>

Various cases have also been initiated following the imposition of specific tax measures in relation to the sale of telecommunications companies. For example, India's enactment of retrospective legislation to collect capital gains tax from Vodafone's purchase of the entire share capital of a company registered in the Cayman Islands, which indirectly owned 67 per cent of an Indian entity that carried out telecommunications business in India, led to claims being brought by Vodafone under the India–United Kingdom BIT (1994) and India–Netherlands BIT (1995).<sup>[19]</sup> While the former case is still pending at the time of writing, it has been reported that, in the latter case, the tribunal found that India's tax assessment violated the BIT's FET provision.<sup>[20]</sup> The withdrawal of tax exemptions allegedly granted to investors in the IC sector have also led to claims being brought against states.<sup>[21]</sup>

#### Disputes relating to state intervention in the IC sector on national security grounds

The more recent trend of investor–state disputes in the IC sector concerns measures taken by host states on essential security grounds. The need to manage national security risks in relation to operations of IC companies has become a growing concern for states, as telecommunications networks and systems are now vital to the delivery of critical services and infrastructure sectors.<sup>[22]</sup>

The most notable example was India's revocation, in order to protect an 'essential security interest', of an agreement that would have leased capacity on satellite-based S-band spectrum to foreign investors for the provision of multimedia services in 2010.<sup>[23]</sup> This decision led to claims being brought by CC/Devas and Deutsche Telekom under the Mauritius–India BIT (1998) and Germany–India BIT (1995) respectively.<sup>[24]</sup> India alleged that the revocation was due to the state's increased demand for the allocation of spectrum for military and non-military needs (including for defence, paramilitary forces, railways, other public utility services and societal needs).<sup>[25]</sup> In *CC/Devas v. India*, a majority of the tribunal determined that, as a 'mix of factors was at play' in the decision to cancel the agreement, the 'essential security interest' defence enjoyed only partial operation and the revocation was thus an expropriation to the extent that it was motivated by other purposes.<sup>[26]</sup> In *Deutsche Telekom v. India*, the tribunal found that India failed to prove that the revocation was 'necessary for the protection of its essential security interests' (pursuant to the Germany–India BIT) and therefore India could not rely on this defence.<sup>[27]</sup>

Other cases relating to national security include *Global Telekom Holding v. Canada*, where the government agency's review of the claimant's transaction (to gain voting control of its subsidiary) was partly motivated by security concerns relating to the claimant's ultimate owner being a Russian-controlled entity and the subsidiary's use of Huawei-built network infrastructure.<sup>[28]</sup> However, that tribunal concluded that, because Canada provided the claimant with a fair opportunity to present its case in relation to the national security review (through which the claimant 'engaged fully'), Canada did not violate the Canada–Egypt BIT.<sup>[29]</sup> In *Maxim Naumchenko v. India*, which was initiated in 2013, the tribunal determined that India's treatment of a telecommunications company that the Russian and Cypriot claimants had invested in, which included conducting a review and revoking the security clearance of that company, was necessary to safeguard India's essential security interest.<sup>[30]</sup>

The operation of 5G networks by foreign investors has become a particular concern of states because, in a quest to provide better quality and greater speed in cellular data services, the next generation of cellular networks forms part of critical infrastructure and may pose national security threats.<sup>[31]</sup> A recent (and currently pending at the time of writing) case relating to national security concerning 5G technology is *Huawei v. Sweden*, which was initiated in 2022.<sup>[32]</sup> The dispute relates to the Swedish telecommunications regulator's decision to only allow entities to participate in Sweden's 5G spectrum auctions on the express condition that they do not use network equipment from Chinese technology companies Huawei and ZTE. In justifying its decision, the Swedish regulator noted that the use of Huawei and ZTE products 'may harm Sweden's security'.<sup>[33]</sup> As several other states have enacted (or are considering) bans on Huawei equipment, the outcome of this dispute may impact on future regulation of the IC sector on the basis of national security.<sup>[34]</sup>

### III Investor protections and its limits

As discussed elsewhere in this publication, investors can only enforce investment treaty protections through arbitration if they can demonstrate the existence of a 'covered investment' under the terms of the relevant treaty. The definition of 'investment' is determined on a treaty-by-treaty basis, although treaties generally define the term either by reference to a range of 'assets' or by linking an asset to an 'enterprise'.<sup>[35]</sup> IC sector investment arbitrations have historically involved investments that fit into generally accepted investment categories, such as government-issued licences, IP rights and shares in local companies.

