LUND UNIVERSITY

SCHOOL OF
ECONOMICS AND
MANAGEMENT

# The EU Foreign Direct Investment Screening Mechanism

Potential conflicts with International Investment Standards in EU IIA´s

**Sebastian Granroth**

DEPARTMENT OF BUSINESS LAW

Master's Thesis in European and International Trade Law

15 ECTS

HARN63

Spring 2024

# Contents

**Abstract** .................... **5**

**Abbreviations** .................... **6**

**1. Introduction** .................... **7**

1.1 Background.................... 7

1.2 Purpose and research questions .................... 9

1.3 Delimitations .................... 10

1.4 Method and materials .................... 11

1.5 Outline .................... 12

**2. EU Foreign Direct Investment Screening Mechanism** .................... **13**

2.1 Foundations for the Regulation .................... 15

2.1.1 Transfer of competence.................... 15

2.1.2 Support from the Member States .................... 16

2.2 Framework for national screening mechanisms .................... 17

2.2.1. Mandatory provisions.................... 17

2.2.1.1 Minimum procedural standards.................... 17

2.2.1.2 Cooperation and reporting requirements.................... 19

2.3 Substantial powers left to the Member States .................... 21

2.3.1 Sectoral scope and procedure for screening.................... 21

2.3.2 Investment screening in Germany.................... 23

2.2.3 Investment screening in France.................... 26

2.4 Proposed revision of the Regulation.................... 28

2.4.1 Downfalls of the current regulation .................... 28

2.4.2 Key novelties.................... 29

**3. International standards for investment protection** .................... **33**

3.1 Fundamental Investment standards .................... 34

3.1.1. Non-discrimination .................... 34

3.1.2 Fair and equitable treatment.................... 36

3.1.3 Protection against expropriation .................... 38

3.2 Safeguards against investment standards .................... 39

3.2.1 Exception clauses.................... 39

3.2.2 Exclusion clauses .................... 40

3.3 Standards in EU IIA´s .................... 42

3.3.1 EU-Canada Comprehensive Economic and Trade Agreement.................... 42

3.3.2 EU–UK Trade and Cooperation Agreement .................... 45

**4. Potential conflicts**.................... **48**

4.1 The pre-establishment stage ........................................................................49
4.1.1 Explicit inclusion of pre-establishment protection...........................49
4.1.2 Broad definitions of investor and investment .................................50
4.1.3 The screening procedure ..................................................................51
4.2 Post-establishment stage...............................................................................53
4.2.1 Retrospective screening ...................................................................53
4.2.2 Expansion of an existing investment................................................55
**5. Conclusions........................................................................................................ 56**
**Bibliography........................................................................................................ 60**

# Abstract

Following national security concerns regarding foreign direct investments targeting strategically important industries within the EU, a framework regulation on the screening of foreign direct investments was introduced in 2019. However, the vague effects of the regulation on national investment screening mechanisms has enabled constantly increased tightening of these regimes. Therefore, the purpose of this research is to clarify whether the EU screening regime has the potential of conflicting international investment standards in EU IIA´s which protect the foreign investor from arbitrary and discriminatory treatment from the host state of the investment.

The research begins with the assesment of the background for the regulation followed by an overview on the impact of the regulation on investment screening. Hereinafter, the focus is shifted to the purpose of fundamental investment standards and their application in EU IIA´s. The research concludes with the elaboration of potential conflicts between investment screening and investment standards. The findings in the research indicate that there indeed is potential for investment standard violations both in the pre-establishment stage and the post-establishment stage of an investment. However, the protection available to the investor varies depending on the applicable EU IIA and despite the vast safeguards and efforts to limit the applicability of the standards to avoid infringements, Member States cannot rely in perpetuity that these safeguards will cover the ever expanding investment regimes.

**Keywords**: Investments screening, Foreign direct investment, Screening Regulation, IIA, Investment protection, Safeguards

# Abbreviations

| | |
|---|---|
| BIT | Bilateral Investment Treaty |
| CETA | Comprehensive Economic and Trade Agreement |
| CJEU | Court of Justice of the European Union |
| ECJ | European Court of Justice |
| FDI | Foreign Direct Investment |
| IIA | International Investment Agreement |
| MFN | Most-Favoured Nation |
| NT | National Treatment |
| OECD | Organization for Economic Co-operation and Development |
| TCA | Trade and Cooperation Agreement |
| WTO | World Trade Organisation |

# 1. Introduction

## 1.1 Background

The current polarization in international trade can be described as a failure between the industrialized countries and the developing countries to remove barriers to trade and continue global integration. In academic circles the resulting standstill has been considered contributing to increased protectionism, meaning that countries actively reduce the amount of ties they have to each others in questions related to trade, services, capital flows and transfers of technology[1]. In this context, especially the economical rise of China as a major actor in global trade with its market distorting trade policy and failure to reciprocate economical openness has forced significant contributors in global trade such as the EU to adopt protective trade policies to balance these effects, resulting in even further increased protectionism[2].

A concrete example following this shift in trade policy is the Regulation 2019/452 of 19 March 2019 (hereinafter the Screening Regulation). This instrument has the objective of creating an EU wide framework for the screening of foreign direct investments originating from outside the Union in order to protect national security and public order[3]. The underlying motivation for creating this protective instrument was the rising concern of foreign investments targeting the Union which potentially had foreign government involvement and thus withheld the potential of take overs in industries with strategic importance for national security[4]. When the initiative was launched it was inevitable that the regulation was aimed at Chinese investments despite the initial direct suggestions. This is because Chinese investments into the EU surged after the financial crisis in 2008 and continued

---

[1] Uri Dadush, 'Deglobalisation and Protectionism' [2022] Bruegel Working Paper, Bruegel, Brussels, p. 1.

[2] Sarah Bauerle Danzman and Sophie Meunier, 'Naïve no more: Foreign direct investment screening in the European Union' [2023] Global Policy, p. 40.

[3] Ibid, p. 42.

[4] Regis Bismuth, 'Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU' [2018] European Investment Law and Arbitration Review, p. 47.

until 2016 reaching an overall value of 37 billion euros and were allowed into the Union without scrutiny[5]. This liberal approach was however changed as a result of the current Regulation[6]. Despite the reducing trend of Chinese FDI (hereinafter foreign direct investment) in 2016, Chinese investment still play a considerable role in the EU being located in industries which are of vital importance such as technology, finance and energy[7]. Also, the reduction of Chinese investments has not mitigated the position of EU as one of the most popular destinations for FDI. Showcasing this, in 2022 the value of global FDI totalled 1.2 trillion US$ of which the EU was still amongst the largest receivers[8].

Per definition, FDI is a cross-border investment in which a resident or a company based in one country, owns a productive asset located in an other country[9]. FDI also ensues the establishment of permanent presence in the control of an foreign company, per example a share of 10% of the voting power[10]. Traditionally, FDI enters the target country through merger & acquisition transfers which is the most common type of FDI and thus will be the type of investment in focus of the research[11]. From an economical perspective FDI is an essential component of global trade as essential cross-border investments allow the continued economic growth and enables innovation[12]. Therefore, from a practical line of thought, any administrative

[5] Michelle Egan, ‘Taking Back Control: The Political Economy of Investment Screening in the US and EU’ in Elaine Fahey (eds.) *The Routledge Handbook of Transatlantic Relations* (1st ed, Routledge 2023), p. 206.

[6] Elfie Franzetti, ‘Foreign Direct Investments Into the European Union, The Effect of Regulation (EU) 2019/452 on Foreign Investors’ (Masters Thesis, Lund University 2020), p. 9.

[7] Flora Rencz, ‘The determinants of Chinese foreign direct investment in the European Union’ [2023] 21 Asia Europe Journal, p. 332.

[8] Report from the Commission to the European Parliament and the Council, Third Annual Report on the screening of foreign direct investments into the Union COM(2023) 590 final<https://data.consilium.europa.eu/doc/document/ST-14427-2023-INIT/en/pdf> (accessed 2.4.2024), p. 2.

[9] Andrew Kerner, ’What We Talk About When We Talk About Foreign Direct Investment‘ [2014] 58 International Studies Quarterly, p. 805.

[10] Ibid.

[11] Anna Nibe, Sophie Meunier and Christilla Roederer-Rynning, ’Pre-emptive depoliticisation: the European Commission and the EU foreign investment screening regulation’ [2024] 31 Journal of European Public Policy, p. 184.

[12] Sonal Pandya, ‘Political economy of foreign direct invest-ment: globalized production in the twenty-first century’ [2016] 19 Annual Review of Political Science, p. 455–457.

measure subjected towards these investments has the potential to create hinders for foreign investors.

Investment screening itself is an administrative process where the authorities of the target country of an intended foreign investment either screens an investment prior to its establishment, during the expansion of an existing investment or in some cases conducts it reciprocally[13]. These screenings enable the authority to conduct a risk based evaluation on whether the investment shall be allowed, allowed conditionally or completely denied[14].

Because the EU regulation only creates a framework for investment screening, every Member State has its own screening procedure dictated by their own security interests. What remains uncertain is how these developments and the screening mechanism itself complies with the protection guaranteed for foreign investors in international investment agreements (hereinafter IIA´s) concluded by the EU. In order to answer this, there is a need to analyse whether investment screening mechanisms in the EU enabled by the current framework regulation and its recent revision proposals are potentially in conflict with international investment standards.

## 1.2 Purpose and research questions

The purpose of this research is to answer whether the screening regime in the EU has the potential of conflicting international investment standards present in EU IIA´s. To fulfill this purpose, following research questions are presented:

I. What legal effects does the current Screening Regulation and the proposed amendments to it have on the national screening mechanisms?

[13] Georgios Dimitropoulos, 'National security: The role of investment screening mechanisms' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.) *Handbook of international investment law* (1st edn, Springer 2020), p. 10-11.
[14] Ibid.

II. What are the fundamental investment standards and how are they applied in EU IIA´s?

III. What potential legal conflicts may occur between the EU screening regime and international investment standards?

### 1.3 Delimitations

Due to the limited scope of this research the focus will be on the most vital provisions of the EU Screening Regulation reflecting its purpose, objective and overall effects on the Member State screening procedure. Additionally, the very recently proposed key revision proposals of the Regulation will be presented as they contribute to the future development of investment screening and raises concerns over compatibility of such revisions with investment standards.

This is followed by the presentation of the screening procedures in Germany and France in order to elaborate on how investment screening works in practice. The choice of countries is justified for the following reasons: Due to each Member State having their own screening mechanism it is necessary to limit the scope of analysis to countries which reflect the future development of investment screening in the EU. Additionally, these countries are amongst the largest receivers of FDI and hence are responsible for the majority of screenings reported to the Union and thus reflects the screening regimes the foreign investor commonly phases in the EU market.

For the purpose of analysing investment standards there is a need to familiarize with investment law. As international investment law comprises in majority of bilateral investment treaties mounting to thousands globally, the research is limited to fundamental investment standards found commonly in all IIA´s, followed by the review of their applicability in EU IIA´s with Canada and the UK. The applicability of these standards are reviewed only in IIA´s the EU has successfully concluded with Canada and the United Kingdom as these countries contribute a large proportion of FDI inflows to the Union but also because the EU IIA´s with other significant contributors remain unfinished.

## 1.4 Method and materials

For the purpose of answering whether the current EU screening regime is in conflict with the  investment standards in EU IIA´s, it is necessary to apply various legal research methods. This is because there is a need to analyse not only EU legal instruments and but also international investment standards in international public law and their application in various contexts. In addition, the research analyses arbitration tribunal awards on how the relevant investment standards have been interpreted in practice. All of the aforementioned requires the use of the legal dogmatic method which enables legal analysis and explanation of legal instruments by placing the research inside a broader system where the applicable norms are applied in different contexts[15]. This doctrinal approach also gives an insight to the present law from the light of societal change which also set the agenda for the current screening regulation[16].

In addition to the legal dogmatic method the research uses the EU legal method and comparative legal analysis. The EU legal method is used inter alia to address how the regulation has effected Member State screening procedures. Even if the difference between the legal dogmatic method and EU legal method is not significant, the EU legal method as it name suggests includes the use of various legal sources in the EU such as primary and secondary law and hence includes a more detailed scrutiny.

The research also includes a section on comparative legal analysis where the research has an overview on how the investment standards are present in the EU IIA´s between Canada and the UK. The comparative legal analysis is used because its the only method which can be used in viewing different legal systems in the world[17]. Moreover, as the objective of comparative legal analysis is to evaluate the solutions used in different legal systems and potentially finding the similarities and differences, this method is suitable for the purpose recognizing the eventual differences of investment standard

---

[15] Jan Smits, What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research in Rob van Gestel, Hans Micklitz and Edward L Rubin (eds.) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (1st edn, Cambridge University Press 2017), p. 210.

[16] Ibid, p. 212.

[17] Irene Calboli, Comparative Legal Analysis and Intellectual Property Law: A Guide for Research in Irene Calboli, Maria Lilla Montagnani (eds.) *Handbook on Intellectual Property Research* ( 1st edn, Oxford University Press 2021), p. 47.

application in the relevant IIA´s[18]. The comparative analysis is however used for practical purposes and not as a distinct theory or method.

Finally, the research analyses the potential conflicts which may occur between the EU screening mechanism and international investment standards which yet again requires the use of legal dogmatic method. Throughout this research the discussion is supported by the use of various secondary sources such as reports, legal journals and preliminary works.

