


Investment law and the digital economy

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ABSTRACT

The transition to the digital economy poses significant challenges to international investment law, which was originally designed for the traditional economy. Current international investment agreements often fail to address developments in the digital economy. This article explores how the body of existing international investment law interacts with the digital economy, examining concepts such as ‘investor’ and ‘investment’. It then identifies two main challenges to investment law in the digital economy: the emergence of new digital divides and the rise of geoeconomics. The article also highlights different layers of digital investment law: the domestic layer—with measures such as data localization, technology transfer requirements, and investment screening mechanisms; the bilateral and regional layer—including new types of agreements like Digital Economy Agreements; and the potential for a new overarching framework tailored to the digital economy—drawing on initiatives such as the Cornwall Consensus along with possible design principles.

KEYWORDS: Cornwall Consensus; data localization; digital divide; digital economy; geoeconomics

INTRODUCTION

Arguably the greatest challenge of the day in the field of international economic law is the transition to the digital economy. International investment law was designed to accommodate an analogue economy¹; very few international investment agreements (IIAs) consider developments in the growing digital economy.² This article examines how investment law shapes and is shaped by the digital economy broadly defined.³

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¹ Rodrigo Polanco, ‘The Impact of Digitalization on International Investment Law: Are Investment Treaties Analogue or Digital?’ (2023) 24 *German Law Journal* S74, S87.

² Zhang Sheng, ‘Protection of Cross-Border Data Flows Under International Investment Law’ in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021).

³ See generally Julien Chaisse and Cristen Bauer, ‘Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration’ (2019) 21 *Vand J Ent & Tech L* 549; Robert Ginsburg, ‘Investor-State Dispute Settlement in the Digital Economy: The Case for Structured Proportionality’ (2019) 39 *Northwestern Journal of International Law and Business* 171; Jose Gustavo Prieto Munoz, ‘“Crypto-investment” in International Economic Law: A First Sketch’ (2020) 20 *Global Jurist* 1; Premila N Satyanand, ‘Foreign Direct Investment and the Digital Economy’, UNESCAP ARTNeT on FDI Working Paper Series No 2 (2021) <<https://artnet.unescap.org/fdi>>; Qianwen Zhang and Andrew Mitchell, ‘Data Localization and the National Treatment Obligation in International Investment Treaties’ (2021) *World Trade Review* 1; Gautam Mohanty and

The notion of a ‘digital economy’ is already complicated and changing with the development of the Internet—from the original World Wide Web to Web 4.0.⁴ It may be suggested that there are two types of digital economies. First, the digital economy is often seen as a reiteration of the traditional economy, supported by digital technologies.⁵ Data are added as a fourth factor of production, alongside land, labour, and capital.⁶ However, the digital economy has expanded way beyond the bounds of the interaction between physical and digital worlds. There is an economy—or economies—purely native to the digital world. For example, the digital world replicates, to some extent, the physical world in the ‘metaverse’. Users can purchase clothing, accessories, art, real estate, and more for their avatars in this virtual world.⁷

International investment law was developed to protect investors venturing into cross-border investments in ‘assets’.⁸ The notion of ‘asset’ defines the scope of the overall field. Still, most IIAs provide generic definitions of the term. Each form of digital economy attracts its own version of investment; investment in digital companies, as well as infrastructure, on the one hand, and investment in purely ‘digital assets’—be they of the metaverse, the crypto-world, or otherwise, on the other.⁹ The article explores how the body of existing international investment law interacts with the digital economy and how the rise of the digital economy is both challenging and reshaping the field.

There are two main challenges to investment law in the digital economy: first, the emergence of new digital divides, with many arguing that the digital economy exacerbates economic disparities.¹⁰ If left unchecked, digital globalization will create inequalities similar to those of economic globalization. The Fourth Industrial Revolution may disadvantage

Hamidou Tangara, ‘Cryptocurrencies in International Investment Law: The Dawn of a New Era of Protected Investments under Article 25(1) of the ICSID Convention?’ (2023) 20 *Manchester Journal of International Economic Law* 66; Mark McLaughlin, ‘Regulating Artificial Intelligence in International Investment Law’ (2023) 24 *Journal of World Investment & Trade* 256; Polanco (n 1); Evgeniya Rubinina, ‘Are Cryptocurrency Assets a Protected Investment Under Investment Treaties?’ (2023) 89 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 3; Panagiotis Delimatsis, Georgios Dimitropoulos and Anastasios Gourgourinis (eds), *Digitalisation, New Technologies and International Investment Law* (Cambridge University Press, forthcoming 2025); see also Georgios Dimitropoulos, ‘Law and Digital Globalization’ (2022) 44 *University of Pennsylvania Journal of International Law* 41; Nicolette Butler and Jasem Tarawneh, ‘A BIT of Protection for Non-Fungible Tokens: Digital Assets as a Catalyst for Economic Growth’ (2024) 25 *Journal of World Investment & Trade* 93.

⁴ See generally Don Tapscott, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence* (McGraw-Hill 1997); David Chandler and Christian Fuchs, *Digital Objects, Digital Subjects: Interdisciplinary Perspectives on Capitalism, Labour and Politics in the Age of Big Data* (University of Westminster Press 2019).

⁵ Michael Gestrin and Julia Staudt, *The Digital Economy, Multinational Enterprises and International Investment Policy* (OECD 2018) <<https://www.oecd.org/investment/investment-policy/The-digital-economy-multinational-enterprises-and-international-investment-policy.pdf>> accessed 1 March 2025; Lorraine Eden, *Strengthening the Global Trade and Investment System for Sustainable Development: Multinationals and Foreign Investment Policies in a Digital World* (The E15 Initiative January 2016) <<https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Eden-Final.pdf>> accessed 1 March 2025; World Trade Organization, *World Trade Report 2018: The Future of World Trade: How Digital Technologies Are Transforming Global Commerce*, 8 (3 October 2018) <wto.org/english/res_e/publications_e/world_trade_report18_e_under_embargo.pdf> accessed 1 March 2025; UNCTAD, *Digital Economy Report 2021: Cross-Border Data flows and Development: For Whom the Data Flow* (29 September 2021).

⁶ See Economist Intelligence Unit, *The Deciding Factor: Big Data & Decision Making* (Cappgemini 2012) <https://www.cappgemini.com/wp-content/uploads/2017/07/The_Deciding_Factor_Big_Data_Decision_Making.pdf> accessed 1 March 2025.

⁷ Michel Kilzi, ‘The New Virtual Economy of the Metaverse’ *Forbes* (20 May 2022) <<https://www.forbes.com/sites/forbesbusinesscouncil/2022/05/20/the-new-virtual-economy-of-the-metaverse/?sh=198217946d83>> accessed 1 March 2025.

⁸ Zhang and Mitchell (n 3) 393; Cheng Bian, ‘Data as Assets in Foreign Direct Investment: Is China’s National Data Governance Compatible with its International Investment Agreements?’ (2023) 13 *Asian Journal of International Law* 342, 347–348 (emphasizing how the dominant asset protection paradigm leaves ample for space for an expanded arbitral interpretation of what types of investments an investment treaty covers).

⁹ See also Georgios Dimitropoulos, Ayesha Bashir and Safaa Jaber, ‘Digital Assets in International Economic Law’ in Jason Grant Allen, Peter Hunn and Simon Gleeson (eds), *Oxford Handbook on Digital Assets* (Oxford University Press forthcoming 2025). See, eg, Syren Johnstone, ‘Taxonomies of Digital Assets: Recursive or Progressive?’ (2019) 2 *Stanford Journal of Blockchain Law & Policy* 78 (on a taxonomy of digital assets).

¹⁰ Ali Parry and others, ‘Are Digital Advances and Inclusive Growth Compatible Goals? Implications for Trade Policy in Developing Countries’ in Maarten Smeets (ed), *Adapting to the Digital Trade Era: Challenges and Opportunities* (WTO Chairs Programme 2021) 280, 289–291.

developing countries, limiting their opportunities to improve future economic conditions. Secondly, a new geopolitical and geoeconomic landscape is emerging amid competition over the development of digital technologies.¹¹ A new ‘geo-economic world order’ is challenging the role of neoliberalism as the dominant political economy in the contemporary—and especially digital—world order.¹²

These developments give rise to multiple layers of investment law in the digital era: first, a domestic layer. Countries now often make market access to foreign investors conditional on new types of requirements relating to the digital world, such as data localization requirements,¹³ mandatory transfer of technology requirements,¹⁴ or Investment Screening Mechanisms (ISMs).¹⁵ Secondly, a bilateral and regional layer. New types of international agreements are emerging to regulate and/or facilitate the digital economy. Recent Regional Trade Agreements (RTAs) invariably include chapters on ‘electronic commerce’ or ‘digital trade’.¹⁶ New Digital Economy Agreements (DEAs), such as the Digital Economy Partnership Agreement (DEPA) signed by Chile, New Zealand, Singapore, and South Korea, aim to establish cross-border digital economy areas based on free data flows and the non-discrimination of digital products, while providing the necessary policy space for the participating countries.¹⁷ These agreements increasingly shape the field of international investment law by influencing market access conditions for digital services, redefining regulatory autonomy in areas such as data governance, and thus establishing a framework for digital economy-related investments. Finally, this article explores the potential for an overarching framework for digital investment law. It examines possible design principles to ensure a balanced approach between facilitating cross-border digital investment and preserving national policy space amid rising digital divides and geoeconomic tensions.

