

ORIGINAL ARTICLE

# ‘The Black Pit:’ Power and Pitfalls of Digital FDI and Cross-Border Data Flows

Julien Chaisse\* 

School of Law, City University of Hong Kong  
Email: [julien.chaisse@cityu.edu.hk](mailto:julien.chaisse@cityu.edu.hk)

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## Abstract

In today’s data-driven economy, data have been dubbed as the *new oil*. Hence, a close relationship is shared between the increasing amounts of international investments and the increasing volumes of cross-border data flows. The aim of this article is to discuss the legal aspects of the new data paradigm in the international economy and place this discussion in the larger framework of globalization and the Liberal International Order. The central thesis of the article revolves around the crucial role played by domestic laws in the fragmentation of international investment law. The article further discusses the interplay between national and international legal landscapes and how the changing nature of the Liberal International Order is affecting the flow of data across borders. In this context, it also discusses the issues that are presented by a lack of any comprehensive international framework governing Cross-Border Data Flows. The need to update existing agreements and laws in order to factor in digital investment is also highlighted.

**Keywords:** International Investment Law; International Trade Law; Liberal International Order; Digital Special Economic Zones; Digital Economy; International Investment Agreements; FDI Screening; data security; data protection laws

## 1. Introduction

Today’s data-driven and digitalized economy brings into the limelight the importance of investment in data flows. The issues relating to digital Foreign Direct Investment (FDI) and cross-border data flows (CBDF) are deeply intertwined.<sup>1</sup> The digital economy is gaining increasing importance in the world economy.<sup>2</sup> However, at the level of international law, the specific

\*Co-founder of the Internet Intellectual Property Institute (IIPI).

This article title is an allusion to the Mid-Atlantic gap. The ‘Black Pit’ reference is to compare the topic of data flow and FDI (which lacks proper adequate and systematic regulatory framework governing this area) with the Mid-Atlantic Gap which was a strategic area left undefended during the Second World War, owing to the inability to access the area.

<sup>1</sup>See World Economic Forum (2020) ‘A Roadmap for Cross Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy’ (June 2020), [www.weforum.org/whitepapers/a-roadmap-for-crossborder-data-flows-future-proofingreadiness-and-cooperation-in-the-new-data-economy](http://www.weforum.org/whitepapers/a-roadmap-for-crossborder-data-flows-future-proofingreadiness-and-cooperation-in-the-new-data-economy). See also B. Casella and L. Formenti (2018) ‘FDI in the Digital Economy: A Shift to Asset-Light International Footprints’, *Transnational Corporations* 25(1), 101–130 and S. Zhang (2021) ‘Protection of Cross-Border Data Flows Under International Investment Law’, in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*, Vol. I. Singapore: Springer, 209–231.

<sup>2</sup>United Nations Conference on Trade and Development (2021) ‘Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow’, 29 September 2021. See also United Nations Conference on Trade and Development (UNCTAD) (2022) *Investment Trends Monitor*, Issue 41, April 2022. Geneva: UNCTAD, 1–10 (Providing comprehensive data showing that digital investments are growing at breakneck speed).

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International Investment Agreements (IIAs), coupled with the regulation of relevant issues in WTO law, fall short of expectations in governing the complex issues of data flow and FDI. Hence, at the forefront of these issues, lies the prominence of fragmented domestic laws on data flows, each expressing a distinct regulatory approach.<sup>3</sup>

The State assumes a hierarchically powerful position in the international economic order. It ascertains, identifies, and attends to the economic sensitivities within its borders. At the fulcrum of the economic considerations of a State, sits foreign investment. The State has a sovereign right to regulate the entry and establishment of foreign investment within its territory.<sup>4</sup> Consequently, States have increasingly attempted to regulate FDI through their strongest armour: domestic laws.<sup>5</sup> Considering the inextricable link between CBDF and FDI, States have also attempted to regulate international data transfers. The underlying rationale they provide for doing so is the protection of personal sensitive information and the reduction of data breaches.<sup>6</sup> However, the real motive behind many of such regulations is to protect the local economy and to try and keep any foreign companies at bay.<sup>7</sup> Protectionist motivations of this kind are known to impact FDI. As a result, CBDF domestic laws increasingly affect the eco-system of domestic investment law.<sup>8</sup>

While the international framework for foreign trade and investment laws has been the dominant focal point of international economic law and policy, the national or domestic aspects of the same have largely remained under the carpet. The lack of a standardized system of international regulation for digital FDI and CBDF coupled with the crippled state of the existing domestic laws serves as a fertile ground for building an analysis of the consequences of such a system on certain key stakeholders such as States, investors, and the larger international community.

This article aims at analysing the emerging domestic digital laws as part of the larger legal framework of foreign investment. Further, a crucial aspect of this article is the underlying structural metamorphosis of the liberal economic order and its profound impact on digital FDI and CBDFs. Over the years, the colloquial conception of the liberal economic order has transitioned from an international to a domestic precept. With the digitalization of data, transnational trade has undeniably become easier. However, concerns regarding privacy and national security have

<sup>3</sup>J. Hepburn, 'The Past, Present and Future of Domestic Investment Laws and International Economic Law', this special issue (explaining that in the current climate of challenges to the liberal economic order, states are seeking to impose new restrictions on inward investment, most notably including heightened screening requirements but also CBDF). See also N. Cory and L. Dascoli (2021) 'How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them', Information Technology & Innovation Foundation, July 2021, <https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost> (accessed 29 April 2022) (Providing evidence that the number of data-localization measures in force around the world has considerably increased over the past years. 'In 2017, 35 countries had implemented 67 such barriers. Now, 62 countries have imposed 144 restrictions – and dozens more are under consideration.')

<sup>4</sup>E. Guntrip (2016) 'Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law', *International and Comparative Law Quarterly* 65(4), 829–857 (developing an understanding of sovereignty in international investment law and policy 'that is primarily sourced from the host State population exercising its right to economic self-determination').

<sup>5</sup>These laws co-exist with a multiplicity of legal instruments: International Economic Law (IEL), Free Trade Agreements (FTAs), IIAs, domestic investment laws, and Special Economic Zones (SEZs). See J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

<sup>6</sup>A.D. Mitchell (2022) 'Theodore Samlidis, Cloud Services and Government Digital Sovereignty in Australia and Beyond', *International Journal of Law and Information Technology* 30(1), 1–31 (explaining the 'rationale and economic disadvantages of digital sovereignty and different digital sovereignty measures').

<sup>7</sup>D. Myles (2021) 'Data is protectionism's new battleground', FDI Intelligence, 15 December 2021, [www.fdiintelligence.com/article/80472](http://www.fdiintelligence.com/article/80472) (accessed 29 April 2022).

<sup>8</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue. Since investors are increasingly reliant on CBDF to effectively manage their operations, as many as 71% of them feel that data regulations impact their FDI. See P. Laudicina and E. Peterson (2021) *On Shaky Ground: The 2021 FDI Confidence Index*. Kearney.

blurred the importance of international trade regimes and States have created a rather widely accepted ecosystem dependent upon domestic investment regulations to regulate foreign investments.

These precepts formulate the regulatory mechanisms for control and promotion of digital FDI and CBDF. The shift has occurred on account of the growing trend towards a dialogical-based relationship between various modern regulatory institutions. There is a vertically dialogic relationship between the domestic and international institutions. Even within the ambit of international institutions, there is a vertical relationship between *nationalism* and *internationalism*.<sup>9</sup> These ideas arose with the desire of putting nationalism and internationalism at par with each other at the global level. However, they are constricted within the boundaries drawn by the lack of sufficient collaboration and the constant differences between geopolitical motives of the States. Meanwhile, there has been an increasingly swift transformation of digital FDI and CBDF towards a domestically demarcated order.

This article is divided into four sections, with the first being the introduction. The second section builds the foundation of the analysis by discussing the conceptual framework surrounding digital FDI and its implications in relation to the current international legal landscape – specifically discussing the impact of IIAs in regulating international data flow. The third section discusses the implications of such domestication on various stakeholders and discusses its development in the era of contemporary globalization. The fourth section takes a deep dive into the notion of CBDF and the role it plays in digital FDI. The section proceeds by discussing the legal challenges that countries may face by virtue of the increasing volumes of data flow, and further elaborates on the domestic legal responses to this challenge through the enactment of national legislation and introduction of digital SEZs.

