IS AUSTRALIA'S FOREIGN INVESTMENT SCREENING POLICY CONSISTENT WITH INTERNATIONAL INVESTMENT LAW?

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Significant changes to Australia's foreign investment screening policy came into effect in 2021, modifying the Foreign Acquisitions and Takeovers Act 1975 (Cth). These changes establish a framework for national security reviews of proposed foreign investments in Australia, including the potential for review of investments that have already been lawfully admitted into the country. These developments increase the risk of conflict with international investment law, as reflected in Australia's obligations under more than thirty international investment agreements, in the form of bilateral investment treaties and preferential trade agreements with investment chapters or associated investment agreements. Traditionally, these agreements shielded Australia's foreign investment policy by restricting themselves to investments that had already been established in Australia. In more modern agreements, a range of reforms add explicit and implicit protections to Australia's foreign investment policy. However, the co-existence of traditional and modern approaches and the inconsistency with which reforms have been adopted across different treaties complicate the assessment of Australia's compliance with international investment law in its foreign investment screening policy. Potential remains for claims to be brought against Australia in this regard by home states or investors themselves.

CONTENTS

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I INTRODUCTION

On 1 January 2021, several significant changes came into effect for Australia's foreign investment regime,[1] implementing 'a package of reforms to ensure Australia's foreign investment screening framework keeps pace with emerging risks and global developments while remaining a welcoming destination for foreign investment'.[2] These changes brought to an end the temporary zero-dollar threshold above which all foreign investment subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ('*FATA*') was screened as a result of the COVID-19 pandemic, from 29 March 2020.[3] Foreign government investors were always and remain subject to a zero-dollar screening threshold,[4] meaning that approval by the Australian Treasurer via the Foreign Investment Review Board ('FIRB') is generally required for any foreign government investment in Australia. However, a zero-dollar threshold now also exists for certain private foreign investments, which were previously screened only above the threshold of AUD275 million, or AUD1,192 million for Australia's partners under certain of its preferential trade agreements ('PTAs').[5]

The new laws, described by the Australian Treasurer as 'the most significant reforms to [*FATA*] in nearly 50 years',[6] mean that foreign investors must now seek approval for 'all investments in sensitive national security land or businesses … regardless of value'.[7] National security businesses are carried on wholly or partly in Australia and are defined to include a business that:

- is an entity that is a direct interest holder in relation to a critical infrastructure asset within the meaning of the *Security of Critical Infrastructure Act 2018* (Cth), which definition was expanded in late 2021 beyond a critical electricity asset, port, water asset or gas asset, or other declared or prescribed asset to include, among others, a critical telecommunications asset, broadcasting asset, data storage asset, banking asset, insurance asset, financial market infrastructure asset, energy market operator asset, liquid fuel asset, hospital, education asset, public transport asset or defence industry asset;[8]

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1 On earlier features of and changes to the regime, see, eg, Vivienne Bath, 'Foreign Investment, the National Interest and National Security: Foreign Direct Investment in Australia and China' (2012) 34(1) *Sydney Law Review* 5; Vivienne Bath, 'Australia and the Asia-Pacific: The Regulation of Investment Flows into Australia and the Role of Free Trade Agreements' in Fabio Morosini and Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press, 2018) 146 ('Australia and the Asia-Pacific').

2 Explanatory Memorandum, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020 3 ('Explanatory Memorandum').

3 Josh Frydenberg, 'Changes to Foreign Investment Framework' (Media Release, Treasury (Cth), 29 March 2020).

4 See *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) regs 52(1)(d), 56(1) ('*FATR*').

5 Explanatory Memorandum (n 2) 12–13 [1.12].

6 Josh Frydenberg, 'Major Reforms to Australia's Foreign Investment Framework Pass the Parliament' (Media Release, Treasury (Cth), 9 December 2020).

7 Ibid. See also *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 55B, 81 ('*FATA*').

8 *Security of Critical Infrastructure Act 2018* (Cth) s 9, as amended by *Security Legislation Amendment (Critical Infrastructure) Act 2021* (Cth) s 22.