The article is structured as follows: The ‘Digital economies and international investment law’ section examines the rise of digital economies and their impact on international investment law, focusing on traditional investment law concepts and how they are affected by the digital economy. The ‘Challenges for international investment law in the digital age’ section addresses the challenges international investment law faces in the digital era, particularly new digital divides and the rise of geoeconomic competition. The ‘Layers of digital investment law’ section concludes by outlining the layers of investment law in the digital economy, exploring both traditional and emerging principles of digital investment law.

¹¹ See, eg, Benjamin Cedric Larsen, *The Geopolitics of AI and the Rise of Digital Sovereignty* (8 December 2022) <<https://www.brookings.edu/research/the-geopolitics-of-ai-and-the-rise-of-digital-sovereignty/>> accessed 1 March 2025.

¹² Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, ‘Toward A Geoeconomic Order in International Trade and Investment’ (2019) 22 *Journal of International Economic Law* 655.

¹³ See Dan Svantesson, *Data Localisation Trends and Challenges: Considerations for the Review of the Privacy Guidelines* (OECD 2020) 8 <https://www.oecd-ilibrary.org/science-and-technology/data-localisation-trends-and-challenges_7fbaed62-en> accessed 1 March 2025; Marion A Creach, *Assessing the Legality of Data-Localization Requirements: Before the Tribunals or at the Negotiating Table?* Columbia FDI Perspectives, No. 254, Columbia University (Columbia Center on Sustainable Investment (CCSI), New York, NY 2019) <<https://doi.org/10.7916/d8-p3q6-tn21>> accessed 1 March 2025.

¹⁴ Andrea Andrenelli, Julien Gourdon and Evdokia Moïsé, ‘International Technology Transfer Policies’ (2019) 222 *OECD Trade Policy Papers*; Andrew D Mitchell, Dominic Let and Lingxi Tang, ‘AI regulation and the Protection of Source Code’ (2023) 31 *International Journal of Law and Information Technology* 283–301 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2019/01/international-technology-transfer-policies_79921079/7103eabf-en.pdf> accessed 1 March 2025.

¹⁵ See The ‘Domestic layer’ section.

¹⁶ See generally Mira Burri, ‘Digital Trade Provisions in Preferential Trade Agreements’ (2020) 23 *Journal of International Economic Law* 187. The relevant chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) bears the title ‘electronic commerce’. Most later RTAs—with the important exception of the Regional Comprehensive Economic Partnership (RCEP)—adopt the term ‘digital trade’ instead.

¹⁷ Deborah Elms, *Unpacking the Digital Economy Partnership Agreement (DEPA)* (Asian Trade Center) <<http://asiantradecentre.org/talkingtrade/unpacking-the-digital-economy-partnership-agreement-depa>> accessed 1 March 2025.

DIGITAL ECONOMIES AND INTERNATIONAL INVESTMENT LAW

The broader digital economy encompasses two main categories: the digital economy of the physical world and the native economy of the digital world, each attracting its own type of investment. The rise of the digital economy raises new questions in international investment law, including whether digital investments are permitted in a given jurisdiction, whether assets in the digital economy qualify as ‘investments’ and ‘investors’, as well as whether and how substantive protection standards apply to them. These issues are explored in this section.

Two types of digital economies: The digital economy of the physical world and the native economy of the digital world

Already in 1997, the IT sector was the world’s fastest-growing industry.¹⁸ The digital economy has experienced unprecedented growth in recent years.¹⁹ The digital economy also gives rise to new types of foreign investment—referred to as ‘digital Foreign Direct Investment’ (FDI). Digital FDI is defined as investment in areas such as the platform economy, social media, cloud computing, and data-related services.²⁰ The United Nations Conference on Trade and Development (UNCTAD) and the World Economic Forum (WEF) identified early on three main areas of digital FDI: investment in new digital activities, such as ridesharing apps; investment in the adoption of digital services by traditionally non-digital firms, such as telemedicine and mobile banking; and investment in digital and physical infrastructure that relates to digital technologies.²¹

In addition to the quantitative growth of the digital economy and related investment, there are qualitative differences between traditional and digital economy patterns. More significantly, the digital economy has expanded beyond the interaction between the physical and digital worlds, evolving into something more than just a digital technology-supported version of the traditional economy. Scholars like Ciuriak and Ptashkina classify digital transactions based on delivery mode and the nature of the parties involved, breaking down digital commerce into five modes.²² These modes capitalize on data flows, and nearly all types of digital transactions involve potential household-level participation in cross-border economic activities. The Internet is evolving into a platform for commerce between buyers and sellers across borders, fundamentally changing the way in which international trade and investment operate.²³

¹⁸ Barbara A Fliess and Pierre Sauvé, ‘Of Chips, Floppy Disks and Great Timing: Assessing the Information Technology Agreement’, Paper Prepared for the Institut Français des Relations Internationales (IFRI) and the Tokyo Club Foundation for Global Studies (1997), 6 <https://www.nomurafoundation.or.jp/en/wordpress/wp-content/uploads/2014/09/19971011_Barbara_Fliess_-_Pierre_Sauve.pdf> accessed 1 March 2025.

¹⁹ See generally World Bank, *World Development Report 2021: Data for Better Lives* (World Bank 2021).

²⁰ See generally, Bruno Casella and Lorenzo Formenti, ‘FDI in the Digital Economy: A Shift to Asset-Light International Footprints’ (2018) 25 *Transnational Corporations* 101; Matthew Stephenson, ‘Digital FDI: Policies, Regulations and Measures to Attract FDI in the Digital Economy’ World Economic Forum White Paper (September 2020).

²¹ UNCTAD, ‘World Investment Report 2017: Investment and the Digital Economy’ (2017); WEF, ‘Digital FDI Policies, Regulations and Measures to attract FDI in the Digital Economy’ White Paper (September 2020); see also Matthew Stephenson and Nivedita Sen, *COVID-19: How Digital Investments Can Help the Recovery* (World Economic Forum, 15 April 2020) <<https://www.weforum.org/agenda/2020/04/covid-19-digital-foreign-direct-investment-economic-recovery/>> accessed 1 March 2025 (discussing the role digital FDI can play in economic and financial recovery from the COVID-19 recession).

²² Dan Ciuriak and Maria Ptashkina, ‘The Digital Transformation and the Transformation of International Trade’ International Center for Trade and Sustainable Development Issue Paper, Geneva (2018) 3–6 <<https://zbw.eu/econis-archiv/bitstream/11159/1651/1/the-digital-transformation-and-trade-ciuriak-and-ptashkina.pdf>> accessed 1 March 2025.

²³ Joshua Meltzer, ‘The Internet, Cross-Border Data Flows and International Trade’ (2013) 22 *Issues in Technology Innovation* 1.

In addition to the digital economy of the physical world, there is a purely native economy of the digital world, with the ‘sharing’ and ‘platform economies’ serving as prime examples.²⁴ As suggested by the models of Ciuriak and Ptashkina, the sharing economy refers to a business model in which individuals can borrow or rent assets owned by others, facilitated through the Internet. The platform economy includes digital platforms that enable various economic activities, such as the sharing economy, by acting as intermediaries between users and service providers. These platforms often leverage data and network effects to scale rapidly. Another, more salient example is the economy of the metaverse, where the digital world replicates, to some extent, the physical world. A digital avatar can purchase movable property such as clothes, accessories, and art,²⁵ as well as ‘immovable’ property, that is ‘real estate’ in the metaverse.²⁶ The cryptoworld is an extreme version of a digitally native world.²⁷ The cryptoeconomy of the blockchain was developed to bypass mainstream economic and financial institutions such as commercial banks and central banks.²⁸ It was aimed to accommodate digitally native citizens. This challenges the authority of the state. At the same time, tech companies and commercial banks, which were initially sceptical, have begun to embrace this technology, participating in and shaping the cryptoeconomy.²⁹

Investments in the native digital economy are more difficult to classify as foreign direct investments compared to digital FDI as defined above. This is entirely new territory. The novelty lies in the non-territorial and non-physical nature of transactions and potential investments. The next subsection explores some classical notions of international investment law and their function in the digital economy.