## 2. Conceptualizing the Digital Transnational Economy and Its Regulatory Problems

The digital economy can be defined as an economy that is characterized by economic and social activities supported by the internet, mobile networks, and digital technologies.<sup>10</sup> The digital economy also includes markets based on such technologies that enable trade in goods and services by means of e-commerce.<sup>11</sup> This set-up has brought about a change in which business operations are conducted and thereby a change in the approach towards international investment.<sup>12</sup> For the purposes of investing, companies look at *inter alia* the data-related regulations, Intellectual Property (IP) laws, data skills, and digital infrastructure of potential host States. This suggests that States aiming to attract FDI should adjust their laws. Further, there is a need to adjust IIAs that do not fully accommodate digital developing strategies by means of suitable reforms and amendments in the national laws of States and the IIAs.<sup>13</sup>

This section first provides an overview of the interrelation between the digital economy and FDI to establish a backdrop for the analysis that follows. Secondly, it discusses the concept of digital FDI. Lastly, it explains the role played by IIAs in the formation and growth of the contemporary digital economy.

<sup>9</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

<sup>10</sup>L. Eden (2016) '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 29 April 2022).

<sup>11</sup>P. Kambou and M. Khariss (2020) 'Attractiveness of Foreign Direct Investment: Case of Digital Economy', *Revue Internationale des Sciences de Gestion* 3(4), 22.

<sup>12</sup>P.N. Satyanand (2021) 'Foreign Direct Investment and the Digital Economy', UNESCAP ARTNeT on FDI Working Paper Series No. 2, <https://artnet.unescap.org/fdi> (accessed 29 April 2022).

<sup>13</sup>W. Zheng (2020) 'The Digital Challenge to International Trade Law', *New York University Journal of International Law & Politics* 52, 539.

### 2.1 The Digital Economy and FDI: Establishing the Linkages

The digital economy is one that involves the application of internet-based technologies for the purposes of production, trade, and consumption of goods and services. In this respect, '[t]he digital economy has important implications for investment, and investment is crucial for digital development'.<sup>14</sup> The digital economy has given rise to new Information and Communications Technology (ICT) businesses and changed the way of conducting business.<sup>15</sup> This in turn has diversified the shift in the approach two fold for the purpose of international investment of digital enterprises. First, we see a rise in knowledge oriented FDI, i.e., foreign investors increasingly innovating outside their home country.<sup>16</sup> One of the features of knowledge-based FDI is that it is growth promoting. This is because unlike other forms of physical capital, knowledge-based FDI can promote growth. The initial cost incurred in developing any kind of knowledge is not re-incurred at a later point (i.e. when that knowledge is utilized again).<sup>17</sup> This marks an increase in the focus of the enterprises towards the tapping of the available intangible resources of the host State. Secondly, digital FDI is also growing in size, primarily due to the activities of multi-billion dollar companies such as Amazon, and Netflix. These companies seek to invest in not just local markets, but also those abroad.<sup>18</sup>

A major challenge for digital economies today is to bridge the digital gap (such as by developing and enhancing the capacity of emerging firms and States in order to enhance people's access to digitalization) and to tackle the two-fold complexities introduced by the digital structure as discussed above. Policy challenges in a digital economy involve bridging this digital divide and addressing complexities such as internet-related issues.<sup>19</sup> However, in order to attract digital investment in the first place, governments should be equipped with the requisite digital infrastructure. Without the presence of such infrastructure, a State will not be able to attract digital FDI adequately. Further, such digital infrastructure must also be supplemented by a comprehensive regulatory framework to attract digital firms in the host State.

### 2.2 The Notion of Digital FDI

There have been several attempts to theorize the concept of FDI. Such theories seek to answer questions relating to the reason behind the concentration of FDI in certain industries, the relationship between FDI and trade, etc. The most prominent, and perhaps the starting point, of the theories on FDI is that provided by John Dunning. Dunning's Eclectic Paradigm or the OLI (Ownership, Location, Internalization) Paradigm, seeks to provide a holistic framework

<sup>14</sup>United Nations (2017) 'As Booming Digital Economy Sprints Past Poor Countries, UN Report Urges Closing Investment Divide', *UN News*, 7 June 2017, <https://news.un.org/en/story/2017/06/558992-booming-digital-economy-sprints-past-poor-countries-un-report-urges-closing> (accessed 29 April 2022). See also K.F. Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', this special issue (discussing the notion of development and the tensions between domestic law and international law).

<sup>15</sup>Satyanand, supra n. 12.

<sup>16</sup>S.F. Matusik, M.B. Heeley, and J.E. Amorós (2018) 'Home Court Advantage? Knowledge-based FDI and Spillovers in Emerging Economies', *Global Strategy Journal*, 1–18. See also P. Almeida and A. Phene (2004) 'Subsidiaries and Knowledge Creation: The Influence of the MNC and Host Country on Innovation', *Strategic Management Journal* 25 (8–9), 847–864; A. Phene and P. Almeida (2008) 'Innovation in Multinational Subsidiaries: The Role of Knowledge Assimilation and Subsidiary Capabilities', *Journal of International Business Studies* 39, 901–919.

<sup>17</sup>Organisation for Economic Co-operation and Development (2013) 'New Sources of Growth: Knowledge-Based Capital – Key Analyses and Policy Conclusions', Synthesis Report, 2013.

<sup>18</sup>For example, Chinese e-commerce giant JD.com Inc is now looking to invest abroad in order to attract foreign consumers. A. Kharpal (2021) 'JD.com plans to boost overseas investment as China's e-commerce giants look to challenge Amazon', CNBC, 10 November 2021, [www.cnbc.com/2021/11/11/china-jdcom-plans-to-boost-investment-overseas-in-challenge-to-amazon.html](http://www.cnbc.com/2021/11/11/china-jdcom-plans-to-boost-investment-overseas-in-challenge-to-amazon.html) (accessed 10 February 2022).

<sup>19</sup>UNCTAD (2017) 'World Investment Report 2017 Investment and the Digital Economy', UNCTAD, [https://unctad.org/system/files/official-document/wir2017\\_KeyMessage\\_en.pdf](https://unctad.org/system/files/official-document/wir2017_KeyMessage_en.pdf) (accessed 5 February 2022).

that can identify and evaluate the different factors that influence foreign production and the growth of such foreign production.<sup>20</sup> The OLI Paradigm ultimately suggests that the greater the OLI advantages possessed by a Multi-National Enterprise (MNE), the more will be the FDI undertaken. Scholars such as John Cantwell and Christian Bellak refined Dunning's Eclectic Paradigm.<sup>21</sup> In the present context, the debate and theoretical framework surrounding FDI are refuelled through the addition of a new dimension: digital FDI.

FDI is by and large defined as a cross-border investment that involves a foreign economic operator with a significant degree of control over the management of a business that is resident in another economy.<sup>22</sup> Digital FDI has not (yet) received a specific definition in law. However, digital FDI has already proved to be a shaping feature of the global economy.<sup>23</sup> In this respect, digital FDI can be defined as a cross-border investment that is often asset-light as the foreign enterprise does not need to invest in building production or delivery assets in the host economy.<sup>24</sup> Such enterprises can 'digitally' deliver their products to consumers. This asset-light nature can be better understood through an example embedded in the context of the idea of a network economy. Take the example of Uber, which provides services through its platform app across the world, while it is headquartered in California. The function of such companies rests on the maintenance of interaction between the different economic agents involved through long-term relationships.<sup>25</sup>

The White Paper on digital FDI by the World Economic Forum suggests that when considering investment in the digital economy, the investing firm strongly considers the digital skills present in the economy and the stability of the regulatory framework that can be expected by the concerned State.<sup>26</sup> The study shows that investors specifically focus on data privacy and security framework, and the IP laws of the State.<sup>27</sup> It follows, that receiving States should provide the necessary support and assistance so as to attract these firms to invest in its territory. Apart from the factors discussed in the section above, the State should additionally attempt to construct a balance between the national and political concerns on one side (such as with respect to data sovereignty), and the interests of the foreign investor on the other.

<sup>20</sup>J.C. Sharmiladevi (2017) 'Understanding Dunning's OLI Paradigm', *Indian Journal of Commerce & Management Studies* 8(3), 47–52. Dunning's conceived the 'OLI' advantages of a Multinational Enterprise (MNE) as follows: ownership advantages are those which are specific to the enterprise in question, and provide the enterprise with a competitive edge; locational advantages are those which are specific to a particular country, thereby making it attractive to foreign investment; and internalization advantages are the benefits received from the production activities within the enterprise itself. J.H. Dunning (1980) 'Toward an Eclectic Theory of International Production: Some Empirical Tests', *Journal of International Business Studies* 11, 9–31.

<sup>21</sup>J. Cantwell and R. Narula (2014) *International Business and the Eclectic Paradigm*. Routledge.

