Incoming: How International Investment Law Constrains Foreign Investment Screening

Tania Voon | ORCID: 0000-0001-7925-9389
Melbourne Law School, University of Melbourne, Melbourne, Australia
tania.voon@unimelb.edu.au

Dean Merriman | ORCID: 0000-0003-3954-119X
Victorian Bar, Melbourne, Australia
dean.merriman@vicbar.com.au

Abstract

Domestic screening of foreign investment, often on national security grounds, has intensified in recent years. More countries are introducing such regimes, while others expand their scope or allow retrospective screening. These developments increase the potential for investor–State claims under international investment agreements, even sometimes regarding investments that are not yet established. Host States need to be aware of the potential for adverse screening decisions, the imposition of conditions, or due process shortcomings to conflict with investment obligations, such as fair and equitable treatment or most-favoured nation treatment. Although tools exist in some treaties to exclude or exempt investment screening, these may not prevent a successful investment claim. For example, listing a screening regime as a non-conforming measure may not cover all future amendments, and general and security exceptions are subject to considerable uncertainty. Host States need to ensure compliance with international investment law in creating and developing screening regimes.

Keywords

foreign direct investment – investment law – investment policy – national security – screening
1 Introduction

In recent years, many countries around the world have increased the screening of inbound foreign investment, particularly in the context of mergers and acquisitions. By screening, we refer broadly to scrutiny and approval processes that need to be completed before certain investment-related actions by foreign individuals or entities will be allowed, beyond those applicable to local individuals or entities.¹ Such screening will often but not always involve foreign direct investment (FDI), arising when an enterprise from another country purchases a ‘lasting interest’ (typically defined as at least 10% of the voting power) in a local enterprise.² Screening might also be imposed on activities falling short of a permanent commercial presence, such as obtaining a licence or permit or making a portfolio investment. Shifts in approaches to screening predate but have continued through the COVID-19 pandemic, frequently grounded in national security concerns.³ Increased screening has taken different forms, from the introduction of a screening regime where none previously existed, to the identification of additional sensitive or strategic sectors or technologies, to the creation of new powers to screen already established investments. The reasons for such developments, beyond the pandemic,⁴ have arguably included ‘the spread of general-purpose digital technologies’ and ‘the growing geopolitical rivalry between China and the United States’.⁵

These developments in domestic law and policy increase the potential for conflict with international investment law. In particular, they enhance the possibility of claims by investors that States, in rejecting or limiting a given investment as part of a screening regime, have breached obligations under international investment agreements (IIAs), which have been accumulating

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¹ See Ignacio Gómez-Palacio and Peter Muchlinski, ‘Admission and Establishment’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law (OUP 2008) 227, 238, 239.
⁴ See eg OECD, ‘Investment Screening in Times of COVID-19 – and Beyond’ (7 July 2020).
over time. These agreements, numbering approximately 2,646 in force worldwide as at the end of 2020, primarily take the form of bilateral investment treaties (BITs) and preferential trade agreements with investment chapters (PTAs). Most of them provide for dispute settlement not only between the States parties but also by investors of one (home) State against the (host) State of their investment: often known as investor–State dispute settlement (ISDS).

The potential for ISDS claims relating to the screening of inbound foreign investment is exemplified by the 2020 decision in Global Telecom v Canada, a dispute heard by a Tribunal under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). That case sheds light on both the potential for IIAs to cover screening regimes (in that case questioned due to a carve-out from ISDS for screening decisions) and the potential application of IIA obligations to such regimes (in that case the fair and equitable treatment (FET) obligation in particular). As discussed further below, the Tribunal found that screening was covered by the relevant IIA, despite the carve-out (and notwithstanding a minority opinion to the contrary), but that the conduct of the screening in this instance did not breach the FET obligation.

In this article, we investigate the extent to which IIAs constrain inbound foreign investment screening, in order to highlight considerations of which policy-makers and treaty drafters should be aware regarding the intersection between these international and domestic laws. We begin in Section 2 by surveying recent developments in various countries leading to enhanced screening of inbound foreign investment and therefore increased potential for conflict with international investment law. We then examine in Section 3 the ways in which investment screening may be included within the scope of IIAs (with respect to both the pre-establishment and post-establishment stages of investment). Section 4 explains the key investment obligations with which investment screening must comply to the extent that such screening is covered by a given IIA, and Section 5 the ways in which investment screening may be nevertheless protected (that is, excluded from coverage of the IIA or precluded from violating the IIA).

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7 Global Telecom Holding SAE v Canada, ICSID Case No ARB/16/16, Award (27 March 2020); see generally Joshua Paine, ‘Global Telecom Holding v Canada: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties’ (2021) 38(4) J Intl Arb 533.

8 Global Telecom v Canada (n 7) 334.

9 ibid 617, 648; see also ibid 647.
Our analysis reveals significant scope for investment screening to breach a range of investment obligations commonly found in IIAs. For established investments, such obligations relate to performance requirements, expropriation, fair and equitable treatment, and umbrella clauses that may incorporate stabilisation provisions in investment contracts or domestic investment laws. For established investments as well as potential investments in some IIAs, such obligations include non-discrimination: national treatment and most-favoured nation (MFN) treatment. The MFN obligation in particular offers further potential for invoking better standards of treatment from other IIAs. In most IIAs, alleged breaches of this kind may be pursued through either ISDS or State–State dispute settlement.

The complexity of IIAs demands close attention when States introduce, enhance or give effect to investment screening policies or laws. Ideally, States need to review their obligations under existing and forthcoming IIAs (as well as investment contracts and domestic laws) to understand the extent to which they are constrained in making changes to or implementing new investment screening provisions. This kind of detailed review may be a challenge for some States. If the IIA excludes investment screening from ISDS, are State–State challenges still open? If the IIA protects investment screening from violation or coverage under some treaty provisions, what about the remaining treaty obligations? If some sectors are excluded from the treaty or parts of it, does investment screening operate in other covered sectors? If more recent IIAs of a host State include such distinctions but older IIAs do not, is the State exposed to additional claims through the operation of the MFN clause? Relying only on security exceptions or general exceptions in IIAs may provide insufficient certainty that a host State will be able to successfully defend its investment screening laws or their use in the event of a dispute.

2 Developments in Inbound Investment Screening

The United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD) have jointly reported that, in 2020, ‘[t]he pandemic accelerated an already steady decline and contributed to bringing global FDI inflows down to their lowest level in 15 years’. At the same time, investment policies to safeguard essential
security interests in the G20 and beyond have been growing since 2017.\textsuperscript{11} As explained in the following sections, many changes have been made to enhance inbound investment screening on national security grounds, including by:\textsuperscript{12} introducing screening regimes; increasing the scope of sensitive or strategic sectors subject to screening; or providing for retrospective screening. These developments, which we consider in turn, all enhance the possibility for conflict with IIAs and thus the potential for ISDS claims. Screening mechanisms in different jurisdictions are of variable scope, purpose and focus, e.g. with respect to economic, social, and public order interests, but national security is a common concern.

2.1 Introduction of Screening Regimes

According to UNCTAD, 29 (including the European Union) countries currently have FDI screening laws\textsuperscript{13} (although this appears to be an underestimate given ongoing developments, for example in Member States of the European Union as mentioned below). Five of these were introduced since 2017: in India, Norway, Hungary, Belgium, South Africa, and the European Union. As examples, we will refer to the laws introduced in the European Union, South Africa, and India. The EU example is distinct as it provides an overarching procedural framework for screening mechanisms to be implemented by its Member States, as explained further below.

The EU regulation was adopted on 19 March 2019\textsuperscript{14} and became fully operational on 11 October 2020.\textsuperscript{15} It ‘establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between

\textsuperscript{11} ibid 3–4.

\textsuperscript{12} See eg UNCTAD, Investment Policy Monitor (Issue 24, February 2021) 1, 4; UNCTAD, Investment Policy Monitor (Issue 23, April 2020) 1, 7–8; UNCTAD, ‘Investment Policy Responses to the COVID-19 Pandemic’ in Investment Policy Monitor (Special Issue No 4, May 2020) 1, 7–8; UNCTAD, ‘National Security-Related Screening Mechanisms for Foreign Investment: An Analysis’ in Investment Policy Monitor (Special Issue, December 2019).


\textsuperscript{15} EU Regulation (n 14) art 17; European Commission Press Release, ‘EU Foreign Investment Screening Mechanism Becomes Fully Operational’ (9 October 2020).
Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order.\textsuperscript{16} In determining whether such an investment is likely to do so, Member States and the European Commission may consider its potential effects on matters including critical infrastructure, critical technologies and dual use items, supply of critical inputs, access to sensitive information, or the freedom and pluralism of the media.\textsuperscript{17} They may also take into account, for example, whether the foreign investor is directly or indirectly controlled by the government of a third country.\textsuperscript{18} In separate guidelines, the Commission has noted that responsibility for FDI screening rests with Member States and has called on those without screening mechanisms or without comprehensive mechanisms ‘to set up a full-fledged screening mechanism’.\textsuperscript{19} The European Union counts 18 Member States with FDI screening mechanisms\textsuperscript{20} (more than included in the UNCTAD list,\textsuperscript{21} including most recently the Czech Republic, Malta and Slovenia). According to UNCTAD, the European Union itself has 56 IIAs in force\textsuperscript{22} (with EU Member States having additional IIAs of their own).