International investment law in the digital economy

International investment law was not designed to accommodate these new types of economies. However, as investment in digital economies continues to grow, it is certain that relevant disputes will arise in the future.³⁰ For instance, in 2021, Australian Senator Rex Patrick warned of the risk of an Investor–State Dispute Settlement (ISDS) claim by Google against Australia, as a proposed law would have required the tech giant to pay publishers for displaying their news content.³¹ The main challenges in international investment law related to digital FDI and purely native digital assets centre on three issues. First, whether they are permitted in the relevant jurisdiction. Secondly, whether activities in the digital economy qualify as ‘investments’ and their operators as ‘investors’, which also requires establishing a territorial connection to host states. Thirdly, the application of substantive standards of protection to investors in the digital economy.

²⁴ Tom Slee, *What's Yours Is Mine: Against the Sharing Economy* (OR Books 2016).

²⁵ Bobby Glushko, ‘Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds’ (2007) 22 *Berkeley Technology Law Journal* 507.

²⁶ See, eg <<https://decentraland.org/>>

²⁷ See Georgios Dimitropoulos, ‘The Law of Blockchain’ (2020) 95 *Washington Law Review* 1117.

²⁸ Satoshi Nakamoto, *Bitcoin: A Peer-To-Peer Electronic Cash System* (2008) 2 <<https://bitcoin.org/bitcoin.pdf>> accessed 1 March 2025; Primavera De Filippi, ‘Bitcoin: A Regulatory Nightmare to a Libertarian Dream’ *Internet Policy Review* (2014).

²⁹ See, eg, Wolfie Zhao, ‘Bank of America Files for 3 New Blockchain Patents’ (*Coindesk*, 1 August 2017) <<https://www.coindesk.com/bank-america-files-3-new-blockchain-patents>> accessed 1 March 2025 (discussing three blockchain-related patents filed by the Bank of America).

³⁰ Mohanty and Tangara (n 3) 69; see also Panagiotis Delimatsis, ‘From *TikTok* to *Uber* to the *Metaverse*: Digital Services, Servification and International Investment Law’ in Panagiotis Delimatsis, Georgios Dimitropoulos and Anastasios Gourgourinis (eds), *Digitalisation, New Technologies and International Investment Law* (Cambridge University Press, forthcoming 2025).

³¹ Vladislav Djanic, ‘Australian Parliamentarian Voices Concern that Google May Bring a Billion-Dollar ISDS Claim against Australia’ (*IAReporter*, 4 February 2021) <<https://www.iareporter.com/articles/australian-parliamentarian-voices-concern-that-google-may-bring-a-billion-dollar-isds-claim-against-australia/>> accessed 14 March 2025.

Market access and regulation

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID or the Washington Convention) governs ISDS. The Washington Convention does not include provisions for protecting foreign investors before they enter a prospective host state's jurisdiction. States may grant foreign investors admission or establishment rights in their markets through IIAs and/or domestic law.³² Traditional European bilateral investment treaties (BITs) and multilateral IIAs generally do not confer such rights.³³ Market access provisions are more common in investment treaties in North America and East Asia.³⁴ Thus, only a few IIAs grant pre-entry protections to prospective investors. Even these 'pre-entry IIAs' grant a right of establishment that is often limited in scope.³⁵ The limitation is imposed either by subjecting this right to a 'national law' clause,³⁶ or by framing the market access obligations of the host state in a 'soft' or 'best endeavour' way.³⁷

In any case, under most IIAs, investments must comply with the laws of the host state³⁸—including, obviously, laws regulating the digital economy. Even in purely post-entry scenarios, more recent IIAs include various exceptions that may permit various domestic measures.³⁹ Respondent states in ISDS have frequently relied on security exceptions to justify a variety of domestic measures.⁴⁰ They have also often invoked the necessity defence under customary international law with success.⁴¹ IIAs would thus generally permit measures related to essential security, public order, or morals in the context of the digital economy.⁴²

The digital economy is inherently global. Digital technologies cross borders without restraint, and actors are deeply interdependent.⁴³ However, the above suggests that, in principle, domestic measures related to the digital economy are generally permitted under international investment law. Domestic investment screening measures are allowed under international investment law,⁴⁴ as are domestic measures specifically regulating the digital economy. From 2014 to 2019, approximately 82 per cent of policies affecting digitally enabled services worldwide were classified as restrictive.⁴⁵ The sharing and platform economy

³² Georgios Dimitropoulos, 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest' (2023) 22 *World Trade Review* 90.

³³ See art 10 ss 1 and 3 Energy Charter Treaty.

³⁴ Muthucumaraswamy Sornarajah, 'Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments' (2011) 1 *Asian Journal of International Law* 267; see, eg, art 3(1) of the US Model BIT (2012).

³⁵ See generally UNCTAD, 'Most-Favoured Nation Treatment' in *Series on Issues in International Investment Agreements* (1999) 8.

³⁶ See on the scope of the limitation *Fraport A.G. Frankfurt Airport Services Worldwide v Republic of the Philippines*, Award of 16 August 2007, ICSID Case No ARB/03/25.

³⁷ See, eg, art 2(1) of the UK Model BIT (2008).

³⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2003) para 46.

³⁹ See generally UNCTAD, 'The Protection of National Security in IIAs', UNCTAD Series on International Investment Policies for Development, UNCTAD/DIAE/IA/2008/5, United Nations, New York/Geneva (2009) 72.

⁴⁰ See, eg, *Bear Creek Mining Corporation v Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) paras 122, 149, 202, 341, 473.

⁴¹ See, eg, *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Award (18 September 2007) para 344; but see *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on Annulment (10 June 2010) paras 159, 168, 177, 200, 223.

⁴² Zhang and Mitchell (n 3) 4.

⁴³ Digital markets are globally integrated through Global Value Chains; see USITC, 'Advice Concerning an Information Technology Agreement and Modification of Duties on Distilled Spirits' Publication 3031 (April 1997).

⁴⁴ See The 'Domestic layer' section.

⁴⁵ Francesca Casalini, Javier López González and Taku Nemoto, 'Mapping Commonalities in Regulatory Approaches to Cross-Border Data Transfers', OECD Trade Policy Papers, No 248, (OECD Publishing 2021); see also generally Rachel F Fefer, Shayerah I Akhtar and Michael D Sutherland, 'Digital Trade and U.S. Trade Policy' (2021) Congressional Research Services R44565 (updated 9 December 2021).

is now heavily regulated or even restricted in some jurisdictions; measures targeting home-sharing platforms, such as Airbnb, and ride-sharing platforms, such as Uber, are increasingly common.⁴⁶ Many states impose restrictions or even prohibit dealings with cryptocurrencies, cryptoassets, or other types of digital assets.⁴⁷ States also frequently implement measures to restrict cross-border data flows.⁴⁸ The two most common measures are data localization requirements and source code disclosure requirements. Data localization restrictions limit the transfer of locally produced data abroad and may include mandates for data storage in local data centres, or impose restrictions or outright bans on data transfers.⁴⁹ Mandatory technology transfer requirements can also force companies to reveal certain aspects of their technology. This may include disclosing software source code.⁵⁰

Overall, these measures are an exercise of digital sovereignty—the power of the state to regulate the Internet⁵¹—either at the admission stage or even later, and are generally permitted under international investment law.

Digital investor and digital investment

For an activity to be protected under international investment law, a ‘double-barrelled’ test generally applies: the investment must satisfy the criteria established under both the Washington Convention and the applicable IIA. The jurisdiction of ICSID extends, according to Article 25(1) of the Washington Convention, to ‘any legal dispute arising directly out of an investment’, and to ‘national(s) of another Contracting State’ as protected investors.⁵² Most BITs make generic references to ‘investors’ and ‘investments’. The definition of investment varies across the thousands of treaties signed between states. Common terms in BITs include ‘every asset’, ‘all kinds of assets’, or ‘every kind of asset’, often accompanied by an indicative list of covered assets. Some BITs, however, specify a defined list of protected assets. Multilateral treaties follow a similar approach.⁵³

The broad definition of ‘investment’ and ‘asset’ in IIAs typically encompasses non-physical rights, including intangible assets and intellectual property.⁵⁴ This expansive interpretation suggests that digital FDI and digital assets would generally qualify as protected investments.⁵⁵ Hence, even if they do not fit the more traditional—physical—concept of assets, digital assets function as a means of recording and storing data, much like Internet websites. As such, they would fall under the category of intangible assets or intellectual property rights, reinforcing their eligibility for investment protection under IIAs.⁵⁶

⁴⁶ See generally Sofia Ranchordás, ‘Innovation Experimentalism in the Age of the Sharing Economy’ (2015) 79 Lewis and Clark Law Review 872.

⁴⁷ Georgios Dimitropoulos, ‘Global Currencies and Domestic Regulation: Embedding through Enabling?’ in Philipp Hacker and others (eds), *Regulating Blockchain: Techno-Social and Legal Challenges* (Oxford University Press 2019) 112.