<sup>22</sup>International Monetary Fund (2009) *Balance of Payments and International Investments Position Manual* (6th edn) International Monetary Fund, [www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf](http://www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf) (accessed 5 February 2022).

<sup>23</sup>OECD/G20 Base Erosion and Profit Shifting Project (2015) 'Addressing the Tax Challenges of the Digital Economy', Action 1 - 2015 Final Report. OECD.

<sup>24</sup>B. Casella and L. Formenti (2018) 'FDI in the Digital Economy: A Shift to Asset-Light International Footprints', *Transnational Corporations* 25(1), 101–130. Digital FDI is one of the most prominent methods in which economies are able to compete in the digital economy to attract FDI. The World Economic Forum has created a digital FDI project to assist countries and firms in increasing their digital capabilities. FDI provides not only cash but also technology transfer, and encouraging digital FDI may help countries and firms boost their digital capabilities. The project aims to assist public and private players in achieving their digital investment objectives (M. Stephenson, 'Digital FDI: Policies, Regulations and Measures to Attract FDI in the Digital Economy', World Economic Forum White Paper, September 2020). Firms that are more digitally nimble are better able to respond to the ongoing crisis, while others are swiftly upgrading their skills in response to the increasing challenges to their business strategies.

<sup>25</sup>E. Ustyuzhanina, S. Evsukov, and I. Komarova (2018) 'Network Economy as a New Economic System', *European Research Studies Journal* 21, 82–84.

<sup>26</sup>M. Stephenson (2020) 'Digital FDI Policies, Regulations and Measures to Attract FDI in the Digital Economy: White Paper', World Economic Forum, September 2020, [www3.weforum.org/docs/WEF\\_Digital\\_FDI\\_2020.pdf](http://www3.weforum.org/docs/WEF_Digital_FDI_2020.pdf) (accessed 29 April 2022).

<sup>27</sup>*Ibid.*

When enabling regulations, the procedures, policies, and measures are classified into three categories based on a conceptual framework established by the United Nations Conference on Trade and Development (UNCTAD) in its 2017 World Investment Report. These categories are enabling investment in digital firms; enabling digital adoption by traditionally non-digital firms; and enabling investment in digital infrastructure.<sup>28</sup> Enabling the expansion of digital products and services by drawing inbound investment (while also allowing enterprises' outward investment into digital products and services in other sectors) can play a crucial role, especially in recovering from the present COVID-19 crisis.<sup>29</sup>

### 3. The Domestication of Digital FDI and Cross-Border Data Flows

Before delving deeper into this section, it is important to first explain the concept of the domestication of FDI and CBDF. Any country's investment law framework may comprise of either legislation that is specialized and relates to investment or of more general legislative frameworks that can potentially impact FDI. There exists thus a broad scope of both specialized and non-specialized domestic laws relating to investment. The overarching domestic legal framework plays a central role in the decision of any investor to invest in another country. Domestic laws of any particular country are not necessarily *directed* at foreign investment but play a pivotal role in *attracting* foreign investment. Those countries that adopt a more liberal approach to foreign investment generally do not have a legislative framework that solely concerns the regulation of foreign investment. In these countries, foreign investors are in fact treated akin to domestic investors under the domestic laws. Such treatment can be about both FDI and CBDF.

This section discusses the general phenomenon of domestication in the context of digital FDI and CBDF while analysing recent domestic policies and measures taken by States at the global level. This section then draws a line between two distinct types of domestication that are subject to a push-pull factor. On the one hand, the contemporary global regulation of digital FDI with a focus on FDI screening represents a push factor. On the other hand, SEZs' effects on digital FDI and CBDF rather show a pull factor. The section shows that the benefits acquired for digital trade through digital SEZs are largely challenged by the growing domestic FDI screening mechanisms around the globe.

#### 3.1 The Phenomenon of Domestication

An ecosystem is a term drawn from the field of ecology.<sup>30</sup> It reflects a sense of natural resource management wherein a community of living and non-living organisms interacts within a defined framework. This framework embodies three critical components: (a) the composition of the entire system is greater than the sum of its components (systemic); (b) the entire system is inter-linked in a manner where every component has a reflecting impact on all others (integration), and; (c) the system is shaped in a specific order (hierarchy). In the eco-system of digital FDI and CBDF, the economic institutions that enforce a legal mechanism and interact within their domain form the living layer, whereas, the legal or regulatory mechanism that these economic institutions enforce form the non-living layer. Additionally, the layered ecosystem is surrounded by *dynamic elements* such as law schools, law firms, in-house counsel, regulators, and alternative

<sup>28</sup>UNCTAD, *supra* n. 19.

<sup>29</sup>See M. Stephenson and N. Sen (2020) 'COVID-19: How Digital Investments Can Help the Recovery', World Economic Forum, [www.weforum.org/agenda/2020/04/covid-19-digital-foreign-direct-investment-economic-recovery/](https://www.weforum.org/agenda/2020/04/covid-19-digital-foreign-direct-investment-economic-recovery/) (accessed 29 April 2022).

<sup>30</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

suppliers. These institutions, their collective existence, and supplementation to each other demarcate the boundaries of digital FDI and CBDF.

States – a key component of the eco-system – are increasingly adopting a domestic approach to regulate foreign trade and investment. States have created a two-fold mechanism to address investments: specialized and non-specialized investment laws.<sup>31</sup> While the former directly interact with investors (investment screening, facilitation and promotion laws), the latter has an indirect role to play (property, nationality, public–private partnership laws). Further, the investment law eco-system is multifaceted depending on the economic approach of a country. Countries may either have specialized or a non-specialized legislation for foreign investments. For instance, countries may prohibit foreign investment in certain industries or restrict market access to defined sectors such as defence or nuclear developments, as in India.<sup>32</sup>

It is widely recognized that the outbreak of the COVID-19 global pandemic has facilitated the digitalization of several public services globally.<sup>33</sup> Furthermore, a nation-wide lockdown in most countries forced businesses to switch to a digital platform. Along with several advantages, digital technologies have drawbacks that have cautioned countries to protect their domestic economy from foreign takeovers.<sup>34</sup> With the emergence of protectionism, EU States have, for instance, introduced FDI screening mechanisms with the aim to enhance information sharing between themselves and to avoid critical loss of assets and technology in sensitive industries such as defence.<sup>35</sup>

In 2019, there was a rise in restrictions on FDI as the EU and the USA had enacted policies and developed frameworks such as strict screenings to regulate foreign acquisitions.<sup>36</sup> Moreover, countries such as Australia have also introduced regulatory measures for FDI screenings to respond to certain perceived risks such as national security or economic vulnerability from foreign takeover.<sup>37</sup> With an increased flow of data, concerns over abuse of data and ineffective storage of data have been prevalent as they could negatively affect national security, public morals, and the right to privacy of individuals in a state. On 11 October 2020, the European Commission along with Member States adopted the EU Foreign Direct Investment Regulation,<sup>38</sup> which includes the earlier notification of existing domestic screening mechanisms by member States.<sup>39</sup> This regulation is essentially a strategy to prevent non-EU investors from claiming any concerns relating to either national security or public order in the EU.<sup>40</sup>

<sup>31</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

<sup>32</sup>'FDI restriction is on nuclear power programme, not in allied industries', *Economic Times*, 10 March 2016, <https://economictimes.indiatimes.com/industry/energy/power/fdi-restriction-is-on-nuclear-power-programme-not-in-allied-industries-jitendra-singh/articleshow/51345977.cms?from=mdr> (accessed 10 March 2022); Foreign Direct Investment Rules in Selected European Countries – An Overview, Debevoise & Plimpton, 16 June 2020, [www.debevoise.com/-/media/files/insights/publications/2020/06/20200616-foreign-direct-investment-fdi-in-selected.pdf](http://www.debevoise.com/-/media/files/insights/publications/2020/06/20200616-foreign-direct-investment-fdi-in-selected.pdf) (accessed 10 March 2022).

<sup>33</sup>World Economic Forum (2020) 'A Roadmap for Cross-Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy', WEF White Papers 5, [www3.weforum.org/docs/WEF\\_A\\_Roadmap\\_for\\_Cross\\_Border\\_Data\\_Flows\\_2020.pdf](http://www3.weforum.org/docs/WEF_A_Roadmap_for_Cross_Border_Data_Flows_2020.pdf) (accessed 29 April 2022).

<sup>34</sup>See A. Heinemann (2012) 'Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism', *Journal of International Economic Law* 15(3), 843–870.