- is a carrier or nominated carriage service provider to which the *Telecommunications Act 1997* (Cth) applies;
- develops, manufactures or supplies critical goods or critical technology for military or intelligence use by defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- stores or has access to information with a security classification;[9] or
- stores, maintains or collects personal information of defence and intelligence personnel that, if accessed, could compromise Australia's national security.[10]

The amendments also introduce a 'call-in' power for the Treasurer, allowing for screening of an investment (that has not already been notified) on national security grounds up to 10 years after the investment is made.[11] This call-in power applies to particular actions taken or proposed to be taken by investors on or after 1 January 2021,[12] (for example acquisition of an interest in an Australian business as a result of which a foreign person will be in a position to influence or participate in the central management and control or the policy of the Australian business).[13] As a 'last resort', the Treasurer may also now conduct a national security review of a previously considered investment,[14] for example where false or misleading information was given, the organisational structure or activities have materially changed or the relevant circumstances or market have materially changed.[15] This last resort power generally applies to actions taken or notified on or after 1 January 2021.[16] The outcome of a national security review, including pursuant to such call-in or last resort powers, may include the imposition or variation of conditions on the investment, prohibition of a transaction, or divestment.[17]

Investments subject to screening in Australia (other than national security reviews) are generally subject to a 'national interest test' (specifically, with the Treasurer deciding whether the proposed investment would be contrary to the national interest).[18] Although the national interest test is not defined in legislation, the FIRB has described it as encompassing a range of factors, which include national security, competition, other Australian government policies, the impact on the economy and the community and the character of the investor.

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9 Ibid r 8AA(2)(g). See also Attorney-General's Department, *Protective Security Policy Framework: 8 Sensitive and Classified Information* (Australian Government, 28 September 2018) <https://www.protectivesecurity.gov.au/publications-library/policy-8-sensitive-and-classified-information>, archived at <https://perma.cc/TX57-8FZC>.

10 *FATR* (n 4) reg 8AA.

11 *FATA* (n 7) ss 66A(1), (2), (5); ibid reg 60A.

12 *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) sch 1 item 229 ('*Foreign Investment Reform*')

13 *FATA* (n 7) s 55E(1).

14 For example, where a 'no objection notification' was given in relation to the action or the investment was allowed subject to conditions: ibid ss 79A(1)(a)(i), (vi).

15 Ibid ss 79A(1)(b), (2).

16 *Foreign Investment Reform* (n 12) sch 1 item 234. See also Explanatory Memorandum (n 2) 35 [1.147].

17 *FATA* (n 7) ss 67, 69, 79D, 79E.

18 Ibid s 67(1)(b).

Investments in the agricultural sector, in residential land or by foreign government investors include additional considerations (in the latter case, such as whether the investment is 'commercial in nature' or pursues 'broader political or strategic objectives').[19] The new national security reviews consider whether an investment would be contrary to national security ('a subset of the national interest'), including 'the extent to which the investment will affect Australia's ability to protect its strategic and security interests', in reliance on 'advice from relevant national security agencies'.[20]

These developments raise questions about the compatibility of Australia's foreign investment screening regime with its obligations under international investment law: primarily in the form of bilateral investment treaties ('BITs') and PTAs with associated investment provisions. At the time of writing, Australia has 15 BITs in force:[21] with Argentina,[22] China,[23] the Czech Republic,[24] Egypt,[25] Hungary,[26] Laos,[27] Lithuania,[28] Pakistan,[29] Papua New Guinea,[30] the Philippines,[31] Poland,[32] Romania,[33] Sri Lanka,[34] Turkey,[35] and

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19 Foreign Investment Review Board, 'Australia's Foreign Investment Policy' (, 9 July 2021) 8–11 <https://firb.gov.au/sites/firb.gov.au/files/2021-07/Australias_foreign_investment_policy.docx>, archived at <https://perma.cc/P9HK-BTYY> ('FIRB Policy').