The global economy's increased digitalisation and greater investment in intangible assets has led to speculation on the extent to which investments in new and emerging technologies may qualify as 'covered investments'. Most investment treaties predate the digital economy and do not explicitly provide for the protection of intangible assets.<sup>[36]</sup> However, broad asset-based definitions of investment that are contained in a substantial portion of investment treaties should arguably be fit for purpose, given their flexibility, non-exhaustive lists of assets that constitute a covered investment and lack of expressly excluded investment types.<sup>[37]</sup>

Apart from meeting the broad asset-based definition, access to protections may be inhibited by other factors. Companies with significant foreign investments in the IC sector are some of the largest multinational corporations in the world which operate across state borders.<sup>[38]</sup> It may be questioned whether an intangible asset will meet the requirement of a physical nexus or territorial link between the investment and the host state contained in many investment treaties<sup>[39]</sup> if the investment comprises digital information or data which is 'created' outside of the host state.<sup>[40]</sup> However, investment tribunals have held that the territoriality requirement will be met for intangible assets that provide a benefit to the host state even if there is no physical link to the state.<sup>[41]</sup> This legal development, alongside the increase in purely intangible forms of investment, means that the requirement of territoriality may not necessarily restrict investment claims in relation to digital assets created outside the host state jurisdiction.

One of the issues that IC companies almost inevitably confront when bringing investment claims is the balance between investor protections under treaties and the host state's right to regulate, particularly where doing so is arguably in the public interest. As discussed in

the preceding section, states often argue that regulation of the IC sector is necessary to protect essential security interests. For example, when states have blocked or threatened to block social media platforms, or banned certain foreign companies from being involved in the implementation of 5G technologies, a justification provided by the national government is commonly based on national security concerns, often in reliance on the 'essential security' exception found in many treaties.<sup>[42]</sup> Essential security exceptions are formulated differently across the investment treaty landscape, with some only applying to certain treaty standards and others operating as free-standing provisions.<sup>[43]</sup> Tribunals have observed that, while host states are able to determine their own essential security interests to an extent, an objective test will be applied and the provisions are generally not self-judging.<sup>[44]</sup> Some investment tribunals have held that the national security exception absolves a state from following certain due process requirements,<sup>[45]</sup> while others have required states to attempt to find a solution with the investor prior to engaging in conduct that breaches the investment treaty.<sup>[46]</sup>

## IV New frontiers

### Protection of data and digital assets

The digital transformation witnessed across various areas of life has started (and will continue) to shape international investment law, bridging the gap between 'analogue'<sup>[47]</sup> investment treaties and the increasingly digitally oriented world that is ripe for a new generation of IC disputes. Several questions arise that will require careful consideration and novel analysis by investment tribunals. One such question is whether digital assets (including data, data centres and digital infrastructure) constitute an investment protected under investment treaties, and whether investment treaties safeguard investors against regulation of cross-border data flow, data localisation requirements and host state regulation.

As discussed above, whether an investment is capable of treaty protection depends on the definition of 'investment' in each individual treaty. Case law on whether digital assets benefit from protection is limited to date, although two cases have emerged that provide a positive indication on how future cases may treat data as a protected asset class of investment.

In *Bridgestone v. Panama*,<sup>[48]</sup> an ICSID tribunal considered whether rights arising from a registered trademark licence could constitute an investment qualifying for treaty protection. After examining the common characteristics of an investment (with reference to the *Salini* test), the tribunal confirmed that an intangible asset such as a trademark licence can indeed qualify as an investment.<sup>[49]</sup> In that case, the trademark licence was said to provide rights and, upon those rights being 'exploited' when selling goods, an investment was made in Panama that could enjoy treaty protection.<sup>[50]</sup> Although this case was ultimately decided in favour of the State, the tribunal's finding that an intangible asset can enjoy treaty protection is relevant to disputes arising from host state regulation of cross-border data flow.

Another relevant case is *Einarsson v. Canada* (which remains pending at the time of writing).<sup>[51]</sup> The asset at the heart of this case is seismic data, used to provide services to the oil and gas industry. While the claimants do not claim that data per se is a protected

investment, they argue that intangible assets such as data-related copyright is a form of investment that attracts treaty protection. This case will be the first to consider rights in data as a separate asset class.