In South Africa, the Competition Amendment Act of 2018 was proclaimed on 14 February 2019,\textsuperscript{23} with several provisions taking effect on subsequent dates as proclaimed.\textsuperscript{24} However, section 14, inserting new section 18A into the Competition Act of 1998, has not yet taken effect at the time of writing. Under section 18A(1), the President is to constitute a Committee to take responsibility for considering ‘whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of

\textsuperscript{16} EU Regulation (n 14) art 1(1).
\textsuperscript{17} ibid art 4(1).
\textsuperscript{18} ibid art 4(2)(a).
\textsuperscript{21} See supra n 13.
\textsuperscript{23} ‘The Presidency’ (14 February 2019) 644 Government Gazette, No 42231.
the Republic’.25 A foreign acquiring firm is defined as an acquiring firm ‘incorporated, established or formed under the laws’ of another country or ‘whose place of effective management is outside’ South Africa.26 In identifying and publishing national security interests,27 the President is to ‘take into account all relevant factors, including the potential impact of a merger transaction’ on matters such as ‘the use or transfer of sensitive technology’, ‘the security of infrastructure’, ‘the supply of critical goods or services’, and ‘the economic and social stability of the Republic’.28 In recent years South Africa went through a process of terminating many of its IIAs and replacing them with a domestic investment framework.29 Nevertheless, UNCTAD reports that South Africa still has 19 IIAs in force,30 including with China.31

In India, the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2017 were published and largely took effect on 7 November 2017.32 Regulation 16 establishes requirements for government approval of investment by persons resident outside

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25 Competition Act of 1998 (South Africa) s 18A (1) (to be inserted by Competition Amendment Act of 2018 (South Africa) s 14, not yet commenced).
26 Competition Act of 1998 (South Africa) s 1 (as amended by Competition Amendment Act of 2018 (South Africa) s 1(d), not yet commenced).
27 Competition Act of 1998 (South Africa) s 18A(3) (to be inserted by Competition Amendment Act of 2018 (South Africa) s 14, not yet commenced).
28 Competition Act of 1998 (South Africa) s 18A(4) (to be inserted by Competition Amendment Act of 2018 (South Africa) s 14, not yet commenced).
32 Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2017 (India) reg 1(2) (‘Indian Regulations 2017’). The regulations were published in the Official Gazette on 7 November 2017. Proviso (ii) to sub-regulation (1) of regulation 10 and proviso (ii) to sub-regulation (2) of regulation 10 entered into force on 2 June 2018: Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2018 (Gazette of India, 1 June 2018). The original regulations were amended with effect from 26 March 2018, 1 September 2018, and 1 February 2019.
India in particular sectors and sectoral caps on foreign investment.\textsuperscript{33} For example, government approval is required for foreign investment in mining,\textsuperscript{34} defence (‘beyond 49% foreign investment wherever it is likely to result in access to modern technology or for other reasons to be recorded’),\textsuperscript{35} FM Radio and uplinking of news and current affairs TV channels (both with a sectoral cap of 49%),\textsuperscript{36} publishing of newspaper and periodicals dealing with news and current affairs or Indian editions of foreign magazines dealing with news and current affairs (both with a sectoral cap of 26%),\textsuperscript{37} all telecommunications services (‘beyond 49%’),\textsuperscript{38} and banking (in the private sector beyond 49% and up to the sectoral cap of 74%;\textsuperscript{39} in the public sector with a sectoral cap of 20%).\textsuperscript{40} UNCTAD counts 17 IIAs in force for India.\textsuperscript{41}

2.2 Growing Lists of Sensitive or Strategic Sectors

In recent years, particularly since the COVID-19 pandemic, several countries have created or expanded lists of sensitive or strategic sectors in which inbound investment screening is now required or enhanced. Many of these shifts, along with implementation of such laws in recent years, reflect increased concerns with outward Chinese investment and national security implications of technology and data.\textsuperscript{42} The expansion of covered sectors increases the potential for conflict with IIAs and thus ISDS claims concerning inbound investment screening.

For example, as of 18 January 2021,\textsuperscript{43} sectors that China subjects to foreign investment security review have been expanded to include investments in proximity to military facilities and military-industrial facilities (rather than only those in proximity to ‘key and/or sensitive’ military facilities), internet/
online products and services, important financial services, and ‘other important sectors/areas’.\textsuperscript{44} UNCTAD lists 128 IIAs in force for China.\textsuperscript{45}

In Canada, guidelines issued by the Minister of Innovation, Science and Industry on 24 March 2021 provide for ‘all foreign investments by state-owned investors, or private investors assessed as being closely tied to or subject to direction from foreign governments, to enhanced scrutiny ... regardless of the value of the investment’.\textsuperscript{46} Factors to be considered in the review process with respect to national security now include the ‘potential impact of the investment on critical minerals and critical mineral supply chains’\textsuperscript{47} and the ‘potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security’.\textsuperscript{48} A non-exhaustive list of sensitive technology areas has been created, including: advanced materials and manufacturing; aerospace; artificial intelligence; biotechnology; energy generation, storage and transmission; medical technology; next generation computing and digital infrastructure; and robotics and autonomous systems.\textsuperscript{49} According to UNCTAD, Canada has 55 IIAs in force.\textsuperscript{50}

Also in 2021, Germany reformed the Foreign Trade and Payments Ordinance, including to add 16 groups of activities not previously requiring investment screening. These include artificial intelligence technology, industrial robots, certain semi-conductors, IT products or components for cybersecurity, quantum technology, network technologies, critical raw materials, and food security.\textsuperscript{51} UNCTAD’s database shows Germany with 172 IIAs in force.\textsuperscript{52}

\begin{itemize}
\item[\textsuperscript{44}] Covington & Burling LLP, ‘China Issues Measures on National Security Review of Foreign Investment’ (Lexology, 22 December 2020) Appendix 2.
\item[\textsuperscript{46}] Minister of Innovation, Science and Industry (Canada), ‘Guidelines on the National Security Review of Investments’ (24 March 2021) 7.
\item[\textsuperscript{47}] ibid 8(v).
\item[\textsuperscript{48}] ibid 8(xii).
\item[\textsuperscript{49}] ibid 8(ii) Annex A.
\item[\textsuperscript{51}] Federal Ministry for Business and Energy (Germany), Seventeenth Ordinance to Change the Foreign Trade Regulation (27 April 2021) (in German) <www.bmwi.de/Redaktion/DE/Publikationen/Aussenwirtschaft/banz-at-2021-04-30-v1.pdf?__blob=publicationFile&v=4> accessed 26 April 2022; Hogan Lovells, ‘New Rules: German Government Passes Far-Reaching Expansion of Foreign Investment Control’ (Engage, 29 April 2021).
\end{itemize}
Similarly spurred by the new EU regime, on 14 January 2021 two decrees published in the Official Gazette in December 2020 entered into force in Italy.53 Decree No 179/2020 provided further clarity on assets of national interest in the sectors identified by the EU regulation, for example by defining ‘critical infrastructures’ as those ‘essential for the maintenance of the vital functions of society, health, security and the economic and social well-being of the population’.54 Decree No 180/2020 identified assets of strategic importance including ‘key properties related to the use of networks and strategic infrastructures’ in the energy sector and ‘national spaceports’ and ‘road and motorway networks of national interest’ in the transport sector.55 According to UNCTAD, Italy has 109 IIAs in force.56

Another recent change, outside the European Union, was the ‘[b]iggest shake-up of UK’s investment screening regime in 20 years’ with the enactment of the National Security and Investment Act 2021, which received royal assent on 29 April 202157 and entered into force on 4 January 2022.58 Regulations set out 17 areas in which acquisitions will be mandatorily notifiable in the case of a specified trigger event (e.g. an increase in shares to more than 25%),59 including advanced materials, advanced robotics, artificial intelligence, communications, computing hardware, critical suppliers to government, data infrastructure, energy, military and dual-use, and transport.60 These sectors were identified following earlier consultations.61 UNCTAD lists 96 IIAs in force for the UK.62

53 Decree of the President of the Council of Ministers No 179 (Italy) (18 December 2020) <www.gazzettaufficiale.it/eli/id/2020/12/30/20G00199/sg>; Decree of the President of the Council of Ministers No 180 (Italy) (23 December 2020) <www.gazzettaufficiale.it/eli/id/2020/12/30/20G00200/sg> both accessed 26 April 2022.
54 Allen & Overy LLP, ‘Golden Powers; Updates in Italy’ (18 January 2021).
55 ibid.
Similarly described as ‘the most significant reforms to the Foreign Acquisitions and Takeovers Act 1975 in nearly 50 years’, Australia introduced changes as of 1 January 2021 requiring foreign investors to ‘[s]eek approval for all investments in sensitive national security land or businesses … regardless of value’ (making permanent in part a temporary change introduced in 2020 under which all investments were subject to approval with a $0 threshold). Notice must be given to the Treasurer, for example, before starting or acquiring a direct interest in a national security business, which is defined in the regulations to include a business that: is an entity that is a direct interest holder in relation to a critical infrastructure asset within the meaning of the Security of Critical Infrastructure Act 2018 (Cth); is a carrier or nominated carriage service provider to which the Telecommunications Act 1997 (Cth) applies; develops, manufactures or supplies critical goods or critical technology for military or intelligence use; or stores or maintains personal information of defence and intelligence personnel that could, if accessed, compromise Australia’s national security. According to UNCTAD, Australia has 37 IIAs in force.

