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# **INVESTOR-STATE ARBITRATION IN ESPORTS: POTENTIAL FOR PROTECTING GAME PUBLISHERS AGAINST ABRUPT BAN**

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Dhritiraj Paul Choudhury, Intellectual Property Counsel at Boudhik IP LLP;

LLM, National Law University Delhi; BAL.LB (H), Assam University (a central university) Silchar.

## **ABSTRACT**

This paper evaluates whether intangible in-game assets can qualify as investments under international investment law and, in the presence of bilateral investment treaties (BITs), and whether abrupt government bans on games, such as India's ban of PUBG Mobile in 2020, could breach treaty protections and trigger investor–state dispute settlement (ISDS) claims.

It clarifies that BITs typically define “investment” broadly (as “every kind of asset”) and often explicitly include intellectual property and other intangible rights, meaning a game's IP, licenses, digital infrastructure or platforms, virtual in-game goods, and even its user base and data can all fall under treaty protection. Applying tests like the Salini criteria from ICSID jurisprudence, the analysis confirms that these digital assets exhibit the hallmarks of an investment demonstrating that even non-traditional, virtual assets meet international investment law's thresholds.

Building on this foundation, the paper assesses the legal viability of potential BIT claims by a game publisher in the face of a ban, focusing on the doctrines of indirect expropriation and fair and equitable treatment (FET). An outright ban can be framed as an indirect expropriation if it substantially deprives the foreign investor of the game's economic value and use without compensation.

Under BIT norms, expropriation is unlawful in absence of due compensation and a legitimate public purpose, so a ban that wipes out the investment's value with no compensation would *prima facie* violate the treaty's expropriation clause. Likewise, a sudden ban may breach the FET standard if it is imposed arbitrarily or in a discriminatory manner without due process, given that FET obliges states to act transparently and fairly towards investors. The investor could argue that the ban undermined its legitimate expectations of regulatory stability and fairness, especially if the game had been operating legally and the ban lacked clear evidence or notice.

At the same time, the analysis acknowledges the host state's perspective, governments may invoke national security or public order imperatives to defend such actions, citing their sovereign "police powers" to regulate for bona fide public welfare objectives. International investment law thus faces an inherent tension between upholding investor protections and respecting a state's sovereign right to regulate in the public interest, a tension only heightened as states increasingly regulate the digital economy. The paper notes that many treaties and tribunals strive to accommodate legitimate regulatory measures (through security exceptions or deference to good-faith regulations) while still holding states accountable for egregious treaty violations. Ultimately, whether such a game ban constitutes a BIT breach is a nuanced question, requiring a tribunal to weigh the measure's genuine public purpose and proportionality against its severe impact on the investor – a balance that epitomizes the broader clash between expanding investment protections to digital assets and preserving state regulatory autonomy.

## INTRODUCTION AND THE PROBLEM OF TERRITORIALITY

The rise of esports and online games has led to significant economic investments by game publishers across borders, but these investments face legal vulnerabilities when states abruptly ban games under the guise of public interest or national security. This issue came to prominence when countries like India instituted overnight bans on popular games (e.g. *PUBG Mobile* and others) amid political and security tensions.<sup>1</sup> Such bans, often executed through domestic law (for instance, India's Information Technology Act 69A)<sup>2</sup> and justified by concerns over data security and sovereignty, highlight the territoriality of laws. Under principles of territorial sovereignty, a country's laws apply within its borders, and foreign game developers must submit to those laws. This renders game publishers effectively helpless within domestic legal systems if a ban or regulatory measure is imposed. The local courts are unlikely to overturn government directives taken in the name of national interest, and may even be legally barred from reviewing them (especially if orders are confidential or couched in broad national security terms).

International intellectual property (IP) law provides limited solace.<sup>3</sup> Even if an abrupt ban may arguably violate the a country's obligations under the WTO's Agreement on Trade-Related

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<sup>1</sup> Aditya Kalra & Munsif Vengattil, Google Blocks Krafton's Battle Royale Game in India After Govt Order, Reuters (July 28, 2022), <https://www.reuters.com/world/india/google-blocks-kraftons-battle-royale-game-india-after-govt-order-2022-07-28/>.

<sup>2</sup> Information Technology Act, No. 21 of 2000, Section 69A, Acts of Parliament, 2000 (India)

<sup>3</sup> Mira Burri, The TikTok Controversy: Can WTO Prevent Bans?, *Regulating for Globalization* (Sept. 1, 2020), <https://regulatingforglobalization.com/2020/09/01/the-tiktok-controversy-can-wto-prevent-bans/>.

Aspects of Intellectual Property Rights (TRIPS) pertaining to National Treatment, Most Favoured Nation, or even Non Violation, a game publisher basically has no standing to directly challenge the state at the WTO. The game publisher in such cases can only attempt to persuade its own government or another State to initiate WTO proceeding on its behalf,<sup>4</sup> which is really a mammoth task and is a rare occurrence.

The banning of an app could also be seen as impeding the company's IP rights, effectively nullifying the ability to commercially exploit that IP in the banning country. Yet such harm would be considered ancillary to the ban's primary purpose (national security or public order),<sup>5</sup> and therefore, the WTO remedy would most likely be off the table. The home state of the publisher might protest (indeed, China argued that India's app bans violated WTO rules),<sup>6</sup> but geopolitical or security exceptions often stymie formal trade challenges.

In practice, therefore, an aggrieved game company's only viable international legal recourse may be the system of investor-state arbitration. If the game publisher (or its shareholders) is from a country that has an investment treaty with the state enacting the ban, the publisher could attempt to invoke protections under that treaty. This paper explores how Bilateral Investment Treaties (BITs) and investor-state arbitration might provide a mechanism for game developers to fight abrupt game bans. It examines the concept of investments under BITs (including IP, in-game assets, and data assets in esports operations), analyses how data and digital assets can qualify as protected investments (applying the Salini test and related definitions), and discusses the potential claims and challenges (expropriation, fair and equitable treatment) that game publishers might raise. Finally, it addresses the tension between regulatory sovereignty and investor protection, a tension at the heart of the ongoing legitimacy crisis of Investor-State Dispute Settlement (ISDS),<sup>7</sup> before drawing conclusions on the feasibility of this approach.

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<sup>4</sup> Peter Van den Bossche, *The TRIPS Agreement and WTO Dispute Settlement: Past, Present and Future*, World Trade Inst., Working Paper No. 02/2020 (2020), [https://www.wti.org/media/filer\\_public/63/33/633360d8-0c5e-4429-8aff-6d30bdf35374/wti\\_working\\_paper\\_02\\_2020.pdf](https://www.wti.org/media/filer_public/63/33/633360d8-0c5e-4429-8aff-6d30bdf35374/wti_working_paper_02_2020.pdf).

