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## Investor-State Dispute Settlement in the Digital Economy: The Case for Structured Proportionality

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# Investor-State Dispute Settlement in the Digital Economy: The Case for Structured Proportionality

*Robert Ginsburg*<sup>1</sup>

*Abstract: The surge of economic nationalism and cross-border technology investments foreshadows disputes between inbound investors and host governments. While cross-border technology transfer is essential for economic development in many countries, host governments retain the right to safeguard citizens against potential consequences of such investments. The tension between these two concepts provides a significant challenge to the future of foreign direct investment and the global economy. For these reasons, legislators and arbitrators must develop and enforce regulations that protect public interests while enabling investors to successfully operate in the host country. In anticipation of these disputes, this article will explain how arbitral tribunals can use structured proportionality to accomplish this objective. More specifically, this article explains the causes of upcoming disputes, introduces a proportionality analysis of the government's right to regulate and the degree to which the investor's rights are threatened, and demonstrates how the consistent implementation of a structured proportionality test will maximize the chances that regulators and arbitrators will find balanced solutions that account for the interests of all stakeholders of FDI projects.*

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The current international investment climate is marked by two major trends that collide to increase risk exposures for foreign investors in the digital economy. First, ill-prepared, undefined regulatory frameworks for innovative technological products and services expose investors to policy changes that prevent them from implementing their business models. Second, political shifts toward protectionist policies provide government officials with the political will to implement such regulations.

When multinational enterprises (MNEs) introduce new products and services into a sovereign economy where no regulatory framework exists, legacy local businesses pressure host government officials to put in place burdensome barriers to entry. These barriers often amount to regulatory expropriation and investors are forced to file for arbitration. Still, governments have the right and obligation to regulate investment climates to protect their citizens from negative impacts of such products and services.<sup>2</sup>

Debates about the merits of foreign direct investment projects and the policies that regulate them often devolve into sweeping conclusions about cross-border transactions. Such arguments fail to consider case-specific variables that ultimately determine the net effects of each project. Case-specific details also help arbitrators and regulators identify regulatory options that safeguard host countries without decimating investors' business models.<sup>3</sup> Although there is an emerging discourse on regulatory frameworks for the sharing economy, the literature has not confronted a critical element: the role of judges and arbitrators in enforcing such regulations. This article will explore ways in which the decisions of arbitral tribunals can account for the interests of both parties to technology disputes.<sup>4</sup> Moreover, it will explain how a framework for reviewing arbitral challenges to regulations can provide an effective bridge to policymakers whose regulations can prevent the need for contentious proceedings.

When foreign investors challenge a host government's regulations, they often pursue claims through investor-state dispute settlement (ISDS). Arbitral reviews and case decisions not only impact the interested parties, but they also draw a figurative line between acceptable and unacceptable

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<sup>2</sup> In the context of cross-border expansions in the digital economy, software platforms threaten privacy and numerous other public interests that government officials are responsible for regulating. The tension between neo-liberals that support free trade and investment and anti-globalists who want to protect the absolute sovereignty of host governments lies at the center of the globalization debate.

<sup>3</sup> See generally Benjamin J. Edelman & Damien Geradin, *Efficiencies & Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?* 19 STAN. TECH. L. REV. 293, 295 (2016).

<sup>4</sup> A thorough review of multiple databases revealed no hits for searches of articles on this topic. While there has been a white paper on the topic, the author could not find any that discuss the topic ISDS and recent innovations in the sharing economy.

regulations, sending a clear message to regulators and investors in future projects.<sup>5</sup> Based on these considerations, this article will argue that arbitrators should consistently use the structured proportionality doctrine to assess investor claims and identify balanced regulations that safeguard the public and allow investors to generate a profit. In addition to finding the most equitable outcome, structured proportionality analysis will guide and encourage legislators and regulators to implement reasonable regulations that prevent disputes. Utilizing a test that provides consistent, foreseeable outcomes will also maximize the chances that parties reach a compromise in the cooling off period.

In anticipation of ISDS cases involving foreign investor technology claims, this article provides a rubric for resolving regulatory disputes. Section I explains why there is a significant likelihood for conflicts between foreign technology investors and host governments. Section II uses case studies of Airbnb and Uber in new markets to provide anecdotal examples of overbroad, one-sided regulations that prevent investors from succeeding; these case studies also show more balanced regulations that provide investors with a platform to succeed while also safeguarding the public from negative externalities. Having differentiated acceptable regulations from those that are overbroad and unacceptable, Section III explains why ISDS will be the venue for investors to claim that certain regulations breach the protections under international investment agreements (IIA). Next, the article identifies the different methods that ISDS tribunals use to analyze claims of regulatory expropriation and argues that tribunals should implement proportionality analysis in cross-border technology disputes. In order to further explain how proportionality analysis will examine treaty claims, Section IV explains the different forms of balancing and proportionality that domestic courts and international tribunals use to examine challenges to regulatory interference. Section V revisits the case studies to demonstrate how and why structured proportionality analysis encourages balanced regulations and provides many positive outcomes for all stakeholders in foreign direct investment projects.

## I. CROSS-BORDER TECHNOLOGY INVESTMENT: THE IDEOLOGICAL FAULT LINES

The regulation of technology investments is a necessary component of the new digital economy.<sup>6</sup> Innovations are creating services and products that provide new threats to the environment, consumer safety, and the well-

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<sup>5</sup> David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 14 (OECD Working Papers on Int'l Inv., No. 2012/03, 2012), <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

<sup>6</sup> See generally Stanislaw Drozd, *Poland: Investment Disputes in the Era of the Fourth Industrial Revolution*, MONDAQ (Apr. 10, 2018), <http://www.mondaq.com/x/690234/international+trade+investment/Investment+Disputes+In+The+Era+Of+The+Fourth+Industrial+Revolution>; Edelman, *supra* note 3, at 294-95 n.1.

being of third parties. For example, Uber's original process for screening new drivers was less thorough than those of its counterparts in the taxi business, who have significant restrictions to ensure safety.<sup>7</sup> Similarly, Airbnb's platform connects tourists with property owners whose facilities are not checked with the same level of scrutiny required of hotel owners.<sup>8</sup> In both cases, host government regulators need to adopt new regulations that protect the safety of consumers and third parties. Because government officials are responsible for regulating a service that has never been regulated, there is a strong likelihood of conflict between investors and government officials responsible for protecting the public good.

#### A. Uncertainty of Regulatory Framework

Regulatory climates are likely to change after technology investors have entered foreign markets. For example, when Uber penetrated the Chinese market in 2010, the host government did not have regulations for ride sharing services; thus, shortly after its arrival in China, the host government developed and implemented regulations that precluded Uber from executing an essential component of its business model.<sup>9</sup> Soon thereafter, Uber decided to terminate its multi-billion dollar investment in China and sold its interests in the platform to a local competitor.<sup>10</sup> When Uber entered the market, such regulations did not exist because Uber was the seminal investor of this innovation.

#### B. Highly Regulated Industries

While the uncertainty of regulatory frameworks leaves investors exposed to new regulations that impede business models, the highly regulated industries in which they operate leave investors exposed to many regulations that will impact their investments. In highly regulated industries, the success of foreign direct investment projects often hinges on

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<sup>7</sup> Luz Lazo, *Cab Companies Unite against Uber and Other Ride-Share Services*, WASH. POST (Aug. 10, 2014), [https://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4\\_story.html?utm\\_term=.f373e81f497b](https://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4_story.html?utm_term=.f373e81f497b).

<sup>8</sup> Ally Marotti, *Hotel Industry Group Says Airbnb Hosts Running "Illegal Hotels,"* CHI. TRIB. (Mar. 9, 2017) <http://www.chicagotribune.com/business/ct-airbnb-hotel-report-0310-biz-20170309-story.html>; Reity O'Brien, *Hotel Industry Targets Upstart Airbnb in Statehouse Battles*, CTR. PUB. INTEGRITY (Jul. 21, 2015), <https://www.publicintegrity.org/2015/07/15/17649/hotel-industry-targets-upstart-airbnb-statehouse-battles>; see generally Erich Eiselt, *Airbnb: Innovation and Its Externalities*, *The Mun. Law. Mag.*, Nov.-Dec. 2014, at 6.

<sup>9</sup> Zheping Huang, *China Finally Made Ride-Hailing Legal, in a Way that Could Destroy Uber's Business Model*, QUARTZ, (July 29, 2016), <https://qz.com/745337/china-finally-made-ride-hailing-legal-in-a-way-that-could-destroy-ubers-business-model/>; William C. Kirby, *The Real Reason Uber is Giving Up in China*, HARV. BUS. REV., Aug. 2, 2016, <https://hbr.org/2016/08/the-real-reason-uber-is-giving-up-in-china>.

