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The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms

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Contents

Abstract This chapter asks how and why investment treaty obligations of the EU or its Member States may affect the design and operation of EU and Member State investment screening mechanisms. It examines the scope of application of such investment treaty obligations in the area of investment screening on grounds of security or public order. It then assesses the potential for norm conflicts between such treaty obligations and legal acts of the EU or its Member States relating to investment screening by considering the manner in which such obligations are to be applied, taking stock of both the material content of the main applicable protection standards and available general and security exceptions. Finally, the chapter explores the available legal remedies by means of which such potential norm conflicts may be

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resolved and considers the effects of such remedies on the functioning of investment screening mechanisms.

1 Introduction

As the new EU regulation on foreign investment screening[1] (EU Screening Regulation) entered into force on 10 April 2019, national screening and control mechanisms for foreign investments were already in place in 14 of the Member States.[2] As of the same date, these Member States and the EU itself were parties to a total of 865 investment treaties with third countries.[3] Put into perspective, this number corresponded to almost two thirds of all investment treaties to which the EU or its Member States were parties and a third of all investment treaties in force globally.[4]

Few investment treaties or other international investment agreements[5] address investment screening directly,[6] but most include provisions on the treatment of foreign investors and foreign investments that may be applicable to the process or effects of screening. The EU Screening Regulation defines 'screening' as 'a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign

[1]Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[2]These Member States were Denmark, Germany, Spain, France, Italy, Latvia, Lithuania, Hungary, Netherlands, Austria, Poland, Portugal, Romania and Finland. As of 10 April 2019, the United Kingdom also had a screening mechanism in force. However, since the United Kingdom has since withdrawn from the Union, it is not included among the Member States for purposes of this chapter.

[3]Investment Policy Hub (2019).

[4]*Ibid*. As of 20 May 2019, there were 1136 international investment agreements (for this term, *see below* fn 5) in force between the EU or its Member States (excluding the United Kingdom), on the one hand, and third countries, on the other hand, and a further 179 such agreements between Member States. There were an additional 1315 international investment agreements in force between third countries *inter se*.

[5]The term 'international investment agreements' refers to investment treaties, i.e. international agreements the principal object of which is to promote or protect investments, as well as other international agreements containing investment treaty obligations, such as free trade agreements and the like. For purposes of this chapter, the Treaty on the Functioning of the European Union (TFEU), despite its inclusion of treaty obligations relating to investments, is not treated as an international investment agreement.

[6]For example, Canadian investment treaties often address screening by way of excluding investment authorisation decisions under the Canadian screening legislation (Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)) from the scope of the dispute settlement provisions of the relevant treaty. See, e.g., Article 8.45 and Annex 8-C of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, on the other part, 30 October 2016 (not published in UNTS) available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download. Accessed 06.1.2020.

direct investments'.[7] As such, investment screening is an administrative procedure and an exercise of public authority liable to produce legal effects or factual consequences for the foreign investors and the undertakings concerned. As will be further elaborated below, both investments that have not yet been made and those that have already been made may be subject to screening. As of the date of publication, screening decisions have not been the subject matter of investment treaty arbitration.

This chapter examines how and why investment treaty obligations of the EU or its Member States may affect the design and operation of EU and Member State investment screening mechanisms. It asks how investment screening mechanisms or screening decisions may conflict with investment treaty obligations and what standards of protection may be invoked against such mechanisms or decisions (Sect. 2). The hundreds of affected international investment agreements contain a wide variety of protective provisions and exceptions that may be applied to the varied situations, procedures and outcomes that may come into play in investment screening. At this stage of the analysis, focus lies on the existence and scope of binding treaty obligations and not on the manner in which they may be enforced. As a matter of international law, a treaty provision that is subject to investor–State arbitration is just as binding as one that is only subject to interstate arbitration.

The chapter then considers why investment treaty obligations might restrict the EU and its Member States in designing or operating investment screening mechanisms (Sect. 3). How is the existence of conflicts between investment screening mechanisms or screening decisions of the EU or its Member States,[8] on the one hand, and the investment treaty obligations of the EU or its Member States, on the other hand, to be determined and, if necessary, resolved? How does the manner of determination or resolution of such norm conflicts—investor–State or interstate arbitration—impact the design and operation of investment screening mechanisms? This section will explore how legal restrictions emanating from investment treaty obligations serve as de facto restrictions at the EU and national levels resulting from the enforceability of these obligations.

The chapter concludes with a summary of its findings and a reflection on their policy implications (Sect. 4).

[7] Article 2(3) of the EU Screening Regulation.

[8] *Note* that while the EU itself does not operate an investment screening mechanism under the EU Screening Regulation, it may issue opinions where it considers that a foreign direct investment undergoing screening is likely to affect security or public order in Member States (*cf.* Article 6 (3) and (4)). Such opinions may also be issued under Article 7 and 8 under the circumstances set forth in those articles. As such, it may participate in the adoption of measures in the application of a screening mechanism, i.e. a 'screening decision' (*cf.* Article 2(6)).

2 Application of Investment Treaty Obligations to Investment Screening

The point of departure of this enquiry is the default proposition that investment treaties apply to investments *once they are made* and that investment screening takes place *before they are made*. From this it seems intuitive that screening is inherently beyond the scope of application of investment treaty obligations. However, as will be elaborated more closely later on, in practice, investment treaties sometimes apply to investments before they are made, while screening often concern investments that have already been made and that are increased above a certain predetermined level that triggers the screening.

Before approaching the question whether investment treaty obligations apply to investment screening in more detail, it is necessary to understand what screening entails. The precise scope of the powers that may be exercised under the investment screening mechanisms of the Member States varies. However, it is clear from the definition of 'screening' in the EU Screening Regulation that these powers may be vast and potentially very invasive. These include the power to authorise or deny authorisation of a contemplated investment, the power to impose potentially burdensome conditions for such investment, the power to prohibit an investment altogether and even the power to order the unwinding of an investment that has already been made.[9] The exercise of these powers would normally constitute a serious interference with the kind of interests that investment treaty obligations are meant to safeguard, *viz*. the ability of foreign investors to make and operate investments.

To assess whether and to what extent investment screening could result in a norm conflict with investment treaty obligations, it is necessary to first understand whether and, if so, how far such obligations extend to screening (Sect. 2.1). Where the obligations are applicable, the existence and extent of norm conflicts depend on how the obligations are to be applied (Sect. 2.2).

2.1 Scope of Application of Investment Treaty Obligations

Before assessing the extent, if any, to which investment treaty obligations may apply to investment screening, it is convenient to ascertain the fact patterns that may trigger the application of investment treaty obligations in the first place or, more precisely, (1) the factual situations that may give rise to screening and (2) the factual consequences that may result from screening.

The criteria for carrying out screening are given by the national investment screening mechanisms of the Member States and by Article 4 of the EU Screening

[9] *See above* fn7.

Regulation. The elements of the screening process, from which legal consequences may ensue, are also provided in national legislation and in the EU Screening Regulation, specifically Articles 2(3), 6 and 8. For present purposes, it is assumed that the national screening mechanisms conform to the requirements of the EU Screening Regulation.

Factual Preconditions to Screening Article 1(1) of the EU Screening Regulation delimits its scope of application to 'foreign direct investments', which is defined in Article 2(1) as follows:

> an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.

It follows from this definition that the existence of an actual or prospective investment is a threshold requirement for the application of the EU Screening Regulation, which is indeed generally true also for investment treaty obligations.[10] This fact therefore does not appear to give rise to any difficulties that are unique to investment screening.

A 'foreign investor' is defined in Article 2(2) as 'a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment', where 'undertaking of a third country' means 'an undertaking constituted or otherwise organised under the laws of a third country' (*cf.* Article 2(7)). From this it is apparent that an undertaking organised under the laws of a Member State falls outside the definition of a 'foreign investor'. Neither the definition of 'foreign direct investment' nor that of 'foreign investor' extends the scope of application to investments by EU undertakings that are controlled by non-EU investors.[11] It is also clear that the definition covers both prospective and actual investors.[12]

The key element of a 'foreign direct investment' as defined in Article 2(1) is the existence of an *aim* 'to establish or to maintain lasting and direct links' between, on the one hand, the foreign investor and, on the other hand, 'the entrepreneur to whom

[10] *See* Bischoff and Happ (2015), Salacuse (2015), pp. 176–206; Dolzer and Schreuer (2012), pp. 60–78.

[11] Nevertheless, the EU Screening Regulation also provides that Member States are obliged to ensure that their screening mechanisms and screening decisions are not circumvented (cf. Article 3 (6)). According to Recital 10, '[t]his should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country'. An investment of an EU undertaking controlled by non-EU investors could in these situations be covered by national screening mechanisms, even though it would not be a 'foreign direct investment' under the EU Screening Regulation.

[12] Note specifically the words 'intending to make or having made' an investment.

or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State'.[13] It is this aim—and not the effect *per se*—of establishing or maintaining lasting and direct links between the relevant parties that is the essence of this definition. At its core, the definition is therefore of a teleological character. Yet another such element is embedded in the definition, *viz*. with respect to the purpose of the transfer of invested capital to its recipient, to whom the capital is to be made available 'in order to carry on an economic activity'. In other words, the *purpose* for which the investor makes the capital available must be for the recipient to carry on such an activity. It is noteworthy that these teleological elements must be attributable to the investor.[14]

Finally, it should be noted that the definition of a 'foreign direct investment', and thus the scope of the EU Screening Regulation, includes 'investments which enable effective participation or control of a company carrying out an economic activity'. Since the definition does not exclude investments that do not enable such participation or control, it appears that the existence of 'lasting and direct links' does not presuppose effective participation or control.[15] In any event, no *de minimis* threshold for what counts as a 'foreign direct investment' can be inferred on the basis of the level of influence at which the investment enables the investor to exercise control over a company carrying on a relevant economic activity.[16] Indeed, the quantitative criteria for screening under the national screening mechanisms of the Member States in terms of percentage of shares or voting rights (screening thresholds) are often well below the level required to exercise control of a company.[17] In other words, 'foreign direct investments' include, but are not necessarily limited to, investments that enable a foreign investor to exercise effective participation or control over a company.

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[13]*Cf.* Judgment of the Court of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paras. 180, 185.

[14]For further discussion on the definition of 'foreign direct investment' for purposes of the EU Screening Regulation, *see* in this volume Lars Otto. An important question in this context is how these teleological elements may be determined; subjectively or by resort to objective determinants (such as structure, effect and operation).

[15]This question, whether 'lasting and direct links' for purposes of the definition of 'foreign direct investment' in the EU Screening Regulation presupposes or merely includes investments that enables the investor to 'participate effectively in the management of the company or in its control', falls outside the scope of this chapter. It is sufficient to note that the Judgment of the Court of 20 May 2008, *Orange European Smallcap Fund*, C-194/06, EU:C:2008:289, paras. 98–102, on which the definition of 'foreign direct investment' seems to have drawn inspiration (*see also* Judgment of the Court of 15 February 2017, *X*, C-317/15, EU:C:2017:119, paras. 21, 22 and 25), addressed the question insofar as it held that direct investments are 'investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity' (para. 102), regardless of the question whether an investor, who is a shareholder of a company, is 'in a position to exercise decisive influence over the management or control of that company' (para. 98). For a comprehensive analysis, *see* Hindelang (2009), pp. 70–74.

[16]*See* generally Hindelang (2009), pp. 81–114.

[17]European Commission (2017), p. 8.

Security or Public Order Article 1(1) of the EU Screening Regulation further delimits the scope of application to screening on the grounds of 'security or public order'.[18] The latter phrase is not defined in the EU Screening Regulation, but Article 4(1) provides an open-ended list of factors that may affect security or public order, which gives an indication of the nature of the investments that may give rise to screening and the sectors of the economy that may be concerned. It includes infrastructure and facilities (including land and real estate), technologies, critical inputs and food security, sensitive information and the media. Moreover, Article 4 (2) indicates that security or public order may be affected if the investment is controlled by a third country, if the investor is already involved in activities affecting a Member State's security or public order or if there is a 'serious risk' that the investor engages in illegal or criminal activities.