<sup>5</sup> E.K. Oke, *War, Armed Conflict, and the Security Exception in the TRIPS Agreement*, 2024 *Intell. Prop. Q.* 206 (UK), available at <https://uk.westlaw.com/Document/I6C39F600607611EF8B3DB8E4D8F78BEE/View/FullText.html>.

<sup>6</sup> Reuters Staff, *China Says Indian Ban on Apps Violates WTO Rules*, Reuters (Jan. 28, 2021), <https://www.reuters.com/article/world/india/china-says-indian-ban-on-apps-violates-wto-rules-idUSKBN29W0TS/>.

<sup>7</sup> Mathias Baudena, *Investor-State Dispute Settlement: Understanding the System's Legitimacy Crisis in Constitutional Terms*, LSE L. Rev. Blog (Feb. 18, 2021), <https://blog.lselawreview.com/2021/02/18/investor-state-dispute-settlement-understanding-the-systems-legitimacy-crisis-in-constitutional-terms/>.

## BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE ARBITRATION

Bilateral Investment Treaties (BITs) are agreements between two countries (or similarly, investment chapters in trade agreements between multiple countries) whereby each promises to protect investments made by investors from the other in its territory.<sup>8</sup> These treaties typically grant foreign investors substantive rights such as protection against expropriation without fair compensation, the right to “fair and equitable treatment” (FET), non-discrimination (national treatment and most-favoured-nation treatment), full protection, security and most critically, they allow investors to enforce those rights directly against the host state through international arbitration. In other words, unlike most international law where only states sue states, BITs empower a private foreign investor to initiate a legal claim (an arbitration) against the host government for treaty breaches, bypassing the host state’s courts.<sup>9</sup> As of the mid-2020s, there are over 3,000 BITs and numerous similar treaties (often collectively termed International Investment Agreements, IIAs) in force globally.<sup>10</sup>

Investor-State Dispute Settlement (ISDS) is the mechanism through which these arbitration claims are resolved. The process is typically as follows: the investor serves a notice of dispute, attempts at amicable settlement might ensue, and failing that, the investor files for arbitration under the rules specified in the treaty (commonly the ICSID Convention arbitration if both states are parties to ICSID, or ad hoc arbitration under UNCITRAL Rules, or other institutional rules). A tribunal of usually three arbitrators is constituted, one chosen by the investor, one by the state, and a presiding arbitrator chosen by agreement or an appointing authority. The tribunal hears the case and issues a binding award. If the arbitration is under the ICSID Convention (administered by the World Bank’s International Centre for Settlement of Investment Disputes), the award is enforceable in all ICSID member states as if it were a final court judgment of that state, with no appeal<sup>11</sup> (aside from a limited ICSID annulment

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<sup>8</sup> Marc Jacob, Investments, Bilateral Treaties, in Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum ed., Oxford Univ. Press, updated Feb.

2008), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1061>.

<sup>9</sup> Columbia Center on Sustainable Investment, Primer on International Investment Treaties and Investor-State Dispute Settlement (May 31, 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3726026](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726026).

<sup>10</sup> Edward Poulton & Kabir Duggal, Investor-State Arbitration – An Introduction, Global Arbitration News (July 20, 2017), <https://www.globalarbitrationnews.com/2017/07/20/investor-state-arbitration/>.

<sup>11</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, art. 53.

process)<sup>12</sup>. If under other rules, enforcement is typically via the New York Convention on arbitral awards.<sup>13</sup>

In essence, BITs and ISDS were designed to depoliticize investment disputes and give investors' confidence that they won't be at the mercy of local courts or political whims when they invest abroad. For game publishers who invest in foreign markets, whether through local offices, servers, marketing expenditures, or simply the deployment of valuable IP and digital infrastructure to serve users – BITs offer a potential shield. If a state takes an adverse measure like banning a game, and if that measure breaches the treaty's standards, the publisher could potentially seek relief (often compensation) through arbitration. This approach has been used in various similar contexts: for example, media and technology companies have brought ISDS claims when governments revoked licenses or access. In *Lemire v. Ukraine*<sup>14</sup> a foreign investor in a radio broadcasting business won damages when regulators' actions were found discriminatory; in *CME v. Czech Republic*<sup>15</sup>, the forced breakdown of a broadcasting venture led to a large award for the investor. In the context of digital platforms and apps, this would be a relatively novel application, but legal scholars suggest that “*where the blocking of [a digital platform] can be in conformity with local laws and regulations, it can nevertheless violate international obligations in [IIAs]*”.<sup>16</sup>

Before examining how exactly a game publisher might frame its assets and rights as protected *investments*, we must understand what counts as an “investment” under these treaties and arbitration conventions.

## DEFINING INVESTMENT : DEFINITIONS AND THE SALINI TEST

BITs generally define *investment* in very broad terms. A typical modern treaty uses an asset-based definition, often stating that “*investment*” means every kind of asset that an investor

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<sup>12</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, art. 52(3).

<sup>13</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958), 330 U.N.T.S. 3 (entered into force June 7, 1959).

<sup>14</sup> Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18 (Award Mar. 28, 2011).

<sup>15</sup> CME Czech Republic B.V. v. Czech Republic, Final Award, UNCITRAL Arb. Trib., Mar. 14, 2003

<sup>16</sup> Aram Aghababayan, government blocking of social media platforms as expropriation of contractual rights- ITA in review the journal of the institute for transnational arbitration, 2023, volume 5 issue 3 at [https://cail-publications.imgix.net/2023/PDFs/Vol\\_5\\_Iss\\_3/3-Aghababayan.pdf](https://cail-publications.imgix.net/2023/PDFs/Vol_5_Iss_3/3-Aghababayan.pdf)

owns or controls in the host state,<sup>17</sup> and then providing a non-exhaustive list of examples. For instance, the 2012 U.S. Model BIT (a template often mirrored in many treaties) defines investment as “*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*”<sup>18</sup> It then lists forms an investment may take, including, inter alia: an enterprise (business entity); shares or stock; bonds or loans; contracts; intellectual property rights; licenses, permits or similar rights conferred by law; and “other tangible or intangible property”. Notably, intellectual property (copyrights, trademarks, patents) is explicitly covered in many treaties, and the catch-all of “intangible property” can encompass other digital or contractual assets. In short, if a game publisher from country X has any assets or economic interests in country Y, which could be anything ranging from a local subsidiary, to server infrastructure, licenses, user data, the game’s player base and goodwill in that market etc, those could potentially qualify as investments under a broad BIT definition.