20 Ibid 11.

21 Australia's BITs with Chile, Hong Kong, India, Indonesia, Mexico, Peru and Viet Nam have been terminated, in each case (apart from India) due to replacement with newer agreements.

22 *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol*, signed 23 August 1995, [1997] ATS 4 (entered into force 11 January 1997) ('*Australia–Argentina BIT*').

23 *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, [1988] ATS 14 (signed and entered into force 11 July 1988) ('*Australia–China BIT*').

24 *Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments*, signed 30 September 1993, [1994] ATS 18 (entered into force 29 June 1994) ('*Australia–Czech Republic BIT*').

25 *Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments*, signed 3 May 2001, 2208 UNTS 347 (entered into force 5 September 2002) ('*Australia–Egypt BIT*').

26 *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments*, signed 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992) ('*Australia–Hungary BIT*').

27 *Agreement between Australia and the Lao People's Democratic Republic on the Reciprocal Promotion and Protection of Investments*, signed 6 April 1994, [1995] ATS 9 (entered into force 8 April 1995) ('*Australia–Lao PDR BIT*').

28 *Agreement between the Government of the Republic of Lithuania and the Government of Australia on the Promotion and Protection of Investments*, signed 24 November 1998, 2336 UNTS 341 (entered into force 10 May 2002) ('*Australia–Lithuania BIT*').

29 *Agreement between the Islamic Republic of Pakistan and Australia on the Promotion and Protection of Investments*, signed 7 February 1998, 2044 UNTS 715 (entered into force 14 October 1998) ('*Australia–Pakistan BIT*').

30 *Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments*, signed 3 September 1990, [1991] ATS 38 (entered into force 20 October 1991) ('*Australia–PNG BIT*').

31 *Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol*, signed 25 January 1995, [1995] ATS 28 (entered into force 8 December 1995) ('*Australia–Philippines BIT*').

32 *Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments*, signed 7 May 1991, [1992] ATS 10 (entered into force 27 March 1992) ('*Australia–Poland BIT*').

Uruguay.[36] Australia also has in force 16 PTAs with investment chapters or associated investment agreements: with the Association of Southeast Asian Nations ('ASEAN')[37] and New Zealand ('*AANZFTA*'),[38] Chile ('*ACLFTA*'),[39] China ('*ChAFTA*'),[40] Hong Kong ('*A–HKFTA*')[41] and its associated investment agreement '*A–HKIA*'),[42] Indonesia ('*IA–CEPA*'),[43] Japan ('*JAEPA*'),[44] Korea ('*KAFTA*'),[45] Malaysia ('*MAFTA*'),[46] New Zealand ('*ANZCERTA*')[47] and its associated investment protocol '*ANZIP*'),[48] Peru ('*PAFTA*'),[49] Singapore

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33 *Agreement between the Government of Australia and the Government of Romania on the Reciprocal Promotion and Protection of Investments*, signed 21 June 1993, [1994] ATS 10 (entered into force 22 April 1994) ('*Australia–Romania BIT*').

34 *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments*, signed 12 November 2002, 2483 UNTS 169 (entered into force 14 March 2007) ('*Australia–Sri Lanka BIT*').

35 *Agreement between Australia and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments*, signed 16 June 2005, [2010] ATS 8 (entered into force 29 June 2009) ('*Australia–Turkey BIT*').

36 *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019, [2019] ANTNIF 12 (entered into force 23 January 2022) ('*Australia–Uruguay IPPA*').

37 Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

38 *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, 2672 UNTS 1 (entered into force 1 January 2010), as amended by the *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014, [2015] ATS 14 (entered into force 1 October 2015) ('*AANZFTA*').

39 *Australia–Chile Free Trade Agreement*, signed 30 July 2008, 2694 UNTS 3 (entered into force 6 March 2009) ('*ACLFTA*').

40 *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) ('*ChAFTA*').

41 *Free Trade Agreement between Australia and Hong Kong, China*, signed 26 March 2019, [2020] ATS 4 (entered into force 17 January 2020) ('*A–HKFTA*').