<sup>10</sup> *Id.*

the efficiency of the regulatory frameworks.<sup>11</sup> As a result, incumbent companies support and work with lobbyists and other government relations strategists to advocate for favorable policies that are disadvantageous for companies in the digital arena.<sup>12</sup> These ongoing relationships between regulators and incumbents paired with the uncertainty of frameworks that threaten foreign investors' success in the technology sector often cause problems for foreign investors who are new to the market. These problems can lead to arbitral disputes between investors and host governments.<sup>13</sup>

### *C. Foreign Investors and the Populist Surge*

The reemergence of economic nationalism has been a significant geopolitical development. From Brexit to President Trump's victory in the United States, we have seen a geopolitical recession that has reversed globalization's tide in the direction of the nation-state and its municipalities.<sup>14</sup> Foreign investors are a common enemy for nationalist host governments and their constituencies. More specifically, nationalist host governments blame many of the host country's economic and social problems on foreign investors who exploit their labor and resources. For this reason, the retreat of global forces has compelled sovereign and sub-sovereign governments to adopt protectionist and overbroad policies that favor local investors over their foreign competitors.<sup>15</sup> While disputes between foreign investors in the technology sector have not yet reached the tribunals of investor-state arbitration, it is only a matter of time before they

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<sup>11</sup> OECD, *Main Determinants and Impacts of Foreign Direct Investment on China's Economy* 14 (OECD Working Papers on Int'l Inv., No. 2000/04, 2000), <http://dx.doi.org/10.1787/321677880185>; Drozd, *supra* note 6; *Economy Rankings*, THE WORLD BANK: DOING BUSINESS: MEASURING BUSINESS REGULATIONS (Sept. 13, 2018, 7:34 P.M.), <http://www.doingbusiness.org/rankings>.

<sup>12</sup> Christopher Elliott, *Someone's Trying to Kill Turo, Airbnb and Uber. Here's Why It Matters*, FORBES (Oct. 6, 2018, 9:45 AM), <https://www.forbes.com/sites/christopherelliott/2018/10/06/someones-trying-to-kill-turo-airbnb-and-uber-heres-why-it-matters/#235306933745>; Aaron Short, *The Sharing Economy is New York's Hottest Political War Right Now*, CITY & STATE N.Y. (May 15, 2018), <https://www.cityandstateny.com/articles/policy/policy/sharing-economy-new-yorks-hottest-political-war-right-now.html>.

<sup>13</sup> Drozd, *supra* note 6. That said, regulators play an important role in managing market failures and maximizing the benefits of foreign investments. To find an ideal arbitral mechanism, it is essential to understand the bona fide regulations and those that are implemented to protect incumbents against foreign investors.

<sup>14</sup> Lazo, *supra* note 7; Robert Ginsburg, *Measuring Trump's FDI Impact*, FDI INTELLIGENCE (Apr.-May 2017).

<sup>15</sup> Christoph Sprich, *Growing Protectionism in Foreign Direct Investment*, BDI (Apr. 18, 2016) <https://english.bdi.eu/article/news/growing-protectionism-in-foreign-direct-investment/>; see, e.g., Mahitha Lingala & Tridivesh Singh Maini, *FDI in India on Slippery Ground? Protectionism, Populism to Blame*, QUINT (Apr. 17, 2019), <https://www.thequint.com/voices/opinion/foreign-direct-investment-india-trend-protectionism-populism-2019-elections>.

do.<sup>16</sup>

Three components present high-risk exposures for cross-border technology products: 1) uncertainty about which regulations will be executed, 2) projects that require significant regulation, and 3) surging nationalist sentiment. Surging nationalist sentiment fuels anti-investor sentiment among local competitors which provides the impetus for regulatory discrimination. The industries that require significant regulatory activity provide government officials with ample opportunity to execute regulations that impair foreign investors' abilities to implement their business models. Finally, the lack of regulations existing at the time of the seminal investment makes it difficult for investors to anticipate and adjust to such discriminatory regulations. These three factors combine to create significant regulatory risk exposure for foreign investors in the digital economy.

## II. PROTOTYPICAL ASPECTS OF CROSS-BORDER TECHNOLOGY INVESTMENTS

Software platforms provide significant efficiencies to markets in which technology companies operate.<sup>17</sup> That said, they also threaten public interests that regulators and other government officials safeguard. Because of new technology disruptions to host country economies, international business experts predict many conflicts between foreign investors and the governments regulating them.<sup>18</sup> The challenge for regulators is to harness the positive aspects of such technology, refrain from implementing measures that serve to protect industry incumbents and exclude competitors, and safeguard against the innovation's threats to public interest. This requires an understanding of the positive and negative externalities of such products, the drivers of regulatory conflict, and the distinction between unfair, protectionist and bona fide, merit-based regulations.

Airbnb and Uber are pioneers of cross-border investments in the new digital economy. Airbnb is an online hospitality marketplace for short-term lodging, and Uber is a global transportation technology company. Both use platforms to connect service providers and consumers, serving as illustrative examples of leading innovators in the new digital economy.<sup>19</sup> The case studies below demonstrate the problems these companies have experienced with regulators in U.S. and foreign cities. While this paper focuses on cross-border disputes, it uses foreign and domestic case studies

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<sup>16</sup> Drozd, *supra* note 6; Gerhard Wegen & Stephan Wilske, *Introduction*, GETTING THE DEAL THROUGH, (2018) <https://gettingthedealthrough.com/area/3/article/29061/arbitration-2017-introduction/>.

<sup>17</sup> Drozd, *supra* note 6; Edelman, *supra* note 3, at 296.

<sup>18</sup> Drozd, *supra* note 6; Edelman, *supra* note 3, at 313

<sup>19</sup> Edelman, *supra* note 3, at 294.



to provide examples of overbroad and nuanced regulations. The types of problems in the digital economy are universal.

### A. *Positive Aspects*

The benefits of innovative products and services in the digital economy focus on resource efficiency, enhanced access to information for buyers and sellers, and increased accountability for service providers and consumers.<sup>20</sup> These benefits should be protected, rather than threatened, by regulations.

#### 1. Reducing Transaction Costs

Modern software platforms minimize the costs and simplify the process associated with finding a suitable transaction counterpart. For example, rather than having to find a taxi driver who is available and willing to take the fare, Uber's transportation platforms provide the public with access to available drivers who are in close proximity to passengers.<sup>21</sup> More specifically, the application enables Uber passengers "to hail a car from any location and have it arrive within minutes."<sup>22</sup>

#### 2. Reputation and Safety

Many digital platforms also offer important information to service providers and their clients about each other. For example, if a passenger is rude or unhygienic or a tenant damages property, platforms can issue a warning to alert future service providers or even disable the customer's account. Conversely, passengers can read reviews of their drivers from previous passengers. With a mechanism to hold consumers and service providers accountable to each other, digital platforms encourage actors to behave appropriately and expose those who do not.<sup>23</sup>

#### 3. Pricing Efficiencies

By providing current information that is frequently updated to reflect market conditions and by facilitating open communication among all parties, software platforms help companies set prices that reflect volatile levels of supply and demand. As a result, these platforms maximize pricing efficiencies and enable services providers to meet higher demands.<sup>24</sup> For example, in times of significant demand, higher rates ensure sufficient

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<sup>20</sup> *Id.* at 296.

<sup>21</sup> Mohamed S. Jalloh, *Uber: Advantages and Disadvantages*, INVESTOPEDIA (Apr. 17, 2019), <https://www.investopedia.com/articles/investing/110614/taxi-industry-pros-cons-uber-and-other-e-hail-apps.asp>.

<sup>22</sup> *Id.*

<sup>23</sup> Edelman, *supra* note 3, at 296

<sup>24</sup> *Id.* at 301.

supply by encouraging drivers to work instead of pursuing other activities.

While the benefits of technology transfer have been chronicled for years, digital platforms and related innovations provide new advantages to economies. The three benefits explained above are merely a sample of these new enhancements.<sup>25</sup> For these reasons, legislators and judicial branches of governments are encouraged to develop and enforce regulations that harness these innovations.

### *B. The Regulatory Debate: Protectionist vs. Bona Fide and Protectionist Regulations*

The conflict between governments and investors in the digital economy mirrors the competing interests in ISDS cases. More specifically, these conflicts place those who advocate for investor' property rights against those who support a host government's right to regulate. In the context of ISDS, foreign investors usually argue that regulations violate the host government's commitments under international investment treaties.<sup>26</sup> Conversely, host governments argue that restrictions on their rights to regulate violate the sovereignty of nations.<sup>27</sup> A review of domestic and international investment projects between digital investors and host governments reveals that some regulations are narrowly tailored and merit-based measures that protect the host country from potential consequences of the technology.<sup>28</sup> However, in other cases, the challenged regulations can be overbroad and often serve to protect the interest of local competitors who are losing business to foreign investors.<sup>29</sup>

#### 1. Bona Fide Regulations

Host governments often play a critical role in devising regulations that maximize the public good associated with different aspects of technology.