Interestingly, the China–Russia BIT explicitly includes “intellectual-property rights” and “claims to money” in its definition of covered investments. This means that a game publisher’s assets like trademarks, copyrights (game software code, artwork), licenses to local operators, and more importantly in-game virtual goods or currencies (to the extent they represent monetary claims or property value) could be argued to fall under the treaty’s protection.

However, a complication arises when the arbitration is under the auspices of ICSID (which many BITs specify). The ICSID Convention itself does not define “investment” except to say the dispute must “*arise directly out of an investment*” (Article 25). To fill this gap, arbitral tribunals have developed tests to determine whether a qualifying investment exists. The most influential is the Salini test, originating from the landmark case *Salini v. Morocco*.<sup>19</sup> In that case, the tribunal distilled typical hallmarks of an investment and stated: “*The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract, and a participation in the risks of the transaction. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the*

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<sup>17</sup> Bilateral Investment Treaties 1995–2006: Trends in Investment Rule-making, Executive Summary, at xi (UNCTAD Series on International Investment Policies for Development No. E.06.II.D.16, 2007), available at [https://unctad.org/system/files/official-document/iteiia20065\\_en.pdf](https://unctad.org/system/files/official-document/iteiia20065_en.pdf).

<sup>18</sup> 2012 U.S. Model Bilateral Investment Treaty

<sup>19</sup> *Salini Costruttori S.P.A. & Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 31, 2001), 6 ICSID Rep. 398 (2004)

*investment as an additional condition.*”<sup>20</sup> These four criteria (1) a contribution of money, assets or value; (2) a sufficient duration; (3) an element of risk; and (4) a contribution to the host state’s development came to be known as the so-called Salini criteria. In subsequent cases, some tribunals treated these as mandatory requirements (a strict or “deductive” approach) , while others treated them more flexibly as typical characteristics (the “intuitive” approach). The fourth criterion (economic development) has been especially controversial and tribunals no longer require it as a strict prerequisite, noting that development is inherently a consequence of protected investments rather than a jurisdictional condition.<sup>21</sup> Nevertheless, the first three elements being contribution, duration, and risk are widely regarded as the core features of an investment under ICSID jurisprudence.<sup>22</sup>

In practice, if a given BIT uses a broad definition of investment (which most do), an investor-state tribunal will primarily look to that treaty’s definition. Only if proceeding under ICSID might they also ensure the Salini (or similar) criteria are met to confirm the presence of an investment under Article 25 of ICSID. The difference rarely matters when significant business operations or assets are involved, as those usually satisfy Salini anyway.

For our purposes, it means a game publisher would need to demonstrate that it has an “investment” in the country that banned its game, and if under ICSID, that the investment involves a commitment of resources over time, with risk, contributing (at least potentially) to the host economy. As we explore next we will see that intellectual property, in-game assets, data, and the business of esports may indeed fit those definitions, even though they are not traditional brick-and-mortar investments. Scholars have time and again acknowledged that intangible digital assets can qualify as “investments” just as much as factories or farms, provided they are part of a sustained commercial endeavour.

## **IP, IN-GAME ASSETS, AND ESPORTS OPERATIONS AS PROTECTED INVESTMENTS**

Game publishers’ business in a foreign country can encompass a variety of assets: the intellectual property in the game (copyright in the software code and artwork, user interface, trademarks in the game’s name or characters, etc.), any local corporate entity or office set up

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<sup>20</sup> Id.

<sup>21</sup> Aceris Law LLC, *The Salini Test in ICSID Arbitration*, Aceris Law (Sept. 16, 2018), <https://www.acerislaw.com/the-salini-test-in-icsid-arbitration/>.

<sup>22</sup> Id.

to distribute or promote the game, contractual rights such as distribution agreements or licensing deals, the in-game virtual assets and digital infrastructure, and even less tangible assets like the user base and associated data. Under most BITs, intellectual property rights are explicitly mentioned as a form of protected investment. For example, if a publisher from Country A licenses its game to a local subsidiary or a partner in Country B, that license (and the underlying IP) is an asset invested in Country B. Likewise, trademarks registered in the host country, say the game's brand name, can be an investment. In fact, an ICSID tribunal in *Bridgestone v. Panama (2020)*<sup>23</sup> confirmed that a registered trademark qualified as an investment under a BIT, recognizing that an "intangible asset" can be protected so long as the investor devoted resources to it (in that case, the company had expended capital to develop and promote the trademark). This precedent paves the way for treating other intangibles, like game IP or brands, as investments.

Beyond formal IP registrations, esports and online game operations often rely on complex bundles of intangible assets that can be characterized as investments. In the well-known case *CC/Devas v. India*,<sup>24</sup> the foreign investors had acquired contract rights to use satellite spectrum for a digital multimedia platform; India's cancellation of those rights led a tribunal to hold that the contractual rights (including licenses and spectrum use agreements) were protected investments and that India's revocation constituted an expropriation. By analogy, a game publisher's rights to operate an online platform, which often require various central and state government approval and licenses, could be seen as a "permit" or intangible property right under the treaty. The key is that the investor has something of value in the host state – be it legal rights, goodwill with local users, or digital assets, which was acquired by expenditure of resources and is integral to a revenue-generating venture. Even in the absence of specific licence, contracts, and permits, if the investor can demonstrate a sustained course of commercial activity, a committed presence in the host state, and reliance on a stable regulatory environment, parallels may be drawn in relation to fair and equitable treatment and indirect expropriation doctrines. What remains critical is the factual pattern of state interference and the degree to which it neutralises the economic value of the investment.

In-game assets themselves (such as virtual currencies, items, or even the game's server-side code and player accounts) raise interesting questions. On one hand, these are not physical, but

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<sup>23</sup> *Bridgestone Licensing Services, Inc. & Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award (Aug. 14, 2020).

<sup>24</sup> *CC/Devas (Mauritius) Ltd. v. Republic of India*, PCA Case No. 2013-09, Award on Quantum (July 13, 2020).

on the other, they are part of the company's property and business. Many BITs cover "movable or immovable, tangible or intangible property", which in my opinion is broad enough to include digital goods. Moreover, if the publisher established a local company or servers that host the game for that region, those local installations, employment generation and the player databases could be considered part of the investment. Even without a local incorporation, one could argue the economic participation in the market (for example, revenue from Indian players, advertising contracts in that market, etc.) reflects a committed investment. Tribunals have shown flexibility in recognizing modern forms of assets: for instance, the *Philip Morris v. Uruguay*<sup>25</sup> arbitration (2016) treated Philip Morris's trademarks and goodwill in Uruguay as investments when the company challenged tobacco packaging laws (though the claim of expropriation of trademark ultimately failed on the merits). The mere fact that an asset is intangible or data-driven, in my opinion, should not exclude it from investment protection.