<sup>35</sup>W. Berg and S.J. Mobley (2020) 'The EU Foreign Investment Mechanism Is Now Operational', Baker McKenzie, 14 October 2020, [www.bakermckenzie.com/en/insight/publications/2020/10/eu-foreign-investment-mechanism](http://www.bakermckenzie.com/en/insight/publications/2020/10/eu-foreign-investment-mechanism) (accessed 29 April 2022).

<sup>36</sup>C.Z. Qiang et al. (2020), 'Foreign Direct Investment and Global Value Chains in the Wake of COVID-19: Preparing for the New Normal', World Bank Blogs, 22 May 2020, <https://blogs.worldbank.org/psd/foreign-direct-investment-and-global-value-chains-wake-covid-19-preparing-new-normal> (accessed 29 April 2022).

<sup>37</sup>Ibid.

<sup>38</sup>See Berg and Mobley, supra n. 35.

<sup>39</sup>See European Commission (2016) 'State of the Union 2016: Commission Paves the Way for More and Better Internet Connectivity for All Citizens and Businesses', Press Corner, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1867](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1867) (accessed 29 April 2022).

<sup>40</sup>See C.-C. Kao (2020) 'The EU's FDI Screening Proposal – Can It Really Work?', *European Review* 28, 173.

In this context, it is important to discuss one of the major fallouts of data localization, i.e., that digitalization is regulated through Data Localization Requirements (DLRs) which prohibit any data from leaving the territorial borders<sup>41</sup> and, lead to greater costs of connectivity but with poorer quality and restricted variety as these must be obtained from domestic providers.<sup>42</sup> Though the trends suggest an increase of DLRs in the future, it is high time that their uses were limited by the host States.

### 3.2 The Rise of FDI Screening as Regulation of Digital FDI

It is widely agreed that the globe is undergoing a long-term transformation of global dominance; wealth and power are disseminating, moving away from Europe and the United States. Over the last years, a considerable number of countries have built or enhanced a framework for reviewing FDI in their territories, though their openness to FDI has not been rejected outright. The most prevalent reason for doing so has been national security concerns.<sup>43</sup> This shift in FDI treatment corresponded with the COVID-19 pandemic, and both can be connected to one another. While the IMF and the World Bank, the main globalizing institutions during the years of the LIO, are intact and functional, the promises of an inclusive system are now ruled out. Although participation in the existing liberal system may still be extensive, a more discriminating turn will be taken by rising nationalism and protectionism and the alternatives for integrated and mutually strengthened advantages will be reduced. At least 30 nations, which presumably screen for international investment on the grounds of national security, have been implementing or strengthening rules since 2020. Some have linked these 28 modifications to the COVID-19 pandemic.<sup>44</sup> Many states have imposed institutional modalities, which are already well established in their jurisdictions, to examine the ongoing management and strategic choices of foreign corporations. As a matter of fact, States seem no longer satisfied with mere restrictions on foreign firm establishment or the use of competition law to screen proposals by foreign firms intended to acquire local rivals.<sup>45</sup>

It is also worth noting that several governments stressed the need to keep their economies open to FDI. Governments were obligated, at the very least, to broaden the spectrum of economic activity covered by FDI screening while avoiding the outright imposition of restrictions. Despite FDI gaining traction in the digital economy with its manifold benefits and it being backed by the liberal international order, there seems to be a shift in the attitude towards the operation of these CBDFs and FDI in the digital economy. The underlying reasons are mostly cyber security issues, and inhibitions on the matters of autonomy, which have paved the way for a more cautious acceptance of this, as some economies move towards a more protectionist approach.<sup>46</sup>

<sup>41</sup>S. Mulopulos (2018) 'Digital Trade Zones: Answering Impediments to International Trade in Information', *Chapman Law Review* 21.

<sup>42</sup>H. Lee-Makiyama and S. Lacey (2021) 'Cross-Border Data Flows: The Impact of Data Localisation on IoT', GSMA White Paper, January 2021, 4, [www.gsma.com/publicpolicy/wp-content/uploads/2021/01/Cross\\_border\\_data\\_flows\\_the\\_impact\\_of\\_data\\_localisation\\_on\\_IoT\\_Full\\_Report.pdf](http://www.gsma.com/publicpolicy/wp-content/uploads/2021/01/Cross_border_data_flows_the_impact_of_data_localisation_on_IoT_Full_Report.pdf) (accessed 29 April 2022, at 4).

<sup>43</sup>See Kao, supra n. 20; J. Chaisse (2015) 'Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market', *University of Pennsylvania Journal of International Law* 37, 583; G. Dimitropoulos (2021) 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*, Singapore: Springer.

<sup>44</sup>S.J. Evenett (2021) 'What Caused the Resurgence In FDI Screening?', SUERF Policy Note No. 240, [www.suerf.org/policy-notes/24933/what-caused-the-resurgence-in-fdi-screening](http://www.suerf.org/policy-notes/24933/what-caused-the-resurgence-in-fdi-screening) (accessed 29 April 2022).

<sup>45</sup>A. Ufimtseva (2020) 'The Rise of Foreign Direct Investment Regulation in Investment-Recipient Countries', *Global Policy* 11, 222.

<sup>46</sup>For a critical discussion of Australia's approach, see A. Mitchell (2021) 'A sovereign Australian Government Data Framework, Australian Strategic Institute', Australian Strategic Policy Initiative, 11 August 2021, [www.aspistrategist.org.au/a-sovereign-australian-government-data-framework](http://www.aspistrategist.org.au/a-sovereign-australian-government-data-framework) (accessed 29 April 2022). See also A.D Mitchell and T. Samlidis (2022) 'Cloud Services and Government Digital Sovereignty in Australia and Beyond', *International Journal of Law and Information Technology* 30(1), 1–31.

The global trends in regulation of digital FDI, therefore, emphasize ‘a permanent shift in the treatment of foreign investors’ amidst a situation where the ‘spread of digital general-purpose technologies and growing geopolitical rivalry’<sup>47</sup> are becoming key factors that dictate the increasing use of FDI screening. In fact, three facets are emerging to pervasive digital technologies that have prompted policymakers to support strict FDI screening policies.

First, improved communication mechanisms, easy and wide access to information, and borderless commercial activities have improved the profitability of complex acquisition deals. For instance, in the EU, the easing of trade due to low transportation costs and less trade barriers, as is the case with digital trade, would boost acquisitions.<sup>48</sup> In the EU, FDI screening was applied only to a handful of member States and the application was limited to a few sectors of strategic importance, such as media, security, and defence. However, with the increase in usage of digital technologies, FDI screening in the EU was properly implemented to account for the potential consequences of a foreign takeover.

Secondly, the spread of digital technology shifted brick-and-mortar business models into online models that had low to zero marginal costs, high risk of failure, but large rents accruing to success, and rewards to strategic behaviour. Therefore, a new scope of the competition law regime was created that surrounded the acquisition of digital-based firms and the consequences of such acquisition thwarting innovation and competition. In fact, FDI screening measures were implemented to cross-border deals in a manner similar to merger control under domestic competition law to address the issue of the competition regulator that fails to take proper measures to investigate innovation and the competition-related aspects of the transaction.<sup>49</sup>

Thirdly, digital trade, especially digital services such as telecommunications have raised the issue of abuse of sensitive personal information of users or consumers. Abusive use of any personal information by a foreign entity, sometimes in association with a foreign government, may not only be seen as a violation of the right of privacy but also a national security concern.<sup>50</sup> Therefore, it is common to see heavy restrictions placed by governments on FDI in the digital services sector such as 5G or *Internet of Things*. Moreover, the process of acquisition, storage (data localization), and transfer of data by service providers would come under the scrutiny of domestic data protection laws.<sup>51</sup> Further, there are arguments put forth that link FDI screening to address situations such as ‘foreign access to critical assets and infrastructure of a state’.<sup>52</sup> This could be prevented by ensuring that a proper regulation of foreign investment is implemented by a state.

### 3.3 The Case of Digital Special Economic Zones

Digital SEZs provide new opportunities to businesses as they rely on digital technologies and would not be required to physically transfer their business to a foreign state to facilitate their business in that state.<sup>53</sup> The case of digital SEZ is interesting because the classic instrument of SEZ, as

<sup>47</sup>Evenett, supra n. 40.

<sup>48</sup>Fabry and Bertolini argue that, ‘[t]he aggressive acquisition of a company in one member state can create dependencies in an entire supply chain and therefore affect several member States.’ E. Fabry and M. Bertolini (2020) ‘COVID-19: The Urgent Need for Stricter Foreign Investment Controls’, Jacques Delors Institute, 27 April 2020, <https://institutdelors.eu/en/publications/covid-19-lurgence-dun-controle-renforce-des-investissements-etranagers/> (accessed 29 April 2022).