42 *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China*, signed 26 March 2019, [2020] ATS 5 (entered into force 17 January 2020) ('*A–HKIA*').

43 *Indonesia–Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019, [2020] ATS 9 (entered into force 5 July 2020) ('*IA–CEPA*').

44 *Agreement Between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015) ('*JAEPA*').

45 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) ('*KAFTA*').

46 *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) ('*MAFTA*').

47 *Australia New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983, [1983] ATS 2 (entered into force 1 January 1983) ('*ANZCERTA*').

48 *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, signed 16 February 2011, [2013] ATS 10 (entered into force 1 March 2013) ('*ANZIP*'). See also *Protocol to the Australia New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods*, [1988] ATS 18 (signed and entered into force 18 August 1988); *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations — Trade Agreement*, signed 18 August 1988, [1988] ATS 20 (entered into force 1 January 1989).

49 *Free Trade Agreement between Australia and the Republic of Peru*, signed 12 February 2018, [2020] ATS 6 (entered into force 11 February 2020) ('*PAFTA*').

('*SAFTA*'),[50] Thailand ('*TAFTA*')[51] and the United States ('*AUSFTA*'),[52] as well as the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*CPTPP*'),[53] *Pacific Agreement on Closer Economic Relations Plus* ('*PACER Plus*'),[54] and *Regional Comprehensive Economic Partnership* ('*RCEP*').[55] Collectively, we refer to Australia's BITs and PTAs with investment provisions as international investment agreements ('IIAs'). We count 38 countries with

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50 *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) ('*SAFTA*'), as amended by *Singapore–Australia Free Trade Agreement Amendments*, signed 21 April 2005, [2006] ATS 9 (entered into force 24 February 2006); *Exchange of Notes Constituting a Treaty with the Government of the Republic of Singapore to Amend the Singapore–Australia Free Trade Agreement*, signed 21 December 2006 and 13 February 2007, [2007] ATS 40 (entered into force 13 February 2007); *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of Singapore to Amend Annex 2C and Annex 2D of the Singapore–Australia Free Trade Agreement (SAFTA) to Ensure Compliance with Changes to the International Convention on the Harmonized Commodity Description and Coding System (HS2007)*, signed 8 and 11 October 2007, [2007] ATS 39 (entered into force 11 October 2007); *Amendments to the Singapore–Australia Free Trade Agreement*, signed 27 July 2009, [2011] ATS 31 (entered into force 2 September 2011); *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017); and *Australia–Singapore Digital Economy Agreement*, signed 6 August 2020, [2020] ATS 13 (entered into force 8 December 2020).

51 *Australia–Thailand Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) ('*TAFTA*').

52 *Australia–US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force on 1 January 2005) ('*AUSFTA*').

53 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) art 1.1 ('*CPTPP*'), incorporating *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not in force) ('*TPP*'). The *CPTPP* is currently in force for Australia, Canada, Japan, Mexico, New Zealand, Peru, Singapore and Viet Nam. Brunei Darussalam, Chile and Malaysia are signatories but not yet parties to the *CPTPP*.

54 *Pacific Agreement on Closer Economic Relations Plus*, signed 14 June 2017, [2020] ATS 12 (entered into force 13 December 2020) ('*PACER Plus*'). *PACER Plus* is currently in force for Australia, Cook Islands, Kiribati, New Zealand, Niue, Samoa, Solomon Islands and Tonga. Nauru, Tuvalu and Vanuatu are signatories but not yet parties to *PACER Plus*.