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<sup>25</sup> *Id.*

<sup>26</sup> *Regulation: New Orleans Area*, UBER, <https://www.uber.com/drive/new-orleans/resources/nola-regulation/> (last visited Apr. 21, 2019); *Vehicle Requirements: San Francisco Bay Area*, UBER, <https://www.uber.com/drive/san-francisco/vehicle-requirements/> (last visited Apr. 21, 2019).

<sup>27</sup> Nasser Mehsin Al-Adba, *The Limitation of State Sovereignty in Hosting Foreign Investments and the Role of Investor-State Arbitration to Rebalance the Investment Relationship* (2014) (unpublished Ph.D. dissertation, University of Manchester), [https://www.research.manchester.ac.uk/portal/files/54553070/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54553070/FULL_TEXT.PDF).

<sup>28</sup> Edelman, *supra* note 3 at 313; see *Digital Disruption and the Sharing Economy*, DIGITAL FINANCE ANALYTICS BLOG (Sept. 13, 2018, 7:54 P.M.), <http://digitalfinanceanalytics.com/blog/category/sharing-economy/> (outlining regulations applicable to Uber).

<sup>29</sup> See *Growing Protectionism in Foreign Direct Investment*, BDI (Sept. 13, 2018, 7:58 P.M.), <https://english.bdi.eu/article/news/growing-protectionism-in-foreign-direct-investment/>; Edelman, *supra* note 3 at 307. Greenberg Center for Geoeconomic Studies, *The Rise of Digital Protectionism: Insights from a CFR Workshop*, COUNCIL FOR. REL. (Sept. 13, 2018, 7:57 P.M.), <https://www.cfr.org/report/rise-digital-protectionism>.

One of the most important regulatory objectives in the digital economy is to remedy market failures.<sup>30</sup> Market failures are some set of interactions and relationships that prevent market transactions from adequately serving the interests of everyone concerned.<sup>31</sup> Regulations are necessary for correcting market failures and promoting public policy interests and should be upheld. In the context of Uber, government officials are ostensibly interested in regulating safety concerns related to the condition of the automobile and the skills of the driver.<sup>32</sup> In order to minimize problems associated with these issues, many governments require drivers to undergo extensive background checks and require that every vehicle undergo inspections to ensure that it is structurally sound. These regulations, which also apply to taxi drivers, are reasonable because they are tailored to meet a specific policy interest. For these reasons, they are not protectionist.

## 2. Protectionist Regulations

While many regulations help protect consumers and the public from the potential negative impact of business activity, others are often implemented to protect industry incumbents from competition of new entrants to the market. These regulations often benefit the regulated firms more than the consumers for whom the restrictions are supposed to be implemented. Regulators often become closely linked to the firms they regulate, through extended interactions, parallel career trajectories, or mutual desires to maintain the status quo.<sup>33</sup> In some cases, the influence of companies in a regulated sector is powerful enough to provide a situation in which the regulator is the entity that is being regulated. In such cases, regulations are more likely to be overbroad and/or implemented to favor local investors over foreign competitors.<sup>34</sup>

### C. Case Studies; Uber and Airbnb

After experiencing initial rounds of success in their cross-border expansions, Airbnb and Uber ran into significant roadblocks. Complaints from hotel owners and taxi drivers whose margins were falling and other constituents who were upset about surging rental prices and excessive congestion compelled government officials to take action.<sup>35</sup> While

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<sup>30</sup> Market failures are “some set of interactions and relationships that prevent market transactions from adequately serving the interests of everyone concerned.” Each innovation brings different externalities to the industry or local economy that regulators must address. Edelman, *supra* note 3 at 309.

<sup>31</sup> See Edelman, *supra* note 3 at 309.

<sup>32</sup> Adrienne Roberts, *Uber Crash Highlights Growing Safety Concerns: Pedestrians*, WALL ST. J. (Mar. 23, 2018), <https://www.wsj.com/articles/uber-crash-highlights-growing-safety-concern-pedestrians-1521810000>.

<sup>33</sup> *Id.*

<sup>34</sup> Edelman, *supra* note 3 at 307.

<sup>35</sup> Marotti, *supra* note 8; *Airbnb’s Legal Troubles: What Are the Issues?*, THE

regulators in cities such as Barcelona and Berlin implemented policies that actively discouraged homeowners from renting their homes, regulators in Asia and Europe implemented policies that interfered with Uber's ability to launch operations and compete with local taxi companies.<sup>36</sup> Conversely, there are other examples in which regulators developed policies that were tailored to address market failures and promote public policy interests. For example, in San Francisco and San Diego, authorities implemented regulations to stop rent inflation by preventing hosts from posting more than one listing on Airbnb's website.<sup>37</sup>

#### 1. Uber: Nuanced Measures Directed at the Problem vs. Minimizing Usage or Protectionism

The ostensible objectives of host governments that regulate Uber and its drivers are vehicle safety, driver integrity, and insurance gaps for drivers who do not have adequate coverage.<sup>38</sup> Uber's experiences in France provide an example of situations in which host governments pass unreasonable regulations that are likely implemented for protectionist purposes.<sup>39</sup> When expanding into France, Uber experienced initial success, triggering dissent from local competitors and demonstrations from non-government organizations. In response to the demonstrations against the noise problems and adverse impact on local rental prices, the French Parliament passed a series of laws known as "Loi Thévenoud."<sup>40</sup> This law imposed regulations that are not reasonably connected to consumer protection concerns. Loi Thévenoud precluded "transport vehicles with drivers" (a category developed for covering transportation platforms, including Uber) "from being geo-localized by users before reservation." Under this restriction, Uber users in France cannot use their smartphones to locate drivers before making a reservation with a specific driver. In addition to prohibiting "geolocalization," the law also prohibits Uber drivers from driving consecutive passengers without returning to their base in between rides, if the second passenger has not made a reservation. This causes delays in

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GUARDIAN, July 8, 2014, <https://www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues/>; see also Ambreen Ali, *Different Regulatory Tactics Lead to Success for Sharing Economy Startups Uber, Airbnb*, 1776 (Sept. 13, 2018, 8:08 P.M.), <https://www.1776.vc/insights/different-regulatory-tactics-lead-to-success-for-uber-airbnb/>.

<sup>36</sup> Tracey Lien & David Pierson, *Uber is the Latest U.S. Tech Company to Face Regulatory Backlash in Europe*, L.A. TIMES (Nov. 10, 2017), <https://www.latimes.com/business/technology/la-fi-tn-tech-europe-20171110-story.html>.

<sup>37</sup> Carolyn Said, *Airbnb Loses Thousands of Hosts in SF as Registration Rules Kick in*, SAN FRANCISCO CHRONICLE (Jan. 14, 2018, 6:00 AM), <https://www.sfchronicle.com/business/article/Airbnb-loses-thousands-of-hosts-in-SF-as-12496624.php?psid=hBuu>.

<sup>38</sup> See, e.g., Margaret Bree, *New Background Check Regulation Tackles Ride-Sharing Safety*, THE HEIGHTS (Mar. 17, 2016), <http://bcheights.com/2016/03/17/new-background-check-regulation-tackles-ride-sharing-safety/>.

<sup>39</sup> Edelman, *supra* note 3 at 306-09.

<sup>40</sup> *Id.* at 306.

pickup times and can result in the loss of passengers for drivers who are using resources such as gas and time.

Regulation experts in the digital economy noted that there is not a meritorious objective in implementing this policy, consequently concluding that it exists to obstruct ride-sharing companies.<sup>41</sup> This regulatory scheme solely serves to impede drivers' abilities to be near passengers who are scattered throughout the city. In fact, passengers of Uber taxis are helped (rather than harmed) when drivers are drawn to areas of high demand. When a regulatory framework, such as Loi Thévenoud, complicates the product's ability to serve locals and provides no inherent benefit to either the market or the public, it is likely a protectionist regulation. In fact, in some cities, government officials openly admit that regulations are motivated by protectionist objectives.<sup>42</sup>

Whereas Loi Thevenaou provides an example of regulations that are not reasonably related to the stated objective, others focus on overbroad regulations that deter or terminate the consumer's ability to use software platforms.<sup>43</sup> Alternatively, regulators in Australia and Washington, D.C. chose to address insurance gaps with tailored regulations. Rather than banishing Uber in certain areas, Australian regulators sought to eliminate insurance gaps with legislation that prevents non-commercial insurance policies from paying claims from transportation activity associated with Uber's digital platform.<sup>44</sup> Regulators in Washington D.C. addressed safety concerns by requiring Uber drivers to undergo thorough background checks that include ongoing communication between the digital platform's staff

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<sup>41</sup> *Id.* at 307.