The United States has also expanded the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to cover certain non-controlling investments in US businesses involving critical technology, critical infrastructure, or sensitive personal data that may be exploited in a manner that threatens national security, through the Foreign Investment Risk Review Modernization Act 2018 (US) (FIRRMA). In 2020, the US Department of

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64 Treasurer of the Commonwealth of Australia Press Release, ‘Major Reforms to Australia’s Foreign Investment Framework Pass the Parliament’ (9 December 2020); FATA (n 63) ss 55B(1), 81(1).
66 See Foreign Acquisitions and Takeovers Regulation 2015 (Cth) s 16 (meaning of direct interest). These regulations were most recently amended with effect from 1 April 2022, following government evaluation of the foreign investment reforms. The amendments do not affect the analysis in this article.
67 These include a critical electricity asset, a critical port, a critical water asset, a critical gas asset: Security of Critical Infrastructure Act 2018 (Cth) s 9.
68 Foreign Acquisitions and Takeovers Regulation 2015 (Cth) s 8AA(2).
70 Foreign Investment Risk Review Modernization Act 2018 (US) s 1703 (Definitions), amending the Defense Production Act 1950 (US) s 721(a) (50 USC §4565(a)).
Treasury issued final rules to implement FIRRMA, under which covered investment critical infrastructure is defined to include, for example, any: telecommunications service or information service; facility that provides electric power generation, transmission, distribution or storage directly to or located on specified military installations; or rail line designated as part of the Department of Defense’s Strategic Rail Corridor Network.71 Sensitive personal data means identifiable data that is maintained or collected by US businesses in certain circumstances within specified categories including: ‘financial data that could be used to analyze or determine an individual’s financial distress or hardship;’ ‘[d]ata relating to the physical, mental, or psychological health condition of an individual’; ‘[n]on-public electronic communications’; and ‘[b]iometric enrolment data’.72 Certain exemptions apply for foreign investors from ‘excepted foreign states,’ currently limited to Australia, Canada, New Zealand and the UK,73 while additional scrutiny applies in the information and communications technology and services sector with respect to certain designated countries.74 UNCTAD counts 89 IIAs in force for the United States.75

2.3 Provision for Retrospective Screening

Several of the screening regimes described above provide for retrospective screening of investments that have already been established in the host State, even in the absence of a relevant new transaction. By retrospective screening, we mean screening of an investment that has already been lawfully established. Retrospective screening increases the potential for conflict with IIAs and thus ISDS claims because the scope of protection under IIAs is much greater for established investments. As discussed in Section 3, most IIAs do not cover the pre-establishment period and therefore do not protect a potential investment/

72 ibid 3132 (§800.241).
74 China, Hong Kong, Cuba, Iran, North Korea, Russia, and the Venezuelan President Nicolás Maduro: Department of the Treasury, ‘Securing the Information and Communications Technology and Services Supply Chain: 15 CFR Part 7’ (19 January 2021) 86(11) Federal Register 4909, 4925 (§7.4(a)).
The risks under IIAs may be even greater where the domestic measures for the screening of already established investments were not yet in force at the time of establishment.

Although the 2019 EU screening regulation does not provide for retrospective screening per se, it provides a mechanism whereby an EU Member State may provide comments or the Commission may issue an opinion up to 15 months after completion of an investment that has not undergone screening.\textsuperscript{77} The host Member State of that investment is to ‘give due consideration’ to such comments or opinion\textsuperscript{78} and could take subsequent measures, ‘including the necessary mitigating measures’.\textsuperscript{79}

The 2021 UK legislation provides a ‘call-in’ power to the Secretary of State with respect to actual or anticipated ‘trigger events’, where a person gains control of a qualifying entity (e.g. company or partnership) within the sectors set out in the regulations as explained above\textsuperscript{80} or a qualifying asset (e.g. land or intellectual property),\textsuperscript{81} and the event ‘may give rise to a risk to national security’.\textsuperscript{82} A call-in notice for an actual trigger event must be given within six months of the Secretary of State becoming aware of it, and within five years of its occurrence (subject to transitional arrangements relating to the commencement of the legislation).\textsuperscript{83} The five year limit does not apply to a notifiable acquisition (that is, where notification was mandatory) completed without approval of the Secretary of State.\textsuperscript{84} Where the Secretary of State is satisfied, on the balance of probabilities, that a trigger event has occurred giving rise to a risk to national security, and ‘reasonably considers’ that provisions ‘are necessary and proportionate for the purpose of preventing,remedying or mitigating the risk’, they may make a final order, which may include a requirement that a person do or not do particular things or the appointment of a

\textsuperscript{76} 193 of 2,574 IIAs mapped by UNCTAD cover both pre-establishment and post-establishment MFN; 168 of 2,574 IIAs cover both pre-establishment and post-establishment national treatment: UNCTAD International Investment Agreements Navigator, ‘Mapping of IIA Content’ <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 26 April 2022.

\textsuperscript{77} EU Regulation (n 14) art 7(8).
\textsuperscript{78} ibid art 7(7).
\textsuperscript{79} EU Guidance (n 19) annex, 2.
\textsuperscript{80} See supra n 60 and corresponding text.
\textsuperscript{81} UK Act (n 59) ss 5(1), 6–9.
\textsuperscript{82} ibid s 1(1)(a), (b).
\textsuperscript{83} ibid ss 2(2), (4).
\textsuperscript{84} ibid ss 2(3), 13(1).
person to conduct or supervise the conduct of activities on particular terms and with particular powers.85

The Australian amendments effective from 202186 also provide the Treasurer the power to ‘call-in’ certain investments with national security implications not already notified to it, up to 10 years after the investment is made.87 The Treasurer also now has ‘last resort powers’ to review previously considered investments88 where a national security risk arises, for example due to false or misleading information being given, a material change in organisational structure or activities, or a material change in the relevant circumstances or market.89 As a result of the exercise of these powers, the Treasurer may, inter alia, impose or vary conditions on the investment, prohibit the investment, or require its undoing (e.g. through disposal of assets).90

Under the US legislation (as amended by FIRRMA), the President or CFIUS may unilaterally initiate a review of a covered transaction provided that it has not previously been screened and the President has not previously announced a decision not to undertake such a review. Even previously screened transactions and those previously determined not to be subject to review may be later subject to unilateral review if a party to the transaction submitted false or misleading material information to CFIUS or omitted material information, or in the case of a material breach of a mitigation agreement or condition.91 Subject to certain requirements, ‘the President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States’.92 Such actions are not subject to judicial review93 although, as discussed in Section 4.4, the US District Court for the District of Columbia Court of Appeal has interpreted this legislation as indicating that there is no clear and convincing bar to judicial review in the form of constitutional challenges to any such actions.94

85 ibid ss 26(3), 26(5)(a), (b).
86 See supra n 63. On the call-in and last resort powers discussed in this paragraph, see Foreign Investment Review Board, ‘National Security’ (12 April 2022) Guidance 8.
87 FATA (n 63) ss 66A (1), (2), (5); Foreign Acquisitions and Takeovers Regulation 2015 (Cth) s 60A.
88 For example, where the investment was allowed following screening, with or without conditions: FATA (n 63) s 79A(1)(a)(i), (vi).
89 ibid ss 79A(1), (2).
90 ibid ss 67, 69, 79D, 79E.
91 Defense Production Act 1950 (US) s 721(b)(1) (50 USC §4565(b)(1)(D), (E)).
92 ibid s 721(d)(1) (50 USC §4565(d)(1)).
93 ibid s 721(e)(1) (50 USC §4565(e)(1)).
94 Ralls Corporation v the Committee on Foreign Investment in the United States, 411 US App DC 105, 120.
Coverage of Foreign Investment Screening in International Investment Agreements

In this Section, we explain how the screening of a proposed inbound investment transaction could fall within the scope of some IIAs (subject to protections discussed in Section 5 below), even though the investment may not yet be established in the host State at the time of the screening. Whether a particular obligation covers pre-establishment investment screening depends on not only the definition of investor or investment but also the terms of the obligation in question. We first identify how the definition of investor (but not investment) may cover investments that have not yet been made, before showing how some obligations in IIAs (particularly non-discrimination obligations) may be designed to cover the pre-establishment phase of an investment. To the extent that a host State provides for retrospective screening of already established investments, such screening is more likely to be caught by investment obligations, again subject to any relevant exceptions for screening within the IIA. Similarly, where a host State reviews a new transaction involving an already established investment, such review is more likely to be subject to the substantive obligations in an IIA.

3.1 Definition of Investor: Sometimes Including Potential Investors
The United States has tended to prefer a broad definition of investor, now followed by several other States.95 For example, the 2012 US Model BIT defines an investor of a party as ‘a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party’ (subject to a qualification for dual nationals).96 This kind of broad language provides scope for screening of an investment that has not yet been established in a host State to be caught by an IIA (with respect to an obligation applicable to investors), depending on the definition of investment (since the prospective investor must be attempting to make an investment) and the language used in substantive obligations.