⁴⁸ Anupam Chander and Uyên P Lê, ‘Data Nationalism’ (2015) 64 Emory Law Journal 677; Nigel Cory, *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?* (Information Technology and Innovation Foundation, May 2017); Martina F Ferracane, *Restrictions on Cross-Border Data Flows: A Taxonomy*, ECIPE Working Paper No 1/2017 <<https://ecipe.org/publications/restrictions-to-cross-border-data-flows-a-taxonomy/>>

⁴⁹ See, for instance, Zhang and Mitchell (n 3).

⁵⁰ See, for instance, Mitchell, Let, Tang (n 14).

⁵¹ Anupam Chander and Haochen Sun, *Data Sovereignty: From the Digital Silk Road to the Return of the State* (Oxford University Press 2023).

⁵² art 25(1) and (2) ICSID Convention.

⁵³ See, eg, art 1 s 6 ECT (definition of investment); art 1 s 7 (definition of investor) ECT.

⁵⁴ For an in-depth assessment of how intellectual property rights protected by existing investment treaties may be leveraged for the protection of ICT investments (and the inherent limits in the structure of most investment treaties), see Ivory Mills, ‘Emergent Challenges in International Investment Law: Investing in ICT’ in V Mariateresa Garrido (ed), *Human Rights and Technology: The 2030 Agenda for Sustainable Development* (University for Peace 2017) 33, 43–45.

⁵⁵ Chaisse and Bauer (n 3) 557. On the definition of digital FDI and digital asset, see the ‘Two types of digital economies: The digital economy of the physical world and the native economy of the digital world’ section.

⁵⁶ Chaisse and Bauer (n 3) 555.

On the other side, it may be suggested that investments that were not intended to be covered at the time of the agreement are not protected.⁵⁷ Moreover, the unique nature of certain digital economy assets, such as the decentralized structure of blockchain-based assets, suggests that they do not fit the traditional definition of an asset,⁵⁸ as they lack a central issuer or governing agent, they challenge the traditional notion of ownership and control central to international investment law.⁵⁹ Additionally, under the *Salini* definition of investment—which requires a certain duration and contribution to the host state’s economic development—frugal cryptoasset transactions, such as validating or even purchasing cryptocurrency, would not qualify as investments.⁶⁰ Finally, the pseudonymity of owners makes it difficult to apply conventional international investment law frameworks to identify an investor.⁶¹

Besides these arguments, for an activity to be considered an investment, it must have a presence within the territory of the host state.⁶² The intangible nature of digital FDI and digital assets often presents a challenge in establishing a territorial link between them and a potential host state. Scholars have argued that determining the territorial nexus varies across different types of digital assets and depends on factors such as location, possession, and control.⁶³ It is also suggested that the territorial nexus to the host state should not be solely physical, as some cryptoasset transactions are stored on foreign servers while serving customers in the host state. However, establishing the territorial link is simpler when there is a physical presence of sorts—such as through the server or mining activities.⁶⁴ All this suggests that many activities in the native digital economy would not qualify as investments unless they have a physical presence.

Standards of treatment and protection

IAs offer protection to eligible investors and investments. In addition to protection against illegal expropriation, IAs provide investors with both substantive and procedural standards of protection. Substantive protections cover national treatment (NT), most-favoured nation (MFN) treatment, fair and equitable treatment (FET), and full protection and security (FPS).

Domestic measures pertaining to the digital economy may fall under the protective scope of IAs. Data privacy and cybersecurity regulations, as well as, more obviously, data localization and source code requirements, could discriminate against foreign investors⁶⁵ and thus raise issues of NT or MFN.⁶⁶ They could also potentially violate other standards, such as FET and FPS. The FET standard is the most frequently invoked standard by investors in

⁵⁷ Mills (n 54) 45; Chaisse and Bauer (n 3) 559; Butler and Tarawaneh (n 3) 109, 125.

⁵⁸ Munoz (n 3) 9.

⁵⁹ Kelvin KF Low and Eliza Mik, ‘Pause the Blockchain Revolution’ (2019) 69 *International and Comparative Law Quarterly* 135, 137–138, 147, 150.

⁶⁰ *Salini* (n 38) paras 52, 57. It needs to be noted that the *Salini* definition of investment is controversial and only followed by some international investment tribunals. Other tribunals pursue more open-ended approaches to investment; see Rudolph Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 91–96.

⁶¹ Butler and Tarawaneh (n 3) 117.

⁶² See generally *Bayview v Mexico*, Award, 19 June 2007, esp paras 112, 113; *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, [374]; see also *Abaclat and others v Argentina*, Dissenting Opinion Georges Abi-Saab, 4 August 2011, [78] (explaining that sovereign bonds lack a connection to Argentina because ‘they have been sold in international financial markets, outside Argentina, with choice of law and forum selection clauses subjecting them to laws and fora foreign to Argentina’).

⁶³ Chaisse and Bauer (n 3) 563–564.

⁶⁴ Rubinina (n 3) 19.

⁶⁵ Matthias Bauer and others, ‘The Costs of Data Localisation: Friendly Fire on Economic Recovery’ ECIPE Occasional Paper No 3/2014, 3–4, 10.

⁶⁶ Zhang and Mitchell (n 3).

investment arbitration disputes⁶⁷; at the same time, most successful claims in international investment arbitration are based on a violation of FET.⁶⁸ Due to its wide scope, the FET standard could be used in disputes pertaining to the regulation of cross-border digital investment or its absence.⁶⁹ Given the broad interpretations of the standard by investment tribunals, which may require states to provide a stable and predictable legal environment for investors,⁷⁰ a host state could potentially be found in violation of the FET standard if it lacks adequate laws and regulations to address data privacy or cyberattacks.⁷¹

The intangible and non-physical nature of digital assets, and potentially other investments in the digital economy, raises obvious questions about the applicability of the FPS standard.⁷² Tribunals, such as in *Siemens v Argentina*, have extended the FPS standard beyond physical protection to include intangible assets under the relevant BITs.⁷³ It has been suggested that the FPS standard could extend to protecting intangible assets in the digital economy, allowing investors to seek recourse if a state fails to provide adequate data privacy or cybersecurity protections, thereby leaving them vulnerable to cyberattacks. This extension would be limited by the principle of proportionality and the state's capacity to implement data privacy or cybersecurity measures.⁷⁴

Overall, the extent to which classic substantive standards of protection in international investment law apply to FDI in the digital economy, particularly to digitally native assets, remains uncertain. This ambiguity leaves states—especially developing and least-developed ones—vulnerable to investment tribunals' interpretations of these concepts, possibly mirroring how similar provisions were applied during the era of economic globalization. The next section examines the challenges international investment law faces in the digital age.

CHALLENGES FOR INTERNATIONAL INVESTMENT LAW IN THE DIGITAL AGE

The article has examined interpretative challenges related to applying existing international investment law to digital FDI and digitally native assets. This section shifts its focus to the broader implications of digitalization of the economy for international investment law. It identifies two main challenges: first, the emergence of new digital divides, which exacerbate economic inequalities between and within states; and secondly, the growing influence of geoeconomics in international relations, where strategic considerations increasingly shape investment policies and regulations.

⁶⁷ Dolzer, Kriebaum and Schreuer (n 54) 187.

⁶⁸ *ibid.*

⁶⁹ Ginsburg (n 3).

⁷⁰ Without adequate legislation or enforcement to address cybersecurity risks, the host state could, eg, be seen as failing to ensure investors have sufficient access to local remedies; see *Limited Liability Company AMTO v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) para 75 (referring to judicial and legislative failures relating to the administration of justice as potentially constituting a denial of justice and, hence, a violation of the FET standard). See generally Sannoy Das, 'Fine Balance: Empire, Neoliberalism, and the Fair and Equitable Treatment Standard in International Investment Law' (2023) 24 *Journal of World Investment & Trade* 659, 673.

⁷¹ Chaisse and Bauer (n 3) 575–576; see generally Xu Qian, 'Redefining International Law Paradigms: Charting Cybersecurity, Trade, and Investment Trajectories within Global Legal Boundaries' (2024) 25 *Journal of World Investment & Trade* 295, 323–324.

⁷² See Mills (n 54) 33 (identifying 'structural challenges' emerging out of international investment laws governing foreign investment in ICT).

⁷³ *Siemens A.G. v Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, paras 302–309; see also *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, paras 729–731.

⁷⁴ Chaisse and Bauer (n 3) 576–585, and esp at 583.