<sup>42</sup> See, e.g., Marcin Gocłowski, *Poland May Impose More Regulations on Uber*, REUTERS (June 14, 2017), <https://www.reuters.com/article/uber-poland-regulations/poland-may-impose-more-regulations-on-uber-idUSL8N1JB1N1> (noting “[t]he judge issued the ban, the equivalent of a temporary injunction, on the grounds that Uber was deemed to be causing damage to the taxi industry”); Al Goodman, *Spanish Judge Imposes Temporary Ban on Uber Taxi Service*, CNN (Dec. 9, 2014), <https://www.cnn.com/2014/12/09/world/europe/spain-uber-court-ban/index.html> (explaining that ban was imposed because Uber was causing damage to the taxi industry).

<sup>43</sup> Associated Press, *Uber Seeks Legal Advice After New South Wales Suspends Registration of 40 Cars*, GUARDIAN (Sept. 27, 2015), <https://www.theguardian.com/technology/2015/sep/28/uber-seeks-legal-advice-after-40-new-south-wales-drivers-suspended>; Greg Dickinson, *How the World is Going to War with Uber*, TELEGRAPH (June 26, 2018), <https://www.telegraph.co.uk/travel/news/where-is-uber-banned/>.

<sup>44</sup> *Rideshare Insurance Requirements*, UBER (Sept. 13, 2018, 8:14 P.M.), <https://www.uber.com/en-AU/drive/insurance/> (outlining regulations for Australian drivers). The gaps in insurance were caused (in part) by the drivers' expectations that their noncommercial liability coverage would respond to Uber related claims. By disallowing the motivated driver to purchase commercial coverage that does not respond. Roberts, *supra* note 32; Matt Rogers, *Uber and Suffocating Government Regulations*, INT'L POLICY DIGEST (Sept. 23, 2017), <https://intpolicydigest.org/2017/09/23/uber-and-suffocating-government-regulations/>.

and the FBI.<sup>45</sup> Unlike the regulations in *Loi Thevenaou*, these regulations serve a clear purpose. By performing background checks, authorities are screening potential drivers without preventing those with clean records from driving. Regulators in Washington D.C. and Australia implemented more tailored regulations that address related concerns without a significant intrusion into the investor's property rights. Ultimately, these regulations allow the public to benefit from the positive aspects of the innovation while minimizing the impact of the negative aspects.

## 2. Airbnb: Nuanced Measures vs. Minimizing Usage with Blunt Tools

In the context of Airbnb, regulators' ostensible objectives are to reduce traffic in and out of rented units, reduce inflated residential and commercial rental rates due to increased housing demand, and address housing shortages for residents who cannot compete with the prices speculators are willing to pay.<sup>46</sup>

### (a) *Fort Worth*

Several cities in the United States have mitigated their exposure to Airbnb-related problems by providing stringent regulations for homeowners who want to use the site for additional income. Through these stringent measures, host cities mitigate the problems by significantly reducing the number of hosts who use them. For example, in Fort Worth, Texas regulators require potential Airbnb hosts to apply for a bed and breakfast exception to the rule that prohibits short-term rentals for under 30 days in residential areas.<sup>47</sup> <sup>48</sup> Bed and breakfasts are commercial entities subject to a number of stricter regulatory requirements with which residential entities need not comply.<sup>49</sup> Therefore, Airbnb applicants in Fort Worth must make sure that their rental properties have standard commercial safety equipment

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<sup>45</sup> Faiz Siddiqui, *Uber Threatens to Pull Out of Maryland if State Requires Fingerprint-Based Background Checks*, WASH. POST, (Dec. 3, 2016), [https://www.washingtonpost.com/local/trafficandcommuting/uber-is-threatening-to-leave-maryland-if-state-toughens-driver-screening-rules/2016/12/03/1080b1b2-b02c-11e6-belc-8cec35b1ad25\\_story.html?utm\\_term=.683eaacf6ca6](https://www.washingtonpost.com/local/trafficandcommuting/uber-is-threatening-to-leave-maryland-if-state-toughens-driver-screening-rules/2016/12/03/1080b1b2-b02c-11e6-belc-8cec35b1ad25_story.html?utm_term=.683eaacf6ca6).

<sup>46</sup> Gaby Hinsliff, *Airbnb and the So-Called Sharing Economy is Hollowing Out Our Cities*, GUARDIAN (Aug 31, 2018, 3:06 AM), [https://www.theguardian.com/commentisfree/2018/aug/31/airbnb-sharing-economy-cities-barcelona-inequality-locals;What\\_Regulations\\_Apply\\_to\\_My\\_City?\\_airbnb\\_help\\_article/961/what-regulations-apply-to-my-city](https://www.theguardian.com/commentisfree/2018/aug/31/airbnb-sharing-economy-cities-barcelona-inequality-locals;What_Regulations_Apply_to_My_City?_airbnb_help_article/961/what-regulations-apply-to-my-city) (last visited Apr. 21, 2019).

<sup>47</sup> <https://www.star-telegram.com/news/local/community/arlington/article210174114.html>

<sup>48</sup> *Id.*

<sup>49</sup> See Fort Worth Ordinance 21653. The ordinance says, in making a determination if a property is being used as a short-term home rental, the definition for "transient or short-term resident" is reviewed and if the duration of the stay is less than 30 days, that use is not allowed since it is more analogous to a bed or breakfast home which is allowed in a two-family zoning district by special exception.

and that they meet specific structural and parking requirements.<sup>50</sup> These regulations—including door widths, safety stairs, sprinkler systems, and access points—often require homeowners to make structural adjustments to their homes if they want to rent their homes out on Airbnb.<sup>51</sup> Other regulations include onerous parking regulations and staffing requirements: Fort Worth’s hosts must provide a parking space for every guest who stays in the home.<sup>52</sup> Hosts who have multiple guests and live in an urban areas (including Fort Worth) are unable to meet this requirement and, consequently, cannot host through Airbnb. For hosts who want to rent out their homes for supplemental income, the financial and time investments required to rent out their homes outweigh the potential benefits. Conversely, traditional bed and breakfast owners and hotels, whose primary incomes come from housing guests, are more than happy to comply with such regulations. With less incentive to register with Airbnb, the supply of available rental units diminishes, and consequently, so do the financial, noise, and pollution problems that cities need to regulate. While these broad regulations are effective at mitigating the negative consequences, they provide a very significant intrusion on the property rights of potential hosts who are discouraged from using the platform. In sharp contrast to the regulators in Fort Worth, San Francisco has developed tailored regulations for managing problems associated with home sharing.<sup>53</sup>

(b) *San Francisco*

City officials in San Francisco have spent a significant amount of time listening to complaints from city residents about Airbnb’s negative impact on the local real estate market. The surge in rental prices and the related shortage of available housing is a direct result of the real estate investors buying properties as investments and renting them out to visitors.<sup>54</sup> Speculators who buy and rent their homes as hotels are buying many of the

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<sup>50</sup> *Id.* Chapter 5.106 is the bed and breakfast home regulation, which also refers to additional requirements of Chapter 4, Articles 6 and 8 of the city’s zoning ordinance. [http://fortworthtexas.gov/planninganddevelopment/zoning/ordinance/5\\_100.pdf?v=2016-05-20](http://fortworthtexas.gov/planninganddevelopment/zoning/ordinance/5_100.pdf?v=2016-05-20)

<sup>51</sup> These requirements can be found in Chapter 4, Article 6 of Fort Worth’s Zoning Ordinance.

<sup>52</sup> *Id.*

<sup>53</sup> There are myriad examples of cities using problem-specific measures to regulate Airbnb. *See, e.g.,* Leonard Cohen, *Airbnb and Municipal Zoning Regulation*, HOST COMPLIANCE (Sept. 13, 2018 9:12 P.M.), <https://hostcompliance.com/resources-gallery/2016/6/5/airbnbregulation> (discussing how, in order to mitigate the financial problems associated with Airbnb, the city council voted to legalize home-sharing services and partnered with Airbnb to launch its Shared City Initiative, which has agreed to help Airbnb renters collect taxes on behalf of the city).