Typically, in-game assets are licensed to players by the publisher. For the publisher, the sale of in-game items is part of its business model and revenue stream. While individual virtual items are not "investments" per se from the publisher's perspective, the aggregate operation of an in-game economy is can qualify as an investment activity. The publisher's platform that facilitates transactions, the servers that store and process these items, and the digital marketplace for assets are all part of the infrastructure the company invests in. Additionally, in-game assets such as gun skins, which contain multiple layers of underlying intellectual property rights, are often licensed to users through End-User License Agreements (EULAs). In certain cases, these in-game asset licensing arrangements may themselves fall within the definition of an investment, particularly when the licensed assets are actively used in the host state and contribute to its economic development. For example, a player might use a licensed gun skin to enhance the visual appeal of their gameplay videos or livestreams, thereby attracting viewers, generating revenue, and creating economic activity. Such practices are very common in the esports and gaming industry, where digital assets are frequently monetized through content creation and related services.

If a government ban suddenly forces servers offline, virtual assets held by players might be rendered worthless and the publisher loses the goodwill and revenue from that in-game economy. In legal terms, the publisher could frame this as interference with its intangible

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<sup>25</sup> Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

property (goodwill and user contracts) and perhaps as an expropriation of the business value attached to those in-game assets (since the business of selling virtual goods is destroyed). Admittedly, this is a novel area and arbitration jurisprudence has not yet dealt with a case about virtual game items. However, by analogy to the known cases relating to trademarks, patents, or licenses as investments, a strong argument can be made that the entire bundle of rights and assets that make up an esports operation including the digital assets can be protected.

Again, Restrictions on monetisation in games present another flashpoint. Governments might ban or regulate specific revenue models such as prohibiting loot boxes or in-game microtransactions (on grounds of gambling or consumer protection), capping the amount minors can spend, or disallowing certain advertisements in games. While typically aimed at legitimate consumer welfare goals, these measures directly hit the investor's expected profits and could give rise to FET or even expropriation claims if the impact is severe. For example, if a publisher had acquired an investment (like a license or studio) in reliance on monetization through microtransactions, and a new law eliminates that entire revenue stream, the investor could potentially allege that its legitimate expectations were thwarted and that the business has been deprived of significant value. Much would depend on whether the regulation is non-discriminatory (applied equally to local game companies) and how sudden or arbitrary it is. A transparent, well-publicized regulation might pass muster, whereas an abrupt ban via executive order (with no grace period or consultation) could be viewed as arbitrary.

In the context of esports, consider also ancillary investments: tournament infrastructure, sponsorship and media rights deals etc. If a game publisher or its affiliated esports entity invested in local esports tournaments or broadcast rights, those could independently qualify as investments (e.g., contracts and business goodwill related to running an esports league). All these pieces compose the "esports operations" of a publisher in a given country, and each piece could fall under the protective umbrella of a BIT if structured properly. The aggregate of these assets and activities demonstrates a contribution of capital and know-how, often over several years, with the expectation of profit and the risk of market success or failure, which ticks the Salini criteria boxes in substance.

In summary, IP rights, contractual rights, and the business assets of an esports operation are all conceivable as investments under typical BIT language. The next question is whether

something as novel as user data and digital databases can be considered part of the investment, especially since data is at the heart of many modern bans and regulatory conflicts.

### DATA AS A PROTECTED INVESTMENT ASSET : APPLYING THE SALINI TEST

Digital applications, including games, generate and rely on vast amounts of user data. In the esports industry, user data (e.g. player demographics, behavior patterns, social connections, purchasing history in-game) is often monetized through targeted advertising, cross-promotion, or sales of virtual goods. As data becomes a critical economic resource, investment law is grappling with whether data itself is an “asset” protected by treaties. Most older BITs do not explicitly list data, and international law has no settled definition of data as property. Nonetheless, commentators argue that data can be recognized as an investment<sup>26</sup> if it has the key characteristics, notably, the capacity to generate returns for its owner. Recent developments suggest that tribunals are open to this view.

A good point of reference would be the case *Einarsson v. Canada*<sup>27</sup>, which is the first known investor-state arbitration centered on data as the primary asset. The claimants (U.S. investors) allege that Canada, through its regulatory actions, effectively destroyed the value of their seismic data business, amounting to an indirect expropriation and breach of NAFTA obligations. The seismic data which is essentially geological survey information collected at great expense was recognized by Canadian courts as the claimants’ property (protected by copyright), yet a special regulatory regime allowed the government to disclose that data to third parties, undercutting the company’s exclusivity. In their NAFTA claim, the investors emphasize that the data was the fundamental asset of their enterprise and its misappropriation by the state led to the company’s collapse. While the tribunal’s decisions are not yet public, it can be understood that *Einarsson* forces the issue of treating data as an investment. It is important to note that, the data was tied to a local enterprise and was recognized as a form of intellectual property under the domestic law, these factors helped in bringing data within the treaty’s investment definition as “intangible property.” GSI’s seismic data, being essential to a decades-long business and being developed through substantial expenditure, can be argued to have

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<sup>26</sup> Pratyush Nath Upreti, Data, Copyright, and Investor-State Arbitration: Insights from *Einarsson v. Canada*, 45 Eur. Intell. Prop. Rev. 136 (2023),

[https://pureadmin.qub.ac.uk/ws/portalfiles/portal/461558564/Data\\_Copyright\\_and\\_ISDS\\_Insights\\_from\\_Einarsson\\_v\\_Canada\\_EIPR\\_2023.pdf](https://pureadmin.qub.ac.uk/ws/portalfiles/portal/461558564/Data_Copyright_and_ISDS_Insights_from_Einarsson_v_Canada_EIPR_2023.pdf); see also Julien Chaisse & Cristen Bauer, Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration, 21 Vand. J. Ent. & Tech. L. 549 (2020), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1357&context=jetlaw>.

<sup>27</sup> *Einarsson v. Canada*, ICSID Case No. UNCT/20/6 (Notice of Arbitration filed Oct. 20, 2020).

conformed to each of the requirements of the Salini ‘test’, including the controversial economic development prong (since the data was used to facilitate oil and gas exploration, benefiting the host economy)<sup>28</sup>. In other words, data should satisfy Salini’s criteria, if there is a capital contribution (investment in collecting, processing, and maintaining the data), a duration (data sets often hold long-term value and the business was ongoing for years), a risk (market and regulatory risk, as the case itself demonstrates), and even a benefit to the host state’s development (enhancing resource exploration in that example).