### 1.5 Outline

This thesis will consist of five Chapters. In the first Chapter the research introduces the background for the research whilst also providing the purpose and supporting research questions, delimitations and methods and materials.

The second Chapter will elaborate on the enabling factors leading to the adoption of the screening regulation, followed by the impact on national screening regimes and a brief overview of the latest proposed revisions to the regulation. This is followed by a overlook of the current interpretation of the EU screening regulation in strictest EU screening regimes.

The third Chapter will address the core international investment standards protecting the interest of international investors and safeguards available for the EU to deviate from these obligations. The chapter concludes with the overview of how these standards are applied in EU IIA´s between Canada and the UK.

The fourth Chapter will research the possible conflicts between the current screening regime in light of the applicable investment standards which distinguishes these scenarios to occuer either in the pre-establishment phase or in the post-establishment phase.

The fifth Chapter will conclude the main findings whilst reflecting to the background of this research.

[18] Ibid, p. 48.

# 2. EU Foreign Direct Investment Screening Mechanism

The screening regulation aims for two goals: one of them is to establish a framework for foreign direct investment screening mechanisms in Member States justified on the basis of national security and public order and secondly, to create a cooperation mechanism where Member States and the Commission share information on investment screening and issue comments on intended investments in case they potentially effect interests of the Union or Member States[19]. As provided in the regulation, it does not impose a uniform screening mechanism on all Member States but instead takes a preliminary step in guiding Member States towards a coherent mechanism by establishing a framework. This is in particular evident in Article 3 as it does not impose an obligation to create a screening mechanism but provides the possibility for Member States to amend, adopt or maintain their current screening mechanisms[20].

As to regards the legal justification for screening, based on reasons of national security and public order, the EU has recognised on one hand the need to encourage the continuing transfers of FDI enshrined as the freedom of capital in the Treaty on the Functioning of the European Union (hereinafter TFEU) which also covers capital flows between the EU and third countries[21]. However, for reasons of overriding importance such as national security and public order deviations are allowed which hence has been applied as justification for investment screening[22]. Despite the ambiguous contents of these justifications, it is nevertheless reasonable to clarify that these are not unlimited. EU case law has held that such deviations are only be justifiable

---

[19] Regulation of the European Parliament and the Coouncil establishing a framework for the screening of foreign direct investments into the Union [Screening Regulation] [2019] OJ LI 79/1, Art. 1(1).

[20] Ibid, Art. 3(1).

[21] Consolidated version of the Treaty on the Functioning of the European Union [2008] [TFEU] OJ C 115/47, Art 64.

[22] Commission Staff Working Document, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union COM(2017) 487 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2017%3A297%3AFIN> (accessed 5.4.2024) p, 4.

on the basis of a genuine and sufficiently serious threat, has to be interpreted strictly and has to follow the principles of proportionality and legal certainty[23]. On the question if the regulation would interfere with the freedom of establishment as an FDI includes the establishment of foreign ownership in a company, ECJ case law has held that it does not apply to extra-EU investors and therefore is not applicable in this situation[24].

For an foreign investment to fall within the scope of the regulation it has to fulfill the broad understanding of an FDI. First, it includes an investment of any kind and shall have the aim of creating or maintaining lasting- and direct links between the investor and the target of the investment with the purpose of having economic activity in a Member State[25]. Second, the investment includes an element of effective participation in the management or control of the company[26]. Due to the uncertainty involving what constitutes such an participation the general view have been that the investment covers at least 10% of the voting shares or other equivalent significant influence in the target company[27].

Investment screening per se is not a new phenomena within the EU Member States, but a legislative instrument creating a framework for establishing a coherent system in the EU indeed is. To reach this goal the EU regulators will quickly face complex issues with overlapping competences which also explains the current outcome of the regulation[28]. Thus, necessary for the broader understanding of the regulation on why it has been formulated as it has, the foundations for the regulation needs to be addressed prior to analysing its substantive effects.

---

[23] Case C-54/99 *Église de Scientology* [2000] ECR I-01335, para. 17.

[24] Case C-35/11 *Test Claimants in the FII Group Litigation v. Inland Revenue Commissioners* [2012] , para. 98.

[25] Screening Regulation (n 19), Art. 2(1).

[26] Ibid.

[27] Bas de Jong and Wolf Zwartkruis,'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' [2020] 31 European Business Law Review, p. 461.

[28] Sarah Bauerle Danzman and Sophie Meunier (n 2), p. 42.

## 2.1 Foundations for the Regulation

### 2.1.1 Transfer of competence

One of the events that changed the future for EU competence within the field of foreign investments was the adoption of the Lisbon Treaty in 2009. Prior to this Treaty, the EU had a very limited capability to make an impact on international investment law and had mainly participated in creating a limited list of investment liberating provisions on the global stage[29]. For the aforementioned reason, the competence in this field was completely left for the Member States leading to varying investment screening regimes and thousands of bilateral investment agreements both in intra-EU perspective and extra-EU perspective.

However, as a result of the implementation of Article 207 (1) and (2) TFEU, the field of foreign direct investment was transferred to the Common Commercial Policy (hereinafter CCP) belonging to the sphere of exclusive competence of the EU[30]. Furthermore, Article 207 (2) enabled the EU to take necessary measures to implement this policy, hence providing a legal basis for the future screening regulation[31].

Despite the transfer of competence there was considerable uncertainty on the eventual scope of Article 207. Consequently, clarification was provided in Opinion 2/15 of the European Court of Justice (hereinafter ECJ) in relation to the recently concluded Singapore-EU Free Trade Agreement. Here, Member States were concerned that the EU had exceeded its competences in determining certain expropriation measures of investments coming from Singapore allowing the EU to impose a less favourable treatment of such investments without the consultation of Member States[32]. The ECJ held that

---

[29] Stephan Schill, 'The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization' in Geraldo Vidigal (eds.) *Legal Issues of Economic Integration* (2nd issue, Wolters Kluwer 2019), p, 109.

[30] TFEU (n 21), Art. 3(1)(e).

[31] Steffen Hindelang and Andreas Moberg,'The Art of Casting Political Dissent in Law: The EU´s Framework for the Screening of Foreign Direct Investment' [2020] 57 Common Market Law Review, p. 1435.

[32] Opinion 2/15 concerning the competence of the EU to conclude the Free Trade Agreement with Singapore (EUSFTA) ECLI:EU:C:2017:376 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CV0002%2801%29> (accessed 3.4.2024), para. 99-103.

this measure did not breach public order or national security interests but was conducted out of necessity, and rather belonged to common behaviour in international trade, thus falling within the scope of the exclusive competence of the EU in Common Trade Policy[33]. This Opinion was important for the eventual adoption of the current screening regulation as it further solidified the legal basis for the EU to adopt the regulation.

### 2.1.2 Support from the Member States

Despite this initial development, the necessary support in the EU was only established after a decade later. During this period, Member States had varying views and levels of enthusiasm when it came to creating of a stricter set of rules on FDI[34]. This legislative stalling was however not only the result of the lack of willingness from the Member States, as the EU respectively considered the creation of a screening mechanism a protectionist development and would hinder the market openness for investment[35].

The initial agenda for a screening regulation commenced in 2011 as a result of a Chinese investor with alleged contacts to the Chinese government made a bid for a Dutch company in 2010[36]. Although the bid was later withdrawn it created concerns in EU officials that as the bid would have won the European bids. Despite the raised concerns, EU powerhouses such as France, Germany and Italy were against creation of a common screening regime in the EU.

As the EU was contemplating on its need to screen foreign investments, Chinese FDI into the Union had increased from 2010 to 2012 with 600% resulting in ever increasing discussion in technologically advanced countries[37]. Finally, the events which culminated in the Commission together with concerned Member States making a proposal for the upcoming regulation were the partially succesful aquistions by Chinese companies in

[33] Ibidem.
[34] Anna Nibe, Sophie Meunier and Christilla Roederer-Rynning (n 11), p. 192-193.
[35] Ibid, p. 194.
[36] Ibid, p. 193.
[37] Zenobia Chan and Sophie Meunier,'Behind the screen: Understanding national support for a foreign investment screening mechanism in the European Union' [2022] 17 The Review of International Organizations, p. 523.

Germany[38]. Thus, in 2017 Italy, Germany and France produced a joint proposal for the Commission on an EU level solution for reciprocity issues with investments coming from outside the EU alongside the raised concerns of investments aimed at security sensitive sectors important to the national industrial policy[39].

## 2.2 Framework for national screening mechanisms

### 2.2.1. Mandatory provisions

#### 2.2.1.1 Minimum procedural standards

The Screening Regulation provides certain procedural standards which have to be guaranteed in each screening mechanism if a Member State has an mechanism or intends to create one. These procedural standards were included to provide at least certain safeguards for the foreign investor[40]. Amongst these obligations the screening mechanisms have to follow the non-discrimination principle which includes the equal treatment of screening of investments between third countries[41]. In more detail this principle covers the possibility of the investor and other Member States to obtain necessary information on what grounds the screening is conducted, other circumstances and the applicable procedural rules applied to it[42].

An aditional obligation which do not directly benefit the investor but may in the long run create increased certainty are timeframe related aspects which shall be present in the mechanism. These timeframes shall enable the possibility of Member States to take effectively into consideration the comments from other Member States and the Commission on the screening decision or the potential investment[43]. This logically however increases the

---

[38] Ibidem.

[39] Germany, Federal Ministry for Economic Affairs and Climate Protection, Proposals for ensuring an improved level playing field in trade and investment <https://www.bmwi.de/Redaktion/DE/Downloads/E/eckpunktepapier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf>(accessed 4.4.2024)

[40] Yuwen Li, 'Europeanization of foreign direct investment screening' in Yuwen Li, Feng Lin, Cheng Bian (eds.) *National Security in International and Domestic Investment Law, Dynamics in China and Europe* (1st edn, Routledge 2023), p. 84.

[41] Steffen Hindelang and Andreas Moberg (n 31), p. 1447.

[42] Screening Regulation (n 19) Art. 3(2).

[43] Ibid, Art. 3(3).

delay in the national screening procedures and thus arguably in the short-term hinders due process.

Other standards provided in Article 3 reflect other fundamental values in the EU such as the protection of confidential information which is of uttermost importance due to the cooperation and information sharing of screening processes between all Member States. Thus, the Regulation emphasizes that the information obtained from the investment under screening shall only be used to the purpose it was obtained for and the classified information is not declassified or downgraded without the consent of its provider[44].

Further, the national screening mechanism shall ensure the provision of recourse to the investor involved in the investment for the purpose of challenging the decision of screening authorities[45].

The final standard includes the concept of transparency which includes the obligation for the Member States to provide the investor information on the grounds and circumstances which triggered the screening together with the obligation to clarify the applicable procedural rules[46].

Regarding the application of these standards some practical issues can be argued to be evident. Foremost, as the regulation only includes the ambiguous term of recourse available to the investor, it leaves up to the Member State to decide whether such recourse includes judicial court procedures or only administrative action[47]. This arguably contributes to an uncertain possibility of granting due process for foreign investors. Further, despite the transparency and non-discrimination safeguards, in some instances the Member States might be relying on intelligence information regarding an investment which cannot be disclosed due to national security concerns[48]. Also if the transparency requirement would be interpreted in a strict sense it would be challenging to provide detailed information on each screening decision especially in regimes which use cross-border screening such as in

[44] Ibid, Art. 10.
[45] Ibid, Art. 3(4), 3(5), 3(6).
[46] Steffen Hindelang and Andreas Moberg (n 31), p. 1447.
[47] Bas de Jong anb Wolf Zwartkruis (n 27), p. 467.
[48] Ibidem.

Germany[49]. In light of this discussion, despite the presence of certain minimum safeguards their actual effective application is subjected to uncertainty in addition to their limited amount. This on the other hand raises arguably the risk of Member States subjecting the foreign investor for unfair treatment.

#### 2.2.1.2 Cooperation and reporting requirements

The most substantial provisions in the Regulation cover the obligations of the Member States to provide information to other Member States and the Commission regarding investments which are undergoing screening, will do so in the future or retrospectively gives rise to security concerns[50]. The purpose of this cooperation function is to provide necessary information to other relevant Member States which could be effected by the screening decision[51]. A secondary outcome of this cooperation is that it could lead to the Member States to take into consideration aspects in their own screening process which otherwise may not have been considered. Furthermore, the sharing of relevant information enables the Commission and the interested Member States to provide comments on the planned investment but the comments lack a binding effect and thus the ultimate screening decision relies with the Member State which is the target of the investment[52]. Here the only obligation of that Member State is to give due consideration of any comments on the investment but it does not have to provide any explanations in case it does not follow these opinions[53].

In case the investment is likely to affect programmes or projects of Union interest the Commission may issue its opinion on the matter to which the screening Member States is obliged to give utmost consideration[54]. This difference in level of consideration requires the targeted Member States to provide an explanation in case it decides not the follow the Commission recommendation[55]. Naturally, these comments in either of the scenarios have

[49] Ibidem.
[50] Screening Regulation (n 19), Art. 7.
[51] Ibid, Art. 6(1).
[52] Ibid, Art. 6(9).
[53] Steffen Hindelang and Andreas Moberg (n 31), p. 1456.
[54] Yuwen Li (n 40), p. 93.
[55] Screening Regulation (n 19), Art. 8(2)(c).

actual legal leverage as the final decision rests with the screening Member State.