It is clear from these provisions that, even if 'security or public order' is restrictively interpreted, the potential range of factual situations that may give rise to screening is considerable.

Factual Situations Emanating from Screening Screening can give rise to numerous factual consequences. Analysed as 'factual' from the perspective of international investment agreements, these include the legal process and legal consequences (under EU law or national law) of screening inherent in the definition of 'screening' in Article 2(3) of the EU Screening Regulation: assessment, investigation, authorisation, conditioning, prohibition and unwinding of foreign direct investments. These activities may give rise to consequences in the form of decisions factually affecting an investor or an investment, and also to other adverse effects, whether resulting from actions or omissions and whether deliberate or not, which may injure the investor or the investment.

For purposes of assessing the applicability of investment treaty obligations to the factual situations that may result from investment screening, it is useful to distinguish between screening that takes place in the period preceding the making of an investment (pre-investment phase), i.e. screening of a future or prospective investment (Sect. 2.1.1), and screening that takes place in the period after an investment has been made (the post-investment phase), i.e. screening of an already existing investment (Sect. 2.1.2).

2.1.1 Screening in the Pre-investment Phase

Most national screening mechanisms of the Member States oblige prospective investors to notify the competent authority that undertakes the screening regarding certain types of contemplated investments and to obtain an authorisation before

[18]This terminology is in contrast to that in Article 65(1)(b) TFEU, which refers to 'public policy or public security'. *See also* recital (4) of the EU Screening Regulation.

making such certain types of investments.[19] Whether investment treaty obligations apply to such *ex ante* screening mechanisms depends, in part, on whether the scope of application of the relevant international investment agreement extends to future investments and, in part, on what counts as a future investment under the relevant agreement.

Future Investments Excluded Most investment treaty obligations, including the core investment protection standards, do not apply to investments that have not yet been made. The obligations to provide national treatment, most-favoured-nation (MFN) treatment, fair and equitable treatment, and full protection and security normally become applicable only once an eligible investor has invested, i.e. when the investor has established a new investment or acquired an existing investment from someone else.[20] When a treaty is silent on the matter, a host State cannot be considered obligated to extend protection to prospective investments or investors.[21] Conversely, foreign individuals cannot be presumed to have a right to invest since States are inherently free as of sovereign right to deny the entry or admission of foreign investors and their investments and thus also to prohibit the establishment of foreign-controlled investments in their territories.[22] In treaty practice, however, the exclusion of prospective investments and of the making of investments from the scope of application of investment treaty obligations is often expressly reflected in a number of different ways.

Definitional Exclusion of Future Investments First, international investment agreements may exclude prospective investments from the scope of application by excluding them from the definition of the term 'investment' or 'covered investment' to which the investment treaty obligations relate. By way of example, Article 8.2 (1) CETA provides:

> This Chapter applies to a measure adopted or maintained by a Party in its territory relating to:
>
> (a) an investor of the other Party;
> (b) a covered investment; and
> (c) with respect to Article 8.5, any investments in its territory.

Here, the term 'investor' is defined in Article 8.1 to mean 'a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that *seeks to make, is making or has made* an investment in the territory of the other Party' [emphasis added]. Prospective investors are thus within the definition of 'investor' and hence within the scope of the investment treaty obligations of

[19]Such *ex ante* screening e.g. exists in Denmark, Germany, Spain, France, Italy, Latvia, Lithuania, Hungary, Netherlands, Austria and Finland.

[20]*See above* fn 10.

[21]*See Barcelona Traction* [1970] ICJ Rep 4, para. 33 and *Mihaly* v. *Sri Lanka*, Award, 15 March 2002, para. 60. For further references, *see* Newcombe and Paradell (2009), pp. 121–122 (and further references cited in footnote 2); Salacuse (2013), p. 76.

[22]*Ibid*.

CETA.[23] By contrast, the term 'covered investment' is limited to an investment that has already been made ('made in accordance with the applicable law at the time the investment is made' and 'existing on the date of entry into force of this Agreement, or made or acquired thereafter').

It is thus clear from Article 8.2(1) that the scope of CETA's investment treaty obligations covers measures relating to investors both in the pre- and post-investment phase, as well as measures relating to actually existing investments.[24] With respect to the prohibition against performance requirements in Article 8.5, the scope covers measures relating to both existing and future investments.[25]

Once excluded from the definition of 'covered investment', prospective investments fall outside substantive investment protections that incorporate the term, such as the absolute standard of protection referred to in Article 8.10(1):

> Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.

Investment protection in the form of fair and equitable treatment and full protection and security in the pre-investment phase is thus excluded in CETA through the limitation of the scope of Article 8.10(1) to 'covered investments' and 'investors with respect to their covered investments'.[26] Similar exclusions are found in Article 2.4 of the EU–Singapore Investment Protection Agreement (IPA),[27] which in addition limits the application of its investment protections to 'covered investors', i.e. investors that have made an investment, and Article 2.5 of the EU–Vietnam IPA.[28]

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[23] *See*, for a similar reasoning, *Nordzucker* v. *Poland*, para. 171.

[24] *Note,* e.g., that the national treatment obligation in Article 8.6(1) CETA thus applies to the pre- and post-investment phase insofar as adverse discrimination of *investors* is concerned (as per the definition of 'investors'), but only to the post-investment phase when it comes to adverse discrimination of *investments* (as per the definition of 'covered investments').

[25] Similar provisions are contained in Article 2.1 of the investment chapter of the draft EU–Australia Free Trade Agreement, published on 22 October 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157572.pdf (accessed 06.1.2020); and Article 2.1 of the investment chapter of the draft EU–New Zealand Free Trade Agreement, published on 25 September 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157580.pdf (accessed 06.1.2020).

[26] *Note* that with respect to the scope of application of Article 8.10(1), Article 8.2(1) does not add any further limitations.

[27] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part, 15 October 2018 (pending ratification) available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download. Accessed 06.1.2020.

[28] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, 30 June 2019 (pending ratification) available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download. Accessed 06.1.2020.

Other examples of definitions of 'investment' that clarify that the act of investing must have taken place can be found in many treaties.[29] Many treaties provide that investments must be 'invested',[30] as illustrated by Article 1(1) of the China–Germany bilateral investment treaty (BIT)[31]:

> the term 'investment' means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes: [. . .].

Another common formulation is that the investment must be 'established or acquired', as exemplified by Article 1(1) of the Finland–Kazakhstan BIT[32]:

> The term 'investment' means every kind of asset established or acquired in connection with business and entrepreneurial activity by an investor of one Party in the territory of the other Party in accordance with the national legislation of the State of the latter Party, including in particular, though not exclusively: [. . .].

The difference between 'establishment' and 'acquisition' of an investment is usually that the former refers to investments in the form of a business being set up, whereas the latter refers to investment in an already set-up business.[33] However, the terminology is not uniform. Some treaties, such as the EU–Japan Economic Partnership Agreement (EPA)[34] and the EU–Korea Free Trade Agreement (FTA),[35] define 'establishment' so as to include acquisition.[36]

In arbitral practice, the issue of pre-investment obligations has surfaced in some cases in the context of the treaty definition of investment, although none has been a 'clean' case of a prospective investment, in the sense of a denied opportunity to invest or a dispute as to the right to invest.[37] The emphasis of these cases has not

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[29]Investment Policy Hub (2019).

[30]*See,* e.g., *Nordzucker* v. *Poland*, para. 184.

[31]Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, 1 December 2003, 2362 UNTS 253.

[32]Agreement between the Government of the Republic of Finland and the Government of the Republic of Kazakhstan on the Promotion and Mutual Protection of Investments, 9 January 2007, 2558 UNTS 585.

[33]*See* Juillard (2000), pp. 332–333. *Note* that another frequent distinction is between, on the one hand 'establishment' and 'acquisition' and, on the other hand, 'admission' (or, synonymously, 'entry'), the latter terms being understood as occurring prior to the establishment, *cf.* Newcombe and Paradell (2009), p. 132; Gómez-Palacio and Muchlinski (2008), pp. 229–232. References to 'admission' or 'entry' therefore signify a somewhat less far-reaching application of the relevant protection standard.

[34]Agreement between the European Union and Japan for an Economic Partnership, 17 July 2018 (not published in UNTS) OJ L330 of 27 December 2018, p. 3.

[35]Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 6 October 2010 (not published in UNTS) OJ L 127 of 14 May 2011, p. 6.

[36]EU–Japan EPA Article 8.2(i) and EU–Korea FTA Article 7.9(a).

[37]*Mihaly* v. *Sri Lanka*, Award dated 15 March 2002; *Nagel* v *Czech Republic*, Final Award, 9 September 2003; *Zhinvali* v. *Georgia*, unpublished award, 24 January 2003; *Petrobart*

centred on whether an investment was 'made' but has turned on the question of whether certain pre-investment phase steps—communications or acts by the prospective investor—had progressed to the extent sufficient to constitute an 'investment'. In other words, the issue in principle of pre-investment application of investment treaty obligations has in practice often veered into the more factual question of whether the substantive criteria for an investment have been satisfied.

Specific Exclusion of Future Investments Second, the substantive provisions of the international investment agreements may be expressly limited to investments that have been made by investors, i.e. to the exclusion of investments yet to be made. An example is contained in the Denmark–North Macedonia BIT,[38] which defines 'investor' and 'investment' in a manner that does not exclude prospective investors or investment, respectively, but provides under Article 3(1) on 'Treatment of Investments':

> Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favorable than that accorded to its own investors or to investors of any third State, whichever is the more favorable from the point of view of the investor.

Here it is clear that the treatment of investments excludes prospective investments by limiting the application of the provision to 'investments *made* by investors' [emphasis added]. An example of another type of formulation is Article 4(1) of the France–Ethiopia BIT,[39] which limits the application of the national treatment and MFN treatment to investments 'once admitted in accordance with the legislation' of the host State. Yet another example is found in Article III(1) of the Slovakia–Turkey BIT[40]:

> Each Party shall in its territory accord investments of investors of the other Party, once established, and returns of investors of the other Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State whichever is more favourable.

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v. *Kyrgyz Republic*, Award, 29 March 2005; *Nordzucker* v. *Poland*, Partial Award (Jurisdiction), 10 December 2008; *White Industries* v. *India*, Final Award, 30 November 2011; *Bosca* v. *Lithuania*, Award, 17 May 2013; *Deutsche Telekom* v. *India*, Interim Award, 13 December 2017.

[38]Agreement between the Macedonian Government and the Government of the Kingdom of Denmark for the Promotion and Reciprocal Protection of Investments, 8 May 2015 (not published in UNTS) UN reg. no. 54486.

[39]Accord entre le gouvernement de la République française et le gouvernement de la République démocratique fédérale d'Ethiopie sur l'encouragement et la protection réciproques des investissements, 25 June 2003 (not registered in UNTS) available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3550/download. Accessed 06.1.2020.

[40]Agreement between the Slovak Republic and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, 13 October 2013 (not published in UNTS) available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2266/download. Accessed 06.1.2020.

Most international investment agreements concluded by Member States neither have restrictive definitions that exclude prospective investments nor exclude such investments expressly in the substantive provisions.[41] Yet, as mentioned above, this absence of an exclusion is an insufficient basis for interpreting the scope of application of these agreements so as to extend protection to the pre-investment phase.

Exclusion of Specific Activities Involved in Making Investments Third, the substantive provisions of the international investment agreement may be expressly limited to certain activities of an investor, which exclude references to the making of the investment, such as the entry, admission, establishment or acquisition of the investment. This usually applies to the national treatment and MFN treatment clauses insofar as they relate to the treatment of investors rather than investments, but it also sometimes applies to the fair and equitable treatment standard.[42] Article 3 (2) of the Denmark–North Macedonia BIT is again illustrative:

> Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favorable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favorable from the point of view of the investor.