<sup>49</sup>R.P. Medhora (2018) ‘Rethinking Policy in a Digital World’, CIGI Policy Brief No. 143, 481, [www.cigionline.org/publications/rethinking-policy-digital-world/](http://www.cigionline.org/publications/rethinking-policy-digital-world/) (accessed 29 April 2022).

<sup>50</sup>See Evenett, supra n. 40, at 11.

<sup>51</sup>See for example Y. Feng (2019) ‘The Future of China’s Personal Data Protection Law: Challenges and Prospects’, *Asia Pacific Law Review* 27(1), 62–82.

<sup>52</sup>UNCTAD (2019) ‘National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments, Investment Policy Monitor’, UNCTAD Investment Policy Monitor, December 2019, [https://unctad.org/system/files/official-document/diaepcbinf2019d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf) (accessed 29 April 2022).

<sup>53</sup>UNCTAD (2019) ‘World Investment Report 2019: Special Economic Zones’, UNCTAD, 12 June 2019, [https://unctad.org/system/files/official-document/wir2019\\_en.pdf](https://unctad.org/system/files/official-document/wir2019_en.pdf) (accessed 29 April 2022).

an expression of States' unilateral economic law, is modernized and improved to also domesticate digital FDI.

In 2017, Malaysia established the first Digital Free Trade Zone (DFTZ) with an aggressive foreign investor, China – as part of the latter's Belt and Road Initiative.<sup>54</sup> With Chinese FDI and European FDI, Malaysia established the first DFTZ with the aim to providing a business-friendly environment to small–medium enterprises (SMEs) by streamlining e-commerce retail.<sup>55</sup> The Malaysian DFTZ promises growth for the country and should bolster Malaysia's capacity to establish digital independence.<sup>56</sup>

SEZs are jurisdictions within a country, either run by the government or private investors, where firms enjoy various benefits like less compliance requirements, more investment opportunities, and business-friendly laws (related to labour, taxes, etc.) when compared to other parts of the country.<sup>57</sup> SEZs are strategically developed in areas that are defined as commercial hubs of a nation as they are the centre of all economic activities. SEZs are created to influx foreign capital and boost the overall growth rates of the nation. SEZ-specific regulations and rules usually offer certain benefits and privileges that are not provided outside these zones.<sup>58</sup> SEZ regulations may also provide foreign investors with the incentive of additional entry rights in industries that are otherwise either closed or restricted.<sup>59</sup> SEZs have been a game changer in bridging the technological and digital gap between developed and developing/LDCs to facilitate domestic firms in achieving the goal of becoming a global corporation.<sup>60</sup>

Developing countries adopting a progressive globalization agenda could benefit from the flexibility and tendency in controlling the reforms relating to trade and investment while developing digital SEZs. Although digital technology has significantly helped reduce operational costs and removed physical barriers to trade with borderless commerce, it has a few drawbacks in the nature of weak data localization infrastructure in many states, cross-border IP violations, forced technology transfers, and economic espionage amongst others.<sup>61</sup> There are no proper international privacy or data protection laws that effectively govern cross-border transactions. In addition to this legal conundrum, developing countries do not have proper laws that govern the acquisition, storage, or movement of data whereas developed countries have stringent measures to regulate data in their jurisdiction<sup>62</sup>, which may pose a further challenge to the development of digital SEZs.

<sup>54</sup>H. Harsono (2020) 'The China–Malaysia Digital Free Trade Zone: National Security Considerations', *The Diplomat*, 25 July 2020, <https://thediplomat.com/2020/07/the-china-malaysia-digital-free-trade-zone-national-security-considerations/> (accessed 1 February 2022, 12 March 2022). See also J. Chaisse and M. Matsushita (2018) 'China's "Belt and Road" Initiative – Mapping the World's Normative and Strategic Implications', *Journal of World Trade* 52(1), 163–185.

<sup>55</sup>I. Sissani and M. Bengana (2018) 'Digital and Free Trade Zones Impact on Malaysia's Economy and Its Prospects', *International Journal of Economics and Financial Issues* 8, 1–4.

<sup>56</sup>In the specific case of Malaysia DFTZ, there remains some uncertainties as the prolonged investment from Chinese banks and China-based entities could lead to the entire model being built upon overdependence on China. See Harsono, *supra* n. 54.

<sup>57</sup>J. Chaisse and G. Dimitropoulos (2021) 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law', *Journal of International Economic Law* 24, 229; See also P. Delimatsis (2021) 'Financial Services Trade in Special Economic Zones', *Journal of International Economic Law* 24, 277–297.

<sup>58</sup>Of course, the manner in which this special regime and the general legislation interact, as well as the degree to which SEZ rules differ from the general legal framework, vary considerably between countries. See D.Z. Zeng (2021) 'The Past, Present, and Future of Special Economic Zones and Their Impact', *Journal of International Economic Law* 24(1), 259–275.

<sup>59</sup>United Nations Conference on Trade and Development (2019) 'World Investment Report 2019', Special Economic Zones, 12 June 2019. Anastasios Gourgourinis, Domestic Investment Incentives in International Trade Law, this special issue (Analyzing whether and how investment incentives are covered under WTO law).

<sup>60</sup>See Lee-Makiyama and Lacey, *supra* n. 42, at 4.

<sup>61</sup>U. Ahmed and G. Aldonas (2015) 'Addressing Barriers to Digital Trade: Strengthening the Global Trade And Investment System for Sustainable Development', The E15 Initiative, December 2015 (accessed 29 April 2022).

<sup>62</sup>The recent *Schrems II* judgement of the Court of Justice European Union (CJEU) reflected on the lack of legal coherence within laws of different jurisdictions. A. Chander (2020) 'Is Data Localization a Solution for Schrems II?', *Journal of International Economic Law* 23, 1–3.

#### 4. Charting the Relation between FDI and Cross-Border Data Flows

CBDFs have been described as commerce-enabling ‘hallmarks of 21st century globalization’<sup>63</sup> and ‘the connective tissue holding the global economy together’.<sup>64</sup> As CBDF has facilitated the increase of digital services that have a huge impact on global GDP, the scope of digital FDI has increased through new developments such the rise of State-Owned Enterprises (SOEs) in the digital economy and the establishment of digital SEZs.<sup>65</sup> The link between FDI and CBDF can be better understood through an example. Say, for instance, an American mining company invests in an Indian mining start-up. If real-time data from the trucks and drills from the latter are collected and transmitted to the data processing centre of the former, then this will help in active monitoring of the operations in India. Such monitoring can help optimize operations, and thus contribute to profit.<sup>66</sup> The digitalization is developing towards a platform for commerce between buyers and sellers across borders, thereby becoming a driving force behind modern international trade and investment.<sup>67</sup>

However, there are several issues pertaining to CBDFs and national security (such as risk of privacy violations, cybercrimes, terrorist financing).<sup>68</sup> Several experts express their dismay over how cyber security concerns with CBDF slow down innovation.<sup>69</sup> At the same time, a lack of international legal harmonization has caused individual states to impose domestic restrictions on cross-border data flows, severely affecting the economies and foreign investments. All these factors have, in turn, collectively played a major role in decelerating business transactions and thereby increasing costs. Overly restrictive regulations on CBDF can also create potential trade barriers and may violate the rules of the WTO such as General Agreement on Tariff and Trade (GATT) and the General Agreement on Trade in Services (GATS).<sup>70</sup> Countries should seek to analyse the total costs of any proposed restriction and ensure that costs of compliance with the restriction do not outweigh the quantifiable benefits.<sup>71</sup>

The following section looks at the interaction of CBDF with the broader framework of International Investment Law. It then proceeds to look at the relation between CBDF and FDI,

<sup>63</sup>J. Manyika *et al.* (2016) ‘Digital Globalization: The New Era of Global Flows’, McKinsey Digital, 24 February 2016, [www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-globalization-the-new-era-of-global-flows](http://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-globalization-the-new-era-of-global-flows) (accessed 29 April 2022).

<sup>64</sup>*Ibid.*

<sup>65</sup>This would in turn allow developing countries and LDCs to attract foreign investment and relevant digital technology to improve their economy by providing commercial incentives and other enablers. X. Qian, Domestic Investment Laws and State Capitalism, this special issue (explaining that State capitalism is a consequence of domestic investment laws and is the catalyst for the development of domestic investment laws).