From the point of view of the investor the issue with these obligations is the delay in screening which stems from gathering respective comments from the Commission and the Member States. Also these comments may result in a theoretical prospect of retrospective screening which may cause issues with legal certainty[56]**.** Regarding the timeframes of the cooperation mechanism, the Regulation has strict timeframes and in exceptional cases the Member State may proceed with the screening without the delay of gathering comments, however again, this is not conducted to protect the investment environment but to secure national security interests of the screening Member State[57]. Also despite the timeframes it cannot be denied that this process extends the screening as a whole.

Finally, the Regulation imposes mandatory reporting by the Member State for each calendar year comprising of foreign investments that took place in that territory and respective information requests from Member States[58]. The report shall also include information on how Member States have applied their screening mechanism[59].

From this discussion it is obvious that the minimum procedural standards whilst disregarding the obligations in the cooperation mechanism, has in fact a very marginal effect on the national screening mechanisms. Therefore, in order to determine the actual effects of investment screening on the foreign investor there is a need to develop the research in the direction to scrutinize more closely national screening mechanisms.

[56] Bas de Jong and Wolf Zwartkruis (n 27), p. 468-469.
[57] Screening Regulation (n 19), Art. 6(8).
[58] Ibid, Art. 5(1).
[59] Ibid, Art. 5(2).

## 2.3 Substantial powers left to the Member States

### 2.3.1 Sectoral scope and procedure for screening

From the earlier discussion it is evident that the substantial powers to construct the screening mechanism remains with the Member States and thus the treatment of foreign investors depends on the particular screening mechanism. The screening regulation only provides examples for Member States of aspects which they may take in consideration whenever reflecting the possible impact the investment may have on national security and public order[60]. This guidance includes proposals of economic sectors which could be subjected to screening whenever a foreign direct investment is targeting such sectors. Examples of such sectors are those involved in maintaining critical infrastructure, manufacturers of critical technologies and dual use items and sectors managing sensitive information[61]. Additional elements proposed do not involve consideration of the particular sector but are rather connected with the character of the investor itself such as the potential government ties of the investor, whether there is a risk of illegal activities or the investor has been involved in similar kinds of investments[62]. Despite the provided guidance which neither provides an exhaustive list, the national screening mechanisms are considered in having significant variations in their approaches to the sectoral scope of screening and the procedures themselves[63].

Examples of variations in screening regimes within the EU include differences such as thresholds for control which the investment has to have in order for it to be subjected to screening, the screening authority and the level of threat that the eventual investment imposes to trigger screening[64]. Neither is the screening mechanisms always automatically initiated as some can be voluntary whilst others always demand screening as a precondition to obtain

[60] Ibid, Art. 4.
[61] Ibidem.
[62] Ibidem.
[63] Sarah Bauerle Danzman and Sophie Meunier (n 2), p. 43.
[64] Ibidem.

authorization for the investment[65]. Some Member States also include triggering thresholds for already established investments which causes the situation that a re-investment by the foreign investor to the same target may trigger the screening in case the percentage of control in the target exceeds this threshold, creating in a sense post-establishment investment screening. In increasing numbers screening mechanisms also include cross-sectoral screening which enables the scrutiny of an investment targeting any sector whereas Member States with sectoral screening are limited to only pre-determined industrial sectors[66]. From the position of the foreign investor it is arguably difficult to obtain certainty over what investment may be screened especially in jurisdictions with cross-border screening. These aforementioned differences which are numerically even greater than the examples provided above are provided to indicate that the assessment of investor treatment depends solely on the particular screening mechanism in question.

Arguably these uncertainties of investment treatment are not going to decrease in the future as the number of screening mechanisms in the EU has increased to the point that most Member States currently have a screening mechanism in place and the remaining countries are in the process of creating one[67]. Furthermore, the scope of sectors and procedures in Member States have constantly been broadened and tightened[68]. This increasing regulatory trend is enabled by the earlier addressed notion of national security and public order which despite certain guidance of EU case-law still remain underdefined[69]. Consequently, Member States are enabled to expand the scope and modify the procedure with a vaguely defined concept of national security and public order. This has caused the possibility that the screening procedure is subjected to arbitrary and non-transparent decision making and

---

[65] Lorenzo Bencivelli, et al., 'Who's afraid of foreign investment screening?' [2023] Working Paper 927, Banque De France <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4603476> (accessed 6.4.2024), p. 18.

[66] Zenobia Chan and Sophie Meunier (n 37), p. 524.

[67] Sarah Danzman and Sophie Meunier (n 2), p. 46.

[68] Teoman Hagemeyer-Witzleb and Steffen Hindelang, 'Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation' [2021] 2 Central European Journal of Comparative Law, p. 40.

[69] Cheng Bian,' Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity' [2021] 22 Journal of World Investment and Trade, p. 569.

the lack of certainty for the foreign investor[70]. Reflecting this trend is the recent amendments made in the screening mechanisms in France and Germany[71]. As these countries receive substantial amounts of FDI inflows and have the strictest screening regimes in the EU they naturally also are amongst the countries which are responsible for the majority of screening notifications[72]. Thus the examination of these screening regimes provide a good point of reference for the treatment which the foreign investor is facing now and arguably increasingly in the future[73].

### 2.3.2 Investment screening in Germany

The German screening mechanism has been subjected to many amendments most notably in 2020 and 2021, leading to the tightening of the screening mechanism[74]. However the overall process in Germany to amend the screening mechanism already commenced after the partially successful Chinese take overs in strategic sectors in 2017[75].

The German screening procedure itself operates a two tier system for investment screening. The first tier category with pre-determined sectors applies to any foreign investor which is targeting highly sensitive targets related to inter alia defence industries which requires mandatory filing and approval before closing, meaning that these screenings are conducted ex ante[76]. The threshold for an investment to trigger this review has been amended and reduced from an initial 25% to the equivalent of 10% control in the company[77]. This low threshold has been questioned as to its compatibility

[70] Ibid, p. 571.

[71] See Second Annual Report on the screening of foreign direct investments in to the Union COM (2022) 433 final < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0433> (accessed 12.4.2024), p. 9; Third Annual Report on the screening of foreign direct investments into the Union COM (2023) 590 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0590> (accessed 12.4.2024), p. 9.

[72] See Second Annual Report (n 72), p. 14; Third Annual Report (n 72), p. 14.

[73] Julia Hörnig, Stefan Kirwitzke and Falk Schöning, 'Foreign Direct Investment Screening in Germany' in Yuwen Li, Feng Lin, Cheng Bian (eds.) *National Security in International and Domestic Investment Law, Dynamics in China and Europe* (1st edn, Routledge 2023), p. 155.

[74] Teoman Hagemeyer-Witzleb and Steffen Hindelang (n 68), p. 40.

[75] Ibidem.

[76] Julia Hörnig, Stefan Kirwitzke and Falk Schöning (n 73), p. 157.

[77] Cheng Bian (n 69), p. 577.

with EU law[78]. Despite the low threshold for review, this tier of screening limits the legislative justification to investment which at least are likely to impair essential security interests  and clearly provides the scope of sectors covered. Thus, it provides some certainty for the investor. However, the recent amendments expanded the list of sectors subjected to mandatory screening. As of this result, currently 27 potential targets are subjected to screening, constituting an expansion of 16 additional sectors from the previous regime[79]. These novel sectors cover inter alia operators in critical infrastructure, media companies and producers of critical raw materials[80].

The second tier, which arguably is of more concern, allows cross-sectoral screening of an investment if it in general exceeds the threshold of 25% control in any sector[81].  Therefore, even if the investment does not fall into a pre-determined category of investments subjected to screening, the authorities may still screen any investment. Especially notable in this regard is the recently amended and thus lowered threshold of evidence, as it will suffice if the investment is likely to affect not only the national security and public order of Germany, but also the national security in any other Member State or projects and programmes of Union interest[82]. The question how this rather broad concept will suffice with the criterion of the Court of Justice who have held that restrictions based on national security and public order have to be justified by a sufficiently serious threat to core interests of society, is uncertain[83]. This wide discretion therefore raises concerns over unjustified discrimination and arbitrary treatment.

Also following the amendments, certain categories such as investments targeting critical infrastructure, development of software and cloud computing services are always to be notified to the authorities if they exceed an threshold of control over 10% and thus will be screened ex ante[84]. However

---

[78] Philipp Stompfe,'Foreign Investment Screening in Germany and France' in Stefan Hindelang and Andreas Moberg (eds.) *YSEC Yearbook of Socio-Economic Constitutions* (Springer 2020), p. 88.
[79] Teoman Hagemeyer-Witzleb and Steffen Hindelang (n 68), p. 47.
[80] Ibid, p. 48.
[81] Cheng Bian (n 69), p. 577.
[82] Teoman Hagemeyer-Witzleb and Steffen Hindelang (n 68), p. 45.
[83] Case C-54/99 *Église de Scientology* (n 23), para. 17.
[84] Philipp Stompfe (n 78), p. 87.

other investments not subjected to mandatory notification are most likely to be screened nevertheless. This is because the national authorities may inspect any such investment ex post within three months after obtaining information about the investment up until 5 years after the establishment of the investment in case the investor do not by itself notify the investment and hence avoid ex-post screening[85]. The justification for this five year period seems like an unreasonable burden against legitimate expectations of the investor.

The investigative stage of the screening process consists of a preliminary stage which can take up to two months and if necessary an in depth analysis which can take up to 4 months[86]. Interestingly, these deadlines were not modified to suit the cooperation mechanism in the screening regulation which has caused some concerns[87]. This is because the 4 month deadline is commenced whenever the authority has received sufficient information on the transaction which in practice is often subjected to additional inquiries and hence delaying the process with even years[88]. These additional inquiries are additional burdens on the investor which already phases arguably a very burdensome requirements on necessary information to be submitted for review[89]. Further, the deadline may be prolonged in complex cases with many months by the reviewing authority[90]. From the point of view of the investor, it would not be unreasonable to claim that the delays in procedure, ex-post screening, vast notion of national security threats and extensive burden of providing information would not constitute unreasonably discriminatory treatment. From this discussion scholars have also identified issues with lack of transparency, procedural certainty and predictability[91].

Lastly, the final decisions of the screening authority cannot be challenged and the only potential challenges may only concern how the procedural rules have

[85] Julia Hörnig, Stefan Kirwitzke and Falk Schöning (n 73), p. 158.
[86] Teoman Hagemeyer-Witzleb and Steffen Hindelang (n 68), p. 56.
[87] Julia Hörnig, Stefan Kirwitzke and Falk Schöning (n 73), p. 166.
[88] Ibidem.
[89] Philipp Stompfe (n 78), p. 92-93.
[90] Julia Hörnig, Stefan Kirwitzke and Falk Schöning (n 73), p. 167.
[91] Cheng Bian (n 69), p. 584.

been applied in the process[92]. This naturally limits drastically the possibility of the investor to be granted due process.

### 2.2.3 Investment screening in France

The French foreign investment screening traditions are together with the German counterparts one of the oldest in the Union[93]. Similarly as in Germany, the current screening mechanism in France relies on a set of reforms which commenced in 2019 and continued in the two consecutive years followed by guidelines issued in 2022[94].

The French screening mechanism makes a distinction between foreign direct investments always subjected for screening and sectors which do not have formal requirements. More precisely the French mechanism makes a divides sectors always subjected for screening to sensitive and extra sensitive sectors[95]. These sectors include amongst others companies involved in the production of dual-use items and companies in possession of strategic information[96]. Investments which do not belong to any of the aforementioned sectors belong to non-sensitive sectors which are only subjected to the obligation to fulfill a formal declaration[97]. Despite the sectors which constitute mandatory screening are numerically less than their German counterparts, they are broadly defined and have been considered to not provide much guidance at all to the investor[98]. Thus, these sectors may cover a vast array of activities making the actual difference between a precisely defined scope of sectors and loosely defined sectors insignificant. This on one hand does not have a detrimental effect on the Member State as it provides room for interpretation but arguably is challenging for the investor.

[92] Julia Hörnig, Stefan Kirwitzke and Falk Schöning (n 73), p. 169.
[93] Christine Miles, ' Foreign investment screening mechanism in France' in Yuwen Li, Feng Lin, Cheng Bian (eds.) *National Security in International and Domestic Investment Law, Dynamics in China and Europe* (1st edn, Routledge 2023), p. 126.
[94] Ibid, p. 128.
[95] Ibid, p. 132.
[96] Philipp Stompfe (n 78), p. 102.
[97] Ibid.
[98] Ibid, p. 108.

Supporting this view is the fact that France yields the highest number of screened investments in the Union[99].

Notable differences between the French and the German systems is the lack of cross-sectoral screening in the French mechanism and the lack of post establishment investment screening. This on one hand means that likely, the intended investment will be screened but the investor may be certain that once the investment has been approved it will not be withdrawn.

Regarding the legal justification for screening it will suffice if the investment is likely to jeopardize the national security and public policy of France[100]. The similarity between the French and German approach in this regard cannot go unnoticed but the scope in the French mechanism is solely limited to the interests of France. Thus, the uncertainty in this regard is limited but the notion of likeliness enables a vast discretion to be decided by the French authorities.