96 2012 US Model BIT art 1. See similarly supra n 95.
In contrast, some other IIAs limit the definition of investor to one that has made an investment. For example, under the 2015 India Model BIT, an investor is defined as ‘a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party’.97 In IIAs that follow this approach,98 a substantive obligation applicable to investors would not apply to would-be or future investors who have not yet made an investment. The next question would be whether in this context a substantive obligation with respect to investments might still cover an investment that has not yet been made.

3.2 **Definition of Investment: Existing Investments Only**

Definitions of investment in IIAs vary and each one must be closely consulted. However, a few general observations may be made. As noted by the OECD in 2008,99 an investment is typically defined to include ‘every kind of asset’ that an investor owns or controls, directly or indirectly.100 IIAs often also include the requirement that an investment have ‘the characteristics of an investment’.101 An illustrative list of investments is generally articulated and may include, for example, property, interests in companies, claims to money, intellectual property rights, and business concessions under public law.102 Thus, the definition of investment is not generally restricted to FDI or permanent forms of commercial presence.

The term investment under Article 25(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (‘ICSID Convention’)103 is not defined but has been interpreted by the Tribunal in *Salini v Morocco* to require ‘contributions, a certain duration of performance

97 2015 India Model BIT art 1.5.
98 See eg 2015 Brazil Model BIT art 3(1.4); Colombia–United Arab Emirates Bilateral Agreement for the Promotion and Protection of Investment (signed 12 November 2017, not in force) art 2.1; Agreement Between Hong Kong and Mexico for the Promotion and Reciprocal Protection of Investments (signed 23 January 2020, entered into force 16 June 2021) art 1.
100 See eg Agreement Between Canada and Egypt for the Promotion and Protection of Investments (signed 13 November 1996, entered into force 3 November 1997) art 1; 2012 US Model BIT art 1; CETA (n 95) art 8.1; 2018 Belgium–Luxembourg Economic Union Model BIT art 2; 2020 Italy Model BIT art 1.
101 See eg 2012 US Model BIT art 1; CETA (n 95) art 8.1.
102 OECD (n 99) 50.
of the contract and a participation in the risks of the transaction, as well as ‘the contribution to the economic development of the host State’. These criteria have been reiterated by several subsequent ICSID tribunals, as well as some non-ICSID tribunals. At least within the ICSID context, it is often said that a ‘double keyhole’ or ‘double-barrelled’ test applies: the investment must satisfy the definition in the relevant IIA as well as the ICSID meaning.

Many IIAs include a requirement in the definition of investment that it be made ‘in accordance with the laws or regulations of’ the host State. An IIA that includes such a requirement is generally understood as excluding from its scope an investment that is illegal in the territory of the host State at the time of investment. Therefore, a transaction subject to inbound investment screening in the host State would need to be permitted through that screening process in order to fall within the definition of an investment made in accordance with the State’s laws and regulations. Before it has gone through a mandatory screening process, the transaction would not be an investment within the meaning of such an IIA.

These definitional aspects do not generally suggest that ‘investment’ extends to an investment that has not yet been made. Moreover, many IIAs provide protections only to ‘covered investments’, defined to exclude investments that have not yet been lawfully made in the territory of the host State. However, some IIAs nevertheless show their application to the pre-establishment phase of an investment in the wording of particular substantive obligations, as discussed in the next Section.

3.3 Coverage of the Pre-Establishment Phase in Non-Discrimination Obligations

In some IIAs, investment obligations (discussed further in Section 4.1. below) implicitly or explicitly extend to the pre-establishment phase of an investment. This kind of coverage means that foreign investment screening could potentially be implicated even where it relates to an investment that has not yet...

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104 Salini Construttori SpA v Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) 52.
107 McLachlan, Shore and Weiniger (n 105) 242.
108 See eg infra nn 126, 148 and corresponding text.
been made. The national treatment obligation in many modern IIAs, including of the United States, Australia, Canada, the European Union and Japan, as well as developing countries, extends to ‘establishment’ and ‘acquisition’ of an investment, reflecting outward rather than inward investment interests. Similar wording often applies to the other non-discrimination obligation: MFN treatment. The conclusion that such non-discrimination obligations extend to the pre-establishment stage is enhanced where they protect ‘investors’ where that term is defined to include those seeking or attempting to make an investment, as discussed above in Section 3.1. Most IIAs do preclude the pre-establishment phase with respect to national treatment and MFN treatment, for example covering only investments ‘once established’.

Prohibitions on expropriation and requirements to accord FET in IIAs usually apply with respect to an ‘investment’ or ‘covered investment’ rather than ‘investor’, and without reference to acquisition or establishment of investments, meaning that they would not apply to an investment that has not yet been established. Therefore, protection from expropriation and the FET obligation would not normally apply to inward investment screening other than

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111 See eg 2012 US Model BIT art 3; Agreement Between Japan and Malaysia for an Economic Partnership (signed 13 December 2005, entered into force 13 July 2006) art 75; ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012) art 5 (ASEAN CIA); Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and India (signed 12 November 2014, not in force) art 3; Free Trade Agreement Between Australia and China (signed 17 June 2015, entered into force 20 December 2015) arts 9.4.1, 9.3.1, 9.3.3 (cf arts 9.3.2, 9.3.4, n 1) (ChAFTA); CETA (n 95) art 8.6; Agreement Between the European Union and Japan for an Economic Partnership (signed 17 July 2018, entered into force 1 February 2019) art 8.8.


113 Agreement Between Turkey and South Africa Concerning the Reciprocal Promotion and Protection of Investments (signed 23 June 2000, not in force) art II(3); Agreement Between Turkey and Indonesia Concerning the Promotion and Protection of Investments (signed 25 February 1997, entered into force 28 September 1998, terminated 7 January 2016) art II(2).

retrospective screening for an established investment (in jurisdictions such as those discussed in Section 2.3. above) or subsequent reviews triggered by a new relevant transaction.

Similarly, although some IIAs contain an obligation to admit investments, this obligation is typically subject to a requirement that the admission take place in accordance with the host State’s relevant laws and policies. Such an obligation therefore does not impose constraints on the host State’s screening mechanisms with respect to the pre-establishment phase of an investment, as long as these mechanisms are consistent with its laws and policies.

4 Key International Investment Obligations Affecting Foreign Investment Screening

To the extent that an investment screening process or decision is subject to an IIA (e.g. because it relates to an established investment or because the IIA covers pre-establishment, as discussed in Section 3) and not protected by a specific carve-out or broader clause or exception as discussed in Section 5, potential arises for conflict with a range of investment obligations. In this Section we consider the main obligations that may be relevant in assessing investment screening: non-discrimination (national treatment and MFN treatment), performance requirements and senior management conditions, protection against expropriation, FET, and stabilisation clauses and umbrella clauses. These various obligations show potential for treaty breaches of which host States should be aware in formulating and conducting investment screening.

4.1 Non-Discrimination

IIAs typically protect against discrimination by a host State through the national treatment and MFN treatment obligations. Under the 2012 US Model BIT, for example, these obligations apply to both investments and investors (bringing in the broader definition of a person attempting to make an investment, as discussed in Section 3.1.). The national treatment obligation with respect to investors reads: ‘Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion,
management, conduct, operation, and sale or other disposition of investments in its territory.116

As inward investment screening by definition applies to foreign and not domestic investors, a breach of the national treatment provision could arise through the imposition of investment screening in the absence of a relevant exclusion or exception, at least for an IIA that extends to pre-establishment or where the screening is of an established investment (because of a new trigger event and/or a retrospective screening mechanism). Differential treatment of foreign investors or investments is not per se discriminatory.117 A host State could argue that the differential treatment arises from a legitimate policy rationale118 such as national security (even in the absence of a security exception)119 or public welfare (even in the absence of a footnote to this effect in the treaty itself).120 The reference to ‘in like circumstances’ in some IIAs (as shown in the example above, and also below with respect to MFN) might be used to support such a distinction,121 and that qualification may be applied by tribunals even in the absence of explicit treaty text.122 However, in our view a plausible argument arises that subjecting all foreign investments (or prospective foreign investors, where national treatment extends to the pre-establishment stage) to additional approval processes that do not apply to domestic investments and investors is inherently ‘nationality-based’123 (or ‘origin-specific’)124 discrimination contrary to the national treatment obligation.125

118 See eg GAMI Investments Inc v Mexico, NAFTA ch 11 Arbitral Tribunal, Final Award (15 November 2004) 114; Bilcon v Canada, PCA Case No 2009–04, Award on Jurisdiction and Liability (17 March 2015) 723.
119 See infra Section 5.4.
120 See eg CPTPP (n 95) art 1.1, incorporating TPP (n 95) art 9.4, n 7.
121 See eg Apotex Holdings Inc and Apotex Inc v US, ICSID Case No ARB(AF)/12/1, Award (25 August 2014) 8.57.
122 See eg McLachlan, Shore and Weiniger (n 105) 7.271.
123 See eg Total SA v Argentina, ICSID Case No ARB/04/1, Decision on Liability (21 December 2010) 213; Merrill & Ring Forestry LP v Canada, ad hoc UNCITRAL, Award (31 March 2010) 94. See also Cargill Inc v Mexico, ICSID Case No ARB(AF)/05/2, Award (13 August 2009) 220.
125 On the potential for a national treatment violation even in the absence of nationality-based discrimination, and the need for a government policy justifying differential treatment not to distinguish de jure or de facto between foreign and domestic investors, see Feldman Karpa v Mexico, ICSID Case No ARB(AF)/99/1, Award (16 December 2002)
The MFN obligation in the 2012 US Model BIT with respect to investments reads: ‘Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.’\(^{126}\)