Digital divide

The digital divide is the greatest challenge of the 21st century. Digitalization and the digital economy may worsen existing divisions, further disadvantage developing countries, and exclude their populations from the opportunities to improve their economic capabilities.⁷⁵ The more advanced the technology, the greater the potential for a digital divide.⁷⁶ The following outlines potential digital divides at three levels: individual, societal, and global.⁷⁷

At the individual level, digital technologies create a stark divide between those with and without Internet access, or with poor connectivity. Similarly, there is a growing divide between those who can code and those who cannot. Cryptoassets, for example, may become exclusive to the global population with Internet access and coding skills.⁷⁸ In addition, digital technologies expose individual consumers and users to significant risks, such as hacking. Therefore, users of digital products require protection.⁷⁹

At the societal level, digital technologies have raised hopes of addressing challenges in the traditional legal system. For instance, it is believed that AI might eliminate human biases from decision-making processes. However, instead of traditional biases, ‘machine bias’ and ‘algorithmic discrimination’ emerge.⁸⁰ Source codes and predictive algorithms, created by individuals, can be biased. Similarly, the datasets used to train AI algorithms may also contain biases. The computer science principle of ‘garbage in, garbage out’ (GIGO) highlights that flawed input data lead to nonsensical outputs.⁸¹ Equally, biased input data affect AI systems that rely on historical data to identify patterns and define ‘typical behaviour’ of individuals and groups of individuals.⁸² As a result, data and algorithms will inevitably affect historically disadvantaged groups.⁸³ These structural issues are exacerbated by the secrecy problem. Tech companies, treating algorithms as business secrets, frequently refuse to reveal the workings and logic of their predictive systems.⁸⁴

From a more global perspective, digital technologies can also negatively impact the physical environment, potentially in catastrophic ways. The growth of the digital economy, such as in data mining, may have very negative consequences on the environment that will eventually have to be mitigated.⁸⁵ In addition, digital technologies shift comparative advantages

⁷⁵ See generally James B Pick and Rasool Azari, ‘Global Digital Divide: Influence of Socioeconomic, Governmental, and Accessibility Factors on Information Technology’ (2008) 14 *Information Technology for Development* 91; Maarten Smeets (ed), *Adapting to the Digital Trade Era: Challenges and Opportunities* (WTO Chairs Programme 2021); Crises, such as the COVID-19 pandemic, have further accentuated digital divides; UNCTAD, COVID-19 Crisis: Accentuating the Need to Bridge Digital Divides (UNCTAD/D/TL/INF/2020/1) <https://unctad.org/en/PublicationsLibrary/dtinf2020d1_en.pdf> accessed 1 March 2025.

⁷⁶ See UNDP, *Beyond Bitcoin: Using Blockchain to Advance the SDGs* <<https://feature.undp.org/beyond-bitcoin/>> (on the example of blockchain); Jochai Ben-Avie, ‘Don’t Let AI Become the Newest Digital Divide’ (*Council on Foreign Relations Blog*, 20 July 2023) <<https://www.cfr.org/blog/dont-let-ai-become-newest-digital-divide>> (on the example of AI).

⁷⁷ See also Dimitropoulos (n 27); Georgios Dimitropoulos, ‘Blockchain’s Heterotopia: Technological Infrastructures and Lawyering in the Public Sector’ in Larry A DiMatteo and others, *The Cambridge Handbook of Lawyering in the Digital Age* (CUP 2019) 239 (presenting similar divides created by the proliferation of blockchain).

⁷⁸ Dimitropoulos (n 27).

⁷⁹ See Robert McMillan, ‘The Inside Story of Mt. Gox, Bitcoins \$460 Million Disaster’ (*Wired*, 3 March 2014) <<https://www.wired.com/2014/03/bitcoin-exchange/>> (discussing the Mt Gox scandal); Klint Finley, ‘A \$50 Million Hack Just Showed that the DAO Was All Too Human’ (*Wired*, 18 June 2016) <<https://www.wired.com/2016/06/50-million-hack-just-showed-dao-human/>> (discussing The DAO scandal).

⁸⁰ Julia Angwin and others, ‘Machine Bias’ (*ProPublica*, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 1 March 2025.

⁸¹ Michael Quinion, ‘Garbage In, Garbage Out’ (*World Wide Words*, 5 November 2005) <<https://www.worldwidewords.org/qa/qa-gar1.htm>> accessed 1 March 2025.

⁸² David Robinson and Logan Koepke, ‘Stuck in a Pattern: Early Evidence on “Predictive Policing” and Civil Rights’ (*Upturn*, 31 August 2016) <<http://www.stuckinapattern.org>> accessed 1 March 2025.

⁸³ Sandra G Mayson, ‘Bias In, Bias Out’ (2019) 128 *Yale Law Journal* 2218.

⁸⁴ This issue was addressed in the *Loomis* case before the Supreme Court of Wisconsin; see *State v Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749. (2016).

⁸⁵ Jon Truby, ‘Decarbonizing Bitcoin: Law and Policy Choices for Reducing the Energy Consumption of Blockchain Technologies and Digital Currencies’ (2018) 44 *Energy Research & Social Science* 399, 401.

by favouring colder climates, for example, for data mining's intensive computing needs. This disadvantages warmer regions, like the Middle East and parts of Latin America and Africa, granting cooler countries, such as those in northern Europe and North America, an edge.⁸⁶

International investment law remains largely indifferent to these multifaceted risks and dangers.⁸⁷ Emerging at a historical juncture marked by a pervasive disregard for non-economic concerns—whether environmental, social, or technological—it has largely failed to grapple with them. This persists into the digital era, where the framework's outdated foundations are increasingly ill-equipped to address the complexities of issues, such as data privacy and security, algorithmic bias, and the socio-economic disruptions brought by the rise of the digital economy.

At the same time, the digital economy has the potential to make a significant contribution to the economic development of states.⁸⁸ It has been argued that the digital economy can benefit developing nations by boosting their productivity and competitiveness.⁸⁹ Few industries are as crucial to the operation of all other goods- and service-producing sectors as the IT industry.⁹⁰ The widespread use of IT fosters organizational and technological innovations across the economy, generating positive externalities.⁹¹ States aiming to attract FDI now recognize that digital policies function as investment policies.⁹²

Agreements in the digital economy have so far mostly focused on liberalizing digital markets by, for example, disallowing local content and source code disclosure requirements.⁹³ A re-orientation is necessary; international investment law can play a crucial role in addressing digital divides,⁹⁴ as well as enabling digital development. There are two main pathways to achieve this: on one side, new IIAs that grant greater deference to domestic regulatory measures; on the other, the facilitation and promotion of investments in digital infrastructure, both physical—such as data centres, antennas, and cables, and non-physical—such as payment systems and digital identity frameworks.⁹⁵

Geoeconomics

Some years ago, Susan Aaronson and Patrick Leblond explored how the USA, EU, and China developed distinct approaches to data governance, resulting in three separate 'data realms'.⁹⁶ These differing frameworks have led to a new digital divide: between the three

⁸⁶ Dimitropoulos (n 27) 1169–1170.

⁸⁷ Lorenzo Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' (2023) 24 *Journal of World Investment & Trade* 766, 780–783.

⁸⁸ Fliess and Sauvé (n 18) 9–10. The availability of modernized digital infrastructure, including Internet bandwidth, Wi-Fi, and fibre optics, has become a crucial factor in foreign investors' decision-making. There seems to be a correlation between the average download speed provided by host states and the volume of foreign investment; see Matthew C Le Merie, Alison Davis and Felix O Le Merie, *The Impact of Internet Regulation on Investment* (Fifth Era 2016) 6–7, 10 <<https://www.fifthera.com/perspectives-blog/2016/1/7/report-the-impact-of-internet-regulations-on-investment>> UNCTAD put forward foreign investment in the digital economy as a way of addressing post-COVID-19 economic challenges; see UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic* (2020) 174–175.

⁸⁹ Parry and others (n 10) 289; International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), World Bank, and World Trade Organization (WTO), 'Digital Trade for Development' (2023).

⁹⁰ Fliess and Sauvé (n 18) 3.

⁹¹ WTO, *15 Years of the Information Technology Agreement: Trade, Innovation and Global Production Networks* (2012) 65.

⁹² See generally Julien Chaisse, "'The Black Pit': Power and Pitfalls of Digital FDI and Cross-Border Data Flows' (2023) 22 *World Trade Review* 73.

⁹³ See the 'Bilateral and regional layer' section.

⁹⁴ Shin-yi Peng, 'The Uneasy Interplay between Digital Inequality and International Economic Law' (2022) 33 *European Journal of International Law* 205.

⁹⁵ See the 'Principles of digital investment law' section.

