POTENTIAL EXPROPRIATION CLAIMS AGAINST DATA SHARING REQUIREMENTS

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I. INTRODUCTION

In the advent of the digital economy, data[1] is increasingly considered one of the most valuable assets.[2] International investment law and its interface with the digital economy seems a natural area to explore given the value that data generates,[3]

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1. At a general level, data is an abstraction about the world which can be processed to extract information.

2. David Nguyen & Marta Paczos, *Measuring the Economic Value of Data and Cross-Border Data Flows: A Business Perspective*, 9 (OECD Digit. Econ. Papers Working Paper No. 297, 2020), https://www.oecd-ilibrary.org/science-and-technology/measuring-the-economic-value-of-data-and-cross-border-data-flows_6345995e-en.

3. Whilst commentators have struggled to construct models to value data as a standalone asset, one way to illustrate how valuable data is in the digital economy is to look to the valuation of tech companies such as Facebook. Data is at the core of a social media company's operations – the data generated from user profiles is used to provide services to commercial clients such as advertisers. For example, in 2020, Facebook's total revenue was USD 84.2 billion, up from USD 69.7 billion in the year prior. Its total net

the extent of cross-border data flows, and how international investment law protects foreign investments. However, there has been a surprising lack of commentary on the subject.[4] Despite this lack of commentary, as governments increasingly seek to regulate data flows, there is a growing potential for a number of investment claims against States for regulating such data flows. The potential is acute given the rising number of cross-border transactions involving data, which are also projected to increase in the future.[5]

Under international investment law, investors enjoy a number of protections, such as those against direct and indirect expropriation. These protections are relevant in the context of the increasing number and variety of data regulations being imposed by States. The focus of this commentary will be on mandatory data disclosure regulations. This commentary argues that in the context of mandatory data sharing regulations, it is the nature of the disclosure which determines whether there may be a viable claim of expropriation.

For the purposes of this commentary, data is assumed to be a covered "investment" which engages investor protections under international investment law, specifically the ICSID

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income for the same period was USD 29.2 billion in 2020, up from USD 18.5 billion in 2019, representing a 58% increase. As of August 2020, Facebook was valued at roughly USD 720 billion. *See* Press Release, Facebook, Facebook Reports Fourth Quarter and Full Year 2020 Results (Jan. 27, 2021), https://s21.q4cdn.com/399680738/files/doc_news/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results-2021.pdf; Trefis Team, *Facebook Added Over $350 Billion In Value Since 2016. Can It Repeat?*, FORBES, (Aug. 5, 2020), https://www.forbes.com/sites/greatspeculations/2020/08/05/facebook-added-over-350-billion-in-value-since-2016-can-it-repeat/?sh=67b2a4f317f4.

4. For those that have written about the intersection between international investment law and the digital economy, *see e.g.*, Andrew D. Mitchell & Jarrod Hepburn, *Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer*, 19 YALE J. L. & TECH. 182 (2017) (arguing that international investment law can protect against unjustified data flow restrictions); Marion Creach, *Assessing the legality of data-localization requirements: Before the tribunals or at the negotiating table?*, COLUMBIA FDI PERSPECTIVES (Jun. 17, 2019), https://academiccommons.columbia.edu/doi/10.7916/d8-p3q6-tn21. There has yet to be consideration about how international investment law may apply to mandatory data sharing regulations.

5. *See* Nguyen & Paczos, *supra* note 2, at 30.

Convention.[6] There are four possible ways in which data can be considered a covered investment under an applicable international investment agreement: (i) the data itself as the investment; (ii) an agreement dealing with rights over or use of data (contractual rights); (iii) intellectual property rights over data; or (iv) data as part of a business enterprise and its valuation.[7] It is then assumed that companies that have such an investment in a foreign country may leverage that investment to bring data-related claims in investor state dispute settlement (ISDS) tribunals.

II. EXPROPRIATION

Expropriation is the taking of property, legal title, or a right of a foreign investor by the State. International investment law recognizes two types of expropriation: direct expropriation and indirect expropriation. Direct expropriation is the outright taking of an investment by State actions or regulations.[8] In the context of mandatory data sharing, a finding of a direct expropriation is unlikely due to the easily replicable nature of data. Whereas the original custodian shares its data in accordance with mandatory data sharing obligations, it still possesses that data after sharing it. States do not "take away" an investor's data, meaning that there cannot be any expropriation.