<sup>66</sup>A similar example is found in the case of multinational technology conglomerate – Cisco Systems. Cisco acknowledges that CBDF helps in enhancing its operations in other countries, where it has placed significant investments. World Economic Forum (2016) ‘Global Information Technology Report 2016’, <https://reports.weforum.org/global-information-technology-report-2016/>.

<sup>67</sup>J. Meltzer (2013) ‘The Internet, Cross-Border Data Flows and International Trade’, *Issues in Technology Innovation* 22.

<sup>68</sup>See H. Akin Ünver (2016) ‘Cross-Border Data Transfers and Data Localization’, EDAM Cyber Policy Paper Series 2016/3’, Centre for Economics and Foreign Policy Studies (EDAM), June 2016, [https://edam.org.tr/wp-content/uploads/2017/03/data\\_transfers\\_en.pdf](https://edam.org.tr/wp-content/uploads/2017/03/data_transfers_en.pdf) (accessed 29 April 2022). See also, the European Center for International Political Economy has compiled a detailed database of data localization restrictions; for more information, see <http://ecipe.org/publications/restrictions-to-cross-border-data-flows-a-taxonomy>.

<sup>69</sup>J. Barbier, A. Dixit, R. Moriarty, C. Nambodri, K. O’Connell, and M. Riegel (2016) ‘Where to Begin Your Journey to Digital Value in the Private Sector’. Economic Analysis 2015–2024. San Jose, CA; Singapore, and Amsterdam: Cisco, [www.connectedfuturesmag.com/a/S15R12/value-at-stake/](http://www.connectedfuturesmag.com/a/S15R12/value-at-stake/).

<sup>70</sup>See D. MacDonald and C.M. Streatfeild (2014) ‘Personal Data Privacy and the WTO’, *Houston Journal of International Law* 36, 625; see generally A. Mitchell and N. Mishra (2018) ‘Data at the Docks: Modernizing International Trade Law for the Digital Economy’, *Vanderbilt Journal of Entertainment & Technology Law* 20, 1073.

<sup>71</sup>J. Meltzer and P. Lovelock (2018) ‘Regulating for a Digital Economy: Understanding the Importance of Cross-Border Data Flows in Asia’, Brookings Institute, 20 March 2018; C. Kaufmann (2021) ‘Responsible Business in a Digital World – What’s International Law Got to Do With It?’, *Houston Journal of International Law* 81(3), 782–813.

specifically digital FDI, to understand the role and importance of data in the conduct of business overseas. Lastly, the analysis builds upon this backdrop to discuss the implications of increasing domestic regulation of data flows. An increased domestic regulation poses a risk of political interests being weighed more than the economic benefits of increased investment and capital flow, resulting in stunting the growth of developing economies and restricting the access to such markets for international investors.

#### 4.1 Cross-Border Data Flows as a Challenge to International Economic Law

In several countries, cross-border investment is governed by means of investment laws and these laws are sometimes similar to IIAs. The digital economy could be covered if a broader interpretation of ‘investment’ is widely accepted under such laws and treaties. Moreover, a large number of Bilateral Investment Treaties (BITs) were entered into before 2010,<sup>72</sup> and thus, do not appear to have explicitly taken into account the subsequent development of the digital economy. There is, therefore, a need to update investment laws and revise such agreements in order to broaden the scope of investment to include digital investments and avert multiple legal interpretations of these texts. Furthermore, there is a need for a comprehensive policy framework to address investment issues in digital development strategies.<sup>73</sup>

Governments of several states are restricting the flow of data across borders via the internet, which is also affecting the ability of businesses to utilize the internet for trade and commerce.<sup>74</sup> The following question thus arises: What are the types of data of which governments seek to restrict the cross-border flow? Several countries have adopted data localization policies to restrict data transfers in sectors such as taxation, accounting, and telecommunications. Some other countries’ data localization policies target only specific services, such as online gambling or online publishing. Another category of data upon which restrictions are increasingly being placed is personal electronic data.<sup>75</sup> Take, for example, the US–EU Trade and Technology Council, which establishes a working group to oversee issues relating to the use of data for targeted advertising.<sup>76</sup>

The reasons cited to defend restrictions over CBDFs range from being as complex as national security, prevention of cybercrime, prohibition of terrorist funding, or as simple as restricting content that is opposed to public policy/public order.<sup>77</sup> However, a potential issue with such restriction is the direct effect of the same on certain principles of international trade law.<sup>78</sup> The most salient example of this conundrum is the restriction of internet use, which in turn restricts CBDF that could harm foreign businesses, and their sale of goods and services online while also benefiting the local businesses. Such restrictions can be termed as discriminatory and could violate the principle of national treatment.<sup>79</sup>

<sup>72</sup>Z. Sheng (2021) ‘Protection of Cross-Border Data Flows Under International Investment Law’, in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*, Singapore: Springer.

<sup>73</sup>UNCTAD (2017) ‘World Investment Report 2017, Chapter 4: Investment and the Digital Economy’, UNCTAD, <https://worldinvestmentreport.unctad.org/world-investment-report-2017/chapter-4-investment-and-the-digital-economy/> (accessed 29 April 2022).

<sup>74</sup>C.-H. Wu (2021) ‘Sovereignty Fever: The Territorial Turn of Global Cyber order’, *Houston Journal of International Law* 81(3), 651–675.

<sup>75</sup>J.P. Meltzer (2014) ‘The Internet, Cross-Border Data Flows and International Trade’, *Asia and the Pacific Policy Studies* 2, 90–102.

<sup>76</sup>C.P. Bown and C. Malmstrom (2021) ‘What is the US–EU Trade and Technology Council? Five things you need to know’, Peterson Institute for International Economics, 24 September 2021.

<sup>77</sup>Satyand, *supra* n. 12.

<sup>78</sup>N. Mishra (2020) ‘Cross-Border Data Flows in WTO Law: Moving Towards an Open, Secure and Privacy-Compliant Data Governance Framework’, Spicy IP Blog, 27 April 2020, <https://spicyip.com/2020/04/cross-border-data-flows-in-wto-law-moving-towards-an-open-secure-and-privacy-compliant-data-governance-framework.html> (accessed 29 April 2022).

<sup>79</sup>Georgios Dimitropoulos, ‘The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest’, this special issue.

The absence of a comprehensive international legal framework governing CBDF through the internet further exacerbates this issue. The WTO Agreement is the only agreement in international law that primarily governs information exchange within the context of trade in goods and services.<sup>80</sup> However, the 1994 international trade framework is suited to a brick-and-mortar business model that needs to be updated in order to effectively address the potential issue caused by sharing of data across borders.<sup>81</sup> The impact of restriction of CBDF and its potential impact on international trade strengthens the call for an international umbrella law in this area<sup>82</sup> to synchronize the domestic legal regimes across the globe.

The goal of a new global framework should be to determine reasonable restrictions, such as those that are aimed at addressing cybercrimes, which is an issue that cannot be contested, and to eliminate contentious arguments (in terms of WTO law) such as discriminatory restrictions on foreign business. Digital SEZs and FDI screening should be structured in a manner where the latter would be an exception to the former. That is, only after having a reasonable apprehension (such as that of terrorism, privacy breach, or threat to national security) should a host State resort to FDI screening, at least in SEZs. The cohabitation of SEZs and FDI screening is what should be seen as an imperative. Secondly, the use of certain policy goals, such as the data privacy policies of the USA and the EU, will create the internet as a sound and reliable place to do business, thereby boosting it as a commercial platform and improving international trade.<sup>83</sup>

There are three goals that need to be achieved in order to better align national and international frameworks in this regard. Firstly, we must realize that the digital economy has created several new business models, and States which seek to embrace these new models can effectively create an enabling environment for investment in digital firms. Beyond these new models, stakeholders must also seek to revolutionize the traditional way of conducting business. Domestic enterprises can be encouraged to adopt digital services to conduct their business. States must also boost investment in expanding their digital infrastructure, as such infrastructure is the key to the overall growth of any digital economy. Better digital infrastructure, enabled through conducive policies, can attract significant digital FDI. It must also be noted that digital technologies generate and consume huge amounts of data. While there exist legitimate security concerns, most data localization requirements negatively impact investment in digital firms and activities. States should seek to provide equitable access to the data economy in order to utilize value from data in a way that creates positive environmental, social, and economic impacts.<sup>84</sup>

This brings us to our second goal: to foster coherence and simplify the regulations concerning CBDF. Like-minded countries can attempt to create an open, rules-based, and innovative form of digital economy.<sup>85</sup> The importance of boosting transparency in both CBDF regulations and digital FDI measures must be realized, else companies will suffer in terms of productivity, innovation, and trade. In fact, Information Technology & Innovation Foundation's estimates have come to the conclusion that a unit increase in a nation's Data Restrictiveness Index can result in a 2.9%

<sup>80</sup>M. Burri (2017) 'The Regulation of Data Flows Through Trade Agreements', *Georgetown Journal of International Law* 48, 407–410.