The threshold for an foreign investment to trigger screening in sectors subjected to authorization will suffice if the threshold equivalent of 10% control in the target is obtained through the transaction, which prior to amendments was 25%[101]. It is however notable that the French mechanism imposes slightly different conditions on investors depending on if the investor is an EU investor or a non-EU investor. An intra-EU investment will be screened in case its targeting the sensitive or extra sensitive sectors and the investment either constitutes acquisition of control of an establishment registered in France or the in total or partial acquisitions of its activity[102]. For non-EU investors the additional condition is that the investment covers 25% of the voting power of the target[103].

The French mechanism exempts from the obligation to seek authorization in case the investor decides to re-invest to the originally authorized investment

[99] OECD Report on the Framework for screening foreign direct investment into the EU. Assesing effectiveness and efficiency 2022 <https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf > (accessed 13.4.2024), p. 96.

[100] Cheng Bian (n 69), p. 569.

[101] Christine Miles (n 93), p. 131.

[102] Philipp Stompfe (n 78), p. 104.

[103] Ibidem.

even if it would go beyond the screening threshold[104]. This on the other hand does not follow in Germany where if the investment exceeds the threshold it has to be re-authorized before approval.

The investigation process may be a two step procedure in case additional information is requested. However, the preliminary procedure is less time consuming with the authority being obliged to provide a decision within 30 or respectively within an additional 45 days in case the investment requires additional scrutiny[105]. These deadlines are on one hand absolute and hence provides better certainty for the foreign investor. Interestingly the failure of the authority to respond in time of these deadlines does not entail that the investment is authorized and therefore despite the formal deadlines the approval of the authorization despite the seemingly speedy process may be in jeopardy[106]. Regarding transparency, there is no obligating practice of the authorities to communicate outcomes or individual decisions and thus the actual number of investments subjected to conditions or directly prohibited is unknown[107].

Lastly, the French screening mechanism provides the possibility for the investor to challenge the decision of the relevant authority within two months or alternatively challenge it in the administrative court providing a more preferential base for any future challenge by the investor[108]. Hence, despite the French and German screening mechanisms include similarities, they indeed have certain procedural differences and uncertainties regarding the treatment of foreign investors, especially in the case of Germany.

### 2.4 Proposed revision of the Regulation

#### 2.4.1 Downfalls of the current regulation

In addition to the discussion above, the Organization for Economic Co-operation and Development (OECD) was entrusted by the Commission to

[104] Christine Miles (n 93), p. 135.
[105] Philipp Stompfe (n 78), p. 107.
[106] Ibidem.
[107] OECD Report (n 99), p. 97.
[108] Christine Miles (n 93), p. 141.

analyse the functioning of the regulation 2 years after its operation[109]. In its report, the OECD held that despite benefits for increased cooperation and increased transparency, the purely procedural aspects of screening procedures have had issues inter alia with delays, duplication of work and problems relating to tight timelines which have resulted in unsatisfactory screening outcomes which arguably work to the detriment of the foreign investor[110]. Also, even if the regulation has been considered to be relatively coherent internally in the EU, some concerns have been raised relating to the external coherence as the dynamic concept of national security and public order has created the possibilities for legal uncertainty for the non-EU investor especially if the investment is targeting various Member States[111]. Supporting this view is the finding that in a large quantity of notifications where Member States have decided to screen the investment have in reality had no impact on public order or security either in the notifying state, other states or the EU common projects[112]. This raises concerns of misuse of national security concerns and discrimination of the foreign investor.

The aforementioned issues together have led for the calling for reforms[113]. These issues combined with the ever increasing amount of notified investments on a yearly basis visible in the annual reports, logically will lead to the magnification of these problems[114].

### 2.4.2 Key novelties

Disregarding the very early stages of this legislative proposal which likely will be refurbished as the process continues, the suggestions put forward are

[109] Stefano Riela,'The EU's foreign direct investment screening mechanism two years after implementation' [2023] 22 European View, p. 64.

[110] OECD Report (n 99), p. 7.

[111] European Commission, Evaluation of 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 accompanying the document Proposal for a Regulation on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452, SWD(2024) 23 final, 24 January 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024SC0023 (accessed 14.4 2024), p. 34.

[112] Ibid, p. 36.

[113] European Court of Auditors Special Report, Screening foreign direct investments in the EU, First steps taken but significant limitations remain in addressing security and public-order risks effectively 2023 < https://www.eca.europa.eu/en/publications/SR-2023-27> (accessed 15.4.2024), point 60.

[114] Ibidem.

significant and arguably could be considered to be a leap forward in creating a uniform screening mechanism in the EU. Despite the proposal is constituting a vast overhaul of the regulation, the discussion focuses on the key provisions which are most likely to affect the situation of the foreign investors.

Firstly, the proposal includes a mandatory obligation on Member States to implement a national screening mechanism within 15 months after the new regulation is adopted[115]. The fundamental impact of this addition is limited as earlier discussed, the trend has already been that Member States are amending their screening mechanisms and those without a screening mechanism are in the process of creating one.

The new proposal seemingly includes certain additional requirements which Member States have to implement into their screening procedure. These new standards include inter alia an obligation for the screening authorities to screen the investment before its established in case it belongs to the list of EU projects in Annex I of the proposal or sectors specifically specified in Annex II[116]. The Annexes themselves also constitute a substantive novelty by implementing certain sectors of common interest for the Union in Annex II and investments directed towards EU projects in Annex I which are always to be screened. Despite of the welcomed clarity it creates for the investor and harmonizes the approaches of Member States, the very broad list of sectors will cover a large part of incoming investments as many of the sectors included covers information and communications technology and manufacturing which were biggest receivers of foreign FDI[117]. Consequently, this will contribute to the already increasing amount of notifications for screening and thus increase the risk of discriminatory treatment of the investor.

Another novelty which shall be included in all screening mechanisms is the capability of the national screening authority to retrospectively screen an

---

[115] European Commission Proposal for a regulation on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452, COM(2024) 23 final < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024PC0023>,Art. 3(2).

[116] Ibid, Art. 3(2)(g).

[117] Third Annual Report on the screening of foreign direct investments (n 71), p. 6.

already established investment at least 15 months after its approval, even if the target of the investment has not belonged to an authorization requirement for targets falling under Annex I or II of the regulation[118]. This post-establishment screening may be conducted seemingly with a low threshold of evidence as it suffices that the investment may affect national security or public order[119]. As the timeframe to conduct such an action is provided to be ”at least 15 months” after the establishment, this indicates that there is no time limit when the investment may be screened after its establishment. This can create risks for conflicts with rules for investment protection as the investment can be denied at any stage despite the lawful establishment.

Interestingly, other Member States and may also initiate this procedure ex officio post-closing in case they consider that an investment has not been notified to the cooperation mechanism and that this investment is likely to negatively affect national security or public order[120]. This power would also be extended to the Commission which may initiate the procedure in case the investment would effect Union projects and programmes provided in Annex 1 or would effect the national interests of two or more Member States[121]. The same timeframe of at least 15 months would apply after the investment has been established. Even if the outcome of this procedure would not constitute more than an opinion it however does not exclude the possibility that the targeted Member State would take measures effecting the established investment. From the investors point of view this would lead to the necessity to consider whether the investment could fall outside the scope of sectors always subjected to the cooperation mechanisms and if so, how it could impact the security interests of Member States or interests of the EU[122]. Hence, its hard to argue that this procedure would not have the potential of creating arbitrary circumstances for the investor.

---

[118] European Commission proposal for a new screening regulation (n 115), Art. 2(c).
[119] Ibidem.
[120] Ibid, Art. 9.
[121] Cleary Gottlieb Steen & Hamilton LLP, Alert Memonrandum, Proposed New EU FDI Screening Regulation – 10 Things to Know<https://www.clearygottlieb.com/-/media/files/alert-memos-2024/proposed-new-eu-fdi-screening-regulation-10-things-to-know.pdf>(accessed 18.5.2024), p. 6.
[122] Ibidem.

The revision proposal also includes modifications to the cooperation mechanism. These changes modify the timeframes and provides clarification on which investments have to be notified to the cooperation mechanism. Regarding timeframe modifications the proposal includes an obligation on the investor to file the notification of an intended investment targeting many Member States on the same day and the concerned Member States shall provide their opinion and comments within set deadlines[123]. These deadlines provide clarity for how time consuming the procedure will be but the requirement that the notifying states cannot make a decision before the cooperation mechanism deadlines are passed, may extend the decision making in national mechanisms with additional 2-3 months[124].

In conclusion of the EU screening regimes and the proposed revisions it is reasonable to claim that the treatment of the foreign investor is something challengeable. Also the increasing number and tightening of screening regimes which contribute to the ever increasing amount of investment subjected to screening has the potential of magnifying these issues. Therefore, the research now turns to international investment standards allocated for protecting the investor, present in the IIA´s concluded by the EU.

[123] European Commission proposal for a new screening regulation (n 115), Art. 8.
[124] Cleary Gottlieb Steen & Hamilton LLP, Alert Memonrandum (n 121), p. 7.

# 3. International standards for investment protection

International investment law is the field of public international law which governs the commercial activities conducted by multinational enterprises in foreign states and thus is the primary source of law governing foreign direct investment[125]. Amongst its purposes in ensuring the free flow of investments between countries it is also the source of international investment standards which are commonly applied in all investment treaties disregarding the parties involved in it.

The composition of investment law is unique because contrary to the common structure of international law which includes multilateral treaties, investment law is provided for in in bilateral investment treaties (hereinafter BIT´s) which fall under the umbrella term IIA´s[126]. Alternatively, investment standards can also be found inter alia in free trade agreements (hereinafter FTA´s) which have investments chapters included. Due to the bilateral character of these agreements, there are per estimate 3000 BIT´s globally of which a big proportion have been concluded by the Member States[127]. Despite many of these BIT´s do not directly assess investment screening, they still enable the protection provided in the agreement to the investor against the effects or process of investment screening[128].

Due to the plurality of BIT´s and the differences between countries, all BIT´s arguably include nuanced differences. Disregarding these differences, certain universal investment standards are present in almost every BIT, such as prohibitions on discrimination, including the principles of most favoured nation treatment and national treatment, fair and equitable treatment standard

[125] David Collins, *Introduction to Foreign Direct Investment: History, Trends and Rationales', in An Introduction to International Investment Law* (2nd edn, Cambridge University Press 2020), p. 1-3.

[126] Ibid, p. 35

[127] Ibid, p. 38.

[128] Jens Pohl, 'The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms' In Steffen Hindelan, & Andreas Moberg (eds.) *A Common European Law on Investment Screening* (Springer 2020), p. 726.

(hereinafter FET) and protection against expropriation[129]. The purpose of these standards is to promote investment and provide protection for the investor in the host country of the investment[130].

The EU has as a consequence of gaining exclusive competence over foreign direct investment in 2009 shown determination of terminating intra-EU BIT´s between Member States and replacing extra-EU BIT´s concluded with third countries with EU level agreements which would also terminate these national agreements[131]. An example of such a new generation FTA was concluded between the EU and Canada and despite its extraordinary status, the EU-UK Trade Agreement. The protection provided in these agreements is significant not only because they are most likely guiding the future of investment protection in the EU but also because, as these countries contribute a majority of FDI inflows to the EU, the eventual challenges by the investor against investment screening will rely on the protection in these agreements.

Thus, this chapter is presenting the most prominent standards of protection in BIT´s for the foreign investors followed by assessing the safeguards available for countries to avoid breaches of these standards. Finally, the chapter will present the application of these standards in recent EU IIA´s concluded with Canada and the United Kingdom.

## 3.1 Fundamental Investment standards

### 3.1.1. Non-discrimination

As it is arguably challenging for the foreign investor to invest abroad due to administrative issues and familiarization with foreign demands in local jurisdictions, it is crucial to guarantee certain minimum standards for treatment which would reduce additional hinders for investment. An example

[129] Tania Voon and Dean Merriman, ’Incoming: How International Investment Law Constrains Foreign Investment Screening’ [2023] 24 Journal Of World Investment & Trade, p. 93.
[130] Peter Egger, Alain Pirotte and Catharine Titi, ’International investment agreements and foreign direct investment’ [2023] 46 The World Economy, p. 1526.
[131] Catherine Titi, ’International Investment Law and the European Union: Towards a New Generation of International Investment Agreements’ [2015] 26 The European Journal of International Law, p. 641-642.

of such a standard is the fundamental principle of non-discrimination consisting of national treatment (hereinafter NT) and most favoured nation treatment principles (hereinafter MFN)[132]. The non-discrimination standard is further known as a relative standard meaning that the protection it provides for the investor depends on how the host state guarantees protection for investors of other nationalities and domestically[133].

National treatment in a simple manner includes the obligation that the foreign investor is not negatively differentiated from the treatment of the domestic investor in the host state. Despite the decreasing importance of this principle in international investment law when contrasted to other fundamental principles of investment protection, national treatment is very commonly found in IIA´s and currently both of the non-discrimination principles are present also in EU IIA´s[134]. Due to its universal application it has even been held to be a part of customary international law and would not need to be explicitly referenced to in the treaties[135].

