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Turning up the Heat on Tech Investors: Navigating the New "Tech Cold War"

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The rapid progression of technology is transforming industries and reshaping global geopolitical dynamics. With the rise of generative artificial intelligence ("AI") and explosive share growth, US tech giants – such as Microsoft, Nvidia, Apple, Alphabet, and Amazon – dominate the list of the world's most valuable companies. Amid concerns over the influence tech companies wield, States are starting to insulate their economies from perceived foreign risks of influence, while seeking to champion home-grown tech juggernauts. These changes have profound political, economic, and societal implications.

As observed by Henry A. Kissinger, Eric Schmidt, and Daniel Huttenlocher in *The Age of AI* (2022):

> "[w]hat the consumer welcomes as a convenience the national security official may view as an unacceptable threat or the political leader may reject as out of keeping with national objectives".

This captures the essence of the unfolding "tech cold war", where States increasingly ban or restrict tech products, services, and operators, or alter regulatory frameworks in the technology and AI sectors under the banner of national security concerns.

Countries are enacting new national security laws to limit foreign influence, including China's 2017 National Security Law; the US's 2022 National Security Strategy; and the EU's 2023 Economic Security Strategy. On the AI and data protection sides, the EU's AI Act leads the way, with others, including most recently the UK, following suit to tighten what remains a largely unregulated market.

Countries like the US and India have banned TikTok, and the EU has not ruled out similar action. Other Chinese companies face restrictions, including Huawei – whose technology was banned/ restricted from numerous countries' 5G infrastructure – and power group CGN, which was excluded from the UK's Sizewell C nuclear project in 2022. Recently, the US revealed plans to ban outbound investments in sensitive technologies and products in China, including semiconductors, quantum technologies, and AI. As social network platforms and other tech companies grow, so will the risks of new restrictions.

As countries quickly alter regulatory frameworks, new measures may encroach on the rights and expectations of foreign investors. This article explores the rising risk of disputes in the tech sector (whether before domestic courts or under international law) and the need for both investors and States to carefully consider their strategies. Tech companies must ensure they are well-positioned to benefit from international protections, while States must craft measures safeguarding their interests without exposing themselves to arbitration and beware of opaque national security grounds for exclusions.

Available Protections

International law, through multilateral or Bilateral Investment Treaties ("BITs"), offers mechanisms to protect tech investments from adverse State actions. Many of these treaties have investor-State dispute settlement ("ISDS") provisions allowing qualifying investors to bring arbitration against States to enforce treaty protections. According to UNCTAD, there are more than 3,000 treaties providing investment protection, including more than 2,800 BITs.

Choosing the ISDS path can be more efficient for investors than dealing with domestic courts, where matters of national security or government action may attract a different (and perhaps less reliable) level of scrutiny. However, ISDS can be a costly process, and investors should carefully consider funding implications (including whether they are able to, and permitted, under relevant laws, to secure third-party funding). Relevant treaty protections include:

- Protection against unlawful expropriation, including outright bans (i.e., direct expropriation) or other restrictions and measures effectively depriving an investor of its investment (i.e., indirect expropriation), which are made on discriminatory grounds, and without compensation. When excluding CGN from Sizewell, the UK compensated the company £100 million, potentially avoiding unlawful expropriation. Generally, BITs will require compensation to be of fair market value (or of similar standard), whereas domestic laws of the Host State may offer lower compensation standards (or none). In the context of a volatile geopolitical context and the rise of economic isolationism globally, investors should also anticipate and mitigate challenges associated with regime changes and elections, particularly if certain political parties – which may become majority governments – vow to implement programmes of nationalisation, or contemplate restrictions for certain investments, including on national security grounds.
- Fair and equitable treatment ("FET"), including passing new regulations (or changing existing regulations) that impose obligations on investors impacting their ability to operate (e.g., data protection/storage; privacy and security; reporting obligations; divestment requirements).
- National treatment, prohibiting discriminatory conduct favouring local companies.
- Most Favoured Nation, ensuring no less favourable treatment than other foreign investors.