An indirect expropriation occurs where the totality of a State's actions constitutes a "taking" of an asset by substantially depriving the investor of the ability to benefit from an investment in a meaningful way.[9] The effect of the measure is the key question in assessing whether an indirect expropriation has occurred. An impediment to business is not enough—the State measures in question must deprive the investor of the

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6. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, art 25.

7. *See* Eniko Horváth & Severin Klinkmüller, *The Concept of 'Investment' in the Digital Economy: The Case of Social Media Companies*, 20 J. WORLD INV. & TRADE 577, 590-609 (2019).

8. Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 667 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.

9. CME Czech Republic B.V. v. Czech, UNCITRAL Arbitral Trib., Partial Award, ¶ 604 (Sept. 13, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf.

economic use or enjoyment of the investment to the extent that the rights attached to that investment, such as income or benefits, cease to exist.[10]

Additionally, some ISDS tribunals have considered the legitimate expectations of the investor in making a finding of indirect expropriation. These expectations may be formed either on the basis of explicit undertakings by the host State[11] or more generally, such as the expectations formed on the basis of a host State's legal framework.[12]

Whilst the right of a State to expropriate an investment is generally recognized under international law, that right is subject to specific criteria that are ordinarily enshrined in a bilateral investment treaty (BIT). Generally, those criteria are that the expropriation: (i) is done in the public interest; (ii) is nondiscriminatory; (iii) follows due process requirements; and (iv) provides fair compensation to the investor.[13]

In order to assess whether a State action in relation to data may be subject to an expropriation claim, three questions must be considered: whether (i) the investor has some sort of legal title or right that can be expropriated; (ii) there is a substantial deprivation or expropriation of the investor's legal title or rights by the State; and (iii) certain criteria are met such that the expropriation is lawful.

This commentary assumes for the purposes of the first question that data or rights attaching to data are covered investments capable of being expropriated. This commentary will also not consider the third question, due to the wide latitude tribunals give to host States in considering what public interest entails,[14] and that most illegal expropriations occur because the host State fails to satisfy the compensation require-

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10. Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 115 (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

11. *See, e.g.*, Revere Copper & Brass Inc. v. OPIC, 17 I.L.M. 1321, Award, ¶ 271 (1978).

12. *See, e.g.*, Metalclad Corporation v The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 107 (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

13. *See, e.g.*, North American Free Trade Agreement art 1110(1), Dec. 17, 1992, 32 I.L.M. 296.

14. *See* Feldman v Mex., ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

ment.[15] Instead, this commentary will solely examine whether there is an expropriation of the investor's legal title or right by the State in a case study concerning mandated data disclosure brought to the attention of an ISDS tribunal.

III. A Case Study: *Einarsson v Canada*

A. *Background*

An expropriation claim in the context of a mandatory data sharing regime arose in a case brought under the North American Free Trade Agreement (NAFTA), *Einarsson v Canada*.[16] The claimants submitted a Notice of Arbitration on 18 April 2019.[17] The case concerns the Canadian Government's handling of proprietary marine seismic data owned by Geophysical Services Incorporated (GSI). GSI is established under the Canada Business Corporations Act and is owned by the Einarssons (from the United States).[18]

GSI's business included creating, licensing, storing, processing, and reprocessing seismic data, principally for use in oil and gas exploration in the Canadian offshore.[19] It licensed its seismic data to third parties through licensing agreements, obliging licensees to pay a licensing fee to obtain the data and not to disclose that data to third parties without GSI's permission.[20] Creation of this data was capital-intensive and time-consuming, with the estimated costs of creating the seismic data being approximately USD 781 million.[21] However, GSI's business was highly lucrative, with estimated outstanding returns from existing licensing agreements for the seismic data worth around USD 2.53 billion.[22] Due to their being capital-

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15. C. L. Lim et al., International Investment Law and Arbitration 414-5 (2d ed. 2021).

16. Einarsson v. Can. (Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11, Oct. 10, 2018) [hereinafter *Einarsson*, Notice of Intent] https://www.italaw.com/sites/default/files/case-documents/italaw11478_0.pdf.

17. Einarsson v. Can. (Notice of Arbitration, Apr. 18, 2019) [hereinafter *Einarsson*, Notice of Arbitration] *https://www.italaw.com/sites/default/files/case-documents/italaw11477.pdf.*

18. *Id.*, at ¶ 9.