The standards of protection available to safeguard investment in digital assets will commonly include the obligation to provide fair and equitable treatment, full protection and security and protection against expropriation.<sup>[52]</sup> Commentary suggests that, when evaluating the strongest standard of protection against the regulation of cross-border data flow, FET will likely be the most relevant<sup>[53]</sup> because the other protections have 'narrower requirements and implicate greater consideration of states' legitimate policy objectives than FET'.<sup>[54]</sup>

It is becoming increasingly common, however, for next generation international investment agreements to contain limits on these protections.<sup>[55]</sup> Whether state regulation of cross-border data flow can constitute a treaty breach will therefore also depend on the particular treaty, including whether the treaty specifically deals with data localisation requirements and safeguards the state's right to regulate. In this context, it is also relevant to note that investment in digital infrastructure comes with high demands for water and electricity, which may encroach upon other areas of public interest such as environmental protections, introducing additional tensions between investor protections and the host state's right to regulate.

## Regulation of social media platforms

The rise of multinational social media platforms has led to policy debates regarding social media's impact on data privacy, national security and domestic politics.<sup>[56]</sup> As a result, there has been an increase in government oversight and regulation of social media platforms,<sup>[57]</sup> with some countries even banning certain platforms altogether.<sup>[58]</sup> This has led to speculation of a potential wave of investment arbitration claims in response.

Social media platforms make investments around the world by holding uncontroversial investment 'assets', such as the value of trademarks inherent in the domain names of social media platforms and interests in local subsidiaries.<sup>[59]</sup> However, the commercial value of social media companies' businesses is typically concentrated elsewhere, including in data and a complex network of intangible assets without physical presence in a host country. Further, compared to traditional media and technology companies, social media platforms generally do not require a government-issued licence to operate, which was a covered investment relied upon by claimant investors in several early IC investment arbitrations.

Investment claims brought by modern technology platforms have asserted that the protected investments are constituted by intellectual property rights and intangible property rights, such as rights under contracts with end users. This was how Uber's claim against Colombia was framed in its Notice of Dispute after Colombia banned Uber in 2019.<sup>[60]</sup> This case did not proceed to arbitration and left open the question of whether a relatively new form of investment, being end-user contracts in the context of technology or social media companies, are afforded protections under investment treaties. While it is generally accepted that contractual rights can be covered investments, social media companies' contracts with their users are not typical commercial or service contracts. This is due to the scale of the contractual network (for example, India is reported to have 360 million Instagram users)<sup>[61]</sup> and the fact that these contracts do not typically involve

a claim to monies.<sup>[62]</sup> Significant commercial value can be realised when considering end-user contracts together (rather than individually), and some investment tribunals have already accepted that multiple separate contracts can constitute a combined protected investment.<sup>[63]</sup>

Some commentators have posited that end-user agreements for social media platforms may not meet the requirements for a protected investment, because they can be easily terminated and do not involve a long-term commitment by either party.<sup>[64]</sup> However, state regulation or banning of social media platforms would likely terminate or make ineffective these contracts and therefore arguably still constitute interference with the social media platform's rights under the end-user agreements,<sup>[65]</sup> quite apart from the separate interference causing a devaluation of the IP rights connected to the social media platform's operation within the host state.

The existence of end-user agreements and the high economic value social media platforms provide to the host country means that, in theory, the ban of a social media platform could constitute indirect expropriation of the platform's contractual rights.<sup>[66]</sup> This is because end-user agreements, and the data collection rights to the platform and use of the platform by the user, are the main profit-drivers for their business,<sup>[67]</sup> such that their termination or ineffectiveness at the hands of the state may constitute the removal of the value of the investment. There is also an argument that blocking access to a domain name is analogous to preventing someone accessing their physical property, or at least the ability to gain economic value from their IP rights. However, the centrality of data collection to social media companies' business model, which would be curtailed by government regulation or a ban, is directly connected to a host states' likely justification for such a measure, namely the protection of national security. As discussed above, social media companies (and any IC companies that rely heavily on data) will have to overcome arguments that government regulation is necessary for the protection of essential security interests.

## Cryptocurrencies as an investment

Two decades ago, cryptocurrencies did not exist. Today, this market is worth more than US\$3 trillion.<sup>[68]</sup> It is thus becoming increasingly pertinent to consider the issues that may arise when applying international investment law to cryptocurrency and whether foreign investors can benefit from treaty protection with this class of asset.