To prove discrimination does not necessitate that there is an actual intent, it will suffice if there is different treatment as it would be challenging to prove such intent in the legislation[136]. However, for the foreign investor an obstacle arises when assessing the discriminatory measure because the measure may be deemed as being justified for the sake of national interests as long as its not solely based upon nationality. Despite the uncertainty of tribunals in determining what grounds are allowed for making a deviation of this protection, a variety of outcomes has been considered justified such as solvency of a locally important sugar industry[137]. Finally, effecting also the possibility of claiming such a breach in a screening process depends on the

[132] Lu Wang, 'Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?' [2016] 31 ICSID Review-Foreign Investment Law Journal, p. 46.
[133] Elizabeth Whitsitt,' International Investment Law's Non-Discrimination Norms and the Rule of Law' in August Reinisch and Stephan Schill (eds.) *Investment Protection Standards and the Rule of Law* (Oxford University Press 2023) p, 119.
[134] Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel, *The political economy of the investment treaty regime* (1st edn, Oxford University Press 2017), p. 93.
[135] Ibid, p. 107.
[136] Andrea Björklund,' National Treatment' in August Reinich (ed.) *Standards of Investment Protection* (Oxford University Press, 2008), p. 31.
[137] *GAMI Investments, Incorporated v Mexico,* Final Award, IIC 109 (2004), para 114.

relevant IIA whether it protects investments before they are established or only after the de facto establishment[138].

The second aspect of non-discrimination, the MFN treatment includes the obligation that the host state of the investment makes no distinction between the treatment of foreign investors[139]. This means that any benefit accorded to investors from other countries has to be at least as good towards any other investor[140]. In practice this principle has the potential of providing substantial leverage for the foreign investor because outside the scope of treatment guaranteed by the bilateral treaty, it also covers the treatment which the host country provides in other bilateral treaties with other countries, making it a risky commitment for the host country as any amendment in other BIT´s will in a case of a dispute potentially be claimed by the foreign investor[141]. However, the possibility of claiming a MFN provision is limited to the extent that the disputed treaty and the third country treaty has to be covering the same subject matter for example investment treaties alongside the requirements that they are in like circumstances[142]. Lastly, host countries may exclude the provision entirely in certain BIT´s to avoid this issue.

### 3.1.2 Fair and equitable treatment

Perhaps the most significant standard of protection granted for investors against screening is the requirement of the host state to provide fair and equitable treatment to the foreign investor in the territory of the host country, enshrined in almost every BIT with slight variations in formulations[143]. This protection is aiming to restrict the host country of the investment to subject the foreign investor to arbitrary, discriminatory and abusive treatment[144]. The FET standard is due to its elastic nature the most challenged standard in BIT´s

[138] Andrea Björklund (n 136) p. 32.

[139]August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (2nd edn, Cambridge University Press, 2020), p. 686.

[140] Andreas Ziegler, 'Most-Favoured-Nation (MFN) Treatment' in August Reinich (ed.) *Standards of Investment Protection* (1st edn, Oxford University Press, 2008), p. 61.

[141] David Collins (n 125), p. 118.

[142] Ibid, p. 123.

[143] Roland Kläger, *Fair and Equitable Treatment' in International Investment Law* (1st edn, Cambridge University Press, 2011), p. 9.

[144] Christopher Campbell, 'House of cards: the relevance of legitimate expectations under fair and equitable treatment provisions in investment treaty law' [2013] 30 Journal of International Arbitration, p. 362.

which investors have brought against States in arbitration tribunals[145]. Primarily, this is because contrary to the non-discrimination principles which provide a more limited scope of what could be considered as such treatment, the FET standard not only incorporates non-discrimination but provides even greater room for interpretation of an infringement as its more of an umbrella term where additional legal concepts fall into. Legal concepts which have been considered falling within the FET standard has included denial of justice, due process, transparency, non-arbitrariness, non-discrimination, legitimate expectations, legal certainty, good faith, proportionality and reasonableness[146]. Secondly, as it is an absolute standard of protection the protection it may provide does not fall under a certain minimum standard even if this threshold may be uncertain on a case to case basis[147]. From this it becomes inevitable that this standard has the most potential for a successful claim. For this reason, certain BIT´s have included the wording of FET treatment accordingly to customary international law in order to limit its applicability, however it has been held that the FET standard is a constantly evolving concept not frozen in time[148].

Despite the preliminary view that the standard has very broad applicability and hence could be resorted to by the foreign investor technically at any alleged violation is however seemingly not the case. In reality, a relatively high threshold of evidence has been established and it will not suffice if there is a minor inconvenience but rather very poor treatment on the behalf of the government such as in *United States v Italy* where the International Court of Justice held that violation of the standard shall constitute a willful disregard for due process and is an act that at least surprises common rationale[149].

---

[145] Katia Yannaca-Small,’ Fair and Equitable Treatment Standard: Recent Developments’ in August Reinich (ed.) *Standards of Investment Protection* (1st edn. Oxford University Press 2008), p. 112.

[146] Marc Jacob and Stephan Schill, ’Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg et al. (eds.), *International Investment Law: A Handbook* (1st edn, Bloomsbury Publishing 2015), p. 718-719.

[147] Christopher Campbell (n 144), p. 363.

[148] Katia Yannaca-Small (n 145), p. 130.

[149] *Elettronica Sicula SpA (ELSI), United States v Italy*, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15, para. 128.

### 3.1.3 Protection against expropriation

A third standard which shall be included in the discussion of core investment protection standards is the risk of a violation against expropriation[150]. This standard is aimed at protecting the investor against host state action which deprives the value of the investment or transfers the investors asset to the host state government[151]. In plain wording, expropriation covers a measure by the host state government where the foreign investors asset forming the investment is nationalized or a series of measures which equivalents expropriation takes place. Expropriation has been a difficult issue to address as on one hand the sovereign powers of any country allows them to enact laws to protect their national interests while on the other it is crucial to secure the property rights of foreign investors to attract FDI into the country. In general, IIA´s recognize this right of expropriation to the host state but limits this right to be justified based on a set of conditions provided for in the particular IIA such as public policy reasons[152]. If such a measure is fulfilling these conditions, the foreign investor will be entitled to compensation despite the justified expropriation.

Expropriation can either be a direct measure which means that the asset is directly transferred to the government through nationalization or through confiscation to which the majority of IIA´s provide protection against[153]. However, the more common form of expropriation is conducted indirectly which consists of a series of regulatory measures which do not per se constitute loss of title but eventually leads to the equivalent scenario because the purpose of the investment becomes obsolete[154]. Due to the difficulty of defining the exact contents of measures forming an effect equivalent to expropriation, there has been significant division between tribunal awards which on one hand has examined the overall effect of the government measure on the investment or in addition have examined the purpose of the government measure[155]. From the point of view of the foreign investor, claims

[150] Tania Voon and Dean Merriman (n 129), p. 98.
[151] Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (1st edn, Oxford University Press 2019), p. 52.
[152] David Collins (n 125), p. 166.
[153] Ibid, p. 170.
[154] Ibid, p. 165.
[155] Federico Ortino (n 151), p. 71.

of indirect expropriations have not been remarkably successful in case the tribunal has opted for approaching the measure by analysing the purpose of the measure or the tribunal has established that the effects on the investment have not been substantial[156]. Despite the still ongoing split between interpretations of tribunals the trend has been shifting to justify greater leeway for governments to act upon national interest reasons[157]. Disregarding this development, the expropriation standard still remain as an option for the investor to claim violations of treatment.

## 3.2 Safeguards against investment standards

### 3.2.1 Exception clauses

A common phenomena in international agreements is that they commonly include various safeguards which enables the country to deviate from its obligations as long as its considered a reasonable action to protect their national interests. This is also the case with the obligations to honour investment standards in BIT´s. These safeguards arguably relieve the tension of potential infringements of investment screening in light of investment standards and provides countries greater scope of regulating their screening mechanism accordingly to their needs.

In general, the most important safeguards in the light of investment screening available for Member States are exceptions and exclusions[158]. Exceptions can furthermore be divided into general and security exceptions of which the latter has specifically been added to the EU IIA´s[159]. The general exceptions found in EU IIA´s commonly include an exhaustive list of public policy objectives which allows deviation from investment standards resembling the construction of equivalent provisions in the WTO agreements including reasons of public morals, public order and preservation of natural

[156] *Azurix Corporation v Argentina*, Award, ICSID ARB/01/12 IIC 24 (2006), para 322.
[157] Federico Ortino (n 151), p. 99.
[158] Jens Pohl (n 128), p. 751.
[159] Ibid, p. 755.

resources[160]. Security exceptions have taken the emphasis on the right to protect national security interests even further and in a way guarantees the continuing possibility to deviate from obligations if necessary[161].

Despite the vast discretion given to these measures there are potential limitations to their application. First, these provisions have to fall within the scope of an stated objective in the clause and to fullfil the nexus requirement such as a requirement of necessity[162]. Further, the measure has to be limited to such an extent that it does not entail arbitrary treatment or unjustified discrimination[163]. Finally, a good faith requirement has been argued to exist which means that despite the wide discretion available in applying a general or safety exception, a sense of reasonableness shall be maintained in a way that the purpose of the exception is not misused[164]. These interpretative conditions gives rise to uncertainty of their interpretation by tribunals which have shown already inconsistencies in awards from having a strict view on fulfilling the nexus requirements to greater discretion to countries but limitations on the justified objectives[165]. This has the potential of creating challenges to justify screening on the basis of these exceptions.

### 3.2.2 Exclusion clauses

Another way for countries to limit the possibility of challenging investment screening is by having carve-outs and reservations. Carve-outs as its name resembles are decisions of parties to the treaty to exclude certain sectors from the treaty obligations relating to investment standards and even the dispute settlement mechanism[166]. Reservations on the other hand, are unilateral

---

[160] Robert Brew, 'Exception Clauses in International Investment Agreements as Tool for Appropriately Balancing the Right to Regulate with Investment Protection' [2019] 25 Canterbury Law Review, p. 220.

[161] Jens Pohl (n 128), p. 755.

[162] Ibid, p. 752.

[163] Caroline Henckels, 'Permission to act: the legal character of general and security exceptions in international trade and investment law' [2020] 69 International & Comparative Law Quarterly, p. 560.

[164] Andreas Ziegler and Jorun Baumgartner, 'Good faith as a general principle of International law' In Andrew Mitchell, M Sornarajah & Tania Voon (eds.) *Good faith and international economic law* ( 1st edn, Oxford University Press 2015), p. 18.

[165] Kilian Wagner,' Determining the Role of FDI Screening in International Investment Law' in Jens Pohl et al. (eds.) *Weaponising Investments* (1st edn, Springer Nature Switzerland AG 2024) p. 144.

[166] Caroline Henckels, 'Should investment treaties contain public policy exceptions' [2018] 59 Boston College Law Review, p. 2828.

measures in certain sectors which otherwise would be contrary to investment standards, known as non-conforming measures but as a result of excluding this from the scope of protection, it cannot be claimed by the investor[167]. In general, especially carve-outs have been proven to be an effective tool for countries in arbitral awards as long as they have been applied in good faith[168]. This however does not mean that the exclusions and reservations would enable absolute immunity from successful investor challenges. This was evident in the *Global Telecom v. Canada* award where the disputed matter involved a BIT with Egypt. In this case, Global Telecom and its joint venture companies in the Canadian market obtained a share of the Canadian telecommunications sector and due to the later relaxation of the Canadian foreign control legislation the company aimed to convert these shares to voting shares which was the equivalent of establishing control. Hence, this action was screened in Canada and denied. The relevant BIT included a carve-out where negative decisions on acquisition or establishment of investments could not be disputed in state-investor arbitration[169]. Logically, such clear carve-out on negative decisions relating to acquisition should be able to protect the interests of the countries. However, the tribunal interpreted acquisition narrowly and held that the conversion of shares was not an acquisition despite the broad definition of acquisition in the BIT, as the international definition may differ from the understanding of national laws[170]. This indicates that despite the powers provided in exclusion clauses, countries shall be careful in formulating their BIT´s as not only may interpretation vary in tribunals, but amendments in screening mechanisms may not automatically be covered by the existing BIT´s.

---

[167] Joshua Paine, 'Global Telecom Holding v. Canada: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties' [2021] 38 Journal of International Arbitration, p. 534.

[168] Kilian Wagner (n 165), p. 142.

[169] *Global Telecom Holding SAE v Canada*, Award and dissenting opinion, ICSID Case No ARB/16/16 IIC 1645 (2020).

[170] Kilian Wagner (n 165), p. 142.

### 3.3 Standards in EU IIA´s

As addressed earlier, the competence to conclude BIT´s with third countries was transferred to the Union in 2009[171]. Ever since, the EU has concluded BIT´s and FTA´s with investment chapters with countries contributing a large share of FDI inflows into the Union such as with Canada and the UK. Notable on these "new generation" agreements is that even if they initially were intended to follow the practices which Member States had resorted to in previous BIT´s consisting of high standards of investment protection, narrow consideration of public policy objectives and broad opportunities for arbitration, the EU took a different approach[172]. Instead, these IIA´s underline the importance of investment liberalization but has limited the substantial protection available for foreign investors in the post-establishment stage as it was considered that the foreign investor enjoyed too broad protection[173]. The EU:s approach on trade liberalization has led to some EU BIT´s including a separate chapter for investment liberalization separately from other investment standards[174]. This shift seemingly to increase pre-establishment protection and decrease post-establishment protection will be discussed in the following section.