⁹⁶ Susan A Aaronson and Patrick Leblond, 'Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO' (2018) 21 *Journal of International Economic Law* 245.

dominant data powers and all other countries that must follow their rules.⁹⁷ This obviously challenges the WTO legal framework's authority to govern international data flows. The authors argue that this fragmentation necessitates a re-evaluation of international economic mechanisms to address the complexities arising from these divergent data governance models.⁹⁸ Beyond data, these three countries have created their own 'digital empires' according to Anu Bradford.⁹⁹ The competing regulatory approaches of the USA, the EU, and China are shaping the global digital economy, influencing innovation, governance, and geopolitical power.¹⁰⁰

The dominant narrative in the 1990s suggested that history had ended; it had ended with the overwhelming victory of Western-type political and economic liberalism.¹⁰¹ Economic liberalization, the foundation of the Liberal International Order, is no longer the main consideration for economic engagement among nations—not even among Western states. A new geopolitical and geoeconomic world order has emerged, refuting neoliberalism as the prevailing ideology and political economy in today's international landscape.¹⁰²

New mega-regionals had already signalled a turn from traditional market economics to geoeconomics in international relations and international (economic) law. Mega-regional RTAs such as the (failed) Transatlantic Trade and Investment Partnership (TTIP), the (now reformed) Trans-Pacific Partnership (TPP), as well as the United States–Mexico–Canada Agreement (USMCA) incorporated linkage chapters, including chapters on investment and digital trade. Early projections suggested that mega-regionals would only have minimal economic impact¹⁰³; the minimal economic impact would be offset by other advantages, such as enhanced protection for foreign investors.¹⁰⁴

Calls for the application of 'economic statecraft',¹⁰⁵ along with 're-shoring' and 'friend-shoring', in international relations are becoming increasingly common. Economic statecraft refers to the combination of foreign policy and domestic industrial policy.¹⁰⁶ The goal of friend-shoring is to strengthen economic ties exclusively with trusted political allies.¹⁰⁷ The primary objective of these strategies is to protect the national security interests of states and their allies within the framework of foreign economic activities.

These shifts do not necessarily imply abandoning the fundamental values of international investment law but rather signal a recalibration of its priorities. They underscore that liberalization is no longer the absolute guiding principle of investment law, as national security con-

⁹⁷ *ibid.*

⁹⁸ *ibid* 268–272.

⁹⁹ Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023)

¹⁰⁰ But see Alexandros Bakos, Amna Zaman, and Georgios Dimitropoulos, 'From the Ashes of the Empires: Towards Global Convergence in Approaches to Data Governance' (*Opinio Juris*, 20 January 2025) <<https://opiniojuris.org/2025/01/20/from-the-ashes-of-the-empires-towards-global-convergence-in-approaches-to-data-governance/>> (discussing the convergence across the regulatory models of the digital empires).

¹⁰¹ Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).

¹⁰² Roberts, Choer Moraes and Ferguson (n 12).

¹⁰³ Melissa K Griffith, Richard H Steinberg and John Zysman, 'From Great Power Politics to a Strategic Vacuum: Origins and Consequences of the TPP and TTIP' (2017) 19 *Business and Politics* 573, 580–581.

¹⁰⁴ *ibid* 578–579.

¹⁰⁵ See generally Linda Weiss and Elizabeth Turbon, 'Developmental State or Economic Statecraft? Where, Why and How the Difference Matters' (2021) 26 *New Political Economy* 472; Ling S Chen and Miles M Evers, "'Wars Without Smoke": Global Supply Chains, Power Transitions, and Economic Statecraft' (2023) 48 *International Security* 164.

¹⁰⁶ See generally Robert D Blackwill and Jennifer M Harris, *War by Other Means: Geoeconomics and Statecraft* (2016) (explaining and criticizing that the two spheres of policymaking were separated in the mid to late 20th century).

¹⁰⁷ Atlantic Council, *Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and "Friend-Shoring" Supply Chains* (13 April 2022) <<https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/>> accessed 1 March 2025.

siderations have become particularly prominent in the digital economy.¹⁰⁸ In this context, geoeconomics is increasingly defined by digital geoeconomics, where technological competition and strategic concerns shape investment policies and regulations.¹⁰⁹

The next section examines the evolving layers and principles of international investment law in the digital economy, shaped by the rise of geoeconomics and states' efforts to address emerging digital divides. It explores how shifting geopolitical dynamics influence investment frameworks and how governments are adapting regulatory approaches to ensure equitable access and participation in the digital economy.

LAYERS OF DIGITAL INVESTMENT LAW

After defining the concepts of the digital economy and digital investment, and outlining the challenges investment law faces in the digital age, the article identifies the layers of investment law governing investments in the digital economy. It distinguishes between a domestic layer and a bilateral and regional layer. The article concludes by examining the potential for an overarching investment law framework tailored to the digital economy, as well as principles governing this new digital investment law.

Domestic layer

As discussed above, the ICSID Convention and IIAs do not often include market access rules or other pre-entry protection for foreign investors and investments. Instead, domestic laws and institutions determine whether a foreign investor and their investment can enter the national market.¹¹⁰ Many countries have historically implemented, or recently introduced, ISMs to regulate the admission of foreign investment. National security is the primary reason for establishing, maintaining, expanding, or proliferating ISMs.¹¹¹

Different ISMs interpret national security in varying ways, typically granting broad review criteria and significant discretion to agencies conducting national security assessments. Recent investment screening laws now incorporate geoeconomic considerations alongside traditional national security factors in foreign investment assessments, extending their scope beyond national defence.¹¹² The emergence of the digital economy has driven both the reform of longstanding ISMs and the introduction of new ones, particularly in the USA and Europe.¹¹³ These mechanisms now prioritize protecting 'critical technologies' and 'critical infrastructure,' broadly defined to include both physical and digital assets in the digital economy.¹¹⁴ Their primary objective is to shield the domestic digital economy from foreign investments in technologies like AI, semiconductors, and quantum computing.

¹⁰⁸ Benjamin Cedric Larsen, *The Geopolitics of AI and the Rise of Digital Sovereignty* (Brookings Institute 8 December 2022) <<https://www.brookings.edu/research/the-geopolitics-of-ai-and-the-rise-of-digital-sovereignty/>> accessed 1 March 2025; but see William Alan Reinsch, *The End of Neoliberalism?* (Centre for Strategic International Studies 3 January 2023) <<https://www.csis.org/analysis/end-neoliberalism>> accessed 1 March 2025.

¹⁰⁹ Georgios Dimitropoulos, 'Industrial Policy and the New Internationalism: After the Liberal International Order' (forthcoming 2025) Cornell International Law Journal.

¹¹⁰ See the 'Market access and regulation' section.

¹¹¹ See the 'Geoeconomics' section; Georgios Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2020) 539.

¹¹² *ibid.*

¹¹³ See art 4(1) of the Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union; s 1702(c)(2) of the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018 that amended s 721 of the Defense Production Act that establishes the Committee on Foreign Investment in the United States (CFIUS).

¹¹⁴ See also Manu Misra, 'Foreign Investment in Critical National Infrastructure' in Panagiotis Delimatsis, Georgios Dimitropoulos and Anastasios Gourgourinis (eds), *State Capitalism and International Investment Law* (Hart 2023) 143.

The rise of the digital economy has, to a significant extent, driven the shift in focus from international to domestic law, fundamentally reshaping the nature of foreign investment law.¹¹⁵ This transformation reflects the increasing importance of national regulatory frameworks in governing digital investments, as states assert greater control over data governance and cybersecurity, while aiming at developing digital infrastructures and adapting to evolving economic and geoeconomic challenges.

Bilateral and regional layer

BITs are not generally designed to address issues specific to the digital economy.¹¹⁶ However, there are exceptions to this. For example, Canada's 2021 model for the Foreign Investment Promotion and Protection Agreement (FIPA) restricts host countries from imposing performance requirements on investments in the digital economy, such as technology transfer, the disclosure of software source code, or cross-border data transfers:

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory, impose or enforce a requirement, or enforce a commitment or undertaking:

[...]

(f) to transfer technology, a production process, source code of software, or other proprietary knowledge to a person in its territory;

(g)

(i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of a person of the Party, or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology;

(h) that prohibits or restricts the cross-border transfer of information by electronic means, if this transfer is related to the business of a covered investment or the business of an investor of a Party; [...]¹¹⁷

Some exceptions are provided for, such as for public procurement,¹¹⁸ as well as for the purposes of compliance with the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO TRIPS Agreement) and domestic competition law.¹¹⁹ There are also some more general exceptions clauses for the purposes of achieving legitimate public policy objectives.¹²⁰ Moreover,

(g) paragraph 1(f) do[es] not preclude a regulatory body or judicial authority of a Party from requiring a person of the other Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding, subject to safeguards against unauthorized disclosure;

(h) paragraphs 1(g) and 1(h) do not apply to a measure that a Party adopts or maintains relating to a financial institution; and

¹¹⁵ See also Georgios Dimitropoulos, 'The WTO New National Security Challenge' in Julien Chaisse and Cristián Rodríguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar 2023) 619.

¹¹⁶ Polanco (n 1).

¹¹⁷ art 12 Model FIPA (footnotes omitted).

¹¹⁸ art 12(3)(c) Model FIPA.

¹¹⁹ art 12(3)(e) Model FIPA.

¹²⁰ art 12(3)(f) Model FIPA.

(i) paragraph 1(h) do [sic] not apply to information held or processed by or on behalf of a Party, or a measure related to this information, including a measure related to its collection.