<sup>54</sup> Sarah Holder, *The Airbnb Effect: It’s Not Just Rising Home Prices*, CITYLAB (Feb. 1, 2019), <https://www.citylab.com/equity/2019/02/study-airbnb-cities-rising-home-prices-tax/581590/>.

available units without any intention of living in them.<sup>55</sup> Consequently, this boost in demand is driving the price of real estate up. Unlike Fort Worth, San Francisco sought to deal with problem head-on without relying on antiquated policies that discourage overall usage. In order to deal with the rent scarcity problem, San Francisco developed two nuanced rules for short-term rentals. First, the city implemented a rule that struck at the core of the speculator's business model. In order to rent their homes to visitors, the homeowner must live in the unit (home or apartment) for at least 275 days per year.<sup>56</sup> This requirement aims directly at the business model of speculators. With this rule in place, real estate entrepreneurs cannot purchase multiple facilities and rent them out without residing in them for a significant amount of time. Rather, they can only rent out the one facility in which they reside for the minimum number of days. Eager to close any loopholes, regulators in San Francisco implemented a 90-day rule, which limits the total number of days that a host can rent out his/her place without actually being present in the house.<sup>57</sup> Real estate entrepreneurs seeking to make significant amounts of money through Airbnb will be discouraged from buying multiple homes if they can only rent out those homes for one-quarter of the year. Violators who continue to rent out their apartments beyond the 90 days are subject to significant fines. While San Francisco developed significant regulations for Airbnb users, its tailored framework stands in sharp contrast to the onerous and overbroad regulations of Fort Worth. In fact, hostcompliance.com, an independent consultancy that helps governments with short-term rental policies, praised San Francisco's highly regulated, but workable, framework. According to hostcompliance.com, "San Francisco should serve as a model for the way municipalities think about Airbnb."<sup>58</sup>

*(c) San Diego*

A review of independent reports and expert commentary reveals that San Diego's regulators and residents favor compromises rather than endorsing extreme policies that either ban Airbnb or allow it to operate without restrictions.<sup>59</sup> In 2016, R Street, a think tank in Washington, D.C., issued a report ranking different cities' Airbnb regulations according to the

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<sup>55</sup> Curtis Hearn, *How to Invest in AirBnB Property (with Investment Calculator)*, SMART MONEY NATION (Mar. 7, 2018), <https://smartmoneynation.com/invest-airbnb-property/>.

<sup>56</sup> Stephen Fishman, *Overview of Airbnb Law in San Francisco*, NOLO <https://www.nolo.com/legal-encyclopedia/overview-airbnb-law-san-francisco.html>.

<sup>57</sup> *Id.*

<sup>58</sup> Cohen, *supra* note 53.

<sup>59</sup> Andrew Moylan, *Roomscore 2016 Short-term Rental Regulation in US Cities*, R STREET 12 (Mar. 2016), <https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET55.pdf>; Steven Greenhut, *San Diego Council Chief trying to quickly push through Airbnb ban*, R STREET (November 2016), <https://www.rstreet.org/2016/11/01/san-diego-council-chief-trying-to-quickly-push-through-airbnb-ban>.



user-friendliness of their policies. Citing user-friendly regulations such as those that allow speculators to own and rent multiple homes, R Street gave the highest possible grade of “A” to San Diego.<sup>60</sup> However, complaints from residents and hotel owners compelled policy makers to shift the regulatory needle toward more restrictive policies.<sup>61</sup> While the debate over the proper remedies ensued, politicians and residents alike agreed that regulatory compromises were the best solution.<sup>62</sup> These new rules addressed the problems of scarcity in home supply and inflated rent by limiting the number of units that lessors can rent to one.<sup>63</sup> Although the new regulations are more stringent than preexisting policies, they are tailored to rent inflation and to specific geographical areas that experience scarcity in available homes. More specifically, additional requirements are placed on lessors who aim to list properties that are located in both more popular coastal areas and in the downtown area.<sup>64</sup> By reserving this stringent measure for areas that have the most serious problems, the Council refrained from endorsing blanket policies that ignore geographic differences. This helps regulators manage the problem without unnecessarily restricting hosts in areas where the problems are less pronounced.

### III. DIFFERENT TESTS FOR REVIEWING REGULATORY CHALLENGES AND WHY FET IS BEST

Many of the conflicts arising out of the regulations of cross-border digital investment will focus on disagreements between foreign investors and host governments. In cases where the host state has entered into a bilateral investment treaty (BIT) with the home country, inbound investors will have a direct cause of action against the host government. For this reason, many of the formal disputes between these parties will take place in investor-state arbitral tribunals. In promising to provide certain protections (including fair and equitable treatment) to investors from the home country, the parties to the investment treaties consent to arbitrations when conflicts cannot be resolved amicably.<sup>65</sup>

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<sup>60</sup> *Id.* at 10.

<sup>61</sup> Lori Weisberg & Rob Nikolewski, San Diego council votes to limit Airbnb rentals to primary residences only, *The San Diego Union-Tribune* (Jul. 16, 2018), <https://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-council-20180715-story.html>.

<sup>62</sup> Greenhut, *supra* note 59.

<sup>63</sup> Lori Weisberg & Rob Nikolewski, San Diego council votes to limit Airbnb rentals to primary residences only, *The San Diego Union-Tribune* (Jul. 16, 2018), <https://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-council-20180715-story.html>.

<sup>64</sup> Additional requirement prevents users from renting out their apartments to guests who stay two nights or less; Jennifer Sokolowsky, *San Diego City Council Approves Strict New Airbnb Rules* (July 2018), <https://www.avalara.com/mylodgetax/en/blog/2018/07/san-diego-city-council-approves-strict-new-airbnb-rules.html>.

<sup>65</sup> U.N. Conference on Trade and Development, *Dispute Settlement: International*

### A. Bilateral Investment Treaties and Investor-State Arbitration

BITs comprise two kinds of protections: general protections that promise certain standards of treatment and specific protections, where governments promise not to implement certain types of measures that impact foreign investors from the home country.<sup>66</sup> The substantive protections include promises to adhere to the national treatment and most favored national standards, in addition to requiring payment of compensation for expropriation and measures “tantamount to expropriation.”<sup>67</sup>

General protections provide foreign investors with guarantees to adhere to basic standards of treatment. The most fundamental principle of non-discrimination, which is comprised of the most-favored nation principle (MFN) and national treatment (NT) principle, forms the basis of treaty provisions that speak to discriminatory regulations.<sup>68</sup> MFN stipulates that a signatory country to a BIT should receive the same benefits as investors from the home country.<sup>69</sup> Similarly, NT states that non-nationals should be treated no worse than nationals. Protections include measures against specific actions including the inability to convert and transfer funds as well as the nationalization of foreign investments. While these provisions of international investment treaties are specifically designed to distinguish between protectionist and merit-based regulations, there is a significant limitation to their applicability.<sup>70</sup> In order to bring a claim of discrimination under a BIT, the claimant must identify investments that were made in like circumstances. Although in some cases the issue of likeness is simple, it is often more difficult to meet this requirement. In the case of cross-border technology investments, the investor is often the innovator of the product or services and consequently, could not satisfy this jurisdictional requirement.

### B. Fair and Equitable Treatment and Relative Protections

While regulations can be challenged under the specific and general protections of international investment treaties, the broadest and most

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Centre for Settlement of Investment Disputes, U.N. CTAD/EDM/Misc.232/Add.2 (2003); Cf. WALLACE DUGAN ET AL., *INVESTOR STATE ARBITRATION* 219-246. (Oxford University Press, 2008).

<sup>66</sup> Brenna Evans, Najia Mahmud, & Robert Ginsburg, *Investor-State Dispute Settlement: What Canadian Practitioners Need to Know*, in *ANNUAL REVIEW OF CIVIL LITIGATION* 229 (Todd Archibald ed., 2018) (whereas the home country is the county in which the foreign investor resides, the host country is a country in which the actual investment takes place); <https://forum.wordreference.com/threads/host-country-and-home-country.1972361/>.

<sup>67</sup> OECD, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law* 44 (Org. Econ. Cooperation & Dev., Working Paper No. 2004/04, 2004); Dugan, *supra* note 65, at 442–43, 450–51.

<sup>68</sup> See Dugan, *supra* note 65, at 397

<sup>69</sup> See *id.* at 414.