The standard of protection is here extended to investors, not in relation to investments made but with respect to the 'management, maintenance, use, enjoyment or disposal of their investment'. What is excluded here is any mention of the making of investments, such as admission, establishment, acquisition or expansion.[43] An example of a treaty that does include such references is the aforementioned Finland–Kazakhstan BIT, which in Article 3(2) provides:

> Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments.

This provision extends MFN treatment to the pre-investment phase through the references to 'establishment' and 'acquisition'. As in most investment treaties, 'investor' here includes prospective investors.[44] Pursuant to Article 1(3), the term 'investor' is defined as 'subjects who *invest* in the territory of the State of the other Party in accordance with the national legislation of the State of the latter Party and the provisions of this Agreement' [emphasis added]. While only a minority of the international investment agreements of the 14 Member States, which have screening

[41]Investment Policy Hub (2019).

[42]*Ibid*.

[43]This point was highlighted by the arbitral tribunal in *Nordzucker* v. *Poland*, para. 177. For further analysis of the pre-investment stage application of national treatment and MFN treatment, see Bonnitcha et al. (2017), pp. 103–104; Gómez-Palacio and Muchlinski (2008), pp. 242–245.

[44]Investment Policy Hub (2019).

mechanisms, extend national treatment and MFN treatment to the pre-investment phase, most of those that do are of this type.[45]

In contrast with the pre-Lisbon treaty practice of the Member States,[46] the national treatment and MFN treatment clauses in the EU's post-Lisbon international investment agreements normally do cover the making of investments. An example is Article 7.12 of the EU–Korea FTA[47]:

> In the sectors inscribed in Annex 7-A, and subject to any conditions and qualifications set out therein, with respect to all measures affecting establishment, each Party shall accord to establishments and investors of the other Party treatment no less favourable than that it accords to its own like establishments and investors.

Here, the term 'establishment' is defined to comprise 'the constitution, acquisition or maintenance of a juridical person [. . .] within the territory of a Party for the purpose of performing an economic activity', including 'capital participation in a juridical person with a view to establishing or maintaining lasting economic links'. When considering that 'investor' is defined as 'any person that *seeks to perform* or performs an economic activity through setting up an establishment' [emphasis added], it becomes clear that the application of the provision extends to the pre-investment phase. A somewhat similar formulation is contained in Article 8.8 (1) of the EU–Japan EPA[48]:

> Each Party shall accord to entrepreneurs of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to its own entrepreneurs and to their enterprises, with respect to establishment in its territory.

The definition of 'establishment' in this treaty means 'the setting up or the acquisition of a juridical person, including through capital participation, or the

[45] *Ibid*. Of the international investment agreements concluded externally by the EU and those of its Member States that have screening mechanisms in force, 31 apply national treatment to the pre-investment phase, whereas 38 apply MFN treatment to the pre-investment phase. In particular, agreements concluded by Finland and Italy are of these types.

[46] On 1 December 2009, the Lisbon Treaty entered into force, bringing about the latest major amendment and re-codification of the founding treaties of the European Union. These amendments included the extension of Union competences to the area of foreign direct investment as part of the common commercial policy of the EU, cf. Article 206 TFEU. This became the departure point for the EU's investment treaty programme. It is therefore convenient to distinguish between treaty practice before and after the Lisbon Treaty.

[47] A similar provision is contained in Article 4 of the investment chapter of the draft EU–Mercosur Association Agreement, published 12 July 2019, available at http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=151. Accessed 06.1.2020.

[48] Similar provisions are contained in Articles 7(1) and 8(1) of the investment chapter of the draft modernised EU–Mexico Global Agreement, published 25 April 2018, available at http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=132 (Accessed 06.1.2020); Article 2.3(1) of the investment chapter of the draft EU–Australia Free Trade Agreement, published on 22 October 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157572.pdf (Accessed 06.1.2020), and Article 2.3(1) of the investment chapter of the draft EU–New Zealand Free Trade Agreement, published on 25 September 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157580.pdf (Accessed 06.1.2020).

creation of a branch or representative office, in the European Union or in Japan respectively, with a view to establishing or maintaining lasting economic links'. Again, considering that 'entrepreneur' refers to 'a natural or juridical person of a Party that *seeks to establish*, is establishing or has established an enterprise in accordance with subparagraph (i), in the territory of the other Party' [emphasis added], the application is also in this case extended to cover national treatment of investors (entrepreneurs) in making (establishing) future investments.[49]

A similar kind of formulation appears in Article 8.6(1) CETA on national treatment:

> Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

Pursuant to this provision, both investors and their investments are to be accorded national treatment. It is important to note, however, that with respect to national treatment of investors, there is no distinction between pre- and post-investment phase. *Investors* are protected with respect to the establishment and acquisition of their investments, as well as the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments.[50] By contrast, national treatment of *investments* only covers investments that have already been made and are existing.[51] As such, treatment of investments (as opposed to investors) with respect to the establishment or acquisition of such investments would cover matters pertaining retrospectively to the making of the investment but not a denied opportunity to make the investment in the first place. On the other hand, such denial would be covered as a treatment of the investor.

By contrast to Article 8.8(1) of the EU–Japan EPA and Article 8.6(1) CETA discussed above, the provisions in Article 2.3 of the EU–Singapore IPA and Article 2.3 of the EU–Vietnam IPA exclude references to the making of investments and restrict the application of the national treatment standard to 'covered investments' and 'covered investors', both of which are defined to apply exclusively to the post-investment phase.

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[49]For another example, *see* Article 88 of the EU–Ukraine Association Agreement, *see further* Investment Policy Hub (2019).

[50]*Note* that Section B of Chapter 8 CETA contains provisions that apply specifically to establishment, although the application of other provisions of the chapter also extend to establishment, notably Section C (which can also be gleaned from Article 8.2(2) and from the text of Articles 8.6 and 8.7). *Note also* that Section B is excluded from the investor–State arbitration provisions (*cf.* Article 8.18(1)). *See further below* Sect. 3.1.2.

[51]*Cf.* the formulation of Article 8.10(1) CETA, discussed above, which applies to 'covered investments of the other Party *and* to investors with respect to their covered investments' [emphasis added]. Here it is clear that both the treatment of investments and that of investors are limited to investments already in existence.

Exceptions There are certain investment treaty obligations that frequently do apply to investments that have yet to be made. Notably, it is not uncommon that obligations may apply with respect to the transfer of investment capital prior to the making of an investment. Some treaties also contain specific obligations to provide market access or not to impose performance requirements, both of which affect prospective investments. None of these types of provisions, however, entail a significant potential for norm conflicts with investment screening mechanisms, as further explained below.

First, transfer-of-funds provisions often cover the free transfer of capital to establish the investment but primarily address the repatriation of funds.[52] The post-Lisbon EU international investment agreements either limit the transfer clause to existing investments[53] or provide for a general free movement of capital clause, common to transfers related to both trade and investment.[54] However, even where transfer-of-funds provisions obligate the host State to not restrict the funds required to make the investment, it does not follow that the investment as such is admitted and subject to investment protection.

Second, 'market access' provisions are included in most post-Lisbon EU investment agreements but are virtually non-existent in Member State agreements.[55] This type of treaty provision, which is based on Article XVI of the General Agreement on Trade in Services (GATS), prohibits the imposition of quantitative restrictions on the establishment of investments and restrictions on the types of legal entities through which economic activity may be carried out.[56] The subject matter of these clauses is thus different from the essentially qualitative restrictions on investment that may result from investment screening, which aims to control investments on the basis of their implications on matters of security and public order.[57] Market access clauses are found, e.g., in Article 8.4 CETA, Article 8.7 of the EU–Japan EPA and Article 7.11 of the EU–Korea FTA.

Third, provisions prohibiting performance requirements are found in some post-Lisbon treaties, including Article 8.5 of CETA and Article 8.11 of the EU–Japan EPA, and in some Member State treaties.[58] This type of clause, which originates from the illustrative list of inconsistent measures set forth in the annex to the Agreement on Trade-Related Investment Measures (TRIMs), applies specifically

[52]*See,* e.g., Article 7.1(g) of the Slovakia–Iran BIT and Article 8.1(a) of the BLEU–Panama BIT, *see further* Investment Policy Hub (2019).

[53]*See,* e.g., Article 8.13(1) CETA and Article 2.7(1) of the EU–Singapore IPA.

[54]*See,* e.g., Article 9.2(1) of the EU–Japan EPA and Article 8.2(1) of the EU–Korea FTA.

[55]Investment Policy Hub (2019).

[56]Hahn (2015), pp. 659–666; Van den Bossche and Zdouc (2017), pp. 516–521.

[57]This does not exclude the possibility of an application of market access provisions to investment screening mechanisms in particular situations, such as if the mechanism were to be designed to impose a maximum limit to foreign capital participation or a restriction in the type of legal entity or joint venture that may engage in particular investments, e.g. sovereign wealth funds or other state-owned enterprises.

[58]Investment Policy Hub (2019).

to future investments.[59] The clause prohibits making investments conditional on certain trade practices, often including subsidies, that typically have discriminatory effects, such as mandated levels of exports or domestic contents or mandated technology transfers.[60] In the context of investment screening, it is possible that an investment authorisation could be made conditional on such performance requirements. However, it is questionable how likely that would be in practice since the policy interests at stake in investment screening are fundamentally different from those underpinning prohibitions against performance requirements. The former concern, at least nominally, security and public order, whereas the latter concern purely economic interests. Thus, while performance requirements clauses are applicable to future investments and could be engaged in *ex ante* investment screening, it is fair to assume that the potential for norm conflicts is limited.

Conclusions In summary, a potential for norm conflicts between *ex ante* investment screening and investment treaty obligations exists with respect to provisions in international investment agreements that are expressly applicable to future investments. The most prevalent types of such clauses are the national treatment and MFN treatment provisions in several post-Lisbon EU investment agreements, the scope of application of which explicitly extends to investors in the pre-investment phase. However, most pre-Lisbon Member State investment agreements and some post-Lisbon EU investment agreements are not applicable to future investments.

Future Investments or Expansion of Existing Investments? Investment treaty obligations may also apply to screening mechanisms to the extent that screening concerns an expansion of an existing investment, rather than a separate, future investment. From the moment an investment has been established or acquired, the provisions of international investment agreements normally apply, in principle encompassing both increases and decreases in the economic value of the investment. In the case of expansion, an investment has already been admitted and established (or acquired). Further increases of an investment, such as subsequent capital contributions or reinvestments of business profits, fall within the scope of investment treaty obligations to the same extent as decreases of the investment, such as divestment of capital or distribution of dividends. When screening concerns a future expansion of an investment—because an investment already exists for purposes of investment treaties—investment treaty obligations therefore apply. From the perspective of investment treaties, such screening consequently occurs in the post-investment phase.

In treaty practice, the distinction between the initial making of an investment, i.e. establishment or acquisition, and the expansion of an investment is often made clear in the treaty provision that provides for pre-investment treatment, such as Article 8.6 (1) CETA quoted above. As per a footnote to Article 8.8(1) of the EU–Japan EPA,

[59] *See,* e.g., Article 8.1(1)(c) CETA and Article 8.6(1)(c) of the EU–Japan EPA.