19. *Id.*, at ¶ 10.

20. Einarsson, Notice of Intent, *supra* note 16, at ¶ 37.

21. Einarsson, Notice of Arbitration, *supra* note 17, at ¶ 11.

22. *Id.*, at ¶¶ 10-11.

intensive but lucrative, seismic surveys are closely guarded trade secrets governed by strict licensing agreements dealing with the confidentiality and reproduction of seismic data.[23]

B. *Canada's Regulatory Regime*

A number of Canada's safety and environmental regulations required GSI to submit its seismic data. These included the: (i) Canada Oil and Gas Land Regulations under the *Territorial Lands Act*; (ii) Canada Oil and Gas Geophysical Operations Regulation under the *Canada Oil and Gas Operations Act*; (iii) Newfoundland Offshore Area Petroleum Geophysical Operations Regulations under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*; and (iv) Nova Scotia Offshore Petroleum Geophysical Operations Regulations under the *Canada-Nova Scotia Offshore Atlantic Accord Implementation Act.*[24]

Pursuant to these regulations, GSI submitted reports containing information about its seismic operations to the Canadian Government.[25] This included a copy of the seismic data itself. GSI expected that its submitted data would remain confidential.[26] This is because certain legislative provisions afforded privilege to GSI's seismic data.[27] However, GSI alleges that Canada transferred and disclosed some of the data submitted by GSI to third parties without GSI's knowledge or consent.[28]

C. *The Einarssons' Claims against Canada*

GSI commenced proceedings against Canada and the third parties accessing its data for copyright infringement and breach of confidentiality.[29] In a decision handed down on 28

23. *Id.*, at ¶ 11.
24. *Id.*, at ¶ 13.
25. Einarsson, Notice of Intent, *supra* note 16, at ¶¶ 7, 14.
26. *Id.*, at ¶ 8.
27. Einarsson, Notice of Arbitration, *supra* note 17, at ¶ 16. *See* Canada Oil and Gas Land Regulations, SOR/61-253, under the Territorial Lands Act, R.S.C. 1952, c 263; *Canada Oil and Gas Act*, S.C. 1981, c 81; Canada Petroleum Resources Act, R.S.C. 1986, c C-36 (2lld Supp); Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, S.C. 1987, c 3; Canada Nova Scotia Offshore Atlantic Accord Implementation Act, S.C. 1988, c 28.
28. Einarsson, Notice of Arbitration, *supra* note 17, at ¶ 17.
29. Einarsson, Notice of Intent, *supra* note 16, at ¶ 12.

June 2016, the Court of Queen's Bench of Alberta considered two questions: (i) whether copyright subsisted in the seismic data; and (ii) the effect of Canada's regulatory regime on GSI's claim.[30] On the first question, the Court determined that copyright did subsist in the seismic data.[31] On the second question, the Court considered the conflict between Canada's regulatory regime and the copyright over the data. It resolved this conflict by finding that GSI retained full copyright and other proprietary rights over the seismic data. However, the regulatory regime applied to the extent of its conflict with these proprietary rights by creating a compulsory license over the data after expiration of the confidentiality or privilege period.[32]

Following appeals to the decision, the case reached the Supreme Court of Canada.[33] GSI claimed that its licensing agreements required its licensees to refrain from obtaining seismic data from the government, instead paying a licensing fee to obtain that data.[34] The Court ultimately dismissed GSI's claims.[35]

Unsatisfied with the rulings by Canada's domestic courts, the Einarssons brought the matter before an ICSID Tribunal. In the Notice of Arbitration, it considered the seismic data as indirectly constituting part of its covered investments. It characterized this as: copyright over the seismic data;[36] confidential information;[37] and commercial licensing agreements of the seismic data with third party licensees.[38] On this basis, one of the Einarssons' claims[39] was that Canada violated Article 1110 of NAFTA, which provides that:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its terri-

30. Geophysical Serv. Inc. v. 612469 Alberta Ltd. (CalWest Printing & Reproductions) 2016 ABQB 356, para. 4; Geophysical Serv. Inc. v. Encana Corp. 2016 ABQB 230 (Can.), para. 7.

31. 2016 ABQB 356, para. 24; 2016 ABQB 230, para. 115.

32. 2016 ABQB 230, para. 321.

33. Geophysical Serv. Inc. v. Murphy Oil Co. Ltd., 2017 ABQB 464 (Can.).

34. *Id.*, at para. 13.