These provisions largely follow the lead of recent RTAs. Almost all recent RTAs have provisions prohibiting data localization¹²¹ and the imposition of source code requirements.¹²² The Regional Comprehensive Economic Partnership (RCEP), which has been spearheaded by China, also has provisions on the location of computing facilities¹²³ and the cross-border transfer of information by electronic means¹²⁴; however, they are rather deferential to the state. USMCA, on the other side, does not include strict exceptions clauses in its prohibition of data localization requirements.¹²⁵

Bilateral and regional agreements, as well as other types of arrangements, are emerging to address gaps left by traditional IIAs and may eventually replace them. In September 2021, for example, the EU and the USA established the EU–US Trade and Technology Council (TTC); its goal is to also address investment-related issues in the digital economy, such as investment screening.¹²⁶ DEPA is an agreement focused on regulating the digital economy. It recognizes an ‘inherent right to regulate’ in cross-border digital trade¹²⁷; this right does not only cover traditional areas of public interest protection, but also the promotion of corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, and more broadly, inclusive trade, sustainable development, and traditional knowledge.¹²⁸ The DEPA experiment is now being replicated in other Digital Economy Agreements (DEAs), mostly spearheaded by Singapore,¹²⁹ and in Digital Trade Agreements (DTAs) promoted by the EU.¹³⁰

These agreements establish comprehensive legal frameworks that create digital economy zones among participating countries. They largely operate based on different principles compared to older IIAs and RTAs. They foster regulatory interoperability, enhance data governance cooperation, and facilitate cross-border transactions in the digital economy without necessarily liberalizing digital borders. As these agreements evolve, they operate as umbrella frameworks for digital investments and could serve as blueprints for a new generation of international investment frameworks tailored to the digital economy, potentially shaping future digital governance at both regional and global levels.

Finally, beyond ‘mainstream’ international law, China is developing its own framework for investment law in the digital economy. This approach is rooted in a distinct digital worldview—both for China and the world. The *Made in China 2025* (MIC 2025) plan seeks to reduce China’s dependence on foreign digital technologies while enhancing its self-sufficiency

¹²¹ art 19.12 USMCA; art 14.13 CPTPP.

¹²² art 19.16: USMCA; art 14.17 CPTPP.

¹²³ art 12.14 RCEP.

¹²⁴ art 12.15 RCEP.

¹²⁵ art 19.12 USMCA.

¹²⁶ See <<https://digital-strategy.ec.europa.eu/en/policies/trade-and-technology-council>> accessed 1 March 2025.

¹²⁷ See Preamble to DEPA.

¹²⁸ *ibid.*

¹²⁹ Ministry of Trade and Industry (Singapore), *Digital Economy Agreements* (Web Page, undated) <<https://www.mti.gov.sg/Trade/Digital-Economy-Agreements>> accessed 1 March 2025; see also Emily Jones, Beatriz Kira and Rutendo Tavengerwei, ‘Norm Entrepreneurship in Digital Trade: The Singapore-led Wave of Digital Trade Agreements’ (2024) 23 *World Trade Review* 208.

¹³⁰ European Commission, ‘Digital Trade: Digital Trade Agreements’ (Web Page, undated) <https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/goods-and-services/digital-trade/digital-trade-agreements_en> accessed 1 March 2025.

in high-tech sectors such as semiconductors and AI, supported by private investment.¹³¹ By emphasizing domestic innovation and self-sufficiency across both state and private sectors, China's strategy signals a broader shift towards digital sovereignty and digital geoeconomic dominance. The Digital Silk Road (DSR) is a key pillar of MIC 2025 and the Belt and Road Initiative (BRI), aimed at expanding cross-border digital infrastructure and integrating large parts of the world into China's digital ecosystem.¹³² Compared to the US and EU approaches, at least as originally envisioned, China's strategy places greater emphasis on developing and investing in infrastructure. This includes both digital components and physical infrastructure, such as data centres, cables, and satellites.¹³³

Towards a new investment law for the digital economy?

Beyond the stand-alone initiatives discussed above, a more coherent approach to digital investment law may be taking shape, informed by both the challenges and the developments in digital investment law that have been identified in the article.¹³⁴ The remainder of the article examines these emerging frameworks and the principles shaping the evolution of digital investment law.

A new overarching framework?

International organizations such as UN Trade & Development and the Organisation for Economic Co-operation and Development (OECD) emphasize that digital transformation presents both challenges and opportunities for investment policy.¹³⁵ The inherent characteristics of digital technologies suggest that a broader international framework for the digital economy may be crucial in addressing digital divides, geoeconomic challenges, and ultimately driving digital development. New international agreements are making small steps in the direction of addressing digital divides and promoting digital development through investment law. The 2021 Bridgetown covenant, developed by UN Trade & Development and signed by 15 states, puts the digital divide and the necessity to spread digital transformation equally across states at the centre of its work.¹³⁶ The provisions in the Covenant related to digital infrastructure, inclusive growth, technology transfer, policy space, and regulation create potential synergies with investment law and should help shape classic investment law as it intersects with the digital economy.

The G7 leaders issued, in June 2021, the Carbis Bay G7 Summit Communiqué, titled 'Our Shared Agenda for Global Action to Build Back Better'¹³⁷; its goal is to help achieve 'a new consensus and restore public trust in a rules-based, free, fair and open economic system'.¹³⁸ This 'Cornwall Consensus' aims to replace the Washington Consensus—the

¹³¹ James McBride and Andrew Chatzky, *Is "Made in China 2025" a Threat to Global Trade?* (Council on Foreign Relations 13 May 2019) <<https://www.cfr.org/background/made-china-2025-threat-global-trade>> accessed 1 March 2025.

¹³² See generally Matthew S Erie and Thomas Streinz, 'The Beijing Effect: China's "Digital Silk Road" as Transnational Data Governance' (2021) 54 *New York University Journal of International Law and Politics* 1.

¹³³ *ibid* 6.

¹³⁴ See the 'Challenges for international investment law in the digital age' section 3 and the 'Bilateral and regional layer' section.

¹³⁵ David Gaukrodger, 'The Future of Investment Treaties—Possible Directions' (OECD Working Papers on International Investment, No 2021/03) (OECD Publishing) <<https://doi.org/10.1787/946c3970-en>> accessed 1 March 2025; United Nations Trade & Development has created a regular technology and innovation report; see, eg, UNCTAD, *Technology and Innovation Report* (2023) <<https://unctad.org/tir2023>> accessed 1 March 2025.

¹³⁶ The Bridgetown Covenant: From Inequality and Vulnerability to Prosperity for All (Fifteenth session, Virtual Barbados 3–7 October 2021) <https://unctad.org/system/files/official-document/td-l435_en.pdf> accessed 1 March 2025.

¹³⁷ See the following documents: G7, *The Cornwall Consensus. Building Forward Better* (G7, 2021) (hereinafter: Cornwall Consensus); G7, *Carbis Bay G7 Summit Communiqué* (13 June 2021) (hereinafter: Carbis Bay Communiqué); G7 Panel on Economic Resilience, *Key Policy Recommendations* (G7, 2021) (hereinafter: G7 Panel on Economic Resilience, Key Policy Recommendations).

¹³⁸ Cornwall Consensus, p 1.

constitution of the neoliberal world order—as the framework of future economic development. Cornwall recognizes the pivotal role of digital technologies in the current international landscape, underscoring their potential societal benefits and risks.¹³⁹ Cyberspace is recognized as a future frontier,¹⁴⁰ and the digital sphere as one of the four themes central to economic resilience, together with health, trade, and climate.¹⁴¹ The Consensus envisions a legal framework for the digital realm that diverges from the law's relationship with economic globalization in the 20th century.

While the new consensus builds upon traditional notions of international ordering,¹⁴² Cornwall's international order shall be based on the principle of equality of opportunities for all individuals and support for the poor.¹⁴³ The new consensus seeks to establish an overarching framework for the digital economy along similar lines. It recognizes bridging the digital divide and 'promoting digital literacy worldwide' as one of the greatest challenges for humanity in the future.¹⁴⁴ It also invites states to regulate digital technologies considering the interests of states, as well as 'all parts of [...] countries', and 'all peoples across the globe, especially the poor'.¹⁴⁵ The Cornwall Consensus specifically emphasizes investment as a means of addressing major global challenges, including climate change, pandemic prevention and response, and the equitable distribution of benefits from the digital transition.¹⁴⁶ Economic and financial recovery in the post-COVID world should be 'investment-led' while also being 'more inclusive'.¹⁴⁷

The vision of Cornwall has also started taking shape more recently through the Indo-Pacific Economic Framework for Prosperity (IPEF), which has pillars on the connected economy, resilient, clean economy, and fair economy.¹⁴⁸

Principles of digital investment law

Digital technologies challenge traditional categories of international investment law. Scholars have suggested that our understanding of basic investment law concepts should be adjusted to include investments in the digital economy.¹⁴⁹ The primary challenge lies in investments in purely digital assets, rather than in digital FDI, as defined above.¹⁵⁰

In addition to the potential extension of IIAs' scope to the digital economy through interpretation, the question arises whether digital economy-related issues should be incorporated into the IIAs themselves. The blend of non-physical and physical components highlights, according to some scholars, the need to extend, for example, the FPS standard to safeguard against cyber threats.¹⁵¹ This might also especially be the case for decentralized technologies,

¹³⁹ Carbis Communiqué para 31.