<sup>70</sup> See Dugan, *supra* note 65, at 413

common challenges to government measures are filed under the Fair and Equitable Treatment clause (FET).<sup>71</sup> Claimants use the FET standard as their primary mechanism for challenging government measures that negatively impact their investments.<sup>72</sup> Arbitrators use the standard as a multi-purpose umbrella principle that allows them to invoke and apply a wealth of sub-principles. The broad scope of the FET enables tribunals to consider a wider range of factors than is possible under the relevant test for direct and indirect expropriations. The analyses of many FET claims focus on investor perspectives of the host governments' actions. Examples of a sub-principles FET analysis include, but are not limited to: good faith; access to justice and due process; regulatory transparency; non-arbitrariness; nondiscrimination and reasonableness; and the investor's legitimate expectations.<sup>73</sup>

Unlike MFN and NT clauses that focus exclusively on a comparative analysis of host governments' treatment of investors, the FET clause sometimes allows consideration of conflicting interests between investors' property rights and host governments' rights to regulate. Arbitrators who focus on the collision of investor property rights with a host government's right to regulate investment climate use a proportionality principle to determine which principle should prevail in cases arising from international investment treaties.

### *C. Legitimate Expectations: The Investor's Perspective*

One of the most common principles invoked under the FET standard is that of legitimate expectations.<sup>74</sup> The FET standard is violated when the investor is deprived of its legitimate expectation.<sup>75</sup> Many assessments of an investor's legitimate expectations examine the facts of a case through the claimant's lens at the time of the investment and, consequently, use an absolute perspective to determine outcomes.<sup>76</sup> In the 2004 *Occidental v. Ecuador* award, the tribunal stated, "there is certainly an obligation not to alter the legal and business environment in which the investment has been made."<sup>77</sup> Three years later, the tribunal in *Parkerings v. Lithuania* stated,

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<sup>71</sup> Dugan, *supra* note 65, at 493.

<sup>72</sup> Matthew C. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, Investment Treaty News (Mar. 22, 2013), <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/>.

<sup>73</sup> Dugan, *supra* note 65, at 491-540.

<sup>74</sup> *Fair and Equitable Treatment*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 10 (2012), [https://unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf).

<sup>75</sup> *Id.* at 63.

<sup>76</sup> *Id.* at 65-66.

<sup>77</sup> GEBHARD BUCHELER, *PROPORTIONALITY IN INVESTOR-STATE ARBITRATION* 200 (1st ed., 2015).

“[t]he Fair and Equitable Treatment standard is violated when the investor is deprived of its legitimate expectation that the conditions existing at the time of the agreement would remain unchanged.”<sup>78</sup> By focusing on the reasonableness of an investor’s expectations, the scope of the examination implies that legislative changes that go against an investor’s reasonable expectations will lead to liability under the FET provision.

#### *D. Proportionality and the Collision of Principles*

While some tribunals focus on the investor’s perspective, a minority of tribunals do not consider the FET standard to be absolute. According to Francesco Francioni, “a progressive interpretation of the ‘fair and equitable standard...’ entails that the investor who seeks equity for his investment’s protection must also be accountable, under equity and fairness principles, to the host state’s population affected by the investment.”<sup>79</sup> As early as 2006, the *Saluka Investments BV v. The Czech Republic* tribunal’s interpretation of the fair and equitable treatment standard stated that the host government’s interest should be considered as well.<sup>80</sup> In *Saluka*, the tribunal determined:

In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well...[t]he determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on one hand and the Respondent’s legitimate regulatory interests on the other.<sup>81</sup>

Multiple tribunals have reinforced the notion that proportionality should be used to review FET claims.<sup>82</sup> In 2010, the Lemire tribunal elaborated on the concept of balancing the interests of multiple stakeholders.<sup>83</sup> More specifically, it stated that the Fair and Equitable Treatment analysis should consider: the State’s sovereign right to pass legislation and to adopt decisions for the protection of public interests, especially if they do not provoke a disproportionate impact on foreign investors, legitimate expectations of the investor, at the time he made his

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<sup>78</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 330 (Sept. 11, 2007).

<sup>79</sup> Alex Stone Sweet, *Investor-state Arbitration: Proportionality’s New Frontier*, 4 J. L. & ETHICS HUM. RIGHTS 48, 62 (2010).

<sup>80</sup> *Saluka Investments BV v. The Czech Republic*, UNCTRAL-PCA Case, ¶ 304-06 (Mar. 17, 2006).

<sup>81</sup> *Saluka Investments BV v. The Czech Republic*, UNCTRAL-PCA Case, ¶ 304-06 (Mar. 17, 2006).

<sup>82</sup> *See generally*, Bucheler, *supra* note 77, at 193.

<sup>83</sup> *Id.*

investment, the investor's duty to perform an investigation before effecting the investment, and the investor's conduct in the host country.<sup>84</sup> Proportionality is a legal doctrine that is perfectly suited for reconciling conflicting interests on a case-by-case basis. In addition to citing case law, arbitrators have opined that FET state action must be proportionate.<sup>85</sup> Using the proportionality test to review the collision of principles with rights on a case-by-case basis, arbitral panels can ensure that the "detriment to one of the values involved is no greater than factually and legally necessary for the purposes of the other."<sup>86</sup>

#### *E. Proportionality with a Caveat*

The enhanced benefits of imminent disputes between foreign investors in the digital economy require alternative approaches to reviewing challenges to regulations. As mentioned above, software platforms enhance pricing efficiencies, lower transaction costs, and enhance safety related to services and products by encouraging and requiring transparency and accountability.<sup>87</sup> Conventional proportionality reviews weigh the host country's need for regulations against the degree with which it interferes with an investor's rights.<sup>88</sup> The enhanced benefits of technological innovation merit a new approach, rather than an exclusive focus on the negative externalities of inbound investments. More specifically, arbitral tribunals should account for the positive impacts of such investments when arbitral claims demonstrate that relevant regulations threaten to eliminate them.

### IV. BALANCING AND PROPORTIONALITY: BASICS OF STRUCTURED PROPORTIONALITY

While there are many ways to apply the FET standard in ISDS cases, there are also multiple forms of proportionality. A review of proportionality jurisprudence in different parts of the world reveals that different countries implement different forms of proportionality analysis in the context of constitutional disputes.<sup>89</sup> The primary distinction between these approaches is reflected in the way that arbitrators weigh the government's intrusion upon the right against the public good that it aims to accomplish.

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<sup>84</sup> Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Int'l Investment Agreement, ¶ 285 (Jan. 14, 2010); *see also* Bucheler, *supra* note 77, at 200.

<sup>85</sup> Other arguments in favor of using proportionality analysis to review FET claims integrate the Vienna Convention. More specifically, scholars and arbitrators have argued that the ordinary meaning of fair and equitable is "just, even-handed treatment."

<sup>86</sup> Robert Alexy, *A THEORY OF CONSTITUTIONAL RIGHTS* 102 (Oxford University Press, 2002).

<sup>87</sup> Edelman, *supra* note 3, at 296

<sup>88</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3099 (2015)

<sup>89</sup> *See* Bucheler, *supra* note 77, at 67-68; *see also*, Sweet, *supra* note 79, at 49.

Specifically, countries including the United States and South Africa follow an approach that considers multiple factors and strikes a balance that courts use differently from case to case.<sup>90</sup> In other nations that employ a structured proportionality test, courts implement a more rigid, sequenced examination that applies each step of the test in the original order.<sup>91</sup> While there are minor differences between each country's implementation of structured proportionality tests, they all follow a similar path.

#### *A. An Overview of Structured Proportionality*

Structured proportionality is a doctrine that comprises a trigger clause and three additional steps to determine the constitutionality of a given measure.<sup>92</sup> First, the court examines whether the law's objective is legitimate, and whether to trigger the subsequent scrutiny into the constitutionality of the government measure. Under structured proportionality analysis, the process of reviewing the law's objective (hereafter the "trigger clause") serves as the gateway to a three-step inquiry focused on the relationship between the means and ends of the legislation and the degree of the intrusion on the relevant right.

Canadian courts provide a great example of structured proportionality review. Canada's version of the trigger clause first examines whether an investor's right is being infringed. If an infringement of interests protected by a right occurs, then the constitutionality of the means used is examined through a three-step inquiry into: (a) rationality, (b) minimal impairment, and (c) proportionality "as such."<sup>93</sup> Whereas the first two steps of this test focus on means-ends analysis, the third step provides a comparison of the marginal improvement between two regulations and the marginal intrusion of the investor's rights between them.<sup>94</sup>

##### 1. Rationality

While jurisdictions may use different forms of the rationality clause, all examine the relationship between means and ends. As opposed to the trigger clause, which focuses on the merits of the government objective, this step focuses on the means chosen to meet the government objective. During this element of the analysis, the courts identify and often reject means that are overly broad or not reasonably related to the ends. While the implementation of this step varies, most measures that satisfy the trigger clause also pass the rationality analysis.<sup>95</sup>

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<sup>90</sup> See Bucheler, *supra* note 77, at 45.

<sup>91</sup> Jackson, *supra* note 88, at 3113.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 UNIV. TORONTO J. 383, 387 (2007).