35. *Id.*, at para. 76.

36. Einarsson, Notice of Intent, *supra* note 16, at ¶ 27.

37. *Id.*, at ¶ 34.

38. *Id.*, at ¶ 237.

39. Einarsson, Notice of Arbitration, *supra* note 17, at ¶ 28.

tory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

for a public purpose;

on a non-discriminatory basis;

in accordance with due process of law and Article 1105(1)[40]

The Einarssons claim that Canada's taking of their seismic data substantially deprived GSI of the ability to benefit from their investment.[41] This is because, through copying and disclosing the seismic data, Canada made it impossible for GSI to collect licensing fees under its licensing agreements.[42] This forced GSI to engage in expensive litigation with its licensees—forty-one defendants in twenty-five court actions—to enforce its licensing obligations against them.[43] The findings in those proceedings did not allow GSI to enforce the obligations under its licensing agreements against its licensees, ultimately destroying its once lucrative business.[44] Subsequently, in their claim of expropriation, the Einarssons seek for Canada to compensate GSI for the fair market value of the seismic data and the consequential losses of its business.[45]

In addition to their claims, the Einarssons may also plead an expropriation claim on the basis of its legitimate expectations as an investor. Under NAFTA, the concept of legitimate expectations has been specified as expectations that are reasonable and justifiable.[46] In this case, the same regulatory regime that compelled GSI's disclosure of its seismic data also afforded privilege over that data. It is reasonable and justifiable for the Einarssons to expect Canada to treat that data with the privilege accorded under its legislation. This would in-

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40. Article 1105(1) accords the investment the minimum standard of treatment under customary international law, including fair and equitable treatment and full protection and security. Articles 1110(2)-(6) require, *inter alia*, payment of compensation without delay that is equivalent to the fair market value of the expropriated investment. *North American Free Trade Agreement*, *supra* note 13.

41. Einarsson, Notice of Intent, *supra* note 16, at ¶ 20.

42. *Id.*, at ¶¶ 13, 127.

43. *Id.*, at ¶ 127.

44. Einarsson, Notice of Arbitration, *supra* note 17, at ¶ 27.

45. Einarsson, Notice of Intent, *supra* note 16, at ¶ 20.

46. International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL Arbitral Tribunal, Award, ¶ 147 (Jan. 26, 2006).

clude not disclosing it to third parties without GSI's knowledge and permission.

In response to the Einarsson's claims of expropriation, Canada argued that the seismic data was taken and used for a public purpose—"to promote offshore oil and gas development".[47] If it is found that there was an expropriation, use of the data for a public purpose might satisfy one of the cumulative criteria that Canada must offer for the expropriation to be deemed lawful.[48]

D. *Changing the Fact Pattern*

Changing the fact pattern of the *Einarsson* case enables an analysis of different circumstances that may impact whether there could be a viable expropriation claim against a State should similar circumstances arise in the future. This commentary examines three fact patterns below: where (i) the State compels disclosure of data but does not disclose that data to third parties; (ii) the State compels disclosure of data and then discloses that data to third parties that are governmental entities; and (iii) the State compels disclosure of data and its regulatory regime expressly allows it to disclose that data to third parties. An examination of these hypotheticals reveals that it is not the taking by the government or the follow-on disclosure of the data *per se* that give rise to a potential expropriation claim. Rather, the nature of the disclosure determines the potential claim.

1. *No Disclosure of Data*

The first scenario to consider is whether there would be a viable expropriation claim if the Canadian Government had not disclosed the data at all. If applied to *Einarsson*, Canada would have afforded the privilege due the seismic data under its regulatory regime by not disclosing GSI's seismic data to third parties. The real question here is whether it is the government's taking of the data, rather than its disclosure thereafter, that could itself give rise to an expropriation claim by an investor.

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47. Einarsson, Notice of Intent, *supra*, at ¶ 129.

48. Note that Canada has not paid GSI any compensation, meaning that if its acts constitute an expropriation, it will be considered an illegal expropriation for failing to satisfy Article 1110(1)(d) NAFTA.

The data, as the object of investment, is submitted to the government. The government then aims to utilize that data for a public purpose to promote offshore oil and gas development. As the host State would not disclose the data at all, it may use the data in another way to achieve this purpose, e.g., to assess how a subsidy might be applied to promote offshore oil and gas development. GSI would still retain its seismic data, and the data would not be available to its business competitors or clients. This scenario would largely appear to fall within what GSI might have characterized as its legitimate expectations.