#### 3.3.1 EU-Canada Comprehensive Economic and Trade Agreement

The Comprehensive Economic and Trade Agreement (hereinafter CETA) was concluded between the EU and Canada in 2016 and has been referred to as the blueprint for future EU IIA´s[175]. Due to the agreement being a mixture agreement involving the competences of Member States and the EU, its ratification requires the signature of all Member States which is yet to be obtained but due to its value of giving a full insight for the future of investment protection it is worthy of discussion. As mentioned above, the

[171] Angelos Dimopoulos, 'EU Investment Agreements: A New Model for the Future' in Julien Chaisse et al. (eds.), *Handbook of International Investment Law and Policy* (1st edn, Springer Singapore 2021), p. 2265.
[172] Ibid, p. 2269.
[173] Noah Barr, 'The Evolution of Substantive Protection in EU International Investment Agreements: taking Stock of the EU's Early treaty-making Practice' [2023] 34 European Business Law Review, p. 416.
[174] Angelos Dimopoulos (n 171), p. 2273.
[175] Noah Barr (n 173), p. 417.

CETA belongs to the new generation of BIT´s which have broader emphasis on pre-investment protection whilst having a restrictive approach to absolute standards for investment protection once the investment is established.

To begin with, the CETA has a precise definition for what types of investments are covered by the agreement. Under Article 8.2 it has to fullfil a two-fold test regarding the definition of an investment and covered investment which potentially limits the scope of claims from the foreign investor[176]. The definition of an investment includes a vast definition on the agreement such as that the investment broadly spoken has to have the characteristics of an investment, includes every asset that the investor owns or controls directly or indirectly and is only limited in sense that it has to have been ongoing for a certain period[177]. The complementary requirement of the investment being made accordingly to the laws when the investment was made in a way limits the scope of what is deemed as an investment under a particular law for a certain investment[178]. However, from a general point of view the concept of an covered investment is arguably broad.

This is in particular important as the CETA:s approach to pre-establishment investment protection is broad. In addition to  market access clauses which prohibits the parties from applying  measures which would restrict the market access of investors such as performance requirements and hinders for establishment, Art 8.6 and 8.7 provides that national treatment and most favoured nation treatment apply to acquisition, establishment and expansion of an investment as long as the investment belongs to a covered investment[179]. At first site this drastically extends the scope of investment protection to areas which have been traditionally considered as not providing protection for the investor. However, after greater scrutiny these protections are undermined by a broad arrangement of exclusions and exceptions of various sectors and non-conforming measures[180]. Further, the agreement provides general exceptions

[176] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its member States, of the other part O.J. L 11/23 (2017) [CETA], Art. 8.2.
[177] Ibid, Art. 8.1.
[178] Ibidem.
[179] Ibid, Art. 8.6, 8.7.
[180] Ibid, Art. 8.15.

to these standards which cover inter alia the broad principles of national security and public order which can be used at every instance[181]. In sum, the precise definitions of these non-discrimination standards combined with a broad list of safeguards has been considered to provide in reality low levels of pre-establishment protection for the investor[182].

As discussed earlier, arbitration tribunals have been divided in their views on what has constituted expropriation or a violation against FET standard. The latter has even been described as a weapon against national laws due to its broad applicability[183]. Thus, the EU took the approach in limiting these post-establishment investment standards in its strive to ensure the right to regulate for Member States in light of their public interest[184]. This led to the establishment of a right to regulate provision which allows the parties the right to modify their national laws or adopt laws which may negatively effect the foreign investor without it infringing investment standards[185]. This provision underlines the possibility of deviating from any alleged infringement in case either party decides to amend its laws. Regarding the FET standard, the CETA includes a closed-list of 5 measures which could constitute such an infringement. The list indeed includes traditional understanding of what would constitute such a breach such as fundamental violations of due process, manifest arbitrariness and denial of justice but by applying a closed list it excludes the possibility to extend the understanding of FET in a broad spectrum[186]. Clearly the CETA also includes an additional aggravating element to these potential infringements which further limits the traditional application of the FET standard. Notably, legitimate expectations considered to be a core value in FET is not covered in the list and can only be taken into account when determining an alleged infringement, but not claimed

[181] Ibid, Art. 28.3.
[182] Noah Barr (n 173), p. 427.
[183] Odysseas Spiliopoulos and Dimitrios Petropoulos, 'The Regime of International Investment in the Light of New EU Economic Agreements' [2022] 11 Business & Entrepreneurship Journal, p. 37.
[184] Ibidem.
[185] CETA (n 176), Section D, Art. 8.9.
[186] Christian Tietje and Kevin Crow, *'The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU FTAs: Convincing?'* in Stefan Griller et al. (eds.) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford 2017) p. 102.

on its own[187]. However, the mentioned categories do not include further specification and thus leaves the further discretion to the tribunal to be decided, leaving some potential claims of infringement possible.

Lastly, the CETA has also provided clarity to the traditionally challenging concept of lawful expropriation of an investment. This includes a list of conditions which shall be fulfilled in order for an legitimate expropriation to take place, namely conducted for a public purpose, follows due process, conducted in a non-discriminatory manner and provides adequate and effective compensation[188]. Most importantly, the annex 8-A of the agreement provides a definition on indirect expropriation which has thus far created most issues in arbitral practice. An indirect expropriation is deemed to have occurred in case a measure or a series of measures has an equivalent effect of direct expropriation and substantially deprives the attributes of property to that investment[189]. Further, the annex provides that this evaluation is conducted on a case to case basis where factors such as overall economic impact, duration and object and intent but also additional factors may be considered[190]. Lastly, the annex highlights that only in rare circumstances where the measure or series of measures are so severe in contrast to its purpose that they are manifestly excessive can public interest measures constitute an unlawful indirect expropriation[191]. Even if these rare circumstances are not defined and thus leaves it for the tribunal, it is reasonable to claim that the interpretations provided significantly reduces the prospects of an successful challenge by the investor.

### 3.3.2 EU–UK Trade and Cooperation Agreement

Despite the fact that the CETA has been considered as the blueprint for the future, it does not mean that the investment protection is similar between the EU and major contributors of FDI into the Union. This is evident in the EU-UK Trade and Cooperation Agreement (hereinafter TCA) which have been

[187] Noah Barr (n 173), p. 430.
[188] CETA (n 176), Art. 8.12.
[189] Ibid, Annex 8-A.
[190] Ibidem.
[191] Ibidem.

in effect since 2021[192]. The agreement which covers a broad spectrum of matters including provisions on investment protection was concluded within a timeframe of 10 months whereas the negotiations surrounding CETA took 7 years[193]. Because of this, the TCA has been described as a building block for UK-EU relations in the post-Brexit phase and invites the parties to further revise the agreement in the future[194]. The urgency with this agreement consequently is reflected in the amount of consideration it has had on investment protection.

The TCA does not in contrast to CETA provide a definition of an investment or a covered investment but instead focuses on the definition of an investor[195]. In order for an investor to be protected by the investment standards in this agreement the investor has to be a natural person or a legal person that seeks to establish is establishing or has established an enterprise with the purpose of establishing lasting links to the territory of the host country[196]. Further, the investor has to have substantive business operations in one of the parties to the agreement[197]. This approach on one hand limits the amount of investments which can be considered to have been made by covered investors but allows for a great interpretation of what constitutes an investment. Similarly to CETA, also the TCA includes a broad range of excluded sectors inter alia audiovisual services and air services further diminishing the amount of investments which enjoy protection. In addition, the TCA also includes other safeguards such as the right to regulate in the fields of national security and public order and a denial of benefits clause enabling the deviation of protection inter alia for the broad understanding of international security[198].

Disregarding these broad carve outs and other safeguards, the substantial standards of protection in the TCA has had a similar approach as the new

[192] Samuel Pape and Alice Zhou, 'Investment Protection Under the EU–UK Trade and Cooperation Agreement: Limited but Predictable?' [2021] 6 European Investment Law and Arbitration Review, p. 128.
[193] Ibid, p. 129.
[194] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of great Britain and Northern Ireland, of the other part O.J. L 149/10 (2021) [TCA], SERVIN Art. 1.4.
[195] Ibid, SERVIN Article.1.2(j) .
[196] Ibid, SERVIN 1.2(h), (j) and (k).
[197] Ibidem.
[198] Ibid, SERVIN Art. 1.3.

generation EU IIA´s with an emphasis on pre-establishment protection and a diminishing focus on post-establishment protection. For pre-establishment protection the TCA not only includes prohibitions on measures that equals to limitations on market access but also includes MFN and NT standards[199]. However, similarly to CETA, the MFN protection is limited in excluding amongst others the dispute settlement provisions of other BIT´s making the possibility of demanding ICSID arbitration impossible[200]. Additionally, the MFN provision is even subjected to more exceptions than the equivalents in CETA, furthermore limiting the actual protection provided for investors.

The most drastic difference in the TCA is the complete exclusion of the fundamental post-establishment investment standards. The agreement does not include the FET standards nor the prohibition against unlawful expropriation which makes it a clear standout in both in new EU IIA´s and older IIA´s[201]. Partially explaining this lack of protection is not only the fact that the negotiations of the TCA were conducted in rushing manner but the extraordinary situation where as a result of Brexit, the United Kingdom has not been obliged to terminate its BIT´s with other EU Member States as these agreements technically has become extra-EU BIT´s. As the TCA does not effect the continuing validity of these agreements, investors may claim protections from other BIT´s which the UK has in place with other Member States[202].

From this discussion it becomes evident that the fundamental investment standards have resulted in unpredictable outcomes in the arbitration tribunals and could possibly be used to challenge investment screening. However, despite the belief that the core investment standards would be applicable in all IIA´s and in their broadest notion is not true. Furthermore, EU investment protection has shifted its weight to include pre-establishment investment protection instead of the traditional approach of post-establishment investment screening. Hence, the protection granted to the investor varies on a case-to-case basis depending on the BIT´s in force. Despite this complexity,

[199] Ibid, SERVIN Art. 2.3, 2.4
[200] Ibidem.
[201] Samuel Pape and Alice Zhou (n 192), p. 133.
[202] Ibid, p. 137.

the research will in the following chapter try to identify the most likely situations where investment screening could infringe EU investment protection standards.

# 4. Potential conflicts

The EU presumes that its investment screening is conforming with its international obligations, including international investment standards in IIA´s[203]. However from the point of view of international investment law the view is less certain and conflicts may be possible[204]. At first sight one could assume that investment screening and investment standards would apply in different phases of an investment as traditionally speaking investment screening occurs before the investment is established whereas especially pre-Lisbon IIA´s provide the most effective protection after the investment has been established[205]. There is however an ongoing blurring of these traditional distinctions which have been becoming more and more visible in the new generation FTA´s concluded by the EU which include investment protection in the pre-establishment phase. Additionally it is not excluded that certain activities between the parties in the so called pre-investment stage could not satisfy the meaning of an investment and hence would enjoy the protection of an established investment in the particular IIA. Thus, the question of potential conflicts caused by investment screening on investment standards have expanded to essentially cover also pre-establishment instead of only post-establishment[206]. Also a more rarely discussed possibility is that the process itself could also be in contradiction to the standards. Therefore, the chapter will analyse different scenarios where investment screening in the EU may cause such infringements.

[203] Screening Regulation (n 19), recital (3) and (35).
[204] Kilian Wagner (n 165), p. 116.
[205] Jens Pohl (n 128), p. 728.
[206] Tania Voon and Dean Merriman (n 129), p. 86.

## 4.1 The pre-establishment stage

### 4.1.1 Explicit inclusion of pre-establishment protection

As mentioned previously, the possibility of foreign investors to enjoy protection of an IIA prior to the aquistion or establishment of an investment has been challenging as very few countries have expanded the scope of protection to include this particular stage[207]. However, recent EU IIA´s concluded with major contributors of FDI into the Union have shown the contrary development[208]. This development has particular significance despite altering views because these FTA´s with investment chapters are referred to as the new generation trade agreements and arguably shows the future trend for investment protection at least on the behalf of the EU. In case the IIA indeed includes pre-establishment protection it means that the investment standards apply and therefore inter alia in principle any treatment inferior to the nationals could be challenged and most favourable treatment present in other IIA´s could be claimed. This could lead to challenges that investment screening as a measure in the pre-establishment stage breaches these standards.

However as shown in the example of CETA and TCA, by implementing exclusions of certain sectors through negative list approaches which usually include the sectors which attract the majority of FDI it is easily possible to limit this protection[209]. Further, the IIA´s may include the exclusion of State-investor dispute settlement which makes any challenge of these measures difficult as the investor would need to rely instead on more challenging options for legal remedies. Arbitration tribunals have also been held to implicitly allow general exceptions to non-discrimination obligations as long as they are justified by the already ambiguous concepts of national security and public order[210]. This guides the research to the other safeguards provided earlier, namely the security and general exceptions which may be used to justify the screening. The only limitation to the usage of these exceptions has

[207] Kilian Wagner (n 165), p. 125.
[208] Tania Voon and Dean Merriman (n 129), p. 92.
[209] Kilian Wagner (n 165), p. 126.
[210] *Pope & Talbot Incorporated v Canada,* Award on the merits of phase 2, IIC 193 (2001), para. 78.

been the requirements of necessity and reasonableness of these measures. As investment screening regimes such as in Germany has already shown signs of excessive use of these deviations, concerns of arbitrariness, uncertainty and lack of transparency indeed includes potentials for breaches of investment standards. This arguably demands from the EU and the Member States constant reflection over the applicable IIA´s that the safeguards and formulations of investment standards continuously cover the expanding regimes.