55 *Regional Comprehensive Economic Partnership Agreement*, signed 15 November 2020, [2022] ATS 1 (entered into force 1 January 2022) ('*RCEP*'). The *RCEP* signatories (11 of which have ratified at the time of writing) are the ASEAN countries (n 37) and ASEAN's PTA partners apart from India (Australia, China, Japan, New Zealand and the Republic of Korea).

which Australia has at least one IIA in force. Australia has several other treaties with investment provisions that are not the subject of this paper.[56]

Australia's IIAs generally include provisions for 'state–state' dispute settlement ('SSDS'), where one state party to the treaty may bring a claim against another state party alleging violation of treaty obligations. Moreover, most of Australia's IIAs also include a mechanism to allow 'Investor–State dispute settlement' ('ISDS'),[57] where an investor of one state party to the treaty (the home state of the investment) may bring a claim against another state party (the state hosting the investment) alleging violation of treaty obligations. ISDS claims are heard by independent arbitral tribunals and may give rise to awards against host states amounting to billions of dollars,[58] although the average amounts awarded are much lower.[59] The potential for ISDS claims also remains

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56 See, eg, *Basic Treaty of Friendship and Co-operation between Australia and Japan*, signed 16 June 1976, [1977] ATS 19 (entered into force 21 August 1977); *Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea*, signed 6 November 1976, signed 6 November 1976, [1977] ATS 7 (entered into force 1 February 1977); *South Pacific Regional Trade and Economic Cooperation Agreement*, signed 14 July 1980, [1982] ATS 31 (entered into force 1 January 1981); *Trade and Economic Cooperation Arrangement between the Government of Canada and the Government of Australia*, (signed and entered into force 15 November 1995); *Agreement between the Government of Australia and the Government of Fiji on Trade and Economic Relations*, signed 11 March 1999, [1999] ATS 32 (entered into force 15 December 1999); *Trade and Economic Framework Agreement between Australia and China*,(signed and entered into force 24 October 2003). See also Tania Voon, 'The Japan Australia Investment Relationship: Treaties Then and Now' (2020) 31(2) *Public Law Review* 175. Australia has signed but not ratified the *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998), corrected by *Protocol of Correction to the Energy Charter Treaty*, signed 17 December 1994 (entered into force 2 August 1996). Australia applies Part VII (Structure and Institutions) provisionally.

57 See generally Luke Nottage, *International Commercial and Investor–State Arbitration: Australia and Japan in Regional and Global Contexts* (Edward Elgar, 2021) ch 11.

58 See, eg, *Hulley Enterprises Limited (Cyprus) v The Russian Federation (Final Award)* (Permanent Court of Arbitration, Case No AA 226, 18 July 2014) [1888] (awarding approximately USD40 billion). But see Vladislav Djanic, 'Yukos v Russia Saga to Continue, as Dutch Supreme Court Overturns Lower Court's Decision to Uphold the Three Underlying Awards without Considering Russia's Fraud Arguments — but Remands the Case to the Amsterdam Court of Appeal', *Investment Arbitration Reporter* (online, 5 November 2021) <https://www-iareporter-com.eu1.proxy.openathens.net/articles/breaking-yukos-v-russia-saga-to-continue-as-dutch-supreme-court-overturns-lower-courts-decision-to-uphold-the-three-underlying-awards-without-considering-russias-fraud-arguments/>. See also Martins Paparinskis, 'Crippling Compensation in the International Law Commission and Investor–State Arbitration' (2021) *ICSID Review* (advance); Jonathan Bonnitcha and Sarah Brewin, 'Compensation under Investment Treaties' (IISD Best Practices Series, International Instutute for Sustainable Development,, November 2020) 27 <https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf>, archived at <https://perma.cc/4ELH-L5AN>.

59 See, eg, Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (Report, June 2021) 28 <https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf>, archived at <https://perma.cc/KHE4-7R6M>.

under some terminated Australian BITs,[60] including the BIT with India (with respect to investments made before 23 March 2017, for 15 years from that date).[61]