On the question of whether there has been an indirect expropriation, GSI would have to show that the disclosure substantially deprived it of the ability to benefit from the data. In its Notice of Arbitration, GSI characterized its loss as losing "its ability to collect significant revenues from licensing the Seismic Data and, in turn, its ability to finance its other operations in acquisition and processing seismic data."[49] That characterization cannot apply in this hypothetical. It is difficult to see any potential revenue loss amounting to a substantial deprivation of the investor's enjoyment of its business. For example, if Canada used the seismic data to inform a new subsidy scheme which resulted in more market entrants and business rivals, it is highly unlikely that this would lead to a total destruction of GSI's business. Consequently, this scenario is unlikely to give rise to a viable expropriation claim.

2. *Disclosure of Data Between Government Entities*

The second scenario is whether an investor could bring a viable expropriation claim against a host State if that government only disclosed and shared the data between its own governmental entities. Under this scenario, Canada would not comply with the privilege afforded to the seismic data submitted by GSI to the extent that it was shared with other government bodies. GSI would not be aware that Canada disclosed its data to its governmental agencies. The core question is whether the disclosure itself is what constitutes the expropriation.

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49. Einarsson, Notice of Arbitration, *supra* note 17, at ¶ 27.

The answer to whether an expropriation has occurred will likely come down to the functions of those government entities with which disclosure is made. GSI's main benefit is its ability to derive revenue from its investment—both to sustain its business and to fund the acquisition and processing of the seismic data. If one of the governmental third parties had a function similar to that of GSI, such that it directly competed with GSI or its operations significantly impacted GSI's business, then there might be a viable claim for expropriation.

Similar to the first scenario of non-disclosure, it is difficult to conceive of a governmental function that would so substantially impact GSI's operation as to amount to an expropriation. This means that mandated disclosure of the data or a follow-on disclosure of that data *per se* does not give rise to an expropriation claim.

3. *Disclosure to Third Parties Expressly Allowed under Regulatory Regime*

The third scenario is one in which a State's mandatory data disclosure regulations compel an investor to disclose its data, and expressly allow the State to disclose that data to third parties. If this was the case, the Einarssons would have been put on notice that any data disclosed by GSI to the Canadian Government might then be disclosed to third parties.

The question of whether an expropriation may have occurred will likely hinge on which third parties the government discloses to. This paper considers two potential classes of third parties: (i) those in the academic or research sector; and (ii) the investor's existing or potential business competitors, or clients from whom they derive revenue. The question is whether it is the nature of the disclosure which determines whether an expropriation has occurred.

The first set of third parties are those in the academic or research sector, specifically those that undertake non-profit work in the public interest. Data disclosed to these third parties would not be used for a for-profit purpose. In this scenario, any negative impact on the investor's ability to benefit from the investment would be indirect and non-substantial. For example, one could reasonably envisage a situation in which the publication of research done on the basis of seismic data might lead to some of that data being available to poten-

tial licensees. This might subsequently result in fewer licensees than the investor might have had if the data-driven research was not published. However, similar to the scenario of a disclosure to other governmental entities, it is difficult to envisage how this might lead to a substantial inability for the investor to derive economic benefit from its data.

The second set of third parties are those that have a direct effect on the investor's revenue or profits. Existing or potential business competitors can take revenue or profit away from the investor, whilst clients are a direct source of revenue. In this case, clients are licensees who procure a license to gain access to the seismic data. This is similar to what occurred in *Einarsson*, with the only difference being that the disclosure to third parties would not be surreptitious. Despite this minor hypothetical change, these circumstances could still amount to an expropriation. However, it is questionable whether an investor could make an argument based on legitimate expectations as the regulatory regime would expressly permit disclosure to third parties.

IV. Conclusion

In formulating a viable claim of expropriation on the basis of mandatory data disclosure, these scenarios indicate that what matters is the nature of the disclosure. If the disclosure is likely to substantially affect the investor's ability to benefit from the investment, it is likely to be considered an expropriation. As most data-driven businesses derive an economic benefit from their data through revenue and profit, it is likely an expropriation will be found where follow-on disclosure of data collected through a mandatory data disclosure regime to third parties substantially disrupts the investor from deriving revenue and profit from that data.