[60] Hahn (2015), pp. 657–659; Van den Bossche and Zdouc (2017), p. 381.

also quoted above, the definition of 'establishment' also covers expansion. However, the distinction between expansion of investments and new investments is equally relevant in the context of treaties that do not explicitly cover expansion.[61] Often such treaties include provisions that investments are admitted in accordance with the domestic law of the host State, e.g. as part of the definition of 'investment'.[62]

Normally, screening laws apply not to all investments but only to investments that satisfy certain quantitative or qualitative criteria, such as a minimum percentage of the shares or voting rights of a company (screening threshold). An investment that was not notified for screening when it was originally made, because it was below the screening threshold stipulated by the applicable screening law, would thus have been admitted in accordance with the law. This means that an 'investment' already exists and that investment treaty obligations already apply to the screening of an expansion of such a previously admitted investment. Moreover, an investment originally not subject to screening would not necessarily lose its investment treaty protection, just because the expansion of such an investment were subject to screening and eventually prohibited. Even if a national screening authority requires the unwinding of an entire investment, i.e. not only the acquisition that brought the investment over the screening threshold, it does not follow from this that, for purposes of international investment law, the investment must be deemed never to have existed or otherwise must be deprived of protection.

In the context of *ex ante* investment screening, there are significant practical implications of distinguishing expansion from the establishment or acquisition of an investment. The fact that most mechanisms provide for (often high) quantitative or qualitative screening criteria means that investors may be able to already make investments and derive rights under investment treaty obligations—such as under the national treatment or MFN standards—prior to reaching the screening threshold.[63] If an investor already has made an investment that is not subject to screening, the *ex ante* screening of a contemplated expansion of that investment over and above the screening threshold would result in the screening being deemed to have occurred in the post-investment phase for purposes of the applicable international investment agreement.

2.1.2 Screening in the Post-Investment Phase

A minority of the national screening mechanisms of the Member States, notably including that of Germany, provides for the screening of certain types of investments

[61] *See,* e.g., Nordzucker v. *Poland*, paras. 143–162.

[62] The post-Lisbon EU treaties, and the vast majority of pre-Lisbon treaties between Member States with screening mechanisms and third countries, are of this type. Investment Policy Hub (2019).

[63] Firm or indicative screening thresholds are e.g. applied by Germany, Spain, France, Italy, Latvia, Lithuania, Hungary, Austria, Portugal, Romania and Finland.

after the investment has been made.[64] In these systems, the competent authority undertaking the screening can, normally within a certain time period, decide to prohibit the investment after it has been established or acquired; to impose conditions for the investor's continued conduct, operation, management, use or enjoyment of the investment; or to order its unwinding, i.e. its sale or disposal.[65] In such an *ex post* screening mechanism, an investment is deemed to already exist for purposes of international investment law and therefore benefits from protection pursuant to the relevant international investment agreement.[66]

In addition, as just mentioned, because of the use of quantitative or qualitative screening criteria, *ex ante* screening is also often deemed to take place in the post-investment phase for purposes of investment treaty obligations, even though the additional investment that triggers the screening has not yet been made. This occurs when such investment is deemed to be an expansion of an already established or acquired investment that has previously not met any screening criteria.

Investment treaty obligations therefore apply to both *ex post* and *ex ante* screening to the extent that the screening takes place in the post-investment phase. In addition, as analysed under Sect. 2.1.1, in some cases investment treaty obligations also apply to (*ex ante*) screening in the pre-investment phase. To assess whether and to what extent such screening could result in a norm conflict with investment treaty obligations, it should next be examined how the obligations are to be applied.

2.2 Manner of Application of Investment Treaty Obligations

The potential for norm conflicts between applicable investment treaty obligations, on the one hand, and investment screening mechanisms, on the other, depends on how investment treaty obligations are applied to particular factual situations involving investment screening. Widely varying factual situations may give rise to investment screening, out of which may, in turn, arise a broad range of administrative actions, omissions and other effects on the investment that may be imputable to the Member State, through its screening authority, in carrying out screening, or even to the European Commission.[67] Given this factual variety, only a cursory outline of the

[64] Such *ex post* screening exists inter alia in Germany, Hungary, Netherlands, Poland, Portugal and Finland. *Note* that the German law only allows for such *ex post* review if the deal has been carried out without being notified in the first place (*cf.* § 55(3) of the German Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung).

[65] *See* in this volume Philipp Stompfe, Investment Screening in Germany and France; in this volume Szilárd Gáspár-Szilágy, Country Report on Hungary and Romania.

[66] The existence of an investment is a general prerequisite under international investment agreements. *See above* fn 10.

[67] *See* in this volume Teoman Hagemeyer, Access to Legal Redress in an EU Investment Screening Mechanism.

application of investment treaty obligations can be provided here. The aim is limited to demonstrating that significant room for norm conflicts exists.

In examining the possibility of such norm conflicts, it is convenient to first look closer at the standards of protection that may be applied to investment screening and the factors that may give rise to their application (Sect. 2.2.1) before turning attention to factors that limit the effect of such application (Sect. 2.2.2).

2.2.1 Applicable Treaty Standards

The factual situations associated with investment screening may engage both the main relative standards of protection (national treatment and MFN treatment) and the most important absolute standard of protection (fair and equitable treatment). Although other standards could conceivably also be applied with respect to screening, such as the general prohibition against arbitrary, unreasonable or discriminatory measures or treaty rules governing expropriation, the analysis below is, in keeping with the aim of Sect. 2.2, limited to the aforementioned principal standards.

Non-discrimination The most common relative standards of protection in international investment agreements provide that a host State must treat investors of a certain home State and their investments no less favourable than it treats its own investors and their investments (national treatment) or foreign investors of a third country and their investments (MFN treatment).[68] All international investment agreements of the EU and the 14 Member States that have screening mechanisms include one or both of these non-discrimination standards.[69]

Formulations of these standards vary somewhat across treaties, but in arbitral practice their application has evolved into a comparison of treatments structured around a threefold enquiry: (A) identifying the basis of comparison, (B) assessing the existence of adverse difference in treatment and (C) evaluating whether any such discrimination is justified.[70]

Basis of Comparison As for the first element, the EU Screening Regulation applies only to third-country investors having made, making or seeking to make direct investments likely to affect security or public order.[71] Similar direct investments that are made, have been made or are sought to be made by Member State investors are not subject to the EU Screening Regulation. To assess whether a relevant

[68] *See* Bonnitcha et al. (2017), p. 93; *see also above* fn 45.

[69] *See above* fn 45.

[70] *UPS* v. *Canada*, Award, 27 August 2009, para. 388; *Saluka* v. *Czech Republic*, Partial Award, 17 March 2006, para. 313; *Marfin* v. *Cyprus*, Award, 26 July 2018, para. 1237. *See further* Nadakavukaren Schefer (2016), pp. 338–353; Reinisch (2015), pp. 852–864; Dolzer and Schreuer (2012), pp. 199–206; Newcombe and Paradell (2009), pp. 158–188.

[71] *See above* fn 12.

differential treatment exists, the basis of comparison must be apposite.[72] The situation or circumstances pertaining to the foreign investor and its investment must be 'like' (or similar to but not necessarily identical with) the situation or circumstances pertaining to Member State investors or investors of other third countries with which the treatment is compared. This means that the investments by foreign investors and those by Member State investors must at least relate to the same economic sector or economic activity.[73] The list of factors in Article 4(1) of the EU Screening Regulation indicates such sectors or activities, on the basis of which the treatment of foreign and Member State investments can be compared.

It is important to note that investment treaties provide differently formulated bases of comparison. Some treaties, including the majority of the EU's post-Lisbon international investment agreements, specify that the treatment in question must be that which is accorded in 'like situations'.[74] Some Member State treaties also include wording to that effect.[75] Nevertheless, even if such qualifiers are meant to narrow the basis of comparison, perhaps to investors or investments in the same line of business, such as competitor or near-competitor industries, arbitral practice does not provide much support for the legal significance of such express comparator wording.[76]

In any event, it is plain from the design of the EU Screening Regulation that, as a matter of fact, similarly situated foreign and Member State investors and investments are inherently treated differently since the EU Screening Regulation exclusively applies to the former and not the latter. Moreover, it cannot be excluded that not all similarly situated foreign investors might be treated equally but that the identity of the investors' home State may be a factor taken into consideration in the screening process, as will be further discussed below.

Adverse Difference in Treatment As for the second element, the EU Screening Regulation and the screening mechanisms of the Member States impose on foreign investors the obligation to undergo screening of their investments on grounds of security or public order. Such investors may be prohibited from establishing, acquiring or expanding investments and subjected to conditions or enforcement measures, including the unwinding of already made investments. This treatment is on its face less favourable than the treatment accorded to similarly situated Member State investors that are not subject to screening in accordance with the EU Screening Regulation.[77] In other words, investment screening inherently involves the adverse

[72]Bonnitcha et al. (2017), pp. 101–102; Nadakavukaren Schefer (2016), pp. 338–350; Newcombe and Paradell (2009), pp. 163–169.

[73]*Ibid*.

[74]Investment Policy Hub (2019).

[75]*Ibid*.

[76]Newcombe and Paradell (2009), pp. 159–161.

[77]It should be noted, however, that most national screening laws apply to Member State investors as well, although somewhat different rules apply to third-country investments under the screening laws of some Member States. European Commission (2017), p. 7.

treatment of third-country investors or investments compared to similarly situated EU investors or investments.

It is also conceivable that this treatment of foreign investors depends on the investor's third country of origin. It could readily be imagined that, in practice, the treatment of foreign investors of a certain third country with which the EU does not maintain close security links is found to be less favourable than, for example, the treatment accorded to similarly situated investors of third countries with which the EU cooperates closely on security matters.[78] The former may be subject to more rigorous screening and more restrictive screening decisions than the latter, which could be seen as an adverse difference in treatment that would be at odds with the MFN treatment obligation. For purposes of the application of MFN provisions, it is sufficient that the treatment of investors or investments of a particular third country is *de facto* less favourable compared to the treatment of investors or investments of another third country; *de jure* discrimination is not required.

Justification It is possible that a discriminatory treatment would not constitute a breach of the non-discrimination standards if such treatment can be appropriately justified. This additional requirement has emerged as a defence or implied exception in arbitral practice in the interpretation of the national treatment standard in international investment agreements,[79] although similar qualifications or implied exceptions have also emerged in the application of non-discrimination standards in other contexts.[80] It is fair to presume that the issue of justification would be central to the application of non-discrimination standards to disputes involving alleged national treatment violations or even MFN treatment violations related to investment screening.

Whether screening direct investments made by foreign investors, while not screening investments of Member State investors in like situations, could be justified is an issue that cannot be determined in abstract. Surely the differentiation of treatment could in principle be readily justified on rational grounds, citing the fundamental societal interest of safeguarding security and public order. Yet, with respect to the manner of application of investment screening, it could be questioned whether the differential treatment of the relevant foreign investor or its investment can be reconciled with, or is rationally related to, the policy objective with which the screening has been justified. In this respect, there is no shortage of inspiration for

[78]Other possible bases for differential treatment might be the maintenance of economic sanctions against a third country or a third country's human rights record.

[79]*Saluka* v. *Czech Republic*, Partial Award, 17 March 2006, para. 313; *Marfin* v. *Cyprus*, Award, 26 July 2018, para. 1237; *SD Myers* v. *Canada*, First Partial Award, 13 November 2000, para. 250. *See* Dolzer and Schreuer (2012), pp. 202–204; Nadakavukaren Schefer (2016), pp. 351–353; Bjorklund (2010), pp. 419, 433–434; Salacuse (2015), pp. 279–280.