The substantive and procedural protections under IIAs are generally reciprocal and may be enforced against any of the states party. Thus, several Australian investors have brought claims against other states under IIAs. For example,[62] in *White Industries Australia Ltd v India*, brought under Australia's now terminated BIT with India,[63] a tribunal ordered India to pay White Industries approximately AUD4 million plus costs and interest.[64] Australia has also been the subject of a claim brought by Philip Morris Asia Ltd in 2011 under Australia's BIT with Hong Kong (now terminated)[65] with respect to Australia's standardised tobacco packaging laws.[66] The claim failed at the jurisdictional stage in 2015 on the basis that it constituted an abuse of rights because the investment was made with the sole or primary purpose of bringing a claim under the BIT, when the dispute was reasonably foreseeable.[67] In 2017, Philip Morris was ordered to pay 50% of Australia's reasonable costs claim, amounting to approximately EUR333,000 plus AUD11.5 million.[68] Nevertheless, this example

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60 The potential for ISDS claims under the terminated BIT with Peru continues for three years following the entry into force of *PAFTA* on 11 February 2020 with respect to investments made before that date, but only with respect to any act or fact that took place or situation that existed before that date. The same applies to the terminated BITs with Mexico and Viet Nam in conjunction with entry into force of the *CPTPP* between Australia and those countries (30 December 2018 for Mexico and 14 January 2019 for Viet Nam). New ISDS claims are no longer allowed under the terminated BITs with Chile, Hong Kong or Indonesia.

61 *Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, signed 26 February 1999, 2116 UNTS 145 (entered into force 4 May 2000) art 17(3) ('*Australia–India BIT*'). This treaty was terminated by India on 23 March 2017.

62 See also Lisa Bohmer, 'Tribunal in Egyptian Mining Arbitration Finds Advance Consent to ICSID Arbitration in Australia–Egypt BIT' (12 October 2020) *Investment Arbitration Reporter* (online, 12 October 2020) <https://www-iareporter-com.eu1.proxy.openathens.net/articles/tribunal-in-egyptian-mining-arbitration-finds-advance-consent-to-icsid-arbitration-in-australia-egypt-bit/>; Andrew D Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar, 2017) 167–71.

63 *Australia–India BIT* (n 61).

64 *White Industries Australia Ltd v India (Final Award)* (UNCITRAL Arbitral Tribunal, 30 November 2011) [16.1.1(e)].

65 *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993, 1770 UNTS 385 (entered into force 15 October 1993) ('*Australia–Hong Kong BIT*'). This treaty was terminated as of 17 January 2020 by *A–HKIA* (n 42) art 40(2).

66 *Tobacco Plain Packaging Act 2011* (Cth); *Tobacco Plain Packaging Regulations 2011* (Cth). See also Tania Voon et al (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012).

67 *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012–12, 17 December 2015) [588]. See also Jarrod Hepburn and Luke Nottage, 'A Procedural Win for Public Health Measures' (2017) 18(2) *Journal of World Investment and Trade* 307.

68 *Philip Morris Asia Ltd v Australia (Final Award Regarding Costs)* (Permanent Court of Arbitration, Case No 2012–12, 8 March 2017) [105].

shows the reality of potential ISDS claims and their implications for Australian law and policy.[69]

The ISDS system is facing a longstanding legitimacy crisis,[70] with wide-ranging reforms being pursued, including by the European Union,[71] the International Centre for Settlement of Investment Disputes ('ICSID'), part of the World Bank,[72] the United Nations Commission on International Trade Law ('UNCITRAL')[73] and the United Nations Conference on Trade and Development ('UNCTAD').[74] In all these processes, in which Australia is participating, as well as in the negotiation, drafting, amendment or termination of IIAs, the interaction between foreign investment screening and IIAs needs to be carefully examined. In this article, we demonstrate this interaction in the context of Australia as a case study, in part as a means of contributing to Australia's current review of its BITs[75] (led by the Department of Foreign Affairs and Trade

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69 Australia also faces an ISDS claim purportedly under *AUSFTA* brought by Power Rental Asset Co Two LLC, Power Rental Op Co Australia LLC and APR Energy LLC. On the unlikelihood of success of the claim: see, eg, Amokura Kawharu and Luke Nottage, 'The Curious Case of ISDS Arbitration Involving Australia and New Zealand' (2019) 44(2) *University of Western Australia Law Review* 32, 54–6. On a more recent potential claim see Jonathan Bonnitcha, 'Can Clive Palmer Use Investor–State Dispute Settlement to Get What the High Court Wouldn't Give Him?' *AUSPUBLAW* (Blog Post, 1 December 2021) <https://www.auspublaw.org/blog/2021/12/can-clive-palmer-use-investor-state-dispute-settlement-to-get-what-the-high-court-wouldnt-give-him>, archived at <https://perma.cc/D4AF-Y5HW>.