The first question to consider is whether cryptocurrencies are protected investments under international investment agreements. Generally speaking, and subject to any exceptions, cryptocurrencies will likely meet many treaties' definition of an 'investment'. This is because, as discussed above, many BITs include a 'broad' asset-based definition of investment. The United Nations Conference on Trade and Development suggests that the 'broad, "every kind of asset" terminology supports the idea that the investment definition "embraces everything of economic value, virtually without limitation".<sup>[69]</sup> Such an understanding would necessarily include cryptocurrency. However, and particularly when invoking ICSID jurisdiction, a claimant with a crypto-investment may also have to satisfy the Salini test.<sup>[70]</sup> Under that test, a tricky criterion that a claimant might need to establish is that the crypto-investment '[contributes] to the economic development of the host State'.<sup>[71]</sup> There is uncertainty as to how tribunals will apply this factor to cryptocurrency. Nevertheless, it should be noted that there is not much difference, for example, between a foreign investor purchasing shares in a company (which has been accepted as a covered

investment) and initial coin offerings where cryptocurrencies are issued as tokens to raise money for a company.<sup>[72]</sup>

The territoriality requirement raises further complications. If the cryptocurrency funds a commercial enterprise with a physical presence in the territory of the host state, the territoriality requirement may readily be satisfied.<sup>[73]</sup> Generally, however, it is difficult to determine a location for cryptocurrencies that operate on blockchain because of blockchain's decentralised and transnational structure. In these circumstances, it might be useful to refer to *Abaclat v. Argentina*, in which the tribunal used different criteria for the purpose of determining whether an investment 'of a purely financial nature' (e.g. international securities that were being traded on secondary markets outside of Argentina) held the necessary territorial link.<sup>[74]</sup> The tribunal found that the determination of the investment location depended on the nature of the investment. Consequently, the tribunal looked at 'where and/or for the benefit of whom the funds [were] ultimately used, and not the place where the funds were paid out or transferred' and whether the invested funds were 'ultimately made available' to the host state.<sup>[75]</sup>

The second question to consider is whether, and how, substantive protections under investment law apply to cryptocurrencies. For example, to what extent does state regulation (or the lack thereof) breach the standard of full protection and security (FPS) to protect against cybersecurity risks? Due to its digital nature, cryptocurrencies can often fall victim to hackers and cyberattacks. Where there is a lack of sufficient cybersecurity rules in a host state, it can be argued that this constitutes an unsafe investment environment. Interestingly, the *Azurix v. Argentina* tribunal confirmed that the standard of FPS can be breached despite there being no physical violence directed against the investor or investment.<sup>[76]</sup> In that case, the Tribunal placed an emphasis on 'full' protection and security. Applying this to cryptocurrencies, one may contend that the host state can breach its FPS obligation by failing to provide a safe investment environment as regards its cybersecurity and cybercrime laws.<sup>[77]</sup> To determine responsibility, and consequently, liability, of a FPS violation, a distinction will need to be made between security failures by the host state and those by an individual investor.<sup>[78]</sup> Other investment tribunals have also focused on the meaning of 'full' to conclude that the standard of FPS extends beyond physical protection.<sup>[79]</sup> This reinforces the notion that FPS can encapsulate the protection of cryptocurrencies in the right circumstances. It also lends support to the proposition that investment treaties require states to take appropriate steps to ensure adequate cybersecurity and exercise due diligence to prevent avoidable and unnecessary harm,<sup>[80]</sup> proportionate to the resources available to the host state.<sup>[81]</sup> Proportionality is an important limiter in this context, as discussed by the tribunal in *Pantechniki v. Albania*.<sup>[82]</sup> The result is that, in the context of modern-age cryptocurrencies and data generally, standards of cybersecurity protection required of states under investment treaties will vary.

## V Developments in treaty-making

The number of states regulating data protection and cross-border data flows domestically is increasing.<sup>[83]</sup> As a result, states are now considering whether rules on data transfer and data protection should be included in their international investment and trade treaties, and if so, what those rules should look like. Some newer international investment agreements explicitly mention 'data protection' and 'privacy' as policy objectives for which the state has the right to regulate or, alternatively, that fall under a general exceptions clause.<sup>[84]</sup>

Such provisions generally clarify that the host state's obligations to protect investors do not 'prevent' the state from taking the measures necessary to secure compliance with laws relating to data protection.<sup>[85]</sup> These provisions reflect states' increasing awareness of the potential ramifications of domestic data and privacy regulations under international investment treaties and the possibility of investment arbitration claims being launched against them as a result.<sup>[86]</sup> These provisions also conform with the general tendency for newly drafted investment treaties to limit the scope of treaty protections to better balance, at least from the state's perspective, investment protection with the state's right to regulate in favour of the public interest.