<sup>81</sup>See Zheng, *supra* n. 13.

<sup>82</sup>M. Nicholson (2018) 'Cross-Border Data flows: Their Importance, and The Need for a Global Framework', ICLR Blog, 12 April 2018, <https://international-and-comparative-law-review.law.miami.edu/cross-border-data-flows-importance-global-framework/> (accessed 29 April 2022).

<sup>83</sup>The OECD has recognized that, 'building and maintaining trust in the internet and related ICT networks must be a key policy area'. OECD (2008) 'Shaping Policies for the Future of the Internet Economy', Digital Economy Papers No. 148, 22, [/www.oecd-ilibrary.org/docserver/230388107607.pdf?expires=1624452052&id=id&accname=guest&checksum=70F1B003D1D33737BDD1CDB105B61D21](http://www.oecd-ilibrary.org/docserver/230388107607.pdf?expires=1624452052&id=id&accname=guest&checksum=70F1B003D1D33737BDD1CDB105B61D21) (accessed 29 April 2022).

<sup>84</sup>A. Goel et al. (2021) '3 levers for ensuring equitable access to the data economy', World Economic Forum, 17 November 2021, [www.weforum.org/agenda/2021/11/3-levers-for-ensuring-equitable-access-to-the-data-economy/](http://www.weforum.org/agenda/2021/11/3-levers-for-ensuring-equitable-access-to-the-data-economy/) (accessed 29 April 2022).

<sup>85</sup>N. Cory and L. Dascoli (2021) 'How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them', Information Technology & Innovation Foundation, 19 July 2021.

decrease in its economy-wide productivity over a period of five years.<sup>86</sup> Policy-makers should introduce laws to address legitimate data-related privacy and security concerns, but care should be taken that such laws do not affect the maximization of the social and economic benefits found at the intersection of data and digital economies.

In order to achieve the first two goals, the fulfilment of a third goal is imperative: promoting greater public–private cooperation. Protectionist tendencies might push States to reject or be wary of foreign technologies, but States must resist this and aim to work closely with the private sector. Governments can mandate respective authorities to cooperate with one other in a bid to support the free flow of data by the private sector across borders.<sup>87</sup> There should be a transparency in their approach in order to build greater trust with the private sector. To simplify compliance, guidance should be provided to the private sector on how CBDF protection policies of the State interact with other industry-specific policies. States should also revisit laws that restrict the ability of their national or domestic entities to cooperate with foreign entities. The need is to establish a normative international framework to minimize the interference of traditional international laws as well as domestic laws in a way that it remains neutral between States and investors.

Albeit no state is obligated to grant access to foreign investors into their domestic economies, the booming use of domestic laws to govern foreign investments reflects an inherent clash between national interests and the liberal international economic order. The eventual aim for domestication should be to adopt a domestic ecosystem open to digital FDI and CBDFs, as well as the principles and values of a post-globalization IEL.<sup>88</sup>

As the WTO rules have not been updated to include regulations for internet-based international trade,<sup>89</sup> some recent FTAs and the emerging Digital Economy Partnership Agreements (DEPAs) have compensated for the same by including rules that govern cross-border movements of data.<sup>90</sup> The GATT and the GATS regulate all trade in goods and services, including such trade that takes place through the internet. These rules, under GATT and GATS, include principles such as the Most Favoured Nation (MFN) and National Treatment (NT). The principle of MFN requires a WTO Member to not treat imports from one WTO Member less favourably than imports from another WTO Member. The principle of NT requires all WTO Members to not treat imports any less favourably than domestic goods and services.

Certain additional potential issues and key challenges that remain in the development of international trade law surrounding CBDF involve the development of CBDF as a mandatory norm to promote free trade while developing a space for the domestic government to impose restrictions wherever necessary in order to achieve certain legitimate policy goals; restrictions on CBDF must be made in a transparent and non-arbitrary manner. Also, there must be rules imposed and due

<sup>86</sup>Ibid.

<sup>87</sup>World Economic Forum (2020) 'A Roadmap for Cross Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy', White Paper, June 2020, [www3.weforum.org/docs/WEF\\_A\\_Roadmap\\_for\\_Cross\\_Border\\_Data\\_Flows\\_2020.pdf](http://www3.weforum.org/docs/WEF_A_Roadmap_for_Cross_Border_Data_Flows_2020.pdf) (accessed 29 April 2022).

<sup>88</sup>G. Dimitropoulos, 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest', this special issue

<sup>89</sup>WTO negotiations on e-commerce is one mechanism that could potentially strengthen the international economic governance in this area. See I. Willems (2020) 'Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations', *Journal of International Economic Law* 23, 221–244; A. Khan *et al.* (2021) 'Plurilateral Negotiation of WTO E-commerce in the Context of Digital Economy: Recent Issues and Developments', *Journal of Law and Political Sciences* 26(1), 28–54.

<sup>90</sup>Examples of recent relevant FTAs include the Korea–US FTA, the USMCA, and the CPTPP among others (see S. Zhang (2021) 'Protection of Cross-Border Data Flows under International Investment Law', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer, 214–215). The Digital Economy Partnership Agreement (DEPA) concluded between Chile, New Zealand, and Singapore is another important development (which however merely replicates rules already agreed upon in the CPTPP), see D. Elms (2020) Unpacking the Digital Economy Partnership Agreement (DEPA), Asian Trade Centre, <http://asiantradecentre.org/talkingtrade/unpacking-the-digital-economy-partnership-agreement-depa> (accessed 29 April 2022).

process should be involved to reasonably restrict CBDF. Instead of imposing restrictions, governments may also choose to develop rules that govern the commercialization of data and the use of the internet to develop international trade while addressing privacy concerns.

#### 4.2 The Link between FDI and Transfer of Data

There is a direct link between foreign investment and transfer of data. Business models today are dependent on digital technology. Moreover, the COVID-19 pandemic has acted as a driving force for the digitalization of several businesses because a nation-wide lockdown in almost all countries forced businesses to switch to a digital platform.<sup>91</sup> With significant growth in the economy of most countries due to digitalization, investors saw an opportunity to invest and benefit from such growth and development. Moreover, the use of communication services, which are dependent on the internet and high volumes of CBDF, has increased during the pandemic as meetings massively moved online.

'Personal data is the new currency of the digital economy'<sup>92</sup> as it can flow easily across borders. CBDF can help businesses and governments alike in creating value. The use of data is accelerating the expansion of business activities across the globe. However, there is a drawback to this and that is the potential violation of privacy rights when it comes to the use of personal data by businesses to create value for their consumers.<sup>93</sup> Several governments<sup>94</sup> have begun regulating data transfers to protect privacy and in certain cases to uphold national security.<sup>95</sup>

With the increase in usage of digital technology, digital SEZs have been introduced to provide new opportunities to businesses that rely on CBDF. This has promoted digital FDI as investors from developed countries now have an incentive to boost their foreign investment in developing countries, thereby improving the rate of growth and development in developing and LDCs through digital knowledge.<sup>96</sup> While FDI can undoubtedly bring in advanced technology, better know-how, more jobs, and growth,<sup>97</sup> CBDF also has an important role to play in boosting such factors. Digital flow of data also allows ideas to ricochet across the world, thus enabling companies to accumulate the best talents to create goods and services of better quality.<sup>98</sup> India, for example, has a relatively large digital service industry. Better information technology structure in India attracts higher digital FDI. This leads to more innovations (through patents, start-ups, etc.), and thus more development, all of which is based on the free flow of data.<sup>99</sup>

The link between digital FDI and CBDF is inextricable, and is seen in the fact that governments have imposed certain data localization requirements as a measure to prohibit personal data from being transferred to foreign businesses that are governed by foreign governments.

<sup>91</sup>World Economic Forum (2020) 'A Roadmap for Cross-Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy', WEF White Papers 5, [www3.weforum.org/docs/WEF\\_A\\_Roadmap\\_for\\_Cross-Border\\_Data\\_Flows\\_2020.pdf](http://www3.weforum.org/docs/WEF_A_Roadmap_for_Cross-Border_Data_Flows_2020.pdf) (accessed 29 April 2022).

<sup>92</sup>T. Cooper *et al.* (2015) 'If Data Is Money, Why Don't Businesses Keep It Secure?', *Harvard Business Review*, 10 February 2015, <https://hbr.org/2015/02/if-data-is-money-why-dont-businesses-keep-it-secure> (accessed 29 April 2022).