Applying this to esports and game publishers: user data collected by a game is usually the product of significant investment (in technology, analytics, servers) and is an income-generating asset (through advertising, personalization, or sale of in-game items using data-driven insights). It is often continuously accumulated over the life of the game (meeting the duration element), and its value is subject to risks, not only business competition, but regulatory changes like privacy laws or data localization requirements. If a government action blocks the game or forces data to be stored locally or even handed over to a domestic entity, it can drastically diminish the value of the company’s data asset. From an investment law perspective, such data could be argued to fall under protected categories like “*intangible property*”, “*claims to performance*” (if there are user agreements or contracts involving data), or “*intellectual property*” (to the extent databases or source code are protected by IP).

Such data localisation mandates can increase an investor’s costs and undermine efficient data management (by preventing aggregation of global datasets). If a game publisher built its business on free cross-border flow of data, forced localization may act as a kind of regulatory “performance requirement” compelling the investor to invest in local servers or technology as a condition of doing business. Some investment treaties (like NAFTA Article 1106)<sup>29</sup> expressly prohibit certain performance requirements, and the Einarsson claimants in fact alleged that Canada’s handling of their data imposed an unlawful performance requirement (by forcing disclosure of data to local third parties). Even when not explicitly covered by a performance requirements clause, data localization may also be contested under FET and indirect expropriation. If the localization rule is so burdensome that it renders the investment unviable (for instance, if servers must be duplicated at high cost or if data transfer out of the country is

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<sup>28</sup> Niels Lachmann, *Einarsson v Canada and Data as Asset in Investor-State Dispute Settlement*, Kluwer Arb. Blog (Oct. 9, 2023), <https://legalblogs.wolterskluwer.com/arbitration-blog/einarsson-v-canada-and-data-as-asset-in-investor-state-dispute-settlement/?output=pdf>.

<sup>29</sup> North American Free Trade Agreement, Can.-Mex.-U.S., art. 1106, Dec. 17, 1992, 32 I.L.M. 289, 641 (1993).

barred, crippling a global game service), the foreign investor might argue that the economic impact is equivalent to an expropriation of its data asset or business. A tribunal would examine factors like the extent of economic loss, whether the measure was foreseeable, and if it was implemented with due regard to the investor's rights.

To qualify for treaty protection, there is also a territorial nexus requirement: the investment (including data) should be in the territory of the host state. For data, this might be shown if the data pertains to the host state's citizens or was collected and stored on servers in the host state, or if the data is integral to a local business operation. In *Einarsson*, the data was collected in Canadian territory and stored there, which satisfied territorial linkage.

Game applications, which collect extensive user data, can meet this requirement if it successfully demonstrates that the investment asset itself have a tangible or substantial economic connection to the territory of the host state. This may be established if the data is collected and stored on servers physically located in the host country, or if it is processed and monetized through local operations.

This aligns with the logic in *Einarsson v. Canada*, where data collected and stored in Canadian territory satisfied the territorial linkage requirement. In many cases, game developers may also store some data on servers located within the host state, either voluntarily for performance optimization or in compliance with local data localization laws. And, the data is often integral to local economic activities. For example, companies monetize user data through targeted advertising, partner with local content creators, or run region-specific in-game promotions. These factors establish a clear connection between the data and the host state's economy, reinforcing the territorial nexus.

It is pertinent to note that one tribunal's comfort with treating seismic data as investment does not automatically mean user data from a game will be treated the same. However, given the direction of the digital economy, it is reasonable to foresee tribunals finding ways to include economically significant data under treaty protection. Indeed, commentators point out that as states modernize treaties, they are explicitly considering data flows, but even under current treaty language, data should be recognized as a protected investment as long as it has the

capacity or potential to generate returns to its owners.<sup>30</sup>

In summary, user data and digital assets may be characterized as part of a foreign investment. If a game publisher has invested in building a database of users and a platform in the host state, that intangible asset might be covered by a BIT, especially if the treaty's definition of investment includes intangible property and intellectual property (as most do). The *Salini* criteria, to the extent they apply, may be met by data-centric businesses when the investment is structured and longstanding, involving risk and contributions to the host economy.

### **ABRUPT GAME BANS AS EXPROPRIATION OR TREATY VIOLATION**

Given that game publishers' interests in a country may qualify as investments, how might an overnight ban on a game be framed as a violation of investment protections? The two most pertinent BIT provisions likely would be those against expropriation and those ensuring fair and equitable treatment (FET).

**Expropriation:** Investment treaties prohibit expropriation of investments by the state, except for expropriations that are for a public purpose, non-discriminatory, carried out under due process, and accompanied by prompt, adequate compensation. Expropriation can be direct (outright seizure or nationalization of an asset) or indirect (measures that, while not overtly taking title, effectively deprive the investor of the use or value of its investment). An outright ban of an app, especially one that is the primary vehicle by which a company derives value from its investment, could be argued to amount to an indirect expropriation. The ban doesn't transfer ownership of the game or its IP to the state, but it renders those assets economically worthless in that country, as the company can no longer access the market or monetize its investment. For example, when India banned *PUBG Mobile* (published by a Chinese-invested company) and later its rebranded version (*BGMI* by South Korea's Krafton) in 2020–22, the companies lost access to tens of millions of users overnight, with immediate financial impact (Krafton's stock price fell on the news).<sup>31</sup> The ban was done under a legal provision that allows blocking content for national security which is a legitimate public purpose on its face but from

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<sup>30</sup>Wenwei Li, Research on the Eligibility of Data Asset from the Perspective of International Investment, 7 Int'l J. Soc. Scis. & Pub. Admin. 11 (May 2025), [https://www.researchgate.net/publication/391762999\\_Research\\_on\\_the\\_Eligibility\\_of\\_Data\\_Asset\\_from\\_the\\_Perspective\\_of\\_International\\_Investment](https://www.researchgate.net/publication/391762999_Research_on_the_Eligibility_of_Data_Asset_from_the_Perspective_of_International_Investment).

<sup>31</sup>Aditya Kalra, Munsif Vengattil & Joyce Lee, India Blocks Krafton's Game on Concerns Over Data Sharing in China, Reuters (July 29, 2022), <https://www.reuters.com/world/india/google-blocks-kraftons-battle-royale-game-india-after-govt-order-2022-07-28/>.

the investor's perspective, it might appear arbitrary or politically motivated (e.g., part of a retaliation in a geopolitical dispute rather than a measured security regulation). If a BIT between the investor's home country and India exists, the investor could claim that this measure is an uncompensated indirect expropriation: the state's act has "*substantially deprived*" the investor of the value of its investment (the game operation and associated IP/user base) without paying compensation. A tribunal assessing such a claim would consider factors like the degree of economic impact, the nature of government action, and whether it was a bona fide general regulation or a targeted taking.