[80]An example from the context to WTO law is the implied exception to the non-discrimination obligation in Article 2.1 of the Agreement on Technical Barriers to Trade (1994) with respect to de facto discrimination stemming exclusively from 'legitimate regulatory distinctions'. *See US–Clove Cigarettes* (2012) paras. 182, 215. *See further* Van den Bossche and Zdouc (2017), pp. 904–912.

persuasive arguments that can be gleaned from other instances where non-discrimination standards have been applied.[81]

For example, it could be argued that there is unjustified discrimination if it is shown that the screening is applied arbitrarily, in the sense of random or capricious application or by being applied rigidly without allowing for an inquiry into its appropriateness for the situation of the relevant investor or its investment.[82] Likewise, a lack of justification may also be argued where the differential treatment could be avoided[83]; where a less intrusive alternative exists to imposing a condition for or denying investment authorisation following a screening investigation[84]; and where the screening measure at hand is unbalanced, disproportionate, or otherwise lacking a sufficient degree of means–end relationship with the pursued policy objective.[85]

Fair and Equitable Treatment Most of the international investment agreements in effect between the EU, or the Member States that have screening mechanisms, and third countries include a fair and equitable treatment clause.[86] These provide for a standard of protection that is not related to how the host State treats its own or other third-country investors. While there are different formulations of the standard, attempts at elaborating the contours of its contents can be found in arbitral practice.[87] For present purposes, it is sufficient to note that reference is commonly made to other legal concepts that are treated as a manifestation of the standard. These include denial of justice, due process, transparency, non-arbitrariness, non-discrimination, legitimate expectations, legal certainty, good faith, proportionality and reasonableness.[88] As such, the standard is susceptible to a wide range of argumentative structures and models of legal discourse. This wide scope is somewhat balanced by certain tendencies in treaty and arbitral practice towards a restrictive application, which leaves a margin of discretion on the part of the host State, rendering non-actionable potential errors within that margin.[89] The fair and equitable treatment clause in Article 8.10(2) and (4) CETA is reflective of this practice:

> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

[81] *See* e.g. Olin v. *Libya,* paras. 200–203; *Pope & Talbott,* para. 78. *See also above* fn 80. With respect to the interpretation of general exceptions, the interpretive guidance provided by WTO jurisprudence may be particularly influential. *See* Newcombe and Paradell (2009), pp. 503–505.

[82] *Ibid*. *See also* Van den Bossche and Zdouc (2017), pp. 595–597, 600–601.

[83] *See above* fn 82; *see also* Van den Bossche and Zdouc (2017), pp. 597–598.

[84] *Ibid*.

[85] *See further* Newcombe and Paradell (2009), pp. 503–505. For the relationship between proportionality and the rule of law, *see generally* Jacob and Schill (2015), pp. 713–717 (in particular para. 36).

[86] Investment Policy Hub (2019).

[87] For a comprehensive review, *see* Jacob and Schill (2015).

[88] *Ibid*. pp. 717–743 and the case law cited. *See also* Bonnitcha et al. (2017), pp. 108–112.

[89] For a comprehensive overview, *see* Nadakavukaren Schefer (2016), pp. 381–426.

(a) denial of justice in criminal, civil or administrative proceedings;
(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
(c) manifest arbitrariness;
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) abusive treatment of investors, such as coercion, duress and harassment; or
(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

[. . .]

4. When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

The first two items on the list relate mainly to procedural justice, whereas the following three are also relevant for the protection of property. Interestingly enough, paragraph 4 makes clear that a breach of legitimate expectations may also constitute a violation of the standard, even though it is not specifically mentioned in the closed list of paragraph 2. Perhaps a breach of legitimate expectations involving property rights would most appropriately have to be construed as a case of manifest arbitrariness. This illustrates that the items of that list are themselves legal concepts of wide scope, the further elaboration of which is still expected from arbitral practice.

Procedural Justice Investment screening is an administrative procedure liable to result in legally binding acts. As such, screening mechanisms are subject to the customary principle prohibiting the denial of justice as well as principles of administrative due process that apply by virtue of treaty obligations, including judicial and administrative transparency.[90] More specifically, an administrative decision to prohibit an investment, to impose conditions, to deny an application for authorisation or to require an investment to be unwound would involve the application of the due process obligation to hear the investor concerned (the principle of *audi alteram partem*).[91] This in turn involves administrative transparency, including providing reasonable notice to the investor when the screening proceeding is initiated,[92] which should comprise the legal basis and a description of the nature of the proceedings and of the facts and issues in question.[93] A failure to provide the investor concerned with

[90] *See generally* Kläger (2011), pp. 213–234; della Cananea (2010), pp. 56–74; Palombino (2018), pp. 57–82; Paparinskis (2013), pp. 181–216; Yannaca-Small (2010), pp. 394–398.

[91] *See further* Kläger (2011), p. 214; della Cananea (2010), pp. 60–64; Palombino (2018), p. 61; Paparinskis (2013), pp. 194, 213.

[92] *See further* Kläger (2011), pp. 227–234, della Cananea (2010), pp. 65–67; Paparinskis (2013), pp. 247–250; Yannaca-Small (2010), pp. 388, 396–397.

[93] *See* e.g. Article 27.3(a) CETA; Article 17.5(2)(a) of the EU–Japan EPA; Article 12.5(a) of the Article EU–Korea FTA.

an effective opportunity to present its views on the truthfulness or relevance of any fact relied upon in an adverse screening decision might result in a violation of the right to be heard.[94] In addition to responding to facts and arguments alleged against it, the investor can expect a reasonable opportunity to present facts and arguments of its own in support of its position.[95]

Administrative justice also requires the possibility for aggrieved investors to seek review and correction of administrative actions before impartial and independent tribunals and to support and defend their positions before such tribunals.[96] The principle of *nemo iudex in sua causa* also requires that the tribunal does not have a substantial interest in the outcome of the proceedings.[97] Moreover, administrative and judicial decisions must be properly motivated and be based on evidence and on facts and arguments submitted in record.[98] The elaboration of these and other fundamental principles of procedural law may be gleaned from a wide range of sources, including the case law of human rights tribunals and of municipal legal systems.

Protection of Property The fair and equitable treatment standard also provides protection against the taking of property rights, in particular by incorporating the concept of legitimate expectations.[99] In this respect, the standard significantly overlaps with the protection of investor interests in connection with direct and indirect expropriation but is broader in scope and also covers situations that involve less invasive interference with property rights than in the case of expropriation.[100] The protection of legitimate expectations requires that the host State's conduct creates 'reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the [host State] to honour those

[94] A related question concerns the determination of the scope of the right to be heard required under investment treaty obligations. If, on the basis of the national treatment standard, the scope is determined by EU law, the *Hoffmann-La Roche* formula would be applicable ['le respect des droits de la défense exige que l'entreprise intéressée ait été mise en mesure, au cours de la procédure administrative, de faire connaître utilement son point de vue sur la réalité et la pertinence des faits et circonstances alléguées et sur les documents retenus par la Commission', Judgment of the Court of 13 February 1979, *Hoffmann-La Roche* v. *Commission*, C-85/76, EU:C:1979:36, para. 11], which also extends to matters of external economic matters, *see* Judgment of the Court of 27 June 1991, *Al-Jubail Fertilizer* v. *Council*, C-49/88, EU:C:1991:276, para. 17. For the relationship between the right to be heard in EU law and the international minimum standard, *see also* Pohl (2018).

[95] *See* e.g. Article 27.3(b) CETA; Article 17.5(2)(b) of the EU–Japan EPA; Article 12.5(b) of the Article EU–Korea FTA. *See also above* fn 94.

[96] *See* e.g. Article 27.4 CETA; Article 17.6 of the EU–Japan EPA; Article 12.6 of the Article EU–Korea FTA. *See also above* fn 94.

[97] *Ibid.*

[98] *Ibid.*

[99] *See generally* Jacob and Schill (2015), pp. 723–728; Kläger (2011), pp. 164–186; Paparinskis (2013), pp. 217–259; Yannaca-Small (2010), pp. 396–407.

[100] *See further* Jacob and Schill (2015), pp. 758–760; Kläger (2011), pp. 281–302.

expectations could cause the investor (or investment) to suffer damages'.[101] In the post-Lisbon treaties that include this standard, it is further qualified by wording such as that contained in Article 8.10(4) CETA quoted above.

Investment screening can result in significant interference with the property rights of investors, particularly in the post-investment phase. The prohibition of an investment, the imposition of conditions for authorising an investment and, in particular, the unwinding of already consummated investments are prone to severely disturb the affected investor's property rights. Nevertheless, absent special circumstances, protection from such disturbances would normally fall short of qualifying as a legitimate expectation created by the host State's conduct. In the post-Lisbon treaties, the argument that the introduction of the screening mechanism would *per se* frustrate the investor's expectations is neutralised by provisions such as Article 8.9(2) CETA:

> For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

Although rare in pre-Lisbon treaties, this type of provision would exclude from the protection of legitimate expectations the mere fact that the host State introduced screening legislation or that the EU adopted the EU Screening Regulation.

As for the application of screening legislation in a particular case, an investor alleging legitimate expectations would have to elicit evidence of conduct attributable to the host State that created the expectation, such as explicit representations that were reasonably relied upon by the investor.[102] It is also possible that consistent host State conduct could amount to implicit representations in the context of investment screening, depending on how the screening mechanism is administered in practice.[103]

The range of claims that could be raised on the basis of legitimate expectations cannot be easily generalised. While expectations relating to an investor's favourable special treatment in the application of screening may seem far-fetched to entertain, a more common type of expectation relates to the manner in which the screening is conducted. Expectations as to the non-discriminatory, non-arbitrary, proportional and good faith application of screening appears more reasonable and justifiable. It may also be reasonably expected that the screening is applied in conformity with its policy objective and not, for example, as a disguised restriction on competition.

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[101] *Thunderbird* v. *Mexico*, Arbitral Award, 26 January 2006, para. 154. *See further* Jacob and Schill (2015), p. 725.

[102] *See generally* Dolzer and Schreuer (2012), pp. 145–149; Newcombe and Paradell (2009), pp. 279–289; Salacuse (2013), pp. 253–260.

[103] *See further* Jacob and Schill (2015), pp. 725–727; Yannaca-Small (2010), pp. 400–402; Salacuse (2013), pp. 260–261.

2.2.2 Applicable Treaty Exceptions

The room for tension between investment treaty obligations and national autonomy is reduced by means of numerous legal techniques or devices that operate to achieve deference to State policy choices. One type of device is exclusions, which delimit *ex ante* the scope of application of treaty obligations (see Sect. 2.1 above). Another type of device is exceptions, which limit *ex post* the effects of applying treaty obligations, thus affecting the manner in which those obligations are applied.[104] The most important exceptions in the context of investment screening are general exceptions and security exceptions.

General Exceptions The post-Lisbon treaties and a minority of Member State treaties include general exception clauses inspired, to a greater or lesser extent, by Article XIV of GATS and Article XX of the General Agreement on Tariffs and Trade (GATT). The structure of this type of clause is often that a treatment that is inconsistent with the host State's treaty obligations may nevertheless be provisionally justified on the basis of enumerated policy objectives but that the exception is only effective if the provisionally justified treatment is consistent with the 'chapeau' of the clause. While the provisional justifications are geared towards the character of the measure at issue, the chapeau addresses the manner in which the measure is applied. Article 28.3(2) CETA is illustrative:

> For the purposes of [...] Sections B (Establishment of investments) and C (Non-discriminatory treatment) of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary:
>
> (a) to protect public security or public morals or to maintain public order;
> (b) to protect human, animal or plant life or health; or
> (c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
> (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
> (iii) safety [footnotes excluded].

Given the policy objective of investment screening, it is clear that the excepted situation in clause (a) of the provision above would be relevant. A footnote to the clause provides that '[t]he public security and public order exceptions may be

[104]For a comprehensive review of devices to achieve deference, of which exceptions are only a notable example, *see* Viñuales (2018). Other devices range from those that operate at the application stage, including rules on burden of proof, choice of applicable law, and exhaustion of domestic remedies, to those that operate at the post-application stage, such as excuses or preclusions of responsibility, and circumstances precluding wrongfulness.

invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'. This requirement reflects the interpretation in case law of Article 65(1)(b) TFEU, which derogates from the free movement of capital with respect to Member State measures justified on grounds of 'public policy or public security'. In EU case law, this requirement means that a measure so justified must not serve purely economic ends[105] and must be designed to give effect to such justification.[106]

In view of Article 4(1)(d) of the EU Screening Regulation, the excepted situation described in clause (c)(ii) of Article 28.3(2) CETA (and similar provisions in other treaties), relating to personal data, may also be of relevance, as well as, generally, the situation described in clause (c)(iii) of that article, relating to safety. An initial step in assessing the applicability of the exception is therefore to determine whether the measure at issue falls within the range of policy objectives permitted by the excepted situation described in these clauses.