Potential exists for an investor to use the MFN obligation in one IIA to invoke a more favourable substantive provision in another IIA (e.g. containing a stabilisation clause or a broader FET or expropriation provision; or with a higher threshold at which screening applies), subject to tribunals’ interpretation of the scope of the MFN rule in the primary IIA.\(^{127}\) However, debate exists over such an approach today,\(^{128}\) despite it being traditionally accepted,\(^{129}\) and some IIAs explicitly preclude the use of non-discrimination obligations to invoke standards of treatment contained in other IIAs.\(^{130}\) Other modern IIAs, such as the Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA), state that substantive obligations in other treaties ‘do not in themselves constitute “treatment”, ... absent measures adopted ... pursuant to those obligations’.\(^{131}\) A breach of MFN might also be claimed on the basis of a screening law that itself provides higher or lower thresholds for particular countries, for example as noted above with respect to the US

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\(^{126}\) 2012 US Model BIT art 4.2.

\(^{127}\) See eg EDF International SA v Argentina, ICSID Case No ARB/03/23, Annulment Proceeding, Decision (15 January 2016) 237.


\(^{129}\) See eg MTD Equity Sdn Bhd v Chile, ICSID Case No ARB/01/7, Award (21 May 2004) 104. See also Stephan W Schill, ‘MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J Benton Heath’ (2017) 111 AJIL 914. A more controversial question historically has been whether the MFN obligation can be used to invoke more favourable procedural treatment, such as dispute settlement provisions: EDF v Argentina (n 127) 238; see also, eg, Maffezini v Spain, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000) 39, 40, 45; Chin Leng Lim, Jean Ho and Martins Paparinskis, International Investment Law and Arbitration (2nd edn, CUP 2021) 388–97.

\(^{130}\) See eg Agreement for Cooperation and Facilitation of Investment Between Brazil and Colombia (signed 9 October 2015, not in force) art 5(3)(b).

\(^{131}\) CETA (n 95) art 8.7.4.
regime, unless the host State can demonstrate that such differential treatment is justified by non-discriminatory policy considerations.

4.2 Performance Requirements and Senior Management Conditions

Bonnitcha notes that conditions imposed following investment screening such as ‘requirements relating to the management structure, employment, and sourcing practices of the investment’ may be inconsistent with prohibitions on performance requirements in some IIAs. For example, in 2015, Australia’s Foreign Investment Review Board (FIRB) approved – subject to extensive conditions – a bid by NSW Electricity Networks (a consortium including a subsidiary of the Abu Dhabi Investment Authority, the Québec Deposit and Investment Fund (CDPQ), and a subsidiary of the Kuwait Investment Authority) for the 99-year lease of TransGrid, the New South Wales electricity transmission network. The conditions included that: the operation and control of the transmission system and telecommunications business be undertaken solely from within Australia; electricity supply data and personal information be accessible and held solely within Australia; the interest of the foreign consortium in TransGrid members be maintained at a maximum of 50%; TransGrid’s boards comprise at least 50% Australian citizens and residents; and TransGrid have an independent chairperson and independent director, both of whom are Australian citizens and residents.

In a separate 2019 decision in Australia, conditional approval was granted to China Mengniu Dairy Company Limited to acquire the child and infant formula company Bellamy’s Australia Ltd. The conditions attached to that transaction were that: a majority of the Bellamy’s Board of Directors be Australian resident citizens; Bellamy’s headquarters remain headquartered in Australia for at least ten years; and an investment of at least AUD 12 million be made to establish or improve infant milk formula processing facilities in the Australian state

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132 See supra nn 73–74 and corresponding text.
133 See eg Parkerings-Compagniet AS v Lithuania, ICSID Case No ARB/05/8, Award on Jurisdiction and Merits (14 August 2007) 371(iii).
of Victoria. According to the Australian Treasurer, the imposition of such conditions was designed to ‘ensure that Bellamy’s maintains its presence in Australia, and that Bellamy’s proceeds with previously announced investment in infant milk formula processing facilities’.

Former Australian Treasurer Peter Costello has also explained a key reason for imposing conditions such as local headquarters or resident executives, which he did with respect to BHP Billiton in June 2001: ‘Otherwise BHP would have made the fatal error that was made by Rio Tinto when its headquarters was divorced from the country where it derived its revenue, and where it lost touch with the important issues in the country, which were important to its future, such as [the destruction of Indigenous heritage by Rio Tinto at] Juukan Gorge [in May 2020].’

The need to maintain domestic capabilities may also increasingly factor into investment screening decisions and conditions, given the potential for vulnerable supply chains arising particularly from the COVID-19 pandemic.

Nevertheless, these kinds of conditions could potentially fall afoul of IIA prohibitions on performance requirements such as requiring, in connection with establishment of an investment, that an enterprise ‘supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market’. Sometimes exceptions apply to such prohibitions, for example for government procurement, ‘measures to protect legitimate public welfare objectives’, or requirements to locate production or construct or expand facilities in a party’s territory. Some IIAs also prohibit requirements to appoint an individual of any particular nationality to a senior management position, or allow

138 ibid.
141 CPTPP (n 95) art 1.1, incorporating TPP (n 95) art 9.10.1(g).
142 CPTPP (n 95) art 1.1, incorporating TPP (n 95) art 9.10.3(f).
143 CPTPP (n 95) art 1.1, incorporating TPP (n 95) art 9.10.3(h).
144 See eg Regional Comprehensive Economic Partnership (signed 15 November 2020, in force for 12 countries as of 26 May 2022) (RCEP) art 10.6.3.
145 See eg 2012 Canada Model Foreign Investment Promotion and Protection Agreement, art 13.1.
requirements that a majority of the board be of a particular nationality or residency, ‘provided that the requirement does not materially impair the ability of the investor to exercise control over its investment’.146

4.3 Protection Against Expropriation

Where a host State allows for retrospective screening of an established investment as explained in Section 2.3, or where screening of a new transaction occurs with respect to such an investment, potential for a claim of expropriation arises. For example, the 2018 United States–Canada–Mexico Agreement (USMCA) (which allows for limited ISDS as between Mexico and the United States only)147 provides:

No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

a. for a public purpose;
   b. in a non-discriminatory manner;
   c. on payment of prompt, adequate, and effective compensation...; and
   d. in accordance with due process of law.148

Indirect expropriation has been understood as involving measures equivalent to expropriation (despite a variation in the language of treaty provisions).149 On one modern view, what is required is the removal of ‘at least one of the essential components of the property rights’;150 a ‘substantial deprivation’ such that the property has been ‘taken’.151 This approach contrasts with earlier suggestions that indirect expropriation could arise through a significant deprivation ‘of the use or reasonably-to-be-expected economic benefit of property’,152 without interference with property rights. However, tribunals

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146 ibid art 13.2.
147 USMCA (n 114) annex 14-D.
148 ibid art 14.8.1.
150 See eg El Paso Energy International Company v Argentina, ICSID Case No ARB/03/15, Award (27 October 2011) 245.
151 See eg Pope & Talbot Inc v Canada, ad hoc UNCITRAL, Interim Award (26 June 2000) 102.
152 Metalclad Corp v Mexico, ICSID Additional Facility Arbitral Tribunal, Case No ARB(AF)/97/1, Award (25 August 2000) 103.
remain divided on these and other approaches, and on whether the ‘object of deprivation’ is ‘property interest, control or value’.

An investor might claim to have had its investment expropriated by a host State’s subsequent requirement of divestment of or imposition of conditions on an existing investment or the refusal to allow a new transaction (central to the future of its existing investment) following a screening process. Some IIAs specify the kinds of factors to be considered in assessing such a claim, including the economic impact of the government action and the extent to which it interferes with distinct, reasonable investment-backed expectations.

Sometimes expropriation is specified not to encompass non-discriminatory regulatory actions taken for legitimate regulatory objectives (often with the qualification ‘except in rare circumstances’). This kind of qualification may raise questions such as whether the investment screening process is discriminatory in a national treatment or MFN treatment sense, whether the circumstances are ‘rare’, and whether the regulatory objective is legitimate, similar to uncertainties arising in the context of broader security and general exceptions discussed in Section 5 below. In the absence of such a qualification, the police powers doctrine may similarly enable justification of legitimate regulatory measures.

4.4 Fair and Equitable Treatment

In *Global Telecom v Canada*, Global Telecom Holding SAE (GTH) made an unsuccessful FET claim under Article II(2) of the Canada–Egypt BIT, which reads: ‘Each Contracting Party shall accord investments or returns of investors of the other Contracting Party (a) fair and equitable treatment in accordance with principles of international law’ (thus linked to the minimum standard of treatment in customary international law, as discussed further below in this section). GTH seems to have argued a breach of FET in relation to the fact of being subject to a national security review, the process of that review, and the outcome of the review. The Award on this point has been redacted, so for example it is not possible to determine the basis on which GTH argued that

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153 Bonnitcha (n 134) 247–71.
155 Bonnitcha (n 134) 10 (referring to the UK call-in power discussed in Section 2.3).
157 See eg Mitchell, Sheargold and Voon (n 110) 142.
159 Canada–Egypt BIT (n 159) art II(2)(a).
it was denied due process in the national security review. However, the case provides an example of how FET may be allegedly breached by FDI-related screening of an established investment.