It is worth noting that IP rights have been the subject of expropriation claims in past ISDS cases. For instance, in *Philip Morris v. Uruguay*, the tobacco company argued that Uruguay's public health measures (which restricted branding on cigarette packs) expropriated its trademark rights by depriving them of economic value. The tribunal in that case did not find an expropriation, largely because it viewed the regulation as a legitimate public policy measure applied in a non-discriminatory way for a public purpose (public health). Similarly, in *Eli Lilly v. Canada*,<sup>32</sup> a pharmaceutical company alleged Canada's court decisions invalidating certain patents were an expropriation and violated NAFTA; that claim also failed, with the tribunal deferring to the domestic court's authority to set patent law standards. These cases show that states can defend their actions as valid exercises of regulatory authority, especially if they are protecting public welfare (health, safety, security) and not specifically singling out the foreign investor. However, the flip side is that if the measure is found to be disproportionate or discriminatory, or if the public purpose rationale is a mere pretext, a tribunal might rule it an unlawful expropriation requiring compensation.

It is also worthwhile to note at this point that tribunals have set high threshold for establishing an expropriation claim. Jurisprudence such as *Feldman v. Mexico*<sup>33</sup> and *Methanex v. United States*<sup>34</sup> makes it clear that mere loss of profits or market access does not suffice; rather, there must be a substantial or near-total deprivation of the investment's economic value or use. App bans typically leave the underlying intellectual property rights intact, allowing the game to operate in other jurisdictions and preserving the investor's ability to exploit its IP globally.

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<sup>32</sup> Eli Lilly & Co. v. Government of Canada, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017).

<sup>33</sup> Marvin Roy Feldman Karpas v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

<sup>34</sup> Methanex Corp. v. United States of America, UNCITRAL (NAFTA Chapter 11 arbitration), Final Award (Aug. 3, 2005).

However, in certain factual contexts, a ban may effectively destroy the economic value of the investment within the host state. As discussed earlier one such example is the banning of PUBG Mobile in India in 2020. India was reportedly one of the largest markets for the game contributing significantly to its global downloads and revenue through in-game purchases, advertising, and esports-related activities.<sup>35</sup> The ban led to the severing of Tencent's publishing rights and a complete suspension of local operations, tournaments, and partnerships, amounting to a near-total loss of economic value in the Indian market. While the global IP remained intact, the local value tied to user data, brand goodwill, monetisation infrastructure, and esports engagements can be arguably said to have been expropriated in substance.

While examining the case, the tribunal might also find it relevant to scrutinize the subsequent developments. Within weeks of the ban, a domestically developed game called FAUG (Fearless and United Guards) was announced and publicly endorsed by Indian actor Akshay Kumar. FAUG was framed as a patriotic alternative to PUBG, and its launch coincided with the geopolitical narrative surrounding self-reliance and digital sovereignty. While no formal connection was made between state action and the promotion of FAUG, the timing and rhetorical framing suggested to some observers a potential policy preference for domestic alternatives. If a claimant could demonstrate that the regulatory measure was applied in a manner that disproportionately harmed a foreign investor while facilitating a local competitor, and that such outcome was foreseeable or encouraged by state actors, this could strengthen an argument that the measure was not a bona fide exercise of regulatory powers, but rather a disguised and disproportionate expropriation. This is particularly relevant in light of *Pope & Talbot v. Canada*,<sup>36</sup> where the tribunal emphasised that substantial deprivation rather than loss of control is the key standard, and that the context and effect of a measure are central to the inquiry.

Fair and Equitable Treatment (FET): Nearly all BITs include a promise to accord investors FET, a broad standard that has been interpreted to require, inter alia, non-arbitrariness, transparency, due process, and respect for the investor's legitimate expectations. An abrupt ban could be challenged as a breach of FET on several grounds.

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<sup>35</sup> Abhijit Ahaskar, Curtains Down on PUBG Mobile in India With Server Shut Down, Mint (Oct. 30, 2020), <https://www.livemint.com/companies/news/curtains-down-on-pubg-mobile-in-india-with-server-shut-down-11604034988734.html>.

<sup>36</sup> *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA Chapter 11 arbitration), Award on Damages (May 31, 2002).

First, the investor might argue the ban was arbitrary or discriminatory, for example, if it is imposed without a credible evidence-based reason, or if it targets games from a particular country while other similar apps are not banned. In the Indian app ban wave 2020-2022, it was predominantly Chinese-linked apps that were banned, arguably reflecting discrimination based on national origin (though India would contend the distinction was security-based, not nationality per se). Second, lack of due process and transparency could be framed as an FET issue as Section 69A bans in India are issued confidentially, without prior notice or hearing to the affected companies, and without public disclosure of decisions, the companies were not given detailed evidence of the allegations nor a meaningful opportunity to defend or mitigate (e.g. by offering to localize data storage). Such a secretive process could be characterized as a denial of justice or at least a violation of basic procedural fairness owed to investors. Third, the investor's legitimate expectations might be invoked, a publisher might say it entered the market on the expectation that it would be allowed to operate legally as long as it complied with existing laws, and that it relied on government representations or the general legal framework. A sudden policy shift banning the service (especially if not clearly grounded in promulgated law or if it reverses previous approvals) may frustrate those expectations.

Moreover, any allegations that the ban was a political retaliation or a form of economic nationalism could bolster an FET claim. For example, if an investor could show that the ban was not truly about cybersecurity (perhaps the concerns were unfounded or could have been addressed with a less draconian measure), and that domestic or any other country's apps with similar data practices faced no restrictions, it might persuade arbitrators that the foreign investor was treated inequitably.

That said, the bar for a successful Fair and Equitable Treatment (FET) violation claim is significantly high. A breach of FET in reality requires conduct that is "wholly arbitrary, grossly unfair, unjust or idiosyncratic," or that amounts to a manifest failure of due process<sup>37</sup>. It must be an act "*sufficiently egregious and shocking*" one that is exhibited by a "*gross denial of justice or manifest arbitrariness falling below acceptable international standards*".<sup>38</sup>

However, even under this demanding standard, there is room for plausible arguments particularly where bans are executed without notice, procedural safeguards, or opportunity to

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<sup>37</sup> Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004).

<sup>38</sup> Glamis Gold, Ltd. v. United States of America, UNCITRAL (NAFTA Chapter 11 arbitration), Final Award (June 8, 2009).

remedy the perceived security concerns.