While traditionally the tech sector has been less prone to commencing ISDS proceedings against States, recent disputes suggest a change. Notable examples include:

- Huawei: in 2022, Huawei initiated arbitration against Sweden under the Sweden-China BIT following its ban from 5G infrastructure on national security grounds, alleging expropriation, discrimination, and a breach of FET. Huawei also notified the UK of a dispute under the China-UK BIT following a similar ban.
- Uber: in February 2020, Uber submitted a notice of dispute to Colombia pursuant to the US-

Colombia Free Trade Agreement, following an effective ban of the Uber app. The dispute notice has not been withdrawn, and the status of the dispute is unknown.
- CC/Devas and Deutsche Telekom: both companies initiated separate proceedings against India under the India-Mauritius and Germany-India BITs, contesting their exclusion from satellite contracts on alleged security grounds. Both tribunals awarded damages to the investors.

Similarly, the cryptocurrency industry is not shielded from increased regulatory burdens, and Swiss cryptocurrency exchange, Nexo, initiated an arbitration against Bulgaria under the Switzerland-Bulgaria BIT in January 2024, following criminal investigations into the company. These disputes are likely to continue rising as government crackdowns on the cryptocurrency industry worldwide gain traction.

Benefitting From Treaty Protection

To benefit from these protections, investors must ensure they satisfy several criteria.

1. Existence of a BIT Providing Protection

To bring a claim against a State, there must be a treaty between the investor's home country (often the jurisdiction of incorporation) ("Home State") and the country in which the investment is made ("Host State"). The treaty must have entered into force. The absence of a BIT between China and the United States may explain why TikTok pursued legal challenges in domestic courts rather than through ISDS mechanisms. There may be other means to initiate arbitration proceedings against a Host State, including under contracts or domestic investment laws.

If no treaty exists between the Host and Home States, or if existing treaty protection could be improved, investors can restructure their investments to jurisdictions with more favourable BITs. Investors should consider:

- The choice of jurisdiction of incorporation, to ensure that the Home State in question has satisfactory BIT protections in place with the Host State.
- The timing of the restructuring: restructurings can be considered abusive if they occur when disputes or measures underpinning a dispute are "reasonably foreseeable" or "in reasonable prospect". See, e.g., *Philip Morris v Australia*; *Alverley and Germen v Romania*; *Tidewater v Venezuela*.
- Commercial considerations: tax, accounting, regulatory, and pensions considerations must be accounted for (including how profits can be repatriated from one jurisdiction to another), as well as change of control provisions that may be triggered.

2. Criteria for Treaty Protection

Investors must ensure they meet the threshold conditions contained in the relevant treaties, including: (i) the definitions of a qualifying investor and qualifying investment; and (ii) other requirements (e.g., a negotiation period, time limitations, or excluded disputes). Some Chinese BITs permit, for example, arbitration only of "dispute[s] on the amount of compensation resulting from nationalization and expropriation". See, e.g., China-Saudi Arabia BIT, Article 8(2); China-UK BIT, Article 7; China-Japan BIT, Article 11(2).

Tech investors should also consider provisions regarding the State's right to regulate, including:

- Whether the BIT recognises a State's right to regulate in the public interest, and how this is defined (e.g., is it recognised in the Treaty's preamble; or as an exclusion of liability). The EU-Singapore Investment Protection Agreement provides, for example, that measures taken to protect legitimate public policy objectives will not constitute an indirect expropriation.
- Emergency clauses protecting States from liability for measures necessary to protect essential security interests, including national security. These clauses, found in many US BITs, may protect States, and often defer to the State's definition of national security. Only a minority of BITs contain such clauses to date. Broad provisions may impact an investor's recourse, for example, against a ban made on national security grounds.

Conclusion

Given the unique challenges posed by tech and AI, developing specialised treaties or tribunals for tech disputes may be beneficial. Such mechanisms could address tech-related disputes' specificities, providing a more effective forum for resolution. We are also yet to see how these considerations may be reflected in next-generation BITs, which may more strongly protect a State's right to regulate in the tech sector or on national security grounds.

The future of tech investments hinges on the evolving landscape of international dispute resolution. As political and social skepticism grows, it remains to be seen whether the current ISDS framework can effectively handle the surge in tech disputes involving sensitive national security issues.

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