One aspect of GTH’s FET claim was that it relied on Canada’s representation that its ownership and control rules could be relaxed in future, and that Canada did not object in its reviews to the structuring of the investment to allow acquisition of voting control in the event of such relaxation.\textsuperscript{160} FET is often regarded as including consideration of investors’ legitimate expectations, even in the absence of specific treaty language.\textsuperscript{161} However, the tribunal in this dispute highlighted the transparency of the rules surrounding foreign investment restrictions in Canada, noting that ‘at the time of making its investment ... the ownership of a Canadian wireless business was subject to foreign investment restrictions’.\textsuperscript{162} Neither the relaxation of the rules nor the structure of the investment guaranteed that GTH would be permitted to take control of Wind Mobile or that it would be exempt from further review.\textsuperscript{163} A more specific representation with respect to future laws or investment screening might be harder to defend.

In relation to the conduct of the review, the tribunal found that Canada provided GTH with an adequate opportunity to make its case in relation to the regulatory and national security reviews, and that GTH engaged fully in that exchange.\textsuperscript{164} The tribunal found that the evidence demonstrated genuine national security concerns, as assessed by the competent authorities, therefore dismissing GTH’s claims that ‘Canada’s actions were unreasonable and arbitrary’.\textsuperscript{165} Canada’s national security concerns reportedly related to the use of Huawei equipment and Russian ownership of VimpelCom\textsuperscript{166} (the largest shareholder in GTH after a change of ownership in April 2011).\textsuperscript{167} The case shows the importance of transparency, due process and evidence in investment

\begin{thebibliography}{99}
\bibitem{160} Global Telecom v Canada (n 7) 573–78.
\bibitem{162} Global Telecom v Canada (n 7) 603.
\bibitem{163} ibid 605–06.
\bibitem{164} ibid 612.
\bibitem{165} ibid 616.
\bibitem{167} Global Telecom v Canada (n 7) 40.
\end{thebibliography}
screening to ensure compliance with the FET obligation. However, investment treaty tribunals have generally found that due process requirements are lower in administrative than judicial proceedings, and they have emphasised that not every procedural error will violate the FET standard.  

Screening processes may raise due process difficulties, as indicated in the reasoning of the United States District Court for the District of Columbia Court of Appeal in *Ralls Corporation v the Committee on Foreign Investment in the United States*.  

Although not an award issued pursuant to an IIA, the factual matrix and the Court of Appeal’s observations in this case provide a useful way of understanding the circumstances in which due process issues may arise in relation to investment screening. Ralls, though an American corporation, was owned by Chinese nationals. As a result, its purchase of certain limited liability companies that were formed to develop windfarms in, near or around restricted airspace and bombing zones maintained by the United States Navy was within the scope of CFIUS review. CFIUS reviewed the transactions and issued an order that put in place certain interim mitigation measures, which did not disclose the nature of the national security threat the transaction posed or the evidence upon which CFIUS relied in issuing the orders.  

Ralls challenged the decision under the due process requirement in the Fifth Amendment to the US Constitution. The Court noted that this Amendment requires, at least, that an affected party: be informed of the official action to be taken against it; be given access to the (unclassified) evidence on which CFIUS relied; and be afforded an opportunity to rebut that evidence.  

Investments giving rise to matters of national security may entitle the withholding of classified information only, and an investor must have an opportunity to tailor its submissions to CFIUS to rebut factual premises underlying the action and to address the national security concerns at issue (an opportunity Ralls did not have in this case).  

Viewed in the light of the *Global Telecom Holdings* tribunal’s observations regarding the content of due process under the FET obligation (as well as similar views expressed by other tribunals), this factual matrix might fail to meet the FET standard of treatment under an IIA for reasons of due process. FET might require, for example, not only transparency of the underlying laws, regulations and rules, but also transparency in the decision-making process.

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168 Paine (n 149) 20–21.
169 *Ralls Corporation v the Committee on Foreign Investment* (n 94).
170 ibid 128.
171 ibid 129.
172 See eg *Waste Management Inc v Mexico (No 2)*, ICSID Case No ARB(AF)/03/3, Award (30 April 2004) 98.
itself. Such transparency might often be lacking in investment screening processes where the decisionmaker is unwilling to disclose the nature or details of the national security concerns precisely because they are (by definition) confidential or classified. Many arbitral tribunals have identified transparency as a component of FET\(^\text{173}\) for example, suggesting that the host State should act ‘totally transparently in its relations with the foreign investor’:\(^\text{174}\) ‘Transparency means that the legal framework for the investor’s operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework’.\(^\text{175}\) However, calls for total transparency have been subject to criticism,\(^\text{176}\) and the tribunal in *Global Telecom v Canada* emphasised:

> Assessing the proper standard of transparency in relation to acts of government requires taking into account the sensitivity of the information at issue. In a national security review, it is understandable that intelligence agencies might conduct investigations before informing the targeted persons, or that information requests might not state the reasons therefor in full detail.\(^\text{177}\)

The FET obligation is often combined with or subsumed by the ‘minimum standard of treatment’ under customary international law. The customary standard is exemplified by the *Neer* decision, which asks whether the treatment of an alien amounts to ‘an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency’.\(^\text{178}\) Some IIAs specify that the FET standard to be applied is that


\(^{174}\) *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB(AF)/02/2, Award (29 May 2003) 154.

\(^{175}\) *Frontier Petroleum Services Ltd v Czech Republic*, PCA Case No 2008–09, Final Award (12 November 2010) 285.

\(^{176}\) See cases and commentary in Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2020) 30, 34, 36. See also eg *Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50, Award (4 September 2020) 416; *RWE Innogy GmbH and RWE Innogy Aersa SAU v Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) 663.

\(^{177}\) *Global Telecom v Canada* (n 7) 608.

\(^{178}\) *Neer and Neer (US) v Mexico*, Mexico–United States Claims Commission (7 October 1926) 4.
in accordance with or limited to the customary international law standard.\textsuperscript{179} Others allow for the possibility that the FET standard affords substantive protection beyond that guaranteed by custom.\textsuperscript{180} Debate exists as to whether the customary minimum standard has evolved,\textsuperscript{181} such that it may be immaterial whether the FET standard is autonomous. An autonomous FET standard, or an evolutionary customary standard, would provide greater scope for a successful FET claim with respect to FDI screening.

Some more modern IIAs specify the kinds of conduct that may breach the FET obligation, such as denying justice in legal or administrative proceedings,\textsuperscript{182} a ‘fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings’, ‘manifest arbitrariness’, or ‘targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief’.\textsuperscript{183} These kinds of specifications (particularly where they are exhaustive, as in CETA)\textsuperscript{184} may increase certainty as to the conduct that may risk violating the FET obligation, which is otherwise notoriously vague and amorphous.\textsuperscript{185} They nevertheless show the potential for the conduct of an investment screening process to violate this obligation, particularly in the context of national security concerns.

\textbf{4.5 Stabilisation Clauses and Umbrella Clauses}

A few IIAs include a stabilisation or freezing clause, containing a commitment to regulatory stability for new investments.\textsuperscript{186} For instance, Ortino refers to the terminated BIT between Italy and Jordan as an example of a broad stabilisation clause:

\begin{itemize}
\item \textsuperscript{179} See eg 2012 US Model BIT art 5(i); RCEP (n 144) art 10.5.2(c); ASEAN–HKIA (n 106) art 5.2(c). See also NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’ (31 July 2001) 2.
\item \textsuperscript{181} See eg \textit{Pope & Talbot Inv v Canada}, NAFTA ch 11 Arbitral Tribunal, Damages Award (31 May 2002) 47, 51, 58–65; \textit{Mondev v United States}, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) 115–16, 123–25.
\item \textsuperscript{182} RCEP (n 144) art 10.5.2(a).
\item \textsuperscript{183} CETA (n 95) art 8.10.2.
\item \textsuperscript{184} CETA (n 95).
\item \textsuperscript{185} See eg Martins Paparinskis, \textit{The International Minimum Standard and Fair and Equitable Treatment} (OUP 2013) 2; Jonathan Bonnitcha (n 134) 144–45.
\item \textsuperscript{186} Ortino (n 154) 14, referring to Tarcisio Gazzini, ‘Beware of Freezing Clauses in International Investment Clauses’ (2017) 191 Columbia FDI Perspectives.
\end{itemize}
Whenever, after the date when the investment has been made, a modification should take place in laws, regulations, acts or measures of economic policies governing directly or indirectly the investment, the same treatment will apply upon request of the investor that was applicable to it at the moment when the investment had been carried out.187

Italy’s Model BIT also contains broad stabilisation clause, although it refers to ‘substantial modification’ of legislation.188 Other stabilisation clauses are limited to particular areas (eg transfer of capital) or to the laws of one State party only.189

Where a stabilisation clause covers the relevant host State and the relevant sector, it could preclude the enhancement of investment screening measures that did not apply at the time of the original investment, such as the introduction of retrospective screening as discussed in Section 2.3 or of screening additional transactions in particular sectors as discussed in Section 2.2.