Moreover, the scope of the doctrine of legitimate expectations has been significantly narrowed in multiple cases such as *Continental Casualty v. Argentina*<sup>39</sup> and *EDF v. Romania*,<sup>40</sup> where it was held that investors cannot have legitimate expectations of regulatory stasis and that general legal compliance does not create specific commitments immune from policy changes. While these cases caution that legitimate expectations do not guarantee regulatory stasis, expectations based on specific representations, formal approvals, or established regulatory practices can still give rise to enforceable claims, especially if abruptly overturned without due process. Therefore, although claims grounded purely on general compliance are unlikely to succeed, where a publisher can show reliance on government conduct or egregious procedural irregularities, FET may offer a viable claim.

**Breach of Other Provisions:** Depending on treaty language, one might also consider claims like violation of national treatment. Under the India–China BIT’s National Treatment clause, India must not treat Chinese investors less favourably than it treats its own investors or those of third states in like circumstances. At first glance, the app bans were facially discriminatory: they specifically targeted Chinese-owned applications. The key question is whether Chinese apps were in “like circumstances” to other apps and whether the differential treatment was justified by legitimate public welfare objectives. India would argue that apps connected to China did pose unique risks (perhaps due to China’s cybersecurity law or documented instances of data misuse), so they were not similarly situated to, say, Western apps. If the tribunal accepted that national security concerns justified singling out Chinese apps, it might not find a National Treatment violation. On the other hand, if evidence showed that the banned apps were functionally similar to many other foreign apps (in data collection behaviour) and that the ban was more of a punitive measure, a tribunal could find nationality-based discrimination. Similarly, an MFN clause (Most-Favored-Nation) could be invoked if the investor can point to another foreign investor (from a third country) being treated better in a comparable situation. However, given the broad scope of India’s bans (eventually including non-Chinese apps with Chinese ties, like the Singaporean and Korean examples), India could argue it applied a consistent security rationale rather than arbitrary national bias.

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<sup>39</sup> *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

<sup>40</sup> *EDF (Services) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009).

Hence, expropriation and FET are the primary weapons in cases dealing with regulatory interference.

It is important to underscore that no arbitral tribunal has yet ruled on a case of a digital app ban. This is a frontier scenario and the actual legal implications remain unexplored. The current international law has no current, obvious, and effective limit on governments banning apps like TikTok, but “investment claims may be pursued” as an alternative to trade disputes. So any such arbitration would be breaking new ground. The closest analogies have been in other sectors: media (broadcast or news service bans, such as the *Al Jazeera v. Egypt*<sup>41</sup> case over the shutdown of a news network, or *beIN Media v. Saudi Arabia*<sup>42</sup> related to blocking of a sports broadcaster), or telecommunications (license revocations). Those cases demonstrate that tribunals do take seriously investors’ rights even in sensitive sectors, though outcomes vary.

In *BeIN Corporation v. Saudi Arabia*<sup>43</sup>, a Qatari-owned sports broadcaster was barred from operating in Saudi Arabia amid a political dispute. BeIN filed an arbitration under a BIT, alleging among other things expropriation and FET breaches. The case was recently decided in the investor’s favor, with the tribunal finding Saudi Arabia had breached the treaty by effectively forcing BeIN out without justification. Saudi’s invocation of a national security defence was not accepted as a blanket shield in that context (though each treaty handles security exceptions differently). This suggests that if a national security claim is not substantiated or is used as a mere political pretext, tribunals may hold states accountable even for actions labelled as security measures.

For game publishers considering ISDS, a hurdle might be proving jurisdiction i.e., showing they qualify as investors and their game business qualifies as an investment covered by the treaty (the issues we discussed earlier). If a publisher only distributed a free-to-download app without a local subsidiary, the host state might argue there was no “investment” in its territory. The investor would counter with the broad definition arguments and perhaps the existence of local data servers, local marketing spending, or other footholds. Assuming jurisdiction is established, the state would likely defend on merits by saying the ban was a legitimate regulatory act. The right to regulate is increasingly emphasized in newer treaties and in arbitral

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<sup>41</sup> *Al Jazeera Media Network v. Arab Republic of Egypt*, ICSID Case No. ARB/16/1.

<sup>42</sup> *beIN Corporation v. Kingdom of Saudi Arabia*, UNCITRAL (OIC Investment Agreement), Final Award (2023).

<sup>43</sup> *Id.*

reasoning. Governments will argue they have bona fide public interests, cybersecurity, protection of personal data of citizens, prevention of espionage, and that the measures were necessary and proportionate to those aims. Many modern BITs have general exceptions or security exceptions (similar to those in WTO law) that can excuse actions needed for essential security or public order. India's 2016 Model BIT, for instance, contains an explicit security exception that is self-judging (meaning the state's assertion of security interest is given deference). If the applicable BIT has such clauses, it would significantly limit the tribunal's jurisdiction to second-guess the host state's security assessment. These clauses are designed to shield states from ISDS liability in matters touching on national defence, critical infrastructure, cybersecurity, or data sovereignty which are concerns increasingly cited in app ban contexts. While the chances are slim, however, if such a dispute gets successfully admitted to ISDS the outcome might hinge on whether the tribunal accepts the state's justification at face value or probes its genuineness and proportionality.

## **REGULATORY SOVEREIGNTY VS. INVESTOR PROTECTION: THE ISDS LEGITIMACY DEBATE**

The possibility of game publishers suing governments over public-interest acts such as app bans highlight the broader tension in international investment law, i.e., how to balance a state's sovereign right (and duty) to regulate for public welfare against the obligation to protect foreign investments. This tension is at the core of what has been termed the ISDS "legitimacy crisis." Over the past decade, a growing chorus of states, scholars, and civil society voices have criticized the investor-state arbitration system for unduly constraining regulatory autonomy and for providing foreign corporations with a privileged avenue to seek hefty damages,<sup>44</sup> sometimes even in situations where governments act for health, safety, or other public goods. The notion that a tribunal of three private arbitrators can second-guess a government's policy (like banning a potentially data-leaking app) and potentially order taxpayers to pay millions (or billions) in compensation has sparked backlash. Governments are increasingly revisiting their investment obligations and pursuing the annulment of certain arbitral awards<sup>45</sup>. Examples frequently cited include environmental or health measures challenged by investors, leading some states to

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<sup>44</sup> Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler & Daniel Behn, UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, 21 J. World Inv. & Trade 167 (2020), available at <https://ssrn.com/abstract=3650890>.