### 4.1.2 Broad definitions of investor and investment

Another situation where investment screening may impose a potential infringement of investment standards depends on the formulation of investor and covered investment in the relevant IIA[211]. Even if the IIA does not intend to cover pre-establishment protection, if the definition of a covered investment and investor is broad, certain preparatory measures or commitments by the investor prior to the intended economical transfer may be considered as an already established investment which enjoys the protection provided in the IIA[212]. Consequently, the pre-establishment investment screening actually screens an established investment and thus poses a risk of infringing the absolute standards of protection. For example, if the intended investment targets an industry which requires significant preparation and various stages, these preparations as a whole may be sufficient to prove an adequate level of commitment if they have been ongoing for a certain time and the investor has participated in the risks of transaction[213].

Tribunals have also held that contractual relations which go beyond only commercial transactions may be considered as investments even if a commercial transfer have not occurred as long as the investor provides evidence of construction agreements or adequate planning[214]. Other aspects

---

[211] Tania Voon and Dean Merriman (n 129), p. 90.

[212] Kilian Wagner (n 165), p. 128.

[213] *Salini Costruttori SpA and Italstrade SpA v Morocco*, Decision on jurisdiction, ICSID Case No ARB/00/4, IIC 206 (2001), paras. 53–58.

[214] *Raymond Charles Eyre and Montrose Developments (Private) Limited v Sri Lanka*, Award, ICSID Case No ARB/16/25, IIC 1639 (2020), paras. 301–302.

which tribunals have considered in sufficing an investment has been activities associated with an existing investment. This requires that the definition of an investment includes associated activities[215]. In case the investor manages to indicate this, the current activity up for a dispute is only deemed as an associated activity to the existing investment and is therefore covered by investment standards applicable to an established investment[216]. Lastly, in case the relevant IIA includes in combination with the broad investment definition promotion provisions such as the provision of fair and equitable treatment in ”in every case” or ”at all times” this may lead to the presumption that this protection extends to the pre-establishment stage of an investment[217]. If interpreted accordingly to the ordinary meaning of terms, and the provision in question does not specify the meaning of these wordings such as including in the same sentence ”for established investments” the rationale is that it indeed covers pre-establishment activities[218]. Thus, the protection is not guaranteed but provides a possibility of such an interpretation which calls for precise formulation by the EU of crucial definitions, primarily on what constitutes an investment. In case uncertainty is involved there is a chance that investment screening can breach absolute standards of investment protection.

The EU may avoid such problems through the adoption of broad exclusions and exceptions or as in TCA and CETA and by including provisions such as the right to regulate. As in the examples of CETA and TCA, even if the definitions seemingly cover a broad category of what constitutes an investment, the actual protection provided for the investor is reduced by various safeguards.

### 4.1.3 The screening procedure

The screening procedure itself is also reasonable to discuss in light of the investment standards. Issues stemming from the procedure itself may occur at any stage of which includes the pre-establishment stage but also the post-

[215] Kilian Wagner (n 165), p. 128.
[216] *Luigiterzo Bosca v. Lithuania,* Award, PCA Case No. 2011-05, PCA 91370 (2013), para 167-178.
[217] Kilian Wagner (n 165), p. 130.
[218] Ibid, p. 132.

establishment stage. As provided in the overview of the screening regulation there are in reality nothing else which restricts the formation of the national screening procedures other than certain openly formulated minimum principles. Therefore, as provided in the examples of the screening regimes in Germany and France, arbitrariness, lack of transparency and uncertainty are issues for discussion. These issues are presented in the form of uncertain timeframes, lack of obligation to provide information, cross-sectoral screening, retrospective screening and the lack of access to effective legal remedies which all have the potential of infringing the broad definition of the FET standard and possibly even being equivalent of indirect expropriation[219].

As FET covers a broad range of potentially breaching measures in case its not precisely limited such as in the CETA, the denial of due process in the screening procedure has inter alia been considered by the tribunals to breach this standard[220]. In case the relevant IIA does not define FET, the Member States can still avoid a successful challenge as the screening is conducted on the basis of national security and public order as the FET standard has limited effect if it is justified on the basis of a legitimate objective[221]. However, Member States cant rely on the fact that every measure taken could be justified on this basis of the safeguards especially with the continuing expansion of screening regimes. In case there is no possibility for the investor to challenge the screening decision the tribunals have held that such a denial of access to judicial review might be breaching the FET standard[222]. The absence of this possibility in the German process raises concerns of a potential breach. FET also covers the prohibition of both discriminatory and arbitrary treatment, and therefore the approaches for example in Germany to expand investments subjected to screening to cover such investments that may affect national security and public order of not only Germany but also other Member States and the EU common projects gives rise to doubts over the potential use

[219] Ibid, p. 137.
[220] *Nordzucker v. Poland,* Second Partial Award (Merits), (2009), paras. 33–65.
[221] Tania Voon and Dean Merriman (n 129), p. 101-102.
[222] *Lemire v Ukraine,* Decision on Jurisdiction and Liability, ICSID Case No ARB/06/18, IIC 424 (2010), para. 418.

of political preferences to deny investments from non-Union rivals, constituting arbitrary treatment[223].

However, in common with the other potential pre-establishment violations the successful challenge by the foreign investor is depending on a lot of factors going in favour of the investor. First, the relevant IIA between the EU and the country of origin of the investor shall not include broad exemptions and exclusions which exclude the specific sector of the targeted investment or the screening mechanism as a whole from the investment standards in the treaty. Second, the IIA has to include both the FET standard and the expropriation standard and preferentially not include a high threshold of wrongdoing from the host Member State, as visible in the CETA. Thirdly, due to the ultimate status of national security and public order, international law allows great leniency for Member States to exempt from many of its obligations as long as its justifiable.

### 4.2 Post-establishment stage

#### 4.2.1 Retrospective screening

Once an investment has undergone screening and it has either been approved or conditionally approved it has nevertheless been considered to be in line with the host state laws and hence is lawfully established[224]. This is significant because the investment standards especially in older IIA´s and to a limited scope the recently concluded IIA by the EU have most leverage for the investor after the investment has been established. Therefore the commonly increasing feature of retrospective screening of an investment such as in Germany and in the latest revision proposal of the screening regulation raises questions of the validity of such action. Especially as the regulation proposal does not impose a timeframe for such a screening, arguably, if FET and expropriation is applicable in the relevant IIA, such an arbitrary action would be against the FET standard and constitute expropriation.

[223] Kilian Wagner (n 165), p. 139.
[224] Tania Voon and Dean Merriman (n 129), p. 86.

The issue with retrospective screening is not its originally incorporated purpose which has been the possibility of national authorities to screen such investments where the investor has failed to seek for necessary approval or submitted the wrong information as there is a justification for it[225]. The problems arise when screening regimes such as in Germany allow for retrospective screening without any error on the behalf of the investor which not only creates uncertainty for the foreign investor but also has the potential of completely dismantling the investment which would equivalent to expropriation. Such restrictions can be argued to breach the FET standard even in the latest EU IIA´s such as CETA which demands the fulfillment of aggravating element to the treatment[226].

Neither is it certain that Member States can resort to exemptions and exclusions and in addition claim the need to do so on the basis of national security and public order. Even if the last mentioned provides a broad discretion it does not mean that the Member State would be exempted from its international obligations as exemplified in *CC/Devas v. The Republic of India* where the tribunal held that the termination of a lease contract on satellites constituted a breach of the FET standard and a partial expropriation despite the claim from India that it was justified due to national security and public order interests[227]. In the light of this tribunal decision it seems hard to argue the justification of the screening of an investment ex post without wrongdoing of the investor. In addition, as the latest regulation proposal includes neither a timeline for when such a screening can no longer be conducted this arguably could be claimed as jeopardizing the investors legitimate expectations. Further, it has been held that any new introduction to the screening mechanisms which apply to already established investments further increases the risk of violating investment standards[228].

[225] Kilian Wagner (n 165), p. 121.
[226] Ibid, p. 135.
[227] *CC/Devas (Mauritius) Ltd and ors v India*, Award on jurisdiction and merits, PCA Case no 2013-09, IIC 1417 (2016), paras. 410–425.
[228] Tania Voon and Dean Merriman (n 129), p. 87.

### 4.2.2 Expansion of an existing investment

As discussed earlier in the research, in order for an FDI to have an impact in the light of the regulation on the security interests of the Union it requires that a certain threshold of the voting power is obtained in the target company. The same principle applies to national screening regimes as provided for in the examples of Germany and France both of which have had at least previously a threshold of 25% to trigger a review which have been reduced to be 10% as of current. Thus, an investment conducted below this threshold is legally established in the host state and thus enjoys the protection of the investment standards in the relevant BIT[229]. However, if an investor wishes to expand the already obtained investment which would lead to exceeding the screening threshold and triggering the mechanism, nothing indicates that the investment would not be protected as an established investment and thus such screening would risk an infringement of FET and expropriation clauses[230]. Thus, the decision of the screening authority to unwind such an investment or impose additional conditions after an investment expansion may not be a reasoned decision.

However, as provided earlier in this chapter, the successful claim by an foreign investor that the screening procedure as a measure or the process itself would violate the investment standards is a sum of many factors going in favour of the investor. The IIA´s has to include favourable interpretations and inclusions of necessary standards, have a limited amount of exclusions and exceptions and the relevant screening regime would clearly overstep the justifications of regulating in the field of national security and public policy. This does not however mean that Member States and the EU should not be careful with maintaining a balance on one hand between investment protection obligations in different IIA´s and the ever increased tightening of national screening regimes which already have shown signs of unreasonable use of national security and public order justifications.

[229] Kilian Wagner (n 165), p. 133.
[230] Jens Pohl (n 128), p. 741.

# 5. Conclusions

The research began with the analysis of the legal effects which the current Screening Regulation and the proposed revision efforts could have on the national screening mechanisms. From the research it became quickly evident that the current screening regulation does not in reality limit the procedural construction nor the sectoral scope of investment screening at a national level apart from certain minimum procedural guarantees which formally should protect the foreign investor. In addition to these procedural guarantees the regulation only poses the obligation on Member States with a screening regime to share information within the Union about their screening activities. Because of the lack of limitations, Member States have been able to determine the procedural construction and scope of the screening regime without EU interference.

Up until now, this has not posed a significant issue as investment screening in the EU has worked relatively well with the majority of notified investments being approved without further scrutiny. However, Member States such as Germany and France, which also are large receivers of FDI inflows into the Union, have started to constantly tighten these screening regimes by introducing new sectors subjected for mandatory screening, expanding the

scope of national security and public order as justifications for investment screening, lowering the thresholds of company control which the foreign investment shall acquire to trigger the screening and introduced post-establishment investment screening possibilities. This development has already been contributing to annual increases in the amount of investments which are screened. Moreover, this trend has not only remained on the Member State level as also the EU in its recent revision proposal included the possibility of post-establishment investment screening without a specified timeframe, included mandatory sectors for screening and potentially further extends the timeframe of national screening procedures. These developments raises the risks that the ever expanding investment screening regimes would eventually contradict investment protection standards in investment law.

Regarding the second question in this research, namely what the international investment standards are which are protecting the foreign investor and how they are applied in EU IIA´s, it became clear that this varies on a case to case basis. Partially the answer for this can be derived from the nature of international investment law, which contrary to the common structure of international law, builds upon bilateral treaties instead of multilateral treaties. Therefore the protection provided for the investor depends on the protection provided for in the particular bilateral investment agreement between the EU and the country of origin of the investor.

Regarding the investment standards, certain fundamental investment standards such as non-discrimination, fair and equitable treatment and prohibition against expropriation have provided successful investor challenges in arbitration tribunals due to the possibility of variation in interpretation. This has on the other hand been enabled by broadly formulated investment standards especially visible in older IIA´s. Therefore, the new generation IIA´s which the EU has concluded with key contributors of FDI into the Union has shifted from emphasizing investment protection to market access questions.

Reflecting this change in the application of investment standards is visible in the CETA and TCA. The CETA includes the non-discrimination standards and the standards of fair and equitable treatment and expropriation but has

precise limitations and definitions of these standards which diminishes their effectivity in case of an investor challenge. On the other hand, the TCA completely excludes fair and equitable treatment and expropriation from the treaty protection which diminishes the possibilities for the investor to enjoy investment protection. Secondly, these investment standards are subjected to broad safeguards such as security exceptions which allows deviations by the host state based on national security and public order interests. Other safeguards are exclusions which may include certain industry sectors, articles completely excluding investor-State arbitration for screening decisions or the reservation of certain government actions as not being in contradiction to investment standards.

In the light of these developments, the research aimed at finding potential conflicts between the applicable investment standards and the EU investment screening mechanism. Regarding this question it is especially notable that the EU assumes that the investment screening in the EU follows other international commitments such as investment protection in EU IIA´s. On the contrary from the view of international investment law the view is not certain. Potential conflicts stems from the blurring of the traditional distinctions of when an investment enjoys protection and when the screening occurs. Traditionally, investment protection has only covered investments which have been established in the host state whilst investment screening has occurred in the pre-establishment phase making conflicts less likely. Therefore, conflicts may occur both before the investment has been established and after its establishment.