Outside IIAs, stabilisation clauses may be found more commonly in investment contracts or even some domestic foreign investment laws.190 Some stabilisation clauses are time-limited,191 but some may extend beyond the expiry of the contract or law.192

China’s foreign investment law provides, for example:

The various levels of local people's governments and their relevant department shall fulfill the policy commitments made to foreign investors or foreign invested enterprises and the various types of contracts concluded in accordance with law. Where it is necessary that they change policy commitments or contractual agreements for the national or public interest, they shall proceed in accordance with legally prescribed authorities and procedures and compensate the foreign investors or foreign-invested enterprises for any loss sustained as a result in accordance with law.193

188 2003 Italy Model BIT art XII(3).
189 See Ortino (n 154) 16–17.
190 UNCTAD Investment Policy Monitor, ‘Investment Laws’ (Special Issue, November 2016) 5.
191 See eg Law No 04/L-220 on Foreign Investment 2014 (Kosovo) art 6.2 (via UNCTAD).
Clauses like this may raise questions, such as whether ‘policy commitments’ include domestic legal regimes such as foreign investment screening. They may also be of limited assistance, for example where ‘in accordance with law’ requires little or no compensation. Stabilisation clauses in investment contracts or foreign investment laws are potentially enforceable through the umbrella clause of an IIA. Umbrella clauses are widespread in IIAs, although they may be increasingly omitted from modern reform-oriented IIAs. An example of an umbrella clause is found in the BIT between Switzerland and the Philippines, which provides that ‘Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party’. The Tribunal in SGS v Philippines found that this provision ‘makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments’. Some tribunals have taken different approaches, and the extent to which umbrella clauses incorporate breaches of domestic laws remains contested. Nevertheless, a clear argument exists for investors to bring a claim of breach of a stabilisation clause under contract or domestic law pursuant to an umbrella clause in an IIA in connection with screening of an established investment, where the screening arises from a change in law or policy of the kind discussed in Section 2.

5 Protection of Foreign Investment Screening from International Investment Agreements

An IIA that appears to cover screening with respect to a potential investment by virtue of a broad definition of investor and/or reference to establishment or acquisition in non-discrimination obligations may still exclude or otherwise protect investment screening through various mechanisms. Such mechanisms may also prevent violation of IIAs via screening of established investments.

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194 ibid 671, 694.
195 UNCTAD, ‘Recent Developments in the IIA Regime: Accelerating IIA Reform’ (August 2021) IIA Issues Note 3, 8.
196 Agreement Between the Philippines and Switzerland on the Promotion and Reciprocal Protection of Investments (signed 31 March 1997, entered into force 23 April 1999) art X:2.
197 SGS Société Générale de Surveillance SA v Philippines, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004) 128.
We consider in turn the different ways in which investment screening may be protected, from the specific to the general: explicit exclusion of screening from ISDS; lists of non-conforming measures (NCMs) including foreign investment screening/policy; exclusion of particular sectors that may be subject to screening; security exceptions; and general exceptions. These techniques are likely to become increasingly important as the use of investment screening regimes expands, if host States wish to prevent successful ISDS claims against their screening decisions and processes.

5.1 Exclusion of Foreign Investment Screening from ISDS

As noted in Section 4.4, the ICSID dispute Global Telecom v Canada derived from the Canada–Egypt BIT,199 which provides in Article II(4)(b) that ‘[d]ecisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to’ ISDS under Article XIII of that BIT.200

As noted above, the majority of the Tribunal found that this apparently straightforward exclusion of investment screening from ISDS was inapplicable to the circumstances of the case. The claimant, GTH, is a joint stock company, incorporated in Egypt and listed on the Egyptian Stock Exchange, that operates mobile networks. In 2008, Wind Mobile, a joint venture between GTH and two Canadian operators, won 30 advanced wireless services (AWS) spectrum licences in an auction held by Canada, at a price of CAD 442.1 million.201 The auction was governed by Canada’s ‘Ownership & Control’ (O&C) rules, which provided that GTH could not hold more than 20% of Wind Mobile’s voting shares. These rules were relaxed in 2012, leading GTH to expect that it would be able to obtain voting control over Wind Mobile.202 A wholly owned GTH subsidiary submitted an application seeking approval of its plans to acquire voting control of Wind Mobile, subject to review and approval under the Investment Canada Act, including as to whether the move could be ‘injurious to national security’.203 Despite heavy redactions of the award, it is possible to infer from Canada's jurisdictional arguments that the application was unsuccessful.

The Tribunal majority noted that Canada failed to refer to the pre-existing O&C rules in the BIT, indicating that those rules were not captured by the BIT.
exclusion.\textsuperscript{204} The majority also found that the acquisition of voting control was not an ‘acquisition’ within the meaning of BIT Article II(4)(b), instead merely ‘enhanc[ing]’ shareholders’ rights.\textsuperscript{205} In contrast, the minority arbitrator found the acquisition of voting control did constitute an acquisition of an existing business enterprise under Article II(4)(b): ‘the acquisition of control is at least as significant in the context of the control of foreign investment (with which the BIT is by its nature essentially concerned) as is the acquisition of rights of financial participation in a business without any correlative rights to control that business’.\textsuperscript{206} This disagreement shows how even an apparently clear exclusion of investment screening from ISDS may give rise to uncertainties in application to given circumstances.

Similar exclusions appear in some of Canada’s other IIAs. For example, Canada’s 2012 BIT with China excludes from both ISDS and State–State dispute settlement a decision by Canada following a review under the Investment Canada Act concerning whether to approve an investment subject to review or permit an investment subject to national security review.\textsuperscript{207} A corresponding exclusion applies to China’s foreign investment reviews.\textsuperscript{208} This kind of exclusion, as well as the NCMs discussed below with respect to Australia’s PTA with China, may become significant in the face of ISDS claims (and threats thereof) by Huawei in connection with 5G network security.\textsuperscript{209} Under CETA, Canada excludes from ISDS and State–State dispute settlement a decision by Canada following a review under the Investment Canada Act regarding whether to permit an investment that is subject to review.\textsuperscript{210}

Some of Australia’s other recent IIAs also show examples of ISDS exclusions. Australia’s 2014 PTA with Korea (KAFTA) excludes from the scope of ISDS any decisions made by Australia under its foreign investment policy to

\textsuperscript{204} ibid 326.  
\textsuperscript{205} ibid 329.  
\textsuperscript{206} ibid 336.  
\textsuperscript{207} Agreement Between Canada and China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014) annex D.34(1).  
\textsuperscript{208} ibid annex D.34(2).  
\textsuperscript{210} CETA (n 95) annex 8-C.
refuse or impose orders or conditions on an investment.211 Australia’s 2019 investment agreement with Hong Kong excludes decisions on whether to approve a foreign investment proposal from both ISDS and State–State dispute settlement.212 Similar exclusions apply under Australia’s PTAs with Peru and Singapore.213 Australia’s 2019 IIA with Indonesia excludes from ISDS and State–State dispute settlement decisions under Australia’s foreign investment framework and decisions under any future foreign investment screening mechanism equivalent to Australia’s FIRB established by Indonesia.214 The Regional Comprehensive Economic Partnership (RCEP) signed in 2020 by the Association of Southeast Asian Nations (ASEAN) and its PTA partners other than India (Australia, China, Japan, New Zealand and Republic of Korea) omits ISDS but excludes from State–State dispute settlement a decision by a competent authority of a party whether or not to approve or admit a foreign investment proposal, and the enforcement of any related conditions.215

5.2 Listing of Foreign Investment Screening as a Non-Conforming Measure

Many IIAs allow host States to maintain specified measures that may not conform to particular obligations. These NCMs sometimes include investment screening. For example, under the PTA between Australia and China (ChAFTA), for Australia the national treatment and MFN treatment obligations do not apply to existing NCMs (or their continuity or modification to the extent that it does not decrease conformity with those obligations) set out in Section A of its Annex III or to measures in sectors or activities set out in Section B of its Annex III.216 Australia’s foreign investment policy is listed as an NCM with respect to national treatment in Section A. This NCM imposes thresholds above which investments may be subject to screening, such as: investments in existing Australian businesses with assets exceeding AUD 252 million in sectors such as telecommunications, transport, and military technologies; and investments in existing Australian businesses in all other sectors

211 Korea–Australia Free Trade Agreement (signed 8 April 2014, entered into force 12 December 2014) (KAFTA) annex 11-G.
212 Investment Agreement Between Australia and Hong Kong (signed 26 March 2019, entered into force 17 January 2020) annex III.
213 Peru–Australia Free Trade Agreement (signed 12 February 2018, entered into force 11 February 2020); Singapore–Australia Free Trade Agreement (signed 17 February 2003, entered into force 17 February 2003, as amended to 8 December 2020) annex 8-B.
214 Indonesia–Australia Comprehensive Economic Partnership (signed 4 March 2019, entered into force 5 July 2020) annex 14-C.
215 RCEP (n 144) art 17.11.
216 ChAFTA (n 111) arts 9.5.1, 9.5.3.
(other than financial sector companies) with assets exceeding AUD 1,094 million. Separately, in Section B, Australia lists as an NCM with respect to national treatment and MFN treatment its foreign investment policy, noting that ‘Australia reserves the right to adopt or maintain any measure that it considers necessary for the protection of its essential security interests with respect to proposals by foreign persons and foreign government investors’.