<sup>45</sup> Beth A. Simmons, Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment, 66 World Pol. 12 (2014), <https://doi.org/10.1017/S0043887113000312>.

terminate or renegotiate BITs to clarify the “right to regulate.” For instance, the number of investment treaties being terminated or renegotiated has climbed, as states seek to reclaim policy space or improve ISDS procedures.<sup>46</sup>

In the context of esports and apps, the risk of regulatory chill is a real concern: if a country fears an expensive ISDS claim, it might hesitate to impose even justified regulations on powerful tech companies. On the other hand, proponents of the system argue that BITs do not forbid regulation, they only ensure that states do not act in egregious, unfair ways or completely confiscate property without compensation. From this perspective, holding states accountable for abusive or discriminatory bans is precisely the point of investment protection, and it can deter arbitrary actions that might ultimately harm the country’s own digital economy by undermining investor confidence.

This debate has prompted various reform efforts. Some treaties now include more explicit carve-outs preserving certain regulatory measures (for privacy, health, environment etc.). Others require investors to exhaust local remedies or carve out sensitive sectors. The legitimacy crisis also stems from procedural critiques: lack of transparency in some cases (though transparency has improved with new rules), inconsistent decisions by tribunals, and questions about arbitrator impartiality.<sup>47</sup> There are proposals for a multilateral investment court or appellate mechanism to address these issues. While those systemic reforms are under discussion (notably in UNCITRAL’s Working Group III), investors with current disputes must navigate the system as it is.

In any case, a game publisher bringing an ISDS claim must be cognizant that they are operating in this charged environment. The state might rally public opinion by framing the investor as putting profits over national security or children’s wellbeing (in some countries, concerns about gaming addiction or cultural impact could also be cited). Tribunals, aware of the scrutiny, may be inclined to give states the “benefit of the doubt” in close cases of public purpose regulation, so long as the state’s actions aren’t blatantly abusive. The outcome could hinge on how the ban was executed: was there evidence of a reasonable security threat? Were less restrictive alternatives considered? Was the investor given any opportunity to answer allegations or

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<sup>46</sup> David Gaukrodger, *The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper*, No. 2017/02, OECD Working Papers on International Investment, 24 Feb. 2017, available at [https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/02/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties\\_03028151/82786801-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/02/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_03028151/82786801-en.pdf).

<sup>47</sup> Langford et al., *supra* note 44.

mitigate issues before the ban? Did the state apply the measure even-handedly? These factors could influence whether a tribunal views the state's conduct as a permissible regulation or a treaty breach.

Notably, if the ban is found to violate the treaty, the usual remedy is monetary damages, not reversal of the ban. ISDS tribunals do not typically order states to allow an app again (specific performance is rare, especially in a security context). Thus, a publisher might win compensation for lost investment value, but the game could remain banned. This raises a policy question: does the possibility of paying compensation really deter a country like India in matters it deems national security? If the sum is large, it might; but countries might also dig in and refuse to pay, especially if they have exit options (India, for example, has terminated many older BITs and could resist enforcement). This dynamic is part of the legitimacy crisis too, the enforceability of awards against states and the potential backlash if states refuse compliance.

## **CONCLUSION**

Despite the novel context of esports and gaming, investor–state arbitration remains a difficult yet plausible avenue for challenging abrupt app bans, albeit only under certain conditions. First, the foreign game publisher must meet the jurisdictional thresholds by demonstrating that its gaming assets qualify as a protected “investment” under the relevant treaty. As shown, even intangible and data-driven assets can theoretically meet the Salini test hallmarks of contribution, duration, and risk. Game developers that commit resources over time (e.g. deploying servers, cultivating a user base, or licensing IP in the host state) assume entrepreneurial risk in reliance on the host market, thereby establishing the requisite territorial nexus for investment protection. In other words, the digital nature of esports should not preclude treaty coverage: with a sustained local presence and ongoing economic participation, assets like game IP rights, user data, and in-game virtual economies can be characterized as investments in the host country's territory. Under those conditions, an investor is positioned to invoke BIT protections when a ban obliterates the value of its operations.

Once jurisdiction is secured, however, doctrinal constraints sharply delimit the scope of relief. International tribunals will carefully weigh the host state's sovereign prerogative to regulate in the public interest (especially on grounds of national security or public order) against the investor's treaty rights. A core finding of this paper is that claims of discrimination or unfair treatment arising from game bans must overcome a high deference to genuine public welfare

measures. For example, while India's sweeping ban of Chinese-origin apps was facially discriminatory, the state could contend that those apps were not in "like circumstances" with others due to unique cybersecurity risks, a justification a tribunal might accept if supported by evidence. Tribunals have indeed upheld state measures as lawful where they were non-arbitrary, non-discriminatory enactments for a legitimate purpose (such as protecting public health or security). Conversely, if a ban appears to target a foreign investor without a sound justification, particularly where comparable domestic or third-country apps remain unaffected, it risks being viewed as a pretextual or disproportionate breach of treaty obligations. Notably, past arbitrations (e.g. *Philip Morris v. Uruguay*, *Eli Lilly v. Canada*) show that tribunals defer to bona fide regulations, but they will not accept a blanket "national security" label as an automatic shield if the facts suggest an ulterior motive or manifest unfairness. Thus, a successful ISDS claim in this realm hinges on the investor's ability to present the ban as an egregious measure, one that goes beyond permissible regulation by discriminatorily or arbitrarily eviscerating the investment.

Finally, the viability of ISDS in app ban disputes is profoundly treaty-dependent. Modern investment treaties vary in how much regulatory latitude they grant states, and many include explicit exceptions for security and public policy. A critical constraint discussed is the self-judging security clause found in some BITs. Where the applicable treaty allows a state to unilaterally determine what actions it deems necessary for "essential security", the same is found in India's 2016 Model BIT, in such cases an arbitral tribunal will have little authority to second-guess the ban once the state invokes that clause. Such provisions can effectively bar the claim, insulating sovereign measures from review. By contrast, under treaties lacking self-judging language (or with more narrowly drawn exceptions), the tribunal retains the power to scrutinize the genuineness and proportionality of the state's security rationale. The analysis underscores that an investor's prospects will therefore depend on the fortuity of treaty language: strong investor-protective clauses can open the door to relief, whereas broad exceptions may shut it. In sum, this paper maintains that investor-state arbitration remains a tenable and, at times, potent recourse for esports and gaming companies facing abrupt bans, but only if they satisfy stringent investment definitions and navigate the narrow channel left open between legitimate regulatory deference and treaty breach. Under the right conditions, ISDS offers a needed legal pathway to hold states accountable for uncompensated destructions of digital investment value, even as it respects the state's right to protect the public interest. The result is a nuanced equilibrium where ISDS can serve as a backstop against unfair or

arbitrary treatment in the gaming sector, while still acknowledging that not every public-interest ban will or should engage international responsibility.