<sup>93</sup>Ibid.

<sup>94</sup>See W.Y. Chua *et al.* (2021) 'China Passes Anti-Foreign Sanctions and Data Security Laws', *Debevoise & Plimpton*, 15 June 2021, [www.debevoise.com/insights/publications/2021/06/china-passes-anti-foreign-sanctions-and](http://www.debevoise.com/insights/publications/2021/06/china-passes-anti-foreign-sanctions-and) (accessed 29 April 2022).

<sup>95</sup>C.Z. Qiang *et al.* (2020) 'Foreign Direct Investment and Global Value Chains in the Wake of COVID-19: Preparing for the New Normal', *World Bank Blogs*, 22 May 2020, <https://blogs.worldbank.org/psd/foreign-direct-investment-and-global-value-chains-wake-covid-19-preparing-new-normal> (accessed 29 April 2022).

<sup>96</sup>Mitchell and Mishra, *supra* n. 70, 1073.

<sup>97</sup>R. Ehandi, J. Krajcovicova, and C.Z. Qiang (2015) 'The Impact of Investment Policy in a Changing Global Economy', *World Bank Policy Research Working Paper*, October 2015.

<sup>98</sup>McKinsey Global Institute (2016) 'Digital Globalization: The New Era of Global Flows', *McKinsey & Company*, March 2016.

<sup>99</sup>United Nations Conference on Trade and Development (2021) 'Digital Economy Report 2021: Cross-border Data Flows and Development: For Whom the Data Flow', 29 September 2021.

### 4.3 The Rise of Domestic Regulations on CBDF: Meaning and Implications

The digital economy is heavily dependent on CBDF and digital regulation is a new concept for laws that were framed in the 20th century based on a brick-and-mortar economy. Moreover, with the development of the digital technology, cyberattacks, privacy violations, etc. have caused problems to governments across the globe as they struggled to frame a global framework that would find a balance between digital trade and innovation along with privacy, cyber security, and public policy.<sup>100</sup> While discussing the implications of investment policy on digital development strategies, it becomes imperative to note the impact of digital policies that are concerned with international investments. The first area pertains to national security as foreign ownership in the digital economy may result in security concerns (such as cyber security risks, cyber espionage) for States. Additionally, the challenges that have been introduced due to digital technologies vis-à-vis business operations also need to be addressed. An important area of concern is with respect to either data localization or free flow of data (or both),<sup>101</sup> where such data may include sensitive or personal user-data, where the states and MNEs may be at loggerheads with each other.<sup>102</sup>

Consequently, the lack of an overarching international law framework led to national restrictions on CBDF.<sup>103</sup> These restrictions were related to data localization requirements, digital media censorship, cyber security regulations, privacy rights, and stringent FDI compliances.<sup>104</sup> FDI regulations were imposed to prevent foreign takeovers and investment in minority stakes, especially in areas and industries that are critical. such as healthcare.<sup>105</sup>

The lack of international cooperation and the ever-divergent domestic regulatory models between bilateral treaties or free trade agreements between countries have created obstacles in the way of developing legal standards to regulate internet global governance.<sup>106</sup> Moreover, economies like China,<sup>107</sup> the entire EU, and the USA have their own domestic regulations that are diverse and strategic to their interests.<sup>108</sup> Amidst all the divergence, this creates a hurdle in framing unified guidelines.

Some countries are adopting aggressive measures to ensure that their local businesses have vast quantities of data in order to regulate data flow.<sup>109</sup> Furthermore, using regulatory measures, such as FDI screening or forced technology transfer, enable governments to regulate the FDI in its territory. However, there are certain consequences, such as an increase in the price of entry and the

<sup>100</sup>See Mitchell and Mishra, supra n. 70.

<sup>101</sup>Some governments require data to be kept in a jurisdiction but perhaps they can also require not to let send it out.

<sup>102</sup>M. Gestrin and J. Staudt (2018) 'The digital economy, multinational enterprises and international investment policy', OECD, 2018, [www.oecd.org/investment/investment-policy/The-digital-economy-multinational-enterprises-and-international-investment-policy.pdf](http://www.oecd.org/investment/investment-policy/The-digital-economy-multinational-enterprises-and-international-investment-policy.pdf) (accessed 29 April 2022).

<sup>103</sup>See Mishra, supra n. 78.

<sup>104</sup>K. Lai (2021) 'National Security and FDI Policy Ambiguity: A Commentary', *Journal of International Business Policy* 4 (4), 496–505.

<sup>105</sup>See G. Dimitropoulos (2021), 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.) (2021) *Handbook of International Investment Law and Policy*. Singapore: Springer; see generally, 'Data Policy Dynamic Briefing', Strategic Intelligence – World Economic Forum, 19 August 2021.

<sup>106</sup>W. Gregory Voss (2020) 'Cross-Border Data Flows, the GDPR, and Data Governance', *Washington International Law Journal* 29(3), 485–489; B. Schmarzo (2021) 'Digital Transformation Requires Redefining the Role of Data Governance', *Data Science Central*, 8 February 2021.

<sup>107</sup>See W.Y. Chua et al. (2021) 'China Passes Anti-Foreign Sanctions and Data Security Laws', Debevoise & Plimpton, 15 June 2021, [www.debevoise.com/insights/publications/2021/06/china-passes-anti-foreign-sanctions-and](http://www.debevoise.com/insights/publications/2021/06/china-passes-anti-foreign-sanctions-and) (accessed 29 April 2022).

<sup>108</sup>See Voss supra n. 106, at 490.

<sup>109</sup>See World Economic Forum (2020) 'A Roadmap for Cross-Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy', WEF White Papers 5, [www3.weforum.org/docs/WEF\\_A\\_Roadmap\\_for\\_Cross\\_Border\\_Data\\_Flows\\_2020.pdf](http://www3.weforum.org/docs/WEF_A_Roadmap_for_Cross_Border_Data_Flows_2020.pdf) (accessed 29 April 2022) at 13; See D. Arner et al., 'The Transnational Data Governance Problem', *Berkeley Technology Law Journal* (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3912487](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912487) (accessed 29 April 2022).

costs of doing business for foreign investment, which would reduce the amount of digital investment, data, and digital technology from entering their borders, thereby ‘slowing down the economic progress for smaller and emerging nations.’<sup>110</sup>

Finally, if one State is adopting such measures, then there is a reactionary domino effect due to which other countries adopt similar measures too, in order to safeguard their national interests. This shall severely affect the entire area as large and developed States have sufficient technology, means, and economy to thrive, but the smaller and under-developed states have to suffer as they do not have the means or capacity to acquire such technology, which could improve their economy by increasing their growth and development rates.

## 5. Conclusion

Owing to the primary authority associated with the State and the importance of foreign investment, the success of digital economies demands a closely collaborative effort from both the State and private sector to mitigate the risks of data flows and reconcile their interests. The advent of data as a central factor in modern businesses has led them to give considerable weight to the data regulatory landscape when making investment decisions. States are constantly making an effort to reconcile their interests regarding data security and open economy. At present, some international instruments of WTO and IIAs contain rules on CBDF; however, they fail to do so clearly. CBDF and its close connection to FDI have posed a considerable challenge for the traditional texts and rules of international trade law. They have showcased the need to upgrade the regulatory setting with the modern-day commerce. In addition, the lack of a clear and harmonized international law approach, domestic laws are able to penetrate and fragment the body of international investment law. Furthermore, due to the introduction of data localization requirements and increased government involvement in exerting data control, businesses are facing increased costs, which may render some investment decisions inviable. The need to attract international investment has also led States to introduce Digital SEZs which help States leverage commerce-friendly policies to increase their rates of growth and investment. However, with increasing polarization of global politics, trade protectionism and geopolitical considerations, and the pandemic, countries have extensively used FDI Screening as a tool to further their own national interests. FDI screening was used around the globe to exert merger-control and regulate the entry, or the effect of, foreign investment in the country. This creates an impediment and may even lead to a point of inflection in the overall trajectory of international trade and CBDF.

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<sup>110</sup>World Economic Forum (2020) ‘A Roadmap for Cross-Border Data Flows: Future-Proofing Readiness and Cooperation in the New Data Economy’, WEF White Papers 5, [www3.weforum.org/docs/WEF\\_A\\_Roadmap\\_for\\_Cross\\_Border\\_Data\\_Flows\\_2020.pdf](http://www3.weforum.org/docs/WEF_A_Roadmap_for_Cross_Border_Data_Flows_2020.pdf) (accessed 29 April 2022).