Importantly, in the next step, the measures at issue must be *necessary* for the achievement of the relevant policy objective, which generally implies that they must contribute in a particular manner and to a sufficient degree to achieving that objective. In determining whether the necessity requirement is met, interpretive guidance is provided by a rich body of WTO case law,[107] which indicates a 'weighing and balancing' of (A) the degree to which the measure contributes to achieving the policy objective in question, relative to 'reasonably available' alternative measures, against other factors, including (B) the relative importance of the values or interests that the measure aims to safeguard and (C) the degree to which the measure restricts international commerce.[108] As stated by the Appellate Body in *US–Gambling* (2005):

> The requirement, under Article XIV(a), that a measure be 'necessary' – that is, that there be no 'reasonably available', WTO – consistent alternative – reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its

[105] *See* Judgment of the Court of 7 June 2012, *VBV-Vorsorgekasse*, Case C-39/11, EU:C:2012:327, para. 29 and the case law cited.

[106] *Ibid*., para. 30 and the case law cited.

[107] For a comprehensive analysis of GATT-style general exception clauses in investment treaties, *see* Mitchell et al. (2019).

[108] *See* Mitchell et al. (2019), pp. 225–231; Newcombe and Paradell (2009), pp. 503–506; Van den Bossche and Zdouc (2017), pp. 609–611. The 'weighing and balancing' is not necessarily limited to these three factors, *see* Van den Bossche and Zdouc (2017), p. 614, citing *US–Gambling* (2005) paras. 306–307.

right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.[109]

As interpreted by the Appellate Body, the determination of 'necessity' is the entry point to a multifaceted scrutiny of the measure at issue, involving both a relative assessment of international and domestic policy interests (trade restrictiveness versus the importance policy objective of the domestic measure at issue) and a relative assessment of the measure's policy effectiveness (contribution to the objective).[110]

In the context of investment screening, it is sufficient to observe that the policy interests of security and public order, interpreted in light of the list of factors in Article 4(1) of the EU Screening Regulation, would have to be scrutinised with respect to their relative importance. Given the diverse nature of these policy interests, one could expect them to be assigned different levels of importance. It is conceivable that essential security interests may, for example, have to be considered more important than the supply of certain raw materials or that food security and critical financial infrastructure may not be deemed to be at the same level of importance. Moreover, it is possible that the trade-restrictive impact of the screening measure at issue would be limited, in which case the necessity test would focus more on the contribution of the screening measure at issue to the policy objectives and the 'reasonable availability' of alternative measures. For example, a screening decision consisting of the imposition of a condition (*cf.* Article 2(3) of the EU Screening Regulation) may be a 'reasonably available' alternative to prohibiting the investment (*ibid.*) and may contribute to an equivalent (or even greater) degree to the realisation of the policy interests at stake.

Pursuant to the chapeau, the exceptions must be applied in good faith and not discriminate arbitrarily or unjustifiably between 'the Parties where like conditions prevail'.[111] The chapeau serves to prevent abuse by providing that provisionally justified measures may not be used as disguised restrictions on trade in services.[112]

As mentioned in Sect. 2.2.1 above, an implied exception with respect to the national treatment standard has been recognised in arbitral practice. To some extent, there is an overlap between this implied exception and the general exception that is based on the GATS/GATT standard.[113] Stated differently, if a measure violates the

[109] *US–Gambling* (2005) para. 308.

[110] *Cf.* Mitchell et al. (2019), pp. 329–330 argues that the necessity test is principally characterised by a substantial deference to the level of protection chosen by a host State in order to achieve the policy objective in question.

[111] *Brazil–Retreaded Tyres* (2007) paras. 215 and 224. *See* Van den Bossche and Zdouc (2017), pp. 594–595; Newcombe and Paradell (2009), pp. 504–505.

[112] *See generally* Mitchell et al. (2019), pp. 331, 347–348; Van den Bossche and Zdouc (2017), pp. 594–595; Newcombe and Paradell (2009), pp. 502–503. *Note* that, in addition to general exceptions modelled on Article XIV GATS relating to trade in services, Article 28.3(1) CETA, Article 2.22 of the EU–Japan EPA and Article 2.15 of the EU–Korea FTA incorporate by reference Article XX GATT, addressing trade in goods, as applicable also to the investment chapters of each treaty.

[113] *See further* Newcombe and Paradell (2009), pp. 505–506.

national treatment standard, and thus cannot be justified by the implied exception that forms part of that standard, then it is difficult to imagine that the measure could be justified by the general exception, which if anything is narrower, or at least more structured, than the implied exceptions developed in practice. In any event, the added value of the general exception clause is that it applies uniformly across all standards of protection. It reduces the scope for norm conflicts to those between, on the one hand, investment treaty obligations and, on the other hand, EU or Member State measures, which either cannot be justified as necessary to achieve certain recognised policy objectives or are not applied in a good faith and non-abusive manner.

Security Exceptions Rarely included in pre-Lisbon treaties, security exceptions are now a standard feature of the EU's international investment agreements. Security exceptions included in the latter agreements are modelled on Article XXI(b) of GATT and Article XIV*bis* (1)(b) of GATS and generally except actions related to the protection of the host State's essential security interests. The structure is exemplified by Article 28.6(b) CETA:

> Nothing in this Agreement shall be construed:
>
> [. . .]
>
> (b) to prevent a Party from taking an action that it considers necessary to protect its essential security interests:
>
> (i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment;
> (ii) taken in time of war or other emergency in international relations; or
> (iii) relating to fissionable and fusionable materials or the materials from which they are derived[.]

The exception in clause (b) above covers certain enumerated types of 'actions', i.e. not just legal acts or 'measures' but potentially any type of treatment.[114] The enumerated kinds of actions are excepted subject to the chapeau of the clause, which provides that the host State *considers* the action in question necessary for the protection of the host State's essential security interests. This necessity requirement is thus subjective or 'self-judging'.[115] The material scope of the exception is, for that reason, difficult to delimit *ex ante*. It is, however, not unlimited in scope. This is, in part, because the 'actions' to which it applies must be of the kinds enumerated in

[114]On the meaning of 'treatment', *see* Salacuse (2013), p. 228; Newcombe and Paradell (2009), pp. 182, 203, 261.

[115]*Note* that some pre-Lisbon treaties have non-self-judging essential security exceptions.

subclauses (i), (ii) and (iii)[116] and, in part, because the host State's discretion is subject to the general obligation of good faith.[117]

Covered Actions The actions in respect of which the security exception may be invoked are normally of three kinds. They need to be 'relating to', 'connected with' or 'taken in time of' certain other objectively ascertainable material or temporal facts or circumstances. Actions 'relating to fissionable or fusionable materials or the materials from which they are derived' in clause (b)(iii) of Article 28.6 CETA pose scant interpretive difficulty. Actions 'taken in time of war or other emergency in international relations' in clause (b)(ii) offer some more space for disagreement, particularly with respect to what counts as an 'emergency'.[118] Rather, it is the first prong of the clause that is the widest in scope. A footnote to clause (b)(i) clarifies that '[t]he expression "traffic in arms, ammunition and implements of war" in this Article is equivalent to the expression "trade in arms, munitions and war materials"'. Less clear is the scope of 'such other traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment'.

[116]Muchlinski (2009), pp. 59–60. This conclusion was endorsed in *Russia – Traffic in Transit* (2019), para. 7.101.

[117]Newcombe and Paradell (2009), pp. 484, 492, 494–495; Muchlinski (2009), pp. 57, 74; Salacuse (2013), p. 381; Van den Bossche and Zdouc (2017), p. 620.

By way of reaching the same conclusion, note also that actions of the enumerated kinds are not excepted without qualification under Article 28.6(2) CETA—in which case the necessity requirement would have been superfluous; e.g. the clause could have stated that all actions related to fissionable and fusionable materials were excepted. Nor are all actions of the enumerated kinds that are *objectively necessary* for the purpose of protecting its essential security interests excepted. For these reasons, the clause is not a *pre-application exemption*, i.e. a (preliminary) exclusion from (or delimitation of) the treaty's scope of application, the applicability of which would have been the claimant's burden of proof. *See* Viñuales (2018), section 1.2. *Cf.* Article XI of the Argentine–US BIT (not published in UNTS, UN reg. no. 54935), which was at issue in a number of cases arising out of Argentina's economic crisis of 2001–2002, including *CMS* v. *Argentina*. The security exception of that treaty has an objective necessity requirement and is thus a pre-application exemption, operating as a 'threshold requirement', *see CMS* v. *Argentina*, Decision on the Application for Annulment, 25 September 2007, para. 129.

By contrast, Article 28.6(2) CETA only excepts such actions of the enumerated kinds that the host State *determines to be necessary* for the purpose of protecting its essential security interests; i.e. the necessity requirement is subjective. Absent such a determination—and invocation of the exception by the host State—, full effect will be given to the application of the substantive treaty obligations. This security exception is therefore a *post-application exemption*, i.e. an exception *stricto sensu*, which precludes a finding of breach. *See* Viñuales (2018), section 1.6. This is to be distinguished from an excuse, which operates to preclude liability, *ibid*. section 1.7. Muchlinski (2009), p. 67 rightly points out that the security exception at issue in the Argentina cases is not an exemption that operates to preclude liability. However, nor are all security exceptions exclusions (i.e. scope-of-application clauses). The self-judging ones apply only at the option of the host State and are thus to be invoked and proven (to the extent required) by that State.

[118]It is evident from the negotiating record of the GATT that the potential for abuse in this respect was acknowledged. *See* United Nations Conference on Trade and Employment (1947), pp. 19–21. *Cf. Russia – Traffic in Transit* (2019), section 7.5.5.

The potential for abusive application of the clause is significantly greater with respect to the wide category of actions covered by this wording. Particularly, the 'indirect' purpose of supply may cause interpretive difficulties.

In the context of investment screening, the screening of investments of the kind referred to in Article 4(1)(b) of the EU Screening Regulation could be covered by Article 28.6(b)(i) CETA, i.e. 'critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies'. With respect to the other factors listed in Article 4(1) of the EU Screening Regulation, the screening of investments affecting critical infrastructure and the supply of critical inputs could also be covered to the extent that there is a direct or indirect purpose of supplying a military or other security establishment. By contrast, the screening of investments affecting other critical infrastructure, the supply of other critical inputs, food security in general, access to sensitive information, or the freedom and pluralism of the media would appear to fall outside the scope of the exception. However, the screening of such investments might fall within the ambit of exceptions such as in Article 24(3)(c) of the Energy Charter Treaty, which applies to 'any measure which [a Contracting Party] considers necessary [. . .] for the maintenance of public order'.

Good Faith Article 26 of the Vienna Convention on the Law of Treaties (VCLT) enshrines the customary principle of *pacta sunt servanda*—that '[e]very treaty in force is binding upon the parties to it and must be performed in good faith'. As the International Court of Justice explained in the *Gabčikovo-Nagymaros* case, '[t]he principle of good faith obliges the [parties to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realised'.[119] Interpreting the security exception in good faith thus implies that, although the necessity requirement is self-judging and the discretion of the host State invoking the exception is very extensive, the discretion must nevertheless be exercised reasonably and not in a manner that defeats the purpose of the exception.[120]

In *Russia – Traffic in Transit* (2019), the panel held that the discretion of a WTO Member to take 'any action which it considers necessary for the protection of its essential security interests' pursuant to the chapeau of Article XXI(b) GATT—which is nearly identical to Article 28.6(2) CETA——extends both to the determination of the invoking Member's essential security interests and the necessity of the actions of the enumerated kinds taken for the protection of those interests.[121] The panel observed that 'essential security interests' is a narrower concept than 'security interests' and that it generally referred to 'those interests relating to the quintessential

[119] *Gabčikovo-Nagymaros Project* [1997] ICJ Rep 7, para. 142.