<sup>94</sup> See Jackson, *supra* note 88, at 3099; see Grimm, *supra* note 93, at 393.

<sup>95</sup> Jackson, *supra* note 88, at 3113; Grimm, *supra* note 93, at 387.

## 2. Minimal Impairment

The minimal impairment step focuses on the balance of the alternatives for meeting the government interest. In practice, courts look to see if there are less restrictive alternatives that can achieve the same government objective as the challenged measure.<sup>96</sup> If the claimant cannot demonstrate that the less restrictive alternative equally advances the law's purpose, the challenged measures will remain in place. Consequently, many alternatives that effectively protect the public good (but not as effectively as the original) and provide less intrusive options regarding the claimant's rights are not sufficient to overturn the challenged measure.

## 3. Proportionality "As Such"

Proportionality "as such" is part of a doctrine that prioritizes the right of the investor and the extent to which the right is being intruded upon, putting the burden of justification on the government. Unlike the first two steps (rationality and minimal impairment) that focus exclusively on the means-ends analysis, this step requires a direct comparison between the severity of the government measure and the extent to which the measure infringes on the investor's rights.<sup>97</sup> The proportionality "as such" step compares the need for the challenged measure and its effectiveness with the extent to which the investor's right is infringed.<sup>98</sup> For this reason, government measures that pass the rationality and minimal impairment steps often fail to satisfy the proportionality "as such" step. Although less formal versions of proportionality provide more latitude to decision makers about the form of analysis, the strict footprint of structured proportionality ensures that arbitrators and judges will follow the same line of inquiry.

### *B. Alternatives to Structured Proportionality*

Unlike the jurisdictions mentioned above, the principle of proportionality is not firmly established in U.S. jurisprudence. That said, several concepts in U.S. constitutional law perform a de facto examination of factors similar to those balanced in South African courts.<sup>99</sup> U.S. courts balance and weigh factors in many contexts, including the dormant commerce clause and cases concerning the First Amendment. Like the minimal impairment analysis, U.S. jurisprudence often uses a "less restrictive means" analysis to determine whether the government measure was sufficiently tailored to its purpose.<sup>100</sup> The result is that judges look to

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<sup>96</sup> Jackson, *supra* note 88, at 3114; Grimm, *supra* note 93, at 387.

<sup>97</sup> Jackson, *supra* note 88, at 3116-17; Grimm, *supra* note 93, at 389.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 3100.

<sup>100</sup> "U.S. case law on 'less restrictive means' sometimes obscures the distinction between 'less restrictive means' that are as effective and those that are not in part because of the absence of any separate analysis of 'proportionality as such.'" Jackson, *supra* note 88, at

see if there is a net impact favoring the plaintiff or the government.

In countries, like South Africa, where courts implement a multifactor analysis, the factors are not individual, ordered steps; instead, they are part of an overall balancing exercise that the courts use to determine an outcome.<sup>101</sup> While the factors provide guidance to judges who can often select which factors on which to focus, judges in countries that use structured proportionality are required to consider every factor in a specific order.<sup>102</sup> The accountability brought by a rigid and comprehensive proportionality test ensures that all factors that need to be considered are included in the judicial analysis.

### *C. Why Structured Proportionality is the Best Option*

The following section explains how the third step of the constitutionality analysis often produces different outcomes from balancing and multifactor tests that do not incorporate this step. Next, it provides two reasons why this should be applied in technology disputes under ISDS.

#### 1. The Proportionality “As Such” Step: The Difference Maker

Only through this step does the court take full account of the severity of deleterious effects of a measure on individuals or groups.<sup>103</sup> The real consideration is how deeply the right is infringed. Other considerations include: the seriousness of the danger that the law is preventing and the likelihood that the danger will materialize.

By going beyond rationality and minimal impairment, the proportionality “as such” test can make the doctrine more rigorous than strict U.S. scrutiny or any interpretation of the multi-factor test, which ends after the least restrictive means test. In the seminal Canadian dispute involving structured proportionality, Chief Justice Dickson explained that:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>104</sup>

By including the “as such” proportionality test, structured

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3118. In fact, U.S. courts tend not to specify whether this analysis requires that the measures being compared “equally advance” the compelling government interest.

<sup>101</sup> Jackson, *supra* note 88, at 3099-3100.

<sup>102</sup> Jackson, *supra* note 88, at 3120.

<sup>103</sup> Jackson, *supra* note 88, at 3116-17.

<sup>104</sup> *Id.*



proportionality will maximize the chances of finding an alternative that protects the public good without precluding its success and provide a better bridge and judicial check against legislation.

## 2. Structured Proportionality: Maximizing Chances of Finding Balanced Alternative

The Beit Sourik Village Council vs. Government of Israel dispute from the Israeli courts illustrates an example in which the third step of structured proportionality provides a different outcome from that which is provided by less formal tests without the third step. In cases such as the Beit Sourik case, structured proportionality provides more reasonable outcomes than those that are reviewed without the third step.

A dispute between the state of Israel and Beit Sourik demonstrates how the proportionality “as such” clause provides outcomes based on compromise.<sup>105</sup> This case, which focuses on the conflict between the security of Israelis in occupied territories and Palestinian access to farmland, appeared in front of the Israeli High Court of Justice. While this case focuses on international humanitarian law, it demonstrates how a rigorous application of the “as such” step provides balanced solutions that protect the public good and respect landowners’ and foreign investors’ rights.

In 2005, Israel’s government withdrew from most of its settlements in the Gaza Strip. Still, Israel maintained some of its settlements in the West Bank that were expanded and controlled under military rule. Seven years later, Israel began building a large wall, or separation fence, along the West Bank that was intended to separate Israel’s West Bank settlements from the rest of the territory.<sup>106</sup> While an armistice line authorized the building of a “wall,” parts of the fence reached beyond the authorized space and separated Palestinian inhabitants from their farmland.<sup>107</sup> The lawsuit’s proceedings, which challenged the Israeli Defense Force’s (IDF) attempt to extend its ownership of territory, concluded that a fence, infringing on less Palestinian territory in the West Bank, could simultaneously protect the Israelis and allow inhabitants access to their farmland.<sup>108</sup> As the following overview explains, the third step of the test enabled the court to reach this decision.

The Israeli Court’s review of the first three steps upheld the IDF’s original demarcation of the outlines for the fence.<sup>109</sup> First, the Israeli High

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<sup>105</sup> HCJ 2056/04 *Beit Sourik Vill. Council v. Gov’t of Israel* 58(5) PD 807 [2004] (Isr.), translated in 38 ISR. L. REP. 83 (2005).

<sup>106</sup> HCJ 2056/04 *Beit Sourik Vill. Council v. Gov’t of Israel* 58(5) PD 807 [2004] (Isr.).

<sup>107</sup> Jackson, *supra* note 88, at 3118.

<sup>108</sup> *Id.*; HCJ 2056/04 *Beit Sourik Vill. Council v. Gov’t of Israel* 58(5) PD 807 [2004] (Isr.).

<sup>109</sup> Jackson, *supra* note 88, at 3118.

Court of Justice determined that Israeli protection against violent attacks from the occupied territory was a legitimate purpose for building a fence.<sup>110</sup> Next, the Israeli Court concluded that the government's decision to place the fence near the top of a mountain was a rational step toward that objective.<sup>111</sup> In the third step, Israel's original placement of the fence survived the minimal impairment analysis because any lower alternative placement along the hill that provided a less severe infringement upon Palestinian access to farmland would not provide as much security. In the third step, the court explained that a "less restrictive means" referred only to an alternative that equally advanced the law's purpose while intruding less on rights."<sup>112</sup>

While the location of the fence passed the minimal impairment step of the test, the Court's strict application of proportionality "as such" produced a different outcome that required Israelis to move the fence to a location lower than the original placement that represented a lesser intrusion of Palestinian human rights. More specifically, the Court held that the marginal improvement to security and protection of Israeli civilians from the original line to the lower location was far less than the marginal intrusion on Palestinian human rights imposed by the higher location.<sup>113</sup> A test that stops after minimal impairment analysis had ruled that the fence's higher location should remain in place because the lower location would not be as effective in protecting Israelis. However, when comparing the marginal improvement of the higher with the lower location to the marginal intrusion on Palestinians' rights to access their farmland, the Court found that a lower location should be the final placement.<sup>114</sup> This is a prime example of how the structured proportionality test maximizes the chances of finding solutions that simultaneously promote public interests and respect the rights of individuals or groups who are the object of the government's measures.