Regarding the pre-establishment conflicts, if the IIA includes an explicit provision which enables the investment standards to be applied in the pre-establishment stage, then in principle the screening as a measure itself would constitute discriminatory treatment. On the other hand, EU IIA´s such as CETA includes a broad variety of safeguards which significantly reduces the risk of an successful investor challenge. Also, the EU IIA´s have to be careful with the construction of definitions of an covered investment and investor because broad definitions may lead to the interpretation that also others aspects than the financial transfer would suffice as an investment and therefore investment screening would be against the investment standards.

Also, the screening procedure itself may constitute a violation of the standards as arguably the screening process in Germany indeed includes potential for expropriation and FET standard violations.

Regarding post-establishment conflicts, especially retrospective screening without wrongdoing from the investor and without a timeframe for the national authority to conduct such a screening, rises concerns for breaches against the FET standard and prohibition of unlawful expropriation. It is hard to argue that even in the most restricted views of these standards provided for in the CETA would cover such treatment of the foreign investor. Further, the expansion of an already established investment which triggers the screening threshold of an investment in the host country also has the potential of violating the investment standards. This is because before the expansion of the investment, the original investment has already once been approved to be established according to the laws of the host state. Thus, any additional screening would constitute the screening of an already established investment.

To conclude, as the screening regimes are constantly being broadened and tightened the risk of conflicts with investment standards increase. This is because even if the EU IIA´s include broad variations of applicable safeguards and precise definitions which restrict the possibility of varying interpretation, the treaty construction varies in each agreement. This forces the EU and the Member States to individually respect the applicable standards in each agreement. Neither are the scope of the safeguards which have thus far allowed modification of investment screening absolute as they need to be justified. Therefore, in the future the EU and the individual Member States need to maintain a balance between these regimes.

# Bibliography

## Official publications

### European Union

Consolidated version of the Treaty on the Functioning of the European Union [2008] [TFEU] OJ C 115/47

Commission Staff Working Document, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union COM(2017) 487 final

Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its member States, of the other part O.J. L 11/23 (2017) [CETA]

European Commission, Evaluation of 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 accompanying the document Proposal for a Regulation on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452, SWD(2024) 23 final

European Commission Proposal for a regulation on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452, COM(2024) 23 final

European Court of Auditors Special Report, Screening foreign direct investments in the EU, First steps taken but significant limitations remain in addressing security and public-order risks effectively 2023 < https://www.eca.europa.eu/en/publications/SR-2023-27> (accessed 15.4.2024)

Opinion 2/15 concerning the competence of the EU to conclude the Free Trade Agreement with Singapore (EUSFTA) ECLI:EU:C:2017:376

Report from the Commission to the European Parliament and the Council, Second Annual Report on the screening of foreign direct investments in to the Union COM (2022) 433 final

Report from the Commission to the European Parliament and the Council, Third Annual Report on the screening of foreign direct investments into the Union COM(2023) 590 final

Regulation of the European Parliament and the Coouncil establishing a framework for the screening of foreign direct investments into the Union [Screening Regulation] [2019] OJ LI 79/1

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of great Britain and Northern Ireland, of the other part O.J. L 149/10 (2021) [TCA]

## OECD

OECD Report on the Framework for screening foreign direct investment into the EU. Assesing effectiveness and efficiency 2022 <https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf > (accessed 13.4.2024)

## Germany

Germany, Federal Ministry for Economic Affairs and Climate Protection, Proposals for ensuring an improved level playing field in trade and investment <https://www.bmwi.de/Redaktion/DE/Downloads/E/eckpunktepapier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf> (accessed 4.4.2024)

## Literature

Barr N, 'The Evolution of Substantive Protection in EU International Investment Agreements: taking Stock of the EU's Early treaty-making Practice' [2023] 34 European Business Law Review,

Bencivelli L, et al., ’Who’s afraid of foreign investment screening?‘ [2023] Working Paper 927, Banque De France <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4603476> (accessed 6.4.2024)

Bian C, ’Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity’ [2021] 22 Journal of World Investment and Trade

Bismuth R, ‘Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU’ [2018] European Investment Law and Arbitration Review

Björklund A,’ National Treatment’ in August Reinich (ed.) *Standards of Investment Protection* (Oxford University Press, 2008)

Bonnitcha J, Lauge Poulsen and Michael Waibel, The political economy of the investment treaty regime (Oxford University Press 2017)

Brew R, ’Exception Clauses in International Investment Agreements as Tool for Appropriately Balancing the Right to Regulate with Investment Protection‘ [2019] 25 Canterbury Law Review

Calboli I, Comparative Legal Analysis and Intellectual Property Law: A Guide for Research in Irene Calboli, Maria Lilla Montagnani (eds.) *Handbook on Intellectual Property Research* (Oxford University Press 2021)

Campbell C, ’House of cards: the relevance of legitimate expectations under fair and equitable treatment provisions in investment treaty law’ [2013] 30 Journal of International Arbitration

Chan Z and Meunier S, ‘Behind the screen: Understanding national support for a foreign investment screening mechanism in the European Union‘ [2022] 17 The Review of International Organizations,

Collins D, Introduction to Foreign Direct Investment: History, Trends and Rationales’, in *An Introduction to International Investment Law* ( Cambridge University Press 2020)

Dadush U, ‘Deglobalisation and Protectionism’ [2022] Bruegel Working Paper, Bruegel, Brussels

Danzman S and Meunier S, ‘Naïve no more: Foreign direct investment screening in the European Union’ [2023] Global Policy

Dimitropoulos G, ’National security: The role of investment screening mechanisms‘ in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.) *Handbook of international investment law* (Springer 2020)

Dimopoulos A, ’EU Investment Agreements: A New Model for the Future’ in Julien Chaisse et al. (eds.), *Handbook of International Investment Law and Policy* (Springer Singapore 2021)

Egan M, ‘Taking Back Control: The Political Economy of Investment Screening in the US and EU’ in Elaine Fahey (eds.) *The Routledge Handbook of Transatlantic Relations*, Routledge 2023

Egger P, Pirotte A and Titi C, ’International investment agreements and foreign direct investment’ [2023] 46 The World Economy

Franzetti E, ‘Foreign Direct Investments Into the European Union, The Effect of Regulation (EU) 2019/452 on Foreign Investors’ (Masters Thesis, Lund University 2020)

Hagemeyer-Witzleb T and Hindelang S, ’Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation‘ [2021] 2 Central European Journal of Comparative Law,

Henckels C, ’Should investment treaties contain public policy exceptions’ [2018] 59 Boston College Law Review

-- ’Permission to act: the legal character of general and security exceptions in international trade and investment law’ [2020] 69 International & Comparative Law Quarterly

Hindelang S and Moberg A, ’The Art of Casting Political Dissent in Law: The EU´s Framework for the Screening of Foreign Direct Investment’ [2020] 57 Common Market Law Review

Hörnig J, Kirwitzke S and Schöning F, ’Foreign Direct Investment Screening in Germany’ in Yuwen Li, Feng Lin, Cheng Bian (eds.) *National Security in International and Domestic Investment Law, Dynamics in China and Europe* (Routledge 2023)

Jacob M and Schill S, ’Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg et al. (eds.), *International Investment Law: A Handbook* (Bloomsbury Publishing 2015)

Jong B S and Zwartkruis W, ’The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?’ [2020] 31 European Business Law Review

Kerner A, ’What We Talk About When We Talk About Foreign Direct Investment‘ [2014] 58 International Studies Quarterly

Kläger R, Fair and Equitable Treatment' in *International Investment Law* (Cambridge University Press, 2011)

Li Y, ’Europeanization of foreign direct investment screening’ in Yuwen Li, Feng Lin, Cheng Bian (eds.) *National Security in International and Domestic Investment Law, Dynamics in China and Europe* (Routledge 2023

Miles C, ’ Foreign investment screening mechanism in France’ in Yuwen Li, Feng Lin, Cheng Bian (eds.) *National Security in International and*

*Domestic Investment Law, Dynamics in China and Europe* (Routledge 2023)

Nibe A, Meunier S and Roederer-Rynning C, 'Pre-emptive depoliticisation: the European Commission and the EU foreign investment screening regulation' [2024] 31 Journal of European Public Policy

Ortino F, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press 2019)

Paine J, 'Global Telecom Holding v. Canada: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties' [2021] 38 Journal of International Arbitration

Pandya S, 'Political economy of foreign direct invest-ment: globalized production in the twenty-first century' [2016] 19 Annual Review of Political Science

Pape S and Zhou A, 'Investment Protection Under the EU–UK Trade and Cooperation Agreement: Limited but Predictable?' [2021] 6 European Investment Law and Arbitration Review

Pohl J, 'The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms' In Steffen Hindelang, & Andreas Moberg (eds.) *A Common European Law on Investment Screening* (Springer 2020)

Reinisch A and Schreuer C, *International Protection of Investments: The Substantive Standards* (Cambridge University Press, 2020)

Rencz F, 'The determinants of Chinese foreign direct investment in the European Union' [2023] 21 Asia Europe Journal

Riela S, 'The EU's foreign direct investment screening mechanism two years after implementation' [2023] 22 European View

Schill S, 'The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization' in Geraldo Vidigal (eds.) *Legal Issues of Economic Integration* (Wolters Kluwer 2019)

Smits J, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans Micklitz and Edward L Rubin (eds.) *Rethinking Legal Scholarship*: A Transatlantic Dialogue ( Cambridge University Press 2017)

Spiliopoulos O and Petropoulos D, 'The Regime of International Investment in the Light of New EU Economic Agreements' [2022] 11 Business & Entrepreneurship Journal

Stompfe P,'Foreign Investment Screening in Germany and France' in Stefan Hindelang and Andreas Moberg (eds.) *YSEC Yearbook of Socio-Economic Constitutions* (Springer 2020)

Tietje C and Crow K, 'The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU FTAs: Convincing?' in Stefan Griller et al. (eds.) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford 2017)

Titi C, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' [2015] 26 The European Journal of International Law

Voon T and Merriman D, 'Incoming: How International Investment Law Constrains Foreign Investment Screening' [2023] 24 Journal Of World Investment & Trade

Wagner K,' Determining the Role of FDI Screening in International Investment Law' in Jens Pohl et al. (eds.) *Weaponising Investments* (Springer Nature Switzerland AG 2024)

Wang Lu, 'Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?' [2016] 31 ICSID Review-Foreign Investment Law Journal

Whitsitt E,' International Investment Law's Non-Discrimination Norms and the Rule of Law' in August Reinisch and Stephan Schill (eds.) *Investment Protection Standards and the Rule of Law* (Oxford University Press 2023)

Ziegler A, 'Most-Favoured-Nation (MFN) Treatment' in August Reinich (ed.) *Standards of Investment Protection* (Oxford University Press, 2008)

--- Baumgartner J, 'Good faith as a general principle of International law' In Andrew Mitchell, M Sornarajah & Tania Voon (eds.) *Good faith and international economic law* (Oxford University Press 2015)

Yannaca-Small K,' Fair and Equitable Treatment Standard: Recent Developments' in August Reinich (ed.) *Standards of Investment Protection* (Oxford University Press 2008),

## Webpages

Cleary Gottlieb Steen & Hamilton LLP, Alert Memonrandum, Proposed New EU FDI Screening Regulation – 10 Things to Know<https://www.clearygottlieb.com/-/media/files/alert-memos-2024/proposed-new-eu-fdi-screening-regulation-10-things-to-know.pdf>(accessed 18.5.2024)

## Case law

### Court of Justice of the European Union

Case C-54/99 *Église de Scientology* [2000] ECR I-01335

Case C-35/11 *Test Claimants in the FII Group Litigation v. Inland Revenue Commissioners* ECLI:EU:C:2012:707


### Arbitral Awards

*Elettronica Sicula SpA (ELSI), United States v Italy*, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15

*Pope & Talbot Incorporated v Canada*, Award on the merits of phase 2, IIC 193 (2001)

*Salini Costruttori SpA and Italstrade SpA v Morocco*, Decision on jurisdiction, ICSID Case No ARB/00/4, IIC 206 (2001)

*GAMI Investments, Incorporated v Mexico*, Final Award, IIC 109 (2004)

*Azurix Corporation v Argentina*, Award, ICSID ARB/01/12 IIC 24 (2006)

*Nordzucker v. Poland*, Second Partial Award (Merits), (2009)

*Lemire v Ukraine,* Decision on Jurisdiction and Liability, ICSID Case No ARB/06/18, IIC 424 (2010)

*Luigiterzo Bosca v. Lithuania,* Award, PCA Case No. 2011-05, PCA 91370 (2013)

*CC/Devas (Mauritius) Ltd and ors v India,* Award on jurisdiction and merits, PCA Case no 2013-09, IIC 1417 (2016)

*Global Telecom Holding SAE v Canada*, Award and dissenting opinion, ICSID Case No ARB/16/16 IIC 1645 (2020)

*Raymond Charles Eyre and Montrose Developments (Private) Limited v Sri Lanka,* Award, ICSID Case No ARB/16/25, IIC 1639 (2020)