[120] Ziegler and Baumgartner (2015), pp. 18–19; De Brabandere and Van Damme (2015), pp. 52–55.

[121] *Russia – Traffic in Transit* (2019), paras. 7.131, 7.146 and 7.147.

functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally'.[122] What constitutes essential security interests in a specific case depends on the particular situation and perceptions of the State in question and can be expected to vary with changing circumstances.[123]

The panel observed that the obligation to act in good faith requires WTO Members not to invoke the security exception as a means to circumvent their GATT obligations. From that obligation, the panel derived (A) a duty of transparency—a duty to 'articulate the essential security interests said to arise from the [alleged situation in the relevant enumerated sub-clause (i), (ii) or (iii) of the clause] sufficiently enough to demonstrate their veracity'[124]—and (B) a requirement that the actions at issue are 'not implausible as measures protective of these interests'.[125]

As for the level of transparency required, the panel held that the essential security interests would have to be articulated with greater specificity the further the situation at issue is removed from external or internal threats and the less obvious the 'defence and military interests, or maintenance of law and public order interests, that can generally be expected to arise'.[126] The right of a party not to disclose information contrary to its essential security interests pursuant to Article XXI(a) GATT (cf. Article 28.6(1) CETA) could not be invoked to evade this duty of transparency.[127] As for the implausibility requirement, the panel considered whether the measures at issue was so remote from, or unrelated to, the essential security interests in question that it was implausible that the measures protected these interests.[128]

If this interpretation of Article XXI(b) GATT were to be transferred to Article 28.6(b)(i) CETA to except the screening of an investment, e.g. relating to a critical technology, the duty of transparency would mean that the host State carrying out the screening would have to articulate what essential security interest it considered to be threatened by the contemplated investment in the relevant technology. The exception would then be available unless the screening was so remote from, or unrelated to, these articulated interests that it would be implausible that the interests were being protected by the screening.

[122] *Ibid*. para. 7.130.
[123] *Ibid*. para. 7.131.
[124] *Ibid*. para. 7.134.
[125] *Ibid*. para. 7.138.
[126] *Ibid*. para. 7.135.
[127] *Ibid*. para. 7.129 in light of para. 7.134.
[128] *Ibid*. para. 7.139.

3 Implications of Investment Treaty Obligations on the Functioning of Investment Screening

From the analysis above, it is evident that investment treaty obligations apply, to a greater or lesser extent, at both the pre- and post-investment phases. Post-Lisbon treaties generally apply at the pre-investment phase, while most pre-Lisbon treaties do not. However, even with respect to the latter, by the time screening actually occurs, investors may have already reached the post-investment phase because of the possibility that they may already have acquired pre-existing investments below the relevant screening threshold, which they could then expand.

The analysis has also revealed that there is significant potential for norm conflicts between, on the one hand, the main applicable standards of protection in international investment agreements—national treatment, MFN treatment, and fair and equitable treatment—and, on the other hand, the design or operation of screening mechanisms. The potential for conflicts is reduced, but not eliminated, by general and security exceptions. The former are broad in scope but subject to rigorous conditions, while the latter are narrow in scope but self-judging (within limits).

In light of these findings, the next question to be addressed is why the identified potential for norm conflicts might restrict the EU and its Member States in designing or operating screening mechanisms. At this stage, it should be noted that a potential norm conflict may, on closer scrutiny, not be a conflict of norms in a narrow sense.[129] For example, it may be that a particular screening mechanism does not require anything that cannot be reconciled with investment treaty obligations. Moreover, in a situation where national screening laws, regulations or other measures are interpreted so as to avoid a conflict *stricto sensu* with investment treaty obligations, the latter will inevitably have an influence on the operation (and the future design) of the screening laws or measures. It is thus in the latter, wider sense that norm conflicts are discussed below.[130]

In the event of such conflicts, EU secondary law and national law should be interpreted so as to comply with international commitments.[131] This is emphasised in recital 35 of the EU Screening Regulation:

[129]In the strict sense, a conflict between two norms arises only where both norms cannot be complied with simultaneously. *See* Vranes (2006), p. 400.

[130]In such a broad sense, '[t]here is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated', Vranes (2006), p. 418.

[131]*See* e.g. Judgment of the Court of 3 September 2008, *Kadi and Al Barakaat* v. *Council and Commission*, C-402/05 P, EU:C:2008:461, para. 291 and the case law cited. According to the settled EU case law 'the primacy of international agreements concluded by the EU over secondary legislation requires that the latter be interpreted, in so far as is possible, in conformity with those agreements', *see* General Court Judgment of 21 November 2018, *Stichting Greenpeace Nederland and PAN Europe* v. *Commission*, T-545/11 RENV, EU:T:2018:817, para. 106 and the case law cited. As a matter of international law, States have a general duty to bring their domestic law into

> *The implementation of this Regulation by the Union and the Member States* should comply with the relevant requirements for the imposition of restrictive measures on grounds of security and public order in the WTO agreements, including, in particular, Article XIV (a) and Article XIV bis of the General Agreement on Trade in Services (GATS). It should also comply with Union law and *be consistent with commitments made under other trade and investment agreements to which the Union or Member States are parties* and trade and investment arrangements to which the Union or Member States are adherents [emphasis added].

To assess the possibility that investment treaty obligations may influence the interpretation of the EU Screening Regulation or national screening laws or measures or require them to be changed or designed in a particular way, it is necessary to first ascertain how a norm conflict *lato sensu* would be determined and resolved (Sect. 3.1). It will then be analysed how the different approaches to dispute resolution and enforcement might impact the functioning of investment screening mechanisms (Sect. 3.2).

3.1 Manner of Resolving Norm Conflicts

3.1.1 General

Conflicts between, on the one hand, investment treaty obligations and, on the other hand, EU secondary legislation or national legislation may, in principle, be determined either at the international level or at the EU or national level. With respect to international adjudication, such norm conflicts may be determined by investor–State arbitration or interstate arbitration. With respect to EU or national adjudication, several types of actions are possible.[132] As regards the national level, domestic courts can (A) review the constitutionality of investment treaties, (B) intervene to directly redress breaches of investment treaties and (C) exercise supervisory jurisdiction over investment arbitration proceedings through (i) actions for the disqualification of arbitrators, (ii) actions for provisional measures, (iii) actions to set aside an arbitral award and (iv) actions for the recognition or enforcement of arbitral awards.[133] Each of these actions at national level may be the subject matter of references for preliminary rulings on the interpretation of EU law by the Court of Justice of the European Union (CJEU) pursuant to Article 267(1)(a) TFEU. As regards proceedings directed against the EU, the CJEU could hear (A) an action for

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conformity with their obligations under international law. *Exchange of Greek and Turkish Populations* (1925) PCIJ Ser B No 10, p. 20. *See further* Crawford (2012), p. 52.

[132] *See* in this volume Teoman Hagemeyer, Access to Legal Redress in an EU Investment Screening Mechanism.

[133] On the litigation of investment treaty breaches before domestic courts, *see generally* Ben Hamida (2009), pp. 72–75. *Note* that the ICSID Convention restricts domestic courts from setting aside or denying the recognition or enforcement of an arbitral award rendered under the auspices of that convention.

annulment of a binding EU legal act (such as the EU Screening Regulation) pursuant to Article 263 TFEU; (B) an action for damages resulting from, e.g., a non-binding act (such as an opinion by the Commission pursuant to Articles 6, 7 and 8 of the EU Screening Regulation) pursuant to Article 268 TFEU; (C) references for preliminary rulings on the validity of secondary legislation pursuant to Article 267(1)(b) TFEU (including review of the validity of international agreements concluded by the EU[134]); and (D) requests for interim measures pursuant to Article 278 TFEU.

As outlined in Sect. 1 above, the following analysis is limited to comparing the impact of investor–State arbitration and interstate arbitration on the design and operation of investment screening mechanisms. While a comprehensive review of the impact of the different remedies under EU law and national law would go beyond the aim of this chapter, such review could only provide additional support for the proposition of this chapter; *viz*., the availability at the EU or national level of additional means of resolving norm conflicts or of enforcing international norms, as a complement to international adjudication, could only further restrict the EU and its Member States in designing or operating screening mechanisms.

However, international remedies and remedies under national or EU law are not necessarily complementary. Resort to remedies at the EU or national level may exclude the availability of international remedies as a consequence of so-called fork-in-the-road clauses in investment treaties, by which the investor must choose between pursuing remedies at the international or domestic (including EU) level. Nevertheless, this choice remains with the investor, which can normally be expected to prefer investor–State arbitration.[135]

It should also be noted that adjudication at the national (and EU) level requires that the relevant treaty obligations have direct effect in the national legal order or have been implemented in national law. For present purposes, it is sufficient to observe that there are investment treaties that expressly limit their own direct effect. Notably, the EU's post-Lisbon international investment agreements exclude the possibility of recourse at the national level. For example, Article 30.6 CETA provides:

> 1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.
> 2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

Similarly, Article 23.5 of the EU–Japan EPA provides: 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, without prejudice to the rights and obligations of persons under other public

[134] Judgment of the Court of 27 February 2018, *Western Sahara*, C-266/16, EU:C:2018:118, paras. 43–45, 48–50.

[135] *Cf*. Ben Hamida (2009), p. 69.

international law.' Another similar provision is found in Article 4.11 of the EU–Singapore IPA.[136]

By contrast, a majority of pre-Lisbon Member State treaties contemplate the possibility that they may be relied upon before host State domestic courts, occasionally combined with a 'fork-in-the-road' clause.[137] With respect to disputes brought before domestic courts on the basis of such treaties, provided that the relevant treaty is directly effective or has been transposed into national law, the EU judiciary may also get involved. Matters relating to conflicts between treaty obligations and national law that concern the interpretation and application of the EU Screening Regulation may end up before the CJEU by means of a reference for preliminary ruling pursuant to Article 267 TFEU.

Turning to international adjudication, with respect to post-Lisbon treaties concluded by the EU, norm conflicts may be determined and resolved by means of interstate arbitration or investor–State arbitration. Some treaties, such as the EU–Japan EPA and the EU–Korea FTA, provide only for the former.[138] Others, including CETA and the EU–Singapore IPA, provide for both.[139] A third possibility, which has not been utilised with respect to investment treaty obligations, would be that the treaty does not provide for any consent to arbitration, in which case disputes would have to be resolved through bilateral negotiation with the possibility to submit disputes to arbitration by mutual consent on an *ad hoc* basis.

It should be noted that whenever an international tribunal reviews an EU or national measure for consistency with an international standard, the meaning of that measure will necessarily have to be interpreted, but merely as a fact, not as a matter of national law as such.[140] An explicit provision to such effect has been included in the post-Lisbon treaties that provide for investor–State arbitration.[141]

3.1.2 Scope of Arbitral Jurisdiction

General Except for disputes that are objectively non-arbitrable and thus concern a subject matter that is incapable of settlement by arbitration, States generally enjoy the freedom to agree to settle any dispute by recourse to arbitration. However, in

[136]Domestic recourse is also excluded in relation to the EU–Korea FTA by virtue of Article 8 of the Council Decision (2011/265/EU) of 16 September 2010.

[137]Investment Policy Hub (2019).

[138]Article 21.2 of the EU–Japan EPA and Article 14.2 of the EU–Korea FTA.

[139]Articles 8.18(1) and 29.2 CETA, and Articles 3.1(1) and 3.25 of the EU–Singapore IPA.

[140]*Certain German Interests in Polish Upper Silesia* (*Germany* v *Poland*) [1926] PCIJ Rep Series A No 7, p. 19, para. 52.