## V. PROPORTIONALITY "AS SUCH" USING AIRBNB AND UBER EXAMPLES: THE CASE FOR STRUCTURED PROPORTIONALITY

Ultimately, arbitrators' decisions convey a message about the figurative line between acceptable and unacceptable measures to legislators and regulators who develop and enforce regulations and parties affected by them. While the tailored regulations are not as effective as their broad-brush alternatives, they are significantly less intrusive into users' and providers' rights. Arbitral tribunals that examine cases through the "as such" lens are

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; H CJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Israel* 58(5) PD 807 [2004] (Isr.).

<sup>112</sup> Jackson, *supra* note 88, at 3118.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

less likely to uphold overbroad measures than those who use the less formal approach to proportionality.

*A. Uber and the “As Such” Approach*

Onerous licensing requirements and de facto banishments of Uber drastically mitigate the number of injuries to passengers and, consequently, the number of claims to insurance companies for compensation. For this reason, these measures pass the first two steps of the constitutionality inquiry. The significant reduction of Uber-related problems decrease of Uber drivers and trips produced measures that provide less restrictive measures on investors’ rights. While background checks and tailored insurance requirements will ameliorate Uber’s safety concerns, they will likely not be as effective as onerous licensing requirements that would significantly reduce the number of drivers and the number of safety related incidents. For this reason, the licensing requirement will pass the first two steps. The third step inquiry, however, would provide a different outcome. The third step requires a direct comparison between the marginal improvement of broad regulations that improve safety and uninsured claims by minimizing overall usage of the application to the marginal intrusion on those would be prevented from driving and passengers who could not use the service.

Conversely, the marginal improvement of requisite inspections and background checks (as opposed to none) are greater than the marginal intrusion on drivers who must undergo said inspections and checks. While, the blunt measures that minimize usage would not pass step 3, the nuanced regulations would be upheld. .

*B. Airbnb and the “As Such” Approach*

Fort Worth, as referenced above, has adopted traditional regulatory requirements for Airbnb users that should be more effective at reducing Airbnb-related problems than problem-specific regulations. In spite of the fact that tailored regulations are the more balanced alternative, a proportionality test that does not include the “as such” prong might not identify this option and will uphold the broad regulations. As the graphic below demonstrates, the structured proportionality test would likely produce a different outcome. The marginal improvement in noise reduction, inflated rent, and housing shortages from traditional bed and breakfast regulations that would diminish the usage of Airbnb does not outweigh the marginal intrusion on investors’ rights between minimizing overall usage and implementing nuanced regulations. Therefore, the current Fort Worth measure blunt measures would not pass the “as such” step.

<b>Airbnb</b>	
Step 1: Are requirements that Airbnb lessors use bed and breakfast requirements effective at reducing noise pollution and inflated rent problems?	Yes
Step 2: Are there less restrictive alternatives to stringent Bed and Breakfast regulations and are other measures that minimize usage equally effective at fixing such problems [group them together]? AND	No
Step 3: Which is greater: the marginal improvement to affordable housing shortages and noise concerns from citywide licensing requirements, as compared to regulations tailored to area requirements OR the marginal intrusion on investors' rights to citywide licensing requirements addressing the problems by minimizing usage?	Marginal intrusion

The graphic above does not encapsulate the calculus of every upcoming dispute. Rather, it demonstrates how the structured proportionality test maximizes the probability that arbitrators will identify and encourage more balanced alternatives that recognize the interests of additional stakeholders. For example, in the San Francisco context, the structured proportionality test would likely uphold the measures that are tailored to ensure that hosts only post one listing. The marginal improvement to affordable housing shortages of such regulations would be greater than the marginal intrusion on homeowners who want to rent out multiple homes on Airbnb

*C. Benefits of Structured Proportionality: The Bridge*

The “as such” analysis does not provide a framework solely for arbitral tribunals to identify balanced regulations. The decisions of the courts and tribunals are a bridge to the decision-making processes of legislators, regulators, and investors. While the decisions of government officials play a role in framing risk exposures in all foreign direct investments, the disruption of digital economy projects elicits significant involvement of host government regulators. From developing regulations that accommodate new products, to working with incumbents to provide an effective and equitable investment climate, legislative officials are primary actors in the cross-border digital economy. For these reasons, the consistent application of structured proportionality principles will provide a judicial backstop to legislative decisions that encourage merit-based regulations.<sup>115</sup>

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<sup>115</sup> Jackson, *supra* note 88.

However, arbitral inquiries into the purpose and legality of the regulations and the “as such” comparison step is much more than a judicial backstop: they provide “opportunities for the legislature to reflect on and improve its own legislative product.”<sup>116</sup>

The consistent application of the three steps in structured proportionality provides an explicit model for legislators and other government officials in their decision-making:

Legislators who understand that statutes will be evaluated under proportionality standards if challenged as infringing on individual constitutional rights will have reason to give attention to the rationality of the means, to whether there are other means less likely to intrude on rights, and to whether the gains to be achieved are weightier and of such a character as to warrant intrusions on protected freedoms.<sup>117</sup>

In addition to helping legislative officials understand the court or tribunal’s rubric for decision-making, consistent usage of structured proportionality helps investors assess and manage risks related to their projects. More specifically, an investor entering an emerging market country who understands a tribunal’s process for determining the legality of regulations will be able to make many important decisions that impact all stages of the investment. For example, scenario-planning is a fundamental risk management strategy that companies use to manage country risk. Those companies who plan for such risks identify the different ways in which government decisions will affect their ability to implement their business model. When such decision-makers are equipped with the tools to understand the type and scope of regulations that are likely to be passed by legislators and regulators, they can better prepare and develop a course of action for responding to them. This process is an essential component of succeeding in emerging markets.

#### *D. Compromise in Cooling-off Period*

Another example of the use of structured proportionality that helps investors anticipate the legality of disputed regulations takes place in cooling-off periods. Cooling-off periods are also known as a feature of the Bilateral Investment Treaty (BIT) and ISDS.<sup>118</sup> Parties seeking to initiate arbitration proceedings are required to attempt to reach an amicable

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<sup>116</sup> Insisting on proper purpose and legal authority focuses attention on the central role of legislatures in authorizing and limiting government conduct that affect investors’ rights.

<sup>117</sup> Jackson, *supra* note 88, at 3146.

<sup>118</sup> See Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, 7 *TRANSNATIONAL DISPUTE MANAGEMENT* 1, 17 (2012) (detailing cooling off period).

settlement that would avoid the need for contentious proceedings.<sup>119</sup> While the number of days for a cooling-off period varies, all treaties require that both parties enter mediation or some other form of consultation during which they are encouraged to explore reasonable options for an amicable settlement.<sup>120</sup> After a good-faith effort has failed to produce an amicable settlement, the claimant is authorized to file for arbitration.<sup>121</sup> The consistent application of structured proportionality in technology disputes will draw a figurative line between those that are effective but fail to respect investor rights and those that are sufficiently effective and respectful of the infringed rights. If the parties identify this figurative line and understand that arbitrators are likely to enforce it, they will have a better understanding of the likely arbitration outcome and a clearer picture of their negotiating positions and leverage. With a clear understanding of these positions and the likelihood of success in contentious proceedings, the parties will maximize the chances of reaching a settlement in the cooling-off period.<sup>122</sup>

## CONCLUSION

The current trends of digital expansion and resurgent populist sentiment foreshadow a significant number of disputes between inbound investors and host governments. The outcomes of these disputes will not only determine the fate of the parties in a given case but will also send a clear message to similarly situated investors who are considering cross-border expansions and to legislators who regulate them. Polarized debates about threats to sovereignty and the merits of low investment barriers prevent stakeholders from considering the facts of each case before taking a position. In many cases, there are regulatory options that respect sovereignty and the investors' rights. In the upcoming disputes, arbitral panels must endorse such nuanced regulations to ensure that host countries and investors enjoy the benefits of their investments. Structured proportionality provides the solution to do just that. Unlike other versions of proportionality, structured proportionality always compares the degree to which the government's measure impedes the investment's success with the degree to which it provides a nuanced approach that is practical. The consistent use of this test will demarcate a figurative line between acceptable and unacceptable regulations. With a clear understanding of the difference between reasonable, tailored regulations and blunt measures that

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> The formal, sequenced implementation of structured proportionality helps investors understand the figurative line between acceptable and unacceptable regulations. Because the ambiguity of the less formal test provides the parties with less guidance about the components of their balancing test, the parties will have less knowledge of their bargaining position, and consequently, are less likely to settle.

do not consider investors objectives, governments will be able to develop balanced regulatory alternative that avoid the need for contentious proceedings. In situations where conflicts arise, parties to disputes who understand the figurative line will be more likely to reach a compromise. Finally, the more balanced alternative will also help host governments attract FDI and the benefits of technology transfer.