For example, article 12 of the Indonesia–Switzerland BIT (2022) states that for the purpose of the BIT, 'the Parties reaffirm their right to regulate within their territories necessary to achieve legitimate policy objectives, such as the protection of ... public morals, social or consumer protection, privacy and data protection'.<sup>[87]</sup> A similar provision can be found in the Georgia–Hungary BIT (2024).<sup>[88]</sup> Including 'data protection' within a provision that preserves the state's right to regulate may encourage a tribunal to view regulations on cross-border data flow, particularly where its purpose is related to privacy, public morals or consumer protection, as laws falling within the police powers of the state, and not a breach of its international obligations.<sup>[89]</sup>

Some investment treaties, through a general exceptions clause, clarify that a state's investment protection obligations do not prevent the state from taking the measures necessary to achieve the objective of data privacy. Examples can be found in the Singapore–Australia Free Trade Agreement and the Japan–Georgia BIT (2021).<sup>[90]</sup> It should be noted, however, that tribunals tend to interpret general exceptions clauses narrowly and the efficacy of general exceptions clauses has been called into question following the decision in *Eco Oro Minerals Corporation v. Colombia*. In that case, the tribunal interpreted the general exceptions clause as ensuring that, while a state is 'not prohibited from adopting or enforcing a measure' pursuant to a stated policy objective, it does not 'permit' such action to be taken without the payment of compensation.<sup>[91]</sup>

It is worth noting that some international trade agreements now explicitly deal with cross-border data flows and digital trade. A notable example is the Comprehensive and Progressive Trans-Partnership Agreement (CPTPP).<sup>[92]</sup> The CPTPP<sup>[93]</sup> is considered to be the first agreement that 'comprehensively' addresses policy issues on digital trade.<sup>[94]</sup> Notably, article 14.11 requires that parties 'allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person [as defined in article 14.1]'.<sup>[95]</sup> Article 14.13 prevents parties from requiring covered persons to use locally based computing facilities as a condition for conducting business in that party's territory.<sup>[96]</sup> Exceptions to these obligations (to achieve a legitimate public policy) are built into the provision.<sup>[97]</sup> The United States–Mexico–Canada Agreement<sup>[98]</sup> places a strong limit on data localisation by not explicitly providing an exception to the obligation.<sup>[99]</sup> While these obligations are between states and do not confer direct rights on investors, it is clear that states are increasingly interested in establishing rules for the regulation of data and digital trade under international trade law. An open question remains, however, as to whether these trade obligations have the capacity to inform the state's investment obligations.<sup>[100]</sup>

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## Endnotes

- 1 Arbitration blog Kluwer; Pey Casado Decision on the Application for Annulment of the Republic of Chile (18 December 2012) sec II(A); Antonio R Parra, 'Victor Pey Casado and President Allende Foundation v. Republic of Chile: ICSID's Longest Running Case: An Introduction to the Agora' (2021) 36(3) *ICSID Review* 471. ^ [Back to section](#)
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- 3 *Dick Fernando Abanto Ishivata v. Venezuela*, ICSID Case No. ARB(AF)/18/6. See Susannah Moody, 'Peruvian Telecoms Investor Wins Claim against Venezuela', *Global Arbitration Review* (18 October 2024) <https://globalarbitrationreview.com/article/peruvian-telecoms-investor-wins-claim-against-venezuela>. ^ [Back to section](#)
- 4 *ibid.* ^ [Back to section](#)
- 5 See, e.g., *Dunkeld International Investment Ltd v. Belize* (Award) (Permanent Court of Arbitration, Case No. 2010-13, 28 June 2016) [136]–[137] (*Dunkeld*); ETI Euro Telecom International NV, 'Request for Arbitration' (12 October 2007) 7–8 <https://www.italaw.com/cases/3648>. ^ [Back to section](#)
- 6 *Dunkeld* at [137]. ^ [Back to section](#)
- 7 *Dunkeld International Investment Ltd*, 'Notice of Arbitration' (4 December 2009) <https://www.italaw.com/cases/361> *British Caribbean Bank Ltd*, 'Notice of Arbitration' (4 May 2010) 8–9 <https://www.italaw.com/cases/177> Romilly Holland, 'Is Spectrum the New Oil? Trends in Investor-State Disputes in the Telecommunications Sector' (2018) *Dispute Resolution International* 131, 135. ^ [Back to section](#)
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- 9 *Agility Public Warehousing Company KSC v. Iraq* (Award) (ICSID Arbitral Tribunal, Case No. ARB/17/7, 22 February 2021) 10–16; Susannah Moody, 'Kuwaiti Group Revives Telecoms Claim against Iraq', *Global Arbitration Review* (12 February 2024) <https://globalarbitrationreview.com/article/kuwaiti-group-revives-telecoms-claim-against-iraq>. ^ [Back to section](#)
- 10 *ibid.* ^ [Back to section](#)

- 11 *Agility Public Warehousing Company KSCP v. Iraq* (Decision on Annulment) (ICSID Ad Hoc Committee, Case No. ARB/17/7, 8 February 2024) 30 [89]. [^ Back to section](#)
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