[141]Article 8.31(2) CETA and Article 3.13(2), footnote 7, of the EU–Singapore IPA. The inclusion of such provision in CETA was instrumental in assuaging the European Court of Justice that the investor–State dispute settlement provisions of that treaty do not call into question the autonomy of the EU legal order. *See* CJEU Opinion 1/17, *CETA*, EU:C:2019:341, 30 April 2019, paras. 76–77, 122, 130–131.

practice, disputes rarely confine themselves to non-arbitrable subject matters and will, at least partially, concern matters that States may agree to arbitrate. More commonly, there may be disagreement as to the *scope* of the consent to arbitration.

With respect to interstate arbitration, the post-Lisbon treaties contain explicit consent provisions that cover all types of disputes arising under the relevant treaty, which have not been explicitly excluded.[142] In relation to investment treaty obligations contained in those treaties, no specific exclusions normally apply; this is typically the case also for interstate arbitration clauses of Member State treaties. However, CETA contains an exclusion from both interstate and investor–State arbitration,[143] *viz*. disputes relating to investment screening under the *Investment Canada Act*. Specifically, the exclusion covers '[a] decision by Canada following [investment screening under the *Investment Canada Act*] regarding whether or not to permit an investment that is subject to [screening]'.[144] It is noteworthy that CETA does not contain any similar exclusion applicable to investment screening by the EU or its Member States.

Treaties that provide for investor–State arbitration often limit the application of such arbitration to certain types of disputes and explicitly exclude other types. With respect to investment screening, it is important to note Article 8.18(1)(a) CETA, which limits the scope of investor–State arbitration to allegations of breach of the non-discrimination standards 'with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment'.[145] By not mentioning 'establishment' and 'acquisition', the scope of arbitral jurisdiction is limited to the post-investment phase. However, the arbitral jurisdiction does cover 'expansion' of investments, which seems to imply that a dispute arising out of *ex ante* screening that relates to a prospective expansion of an existing investment can be arbitrated. This is not called into question by Article 8.18 (2) CETA, which provides that '[c]laims under [Article 8.18(1)(a)] with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the *existing* business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment' [emphasis added]. Rather, it appears that Article 8.18(2) CETA serves to exclude expansions of investments into *future* business operations, presumably to avoid circumvention of the exclusion of establishment or acquisition of new investments.

Pursuant to Article 8.18(1)(b) CETA, the scope of arbitral jurisdiction also covers alleged breaches of the fair and equitable treatment standard without limitation.

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[142] *See above* fn 138 and 139.

[143] Article 8.45 CETA.

[144] Annex 8-C CETA. Another example is Annex 9-H of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), which however remains affected by the suspension of Article 9.19 (on the submission of a claim to arbitration) pursuant to Article 2.

[145] Similarly, *see* Article 2(1) of the chapter on the resolution of investment disputes of the draft modernised EU–Mexico Global Agreement, published 25 April 2018, available at http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=132. Accessed 06.1.2020.

Exceptions Limitations to the material scope of investment treaty obligations pursuant to general and security exceptions, discussed in Sect. 2.2.2 above, also limit the scope of arbitral jurisdiction.[146] In particular with respect to the self-judging necessity requirement of GATT/GATS-style security exceptions, the question of material scope and scope of jurisdiction can easily be conflated.[147] However, such conflation should be approached with caution because while the former limits the latter, it is possible that the latter is further limited by the consent to arbitration. Nevertheless, none of the post-Lisbon treaties provide for additional limitations to the arbitral jurisdiction with respect to the matters covered by the general and security exceptions.

3.2 Implications on the Design and Operation of Screening Mechanisms

Three types of dispute resolution and enforcement systems in respect of screening decisions were identified in the previous section: (A) EU and national adjudication, (B) interstate arbitration and (C) investor–State arbitration. While a combination of all three of these systems are available for most pre-Lisbon Member State treaties, only the latter two can be resorted to for purposes of post-Lisbon EU treaties.[148] These types of dispute resolution and enforcement systems differ in important respects.

First, there are important differences in terms of standards of review. With respect to national and EU adjudication, post-Lisbon treaties and some pre-Lisbon treaties cannot form part of the standard of review due to their lack of direct effect. Other pre-Lisbon treaties could have direct effect and, if so, form part of the standard of review. Of course, the precise standards of review also differ depending on the type of action or procedure in the various national legal orders—a review of these differences are beyond the scope of this chapter. As between investor–State arbitration and interstate arbitration, there are no differences in the standards of review, insofar as the dispute falls within the scope of arbitral jurisdiction, which may differ (*cf.* Sect. 3.1.1).

Second, there are also significant differences in terms of legal procedure. The EU and national adjudication systems are not only very different from arbitration but also differ among themselves—again, a review of these procedural differences is beyond the scope of this chapter. There are also important differences between

[146]With respect to the general exceptions in Article 28.3(2) CETA, this point was highlighted in CJEU Opinion 1/17, *CETA*, EU:C:2019:341, 30 April 2019, paras. 152–153.

[147]*Ibid.*

[148]The question of whether national (and EU) courts may exercise supervisory jurisdiction over the arbitral process in the context of (non-ICSID) post-Lisbon treaties is for present purposes ignored.

interstate and investor–State arbitration. The overall effects of these differences on the functioning of screening mechanisms are not obvious, however.

Third, the different systems do not provide access to a legal remedy on the same premises. National and EU adjudication is widely accessible to aggrieved investors concerned by screening decisions. Article 3(5) of the EU Screening Regulation provides that '[f]oreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities'. To the extent that an applicable international investment agreement were to be invoked by an investor before national or EU courts—which has not occurred so far—this would mean that legal recourse under the EU Screening Regulation would comprise disputes relating to conflicts between screening measures and investment treaty obligations. As mentioned above, such disputes would be resolved differently as a result of differing standards of review depending on the type of action or procedure and whether the relevant investment treaty is a post-Lisbon EU treaty or a pre-Lisbon Member State—only treaty.

By contrast, there is a considerable hurdle in accessing interstate and investor–State arbitration. Investors have no right to initiate interstate arbitration but have to petition their home State to do so. Home States have very wide, if not unfettered, discretion to decide whether or not to act upon any such petition. Given the multifaceted nature of interstate relationships, a single investment dispute—even one involving considerable economic value—will rarely be sufficiently important to warrant intervention by the home State. Such intervention comes with the risk of adverse effects on the relationship between the States concerned. Access to this remedy is therefore highly uneven. It will be beyond reach for all but the most economically or politically influential investors.

Investor–State arbitration is more readily available than interstate arbitration, but significantly more costly than adjudication before national or EU courts, and often also very time-consuming. While the investor is, in principle, often entitled to initiate arbitral proceedings without the need to exhaust domestic remedies, it is nevertheless a remedy that requires significant resources. Only disputes of sufficiently high economic value or fundamental significance will justify the commencement of investor–State arbitral proceedings.

Fourth, as between interstate arbitration, on the one hand, and national and EU adjudication and investor–State arbitration, on the other hand, there are material differences in enforcement incentives. Because aggrieved investors have no formal role in interstate arbitration, there is a palpable likelihood of conflicting incentives in pursuing legal recourse between the investor concerned and the home State. As a consequence, even if a home State initiates arbitral proceedings, there are no safeguards that could mitigate the risk that the home State would be guided by ulterior motives or interests that are unrelated to, or even at odds with, those of the investor concerned. This is in stark contrast to national and EU adjudication and investor–State arbitration, where the investor has control over its own procedural conduct as litigant or claimant.

The cumulative effect of a lower level of access and a greater potential for conflicting incentives is to render interstate arbitration a less effective mechanism

than national and EU adjudication and investor–State arbitration for resolving norm conflicts between screening measures and investment treaty obligations.[149] In contrast to investor–State arbitration, access to national and EU adjudication is guaranteed in the EU Screening Regulation and is more cost efficient and expeditious.

The differences between the three dispute settlement systems in terms of accessibility and enforcement incentives are liable to affect the likelihood that investment treaty obligations will be enforced and the intensity of such enforcement. With respect to the application of national treatment and MFN treatment obligations to investment screening in the pre-investment phase (Sect. 2.1.1 above), the fact that national and EU courts lack jurisdiction over treaty disputes under post-Lisbon agreements (Sect. 3.1.1 above) and that investor–State arbitral jurisdiction, where it exists (such as in CETA), does not normally cover national treatment and MFN treatment disputes in the pre-investment phase (Sect. 3.1.2 above) means that only interstate arbitration is available to enforce such obligations. As a result, although the EU Screening Regulation is meant to be interpreted in conformity with investment treaty obligations (pursuant to recital 35), the limited access and non-straightforward procedural incentives involved in interstate arbitration is liable to affect the likelihood that such obligations will be enforced. By contrast, with respect to the application of investment treaty obligations to investment screening in the post-investment phase (Sect. 2.1.2 above), the availability of investor–State arbitration, which is normal under both pre- and post-Lisbon agreements (Sect. 3.1.2 above), as well as national and EU adjudication under many pre-Lisbon agreements, means that the likelihood and intensity of enforcement are comparatively higher.

4 Conclusions

Investment treaty obligations apply to investment screening at least to the extent that the screening takes place after an investment has been made. In practice, most investment screening is of this type, either because the investment that is screened has already been made or because the screening concerns a prospective expansion of an existing investment that would bring the total investment above the applicable screening threshold. As a result, screening laws and other measures relating to screening may potentially conflict with investment treaty obligations not to unjustifiably discriminate between comparable investors or investments and to accord fair and equitable treatment. In particular, foreign investors and their investments must not be denied justice or due process, and their legitimate expectations must be protected.

[149]This is not meant to suggest necessarily that interstate arbitration is a less effective means of dispute resolution.

Host States will generally not breach their investment treaty obligations by applying screening measures that are necessary to maintain public order in a manner that does not arbitrarily or unjustifiably discriminate against investors of comparable third countries. Nor will investment treaty obligations be breached where a host State deems, in good faith, screening measures of certain limited types to be necessary to protect its essential security interests. While the host State's determination of the necessity of such measures and, in particular, of its essential security interests, is, in principle, shielded from adjudicatory scrutiny, the principle of good faith requires a minimum level of transparency and plausible relationship between the measure and the security interest at issue.

The application of investment treaty obligations and treaty exceptions leaves a significant room for potential conflicts between treaty norms, on the one hand, and investment screening laws and other screening measures, on the other. Such conflicts may be resolved by national or EU adjudication, by interstate arbitration or by investor–State arbitration. Post-Lisbon treaties exclude the possibility of national and related EU adjudication of investment treaty provisions, whereas this remains a viable avenue according to most pre-Lisbon treaties concluded by the Member States in question. While some post-Lisbon treaties exclude pre-investment disputes from the scope of investor–State arbitration, expansion of investments relating to existing business operations are not excluded. This means that a dispute concerning an existing investment that is increased above the screening threshold can be arbitrated, whereas a dispute concerning an initial investment above the threshold cannot.

The availability of different international dispute settlement systems influences the design and operation of investment screening mechanisms primarily as a consequence of differences in accessibility and enforcement incentives. Treaty obligations that may be adjudicated before national or EU courts have a greater potential to impact the functioning of screening since access to such adjudication is explicitly guaranteed in the EU Screening Regulation. Where investor–State arbitration is available, it offers better access to a legal remedy and less risk for conflicting incentives than interstate arbitration.

The policy implications of these findings operate at different levels. Principally, investment treaty obligations can be expected to shape the manner in which investment screening is conducted. It may even be possible that screening laws would need to be redesigned to conform to treaty obligations. Working out *ex ante* the possible interactions between investment treaty obligations and screening legislation is a very difficult task, requiring significant further research, but it is a task worth undertaking. The alternative would be to reactively modify the way that screening is carried out over time in view of arbitral awards, which could be financially very burdensome, operationally disruptive and inefficient. A proactive approach to ensure harmony at the international, European and national levels is therefore recommended.

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