¹⁴⁰ Carbis Bay Communiqué para 31.

¹⁴¹ See G7 Panel on Economic Resilience, Key Policy Recommendations.

¹⁴² Carbis Bay Communiqué paras 27–36.

¹⁴³ See *ibid* para 27.

¹⁴⁴ *ibid* para 32.

¹⁴⁵ See *ibid* para 27.

¹⁴⁶ *ibid* paras 21, 39–41, 64.

¹⁴⁷ G7 Panel on Economic Resilience, Key Policy Recommendations, at 6.

¹⁴⁸ The White House, *Statement on Indo-Pacific Economic Framework for Prosperity* (23 May 2022) <<https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/>> accessed 1 March 2025.

¹⁴⁹ This is largely a reflection of technological optimism within international investment law; see generally on technological optimism James E Krier and Clayton P Gillette, 'The Un-Easy Case for Technological Optimism' (1985) 84 *Michigan Law Review* 405.

¹⁵⁰ See the 'Two types of digital economies: The digital economy of the physical world and the native economy of the digital world' section.

¹⁵¹ See the 'Standards of Treatment and Protection' section.

such as blockchain¹⁵²; it has thus been suggested to introduce the term ‘crypto-investments’ into IIAs.¹⁵³ This should arguably be accompanied by a modified test for defining crypto-investment—with a territorial linkage different from traditional FDI.¹⁵⁴ However, this approach risks creating micro-regimes within the same IIA, leading to in-treaty fragmentation and potentially affecting the treaty’s overall consistency and practical implementation.

Developments in the broader field of international investment law should not be disregarded though in the drafting of new agreements such as the ones mentioned in the previous section and other IIAs. Currently, for example, there is a trend towards diminishing protections under the FET standard by favouring an interpretation more aligned with the customary international law principle of the minimum standard of treatment,¹⁵⁵ or (implicitly or expressly) removing the protection of legitimate expectations from the scope of the standard.¹⁵⁶ Even more broadly, there is a growing tendency to recognize greater space for government regulation of FDI¹⁵⁷; this is particularly true in the digital economy. Besides the examples mentioned above,¹⁵⁸ even the US government recently abandoned its position that had informed the USMCA and some of the other above-discussed agreements. In October 2023, the USTR announced a re-evaluation of its approach to data and source code in the WTO e-commerce negotiations and beyond, aiming to allow for more regulatory flexibility in the digital economy.¹⁵⁹ Beyond the trends driven by shifting preferences on the impact of international (economic) law on domestic law and policy space, it is also important to highlight that if developing countries and emerging economies were to forgo domestically produced data, they would be relinquishing a significant comparative advantage in the digital economy.¹⁶⁰ Some IIAs already recognize that the right to regulate for legitimate policy objectives includes privacy and data protection.¹⁶¹

Overall, future IIAs should strike a balance between digital economy liberalization and the preservation of regulatory autonomy in areas such as data protection and cross-border data flows, cybersecurity, and the regulation of different types of digital markets identified above.¹⁶² This raises an important question about the future of traditional principles of international investment law and their relevance in an increasingly digitalized economic landscape.

National treatment—the most important of these principles—remains applicable to the digital economy and ensures that foreign and domestic investors receive equal treatment in

¹⁵² Munoz (n 3) 9.

¹⁵³ *ibid.*

¹⁵⁴ *ibid* 10 ((i) the digitalization of an asset; (ii) connection to a DLT governance infrastructure; and (iii) a strong link to the economy of a state’).

¹⁵⁵ See Georgios Dimitropoulos, ‘National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform’ (2020) 21 *Journal of World Investment & Trade* 71.

¹⁵⁶ For instance, art 8.10(2) (establishing the obligation to afford the investors fair and equitable treatment) of the *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* (provisionally applied since 21 September 2017) contains a closed list of what elements of FET the treaty enshrines, legitimate expectations not being among those listed.

¹⁵⁷ *ibid.*

¹⁵⁸ See the ‘Bilateral and regional layer’.

¹⁵⁹ USTR, *Statement on WTO E-Commerce Negotiations* (United States Trade Representative) (24 October 2023) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/ustr-statement-wto-e-commerce-negotiations>> accessed 1 March 2025.

¹⁶⁰ See Susan A Aaronson and Patrick Leblond, ‘Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO’ (2018) 21 *Journal of International Economic Law* 245, 262 (using the example of the size of the digital economy in China).

¹⁶¹ See, eg, art 3 of the Lithuania-Turkey BIT (2018) (Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments).

¹⁶² See the ‘Two types of digital economies: The digital economy of the physical world and the native economy of the digital world’ section.

like circumstances.¹⁶³ However, its application may require adaptation to address the unique conditions of digital investments, such as the role of data localization requirements, digital services regulation, and emerging security concerns tied to cross-border data flows. Under international investment law, states generally retain their sovereign authority to regulate access to the domestic market.¹⁶⁴ ISMs are now proliferating, specifically targeting foreign investments in the digital economy.¹⁶⁵ Once fully established in the relevant market under the applicable ISM and/or other domestic investment and digital laws, though, the host country must treat foreign investors and their investments in the digital economy no less favourably than its own.¹⁶⁶

Furthermore, the digital economy demands consideration of principles specifically designed to address its unique challenges. One important principle is technological neutrality, a significant concept in international trade law. Embedded in WTO rules, this principle ensures that international trade provisions apply uniformly, regardless of the technology or medium used.¹⁶⁷ This approach enables existing legal frameworks to remain adaptable to evolving features of the digital economy, such as digital assets.¹⁶⁸ At a minimum, technological neutrality should be explicitly enshrined in new IIAs. Its clear inclusion would reduce legal uncertainty, foster technological innovation, and help strike a balance between facilitating open digital markets and preserving regulatory autonomy in admitting investments in the digital economy. Additionally, it could help narrow disparities in global digital geoeconomic competition by fostering equitable opportunities for less digitally advanced economies, while also accommodating differences among digital empires.

Lastly, and perhaps most importantly, new economic agreements must account for those at risk of being left behind—both individuals and states—by ensuring equitable participation in the digital economy. A forward-looking approach to digital investment law should prioritize investments in digital infrastructure, as these serve as the foundation for both technological advancement and economic inclusion.¹⁶⁹ Facilitating and promoting digital infrastructure investment should be prioritized over market liberalization, harmonization of domestic legal frameworks, or broad-based restrictions on national regulatory measures.

CONCLUSION

The transition to the digital economy poses significant challenges for international investment law. This article examines how traditional investment law concepts—such as ‘investor’, ‘asset’, and ‘investment’—operate in the digital economy. It identifies the most fundamental challenges to international investment law in the digital era, particularly the need to address the digital divide and the growing influence of digital geoeconomics. Additionally, the

¹⁶³ See also Zhang and Mitchell (n 3).

¹⁶⁴ See UNCTAD, *World Investment Report 2019: Special Economic Zones* (UNCTAD 2019) 92; see also the ‘Market access and regulation’ section.

¹⁶⁵ See the ‘Domestic layer’ section.

¹⁶⁶ See generally Julien Chaisse and Georgios Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’ (2023) 22 *World Trade Review* 1.

¹⁶⁷ See, eg, art I: 2 of the General Agreement on Trade in Services (GATS) (defining scope of the supply of a service regardless of delivery means—supporting technological neutrality). See generally Gabriele Gagliani, ‘Cybersecurity, Technological Neutrality, and International Trade Law’ (2020) 23 *Journal of International Economic Law* 723 (discussing technological neutrality in the agreements of the WTO framework).

¹⁶⁸ See generally Bruno Mathis, ‘Should Crypto-Asset Regulation be Technology-Neutral?’ in Andrea Bonomi, Matthias Lehmann and Shaheez Lalani (eds), *Blockchain and Private International Law* (Brill 2023) 66 (on the application of the principle to crypto-assets).

¹⁶⁹ Simon B Lacey, ‘Investment Facilitation and the Global Technology Sector: Intergovernmental Cooperation versus Geopolitical Rivalry’ in Axel Berger and Manjiao Chi (eds), *The Making of an International Investment Facilitation Framework. Legal, Political and Economic Perspectives* (Cambridge University Press 2025) 262–263.

analysis explores the multiple layers of digital investment law, from domestic measures such as data localization and technology transfer requirements, as well as ISMs, to the bilateral and regional frameworks embedded in agreements such as DEAs. Moreover, it highlights the potential for developing a comprehensive investment law framework tailored to the digital economy, drawing on initiatives such as the Cornwall Consensus. Ultimately, this discussion underscores the need for a tailored legal framework to address the unique challenges of the digital economy and broader digital transformation. The greatest challenge lies in balancing cross-border digital investment with the preservation of national policy space.

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