Similarly, under CETA, Canada sets out as an NCM with respect to national treatment and performance requirements (among other obligations) the review pursuant to the Investment Canada Act of a direct acquisition of control of a Canadian business valued at CAD 1.5 billion (CAD 369 million for investment by a state-owned enterprise) (adjusted) by an EU investor. These thresholds ‘do not apply to an acquisition of a cultural business’. Canada and Mexico take a similar approach under the USMCA, with different thresholds.

One issue that arises in this context is whether NCMs as captured in an IIA are sufficiently broad to capture modern innovations in domestic foreign investment screening laws. The ChAFTA example illustrates this. As noted, Article 9.5(1)(c) excludes from the scope of the national treatment and MFN obligations the identified existing NCMs (including Australia’s foreign investment policy), together with amendments or modifications thereto that do not decrease the conformity of the measure. Would this exemption capture recent changes to the Treasurer’s powers discussed in Section 2.3, such as those to ‘call-in’ certain investments with national security implications not already notified to it within 10 years of establishment, or the ‘last resort powers’ to review previously considered investments in certain circumstances where a national security risk arises? Such amendments (as well as the removal of screening thresholds in certain circumstances) arguably decrease the conformity of the relevant measures, which demonstrates that States cannot assume that amendments to investment screening laws fall within the scope of an NCM merely because they broadly address the same subject matter. Any such amendments must be reviewed in the light of the precise scope and nature of the NCMs in a State’s IIAs.

217 ibid annex III, pt 1: Schedule of Australia.
218 CETA (n 95) annex I (Canada), reservation I-C-1.
219 USMCA (n 114) art 14.12.1, annex I (Mexico), annex I (Canada).
220 ChAFTA (n 111) art 9.5.1.
221 FATA (n 63) ss 66A(1), (2), (5); Foreign Acquisitions and Takeovers Regulation 2015 (Cth) s 60A.
222 FATA (n 63) s 79A(1).
223 See supra n 64 and corresponding text.
5.3 **Exclusion of Particular Sectors**

Some IIAs apply particular investment obligations only in particular sectors. To the extent that a given sector, sub-sector or activity is excluded from particular investment obligations, inward investment screening will not conflict with those obligations with respect to that sector, sub-sector or activity. Sectoral restrictions may be achieved via a ‘negative list’ approach (where the obligation applies other than in the listed sectors) or a ‘positive list’ approach (where the obligation applies only in listed sectors). The negative list approach is more common, for example under CETA\(^{224}\) and USMCA\(^{225}\) (with respect to national treatment, MFN treatment, and performance requirements, among other obligations). Common exclusions apply, for example, to social services, transport, and maritime matters.\(^{226}\) A positive list approach is seen, for example, in the IIA between India and Singapore.\(^{227}\) Some IIAs use a mix of negative and positive list. For example, under Australia’s 2004 PTA with Thailand, pre-establishment national treatment applies only in sectors listed in Annex 8, and subject to conditions specified therein.\(^{228}\) Post-establishment national treatment applies unless otherwise specified in Annex 8.\(^{229}\) Incidentally, the limitations in Annex 8 include Australia’s foreign investment policy,\(^{230}\) showing how overlap may arise between exclusion of sectors and NCMs as discussed above in Section 4.2.

5.4 **Security Exceptions**

A minority of IIAs contain exceptions with respect to essential security interests or national security,\(^{231}\) sometimes by reference to or incorporation of the corresponding exceptions in the law of the World Trade Organization (WTO).\(^{232}\) These exceptions could potentially provide a defence to an ISDS
claim against a security-based investment screening process or outcome. However, their application will depend on the relevant domestic laws and policies and will be treaty-specific, fact-specific, and perhaps tribunal-specific. For example, several arbitral tribunals took different approaches and reached different outcomes when addressing claims against Argentina following an economic crisis, in connection with Article XI of the BIT between Argentina and the United States, which states: ‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.’

The reference here to ‘public order’ might sometimes be seen instead in general exceptions rather than security exceptions. If a screening mechanism refers explicitly to public order, that mechanism or a decision made under it with reference to public order is likely to be examined under whichever treaty exception uses that term. In the absence of an explicit treaty provision covering public order, the mechanism or decision might arguably be examined under either security or general exceptions, depending on the surrounding context.

Questions arising in relation to the interpretation and application of these kinds of clauses in IIAs include: whether they exclude the relevant matters from the scope of the treaty or merely provide a defence to a violation; their relationship with the customary defence of necessity; and the extent to which they are ‘self-judging’. The extent to which security concerns now properly cover issues such as ‘domestic security of supply in the health care sector and distressed asset sales prompted by the COVID-19 pandemic’ is

233 Sempra Energy International v Argentina, ICSID Case No ARB/02/16, Award (18 September 2007); Sempra Energy International v Argentina, ICSID Case No ARB/02/16, Decision on Annulment (10 June 2010); Enron v Argentina, ICSID Case No ARB/01/3, Award (22 May 2007); Enron Corporation v Argentina, ICSID Case No ARB/01/03, Decision on Annulment (30 July 2010).

234 Treaty Between the United States and Argentina Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994) art XI.


also uncertain, as is the extent to which notions of national security may be undergoing an expansion generally (into matters such as, for example, pre-dominance in innovation and technology).

5.5 General Exceptions
A small but growing number of IIAs also include ‘general’ exceptions, again often linked to or modelled on the corresponding WTO exceptions. For example, the BIT between Canada and Peru provides:

Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

a. to protect human, animal or plant life or health;

b. to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

c. for the conservation of living or non-living exhaustible natural resources.

Sometimes these exceptions apply only to certain investment obligations.

Potential exists for a host State to invoke a general exception to justify an investment screening process or decision, for example where that process or decision relates to concerns about public health or the environment, or enforcement of other internal laws. However, as with security exceptions, it is

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238 Bonnitcha (n 134) 10.


242 See eg CETA (n 95) art 28.3.1.
difficult to predict how a particular exception will be applied to a given action and also how it may influence the interpretation of other provisions or availability of other exceptions, doctrines, or remedies such as compensation.243 Questions could arise as to whether the investment screening is applied in a non-discriminatory manner for the purposes of the introductory ‘chapeau’ of the exceptions (as discussed above in different contexts in Sections 4.1 and 4.3), and whether it is ‘necessary’ (where that word is used, as in the chapeau above).244

6 Conclusion

The growing popularity of foreign investment screening in domestic law, including in some of the major destinations of global FDI, increases the potential for allegations of breach of IIAs (in ISDS or State–State dispute settlement). In some IIAs, this risk arises with respect to potential investors and in connection with non-discrimination obligations extending to the acquisition or establishment of an investment. In all, the risk is likely to arise with respect to established investments in jurisdictions in which the investments may be subject to retrospective screening, or screening in respect of a new transaction related to an existing investment. With respect to established investments, potential breaches extend beyond non-discrimination provisions to other obligations including those concerning performance requirements, expropriation, FET, and stabilisation (particularly through umbrella clauses).

States engaging in investment screening should be aware of these potential conflicts with international investment law. Mechanisms exist in some IIAs to address such conflicts, illustrating that some States are paying attention to these matters. However, these mechanisms have limits and may be insufficient to cover ongoing changes. For example, investment screening may be excluded from ISDS but not State–State dispute settlement. Listing of screening measures with specified thresholds as NCMs may not cover a subsequent change to a screening threshold. Similarly, exclusion of certain sectors from some investment obligations may not prevent coverage of sectors later added to a State’s screening regime. An MFN obligation might also conceivably be

243 See eg Bear Creek Mining Corporation v Peru, ICSID Case No ARB/14/21, Award (30 November 2017) 473, 474, 477; Eco Oro Minerals Corp v Colombia, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) 830.

244 See Henckels (n 117) 82.
used to invoke a more favourable IIA in connection with an alleged breach through investment screening. Uncertainties surrounding security exceptions and general exceptions make them an unreliable basis for justifying investment screening laws or actions. Increasing the work of these exceptions may also exacerbate existing tensions in international economic law.245

Although some States may struggle with the capacity to do so, States ideally need to consider these difficulties in creating, modifying or implementing investment screening policies and laws, as well as in drafting or amending IIAs. States understandably seek to retain for themselves sufficient scope to screen inbound investment that may give rise to legitimate national security-related concerns of one form or another. They should aim for coherence in their domestic and international commitments, ensuring that any such screening is performed consistently with their IIAs.

Disclaimer

This article is based on research funded by the Australian Research Council pursuant to Discovery Project DP200100639. The views expressed here are our own and are not necessarily shared by any employer or other entity. Any errors are ours.

Acknowledgments

We thank Jonathan Bonnitcha, Jarrod Hepburn, Lizzie Knight, Phillip McCalman, Joshua Paine, Andrew Walter, and the two anonymous referees for helpful comments on an earlier draft of this article.