70 See, eg, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73(4) *Fordham Law Review* 1521; Stephen R Buzdugan, 'The Global Governance of FDI and the Non-Market Strategies of TNCs: Explaining the "Backlash" against Bilateral Investment Treaties' (2021) 28(2) *Transnational Corporations* 131; Gus Van Harten, *The Trouble with Foreign Investor Protection* (Oxford University Press, 2020).

71 See, eg, European Commission and Government of Canada, 'Establishment of a Multilateral Investment Dispute Settlement System' (Discussion Paper, December 2016) <https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf>, archived at <https://perma.cc/HD7X-GXQ4>.

72 See, eg, International Centre for Settlement of Investment Disputes, 'ICSID Administrative Council Approves Amendment of ICSID Rules' (News Release, 21 March 2022) <https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules>, archived at <https://perma.cc/QWQ7-PG44>; International Centre for Settlement of Investment Disputes and United Nations Comission on International Trade Law, 'Draft Code of Conduct for Adjudicators in International Investment Disputes: Version 3' (Code of Conduct, International Centre for Settlement of Investment Disputes, September 2021) <https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf>, archived at <https://perma.cc/8A5Q-794N>.

73 See, eg, United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat*, UN GAOR, 38th sess, UN Doc A/CN.9/WG.III/WP.166/Add.1 (30 July 2019).

74 See, eg, United Nations Conference on Trade and Development, *International Investment Agreements: Reform Accelerator*, UN Doc UNCTAD/DIAE/PCB/INF/2020/8 (2020).

75 Department of Foreign Affairs and Trade, Australian Government , 'Review of Australia's Bilateral Investment Treaties' (Discussion Paper, August 2020) <https://www.dfat.gov.au/sites/default/files/review-australia-bilateral-investment-treaties.pdf>, archived at <https://perma.cc/PGF7-7D72>. See also 'Australia's Bilateral Investment Treaties', *Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties>, archived at <https://perma.cc/H6ZC-39ND>.

('DFAT')) and its evaluation of the 2021 foreign investment reforms.[76] Part II of this article addresses Australia's 18 'modern IIAs' (which we define as its 16 PTAs in force with investment chapters or associated investment agreements, plus the new Investment Protection and Promotion Agreement ('*IPPA*') with Uruguay,[77] and the new PTA with the United Kingdom ('*A–UKFTA*') (not yet in force).[78] We exclude the recently signed interim agreement between Australia and India, which contains no investment chapter (while covering foreign investment to some extent, such as in the services chapter).[79] Within the 18 identified modern IIAs, we examine reforms to protect Australia's foreign investment screening from investment law claims and breaches: first, reforms explicitly directed at foreign investment policy; and, second, general reforms that may shield screening. We show that the explicit exclusions regarding foreign investment policy (with respect to dispute settlement and non-discrimination obligations) provide the clearest protections for foreign investment screening. The general reforms largely depend on an assessment of justification or proportionality[80] of a screening regulation or application, and largely reflect developments in arbitral reasoning. However, in six IIAs a broad security exception would provide significant flexibility for Australia in the context of national security concerns.[81]

In Part III, we explore traditional approaches found in Australia's 15 'traditional BITs' (which we define as the 15 BITs in force, apart from the *Australia–Uruguay IPPA*, plus Australia's terminated BIT with India) that may shield Australia's foreign investment screening from investment law claims and breaches. Some of these traditional approaches are also reflected in Australia's modern IIAs. We find that the strongest protections for foreign investment screening in these BITs are exclusion of the pre-establishment stage of an

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76 The Treasury, Australian Government, *Evaluation of the 2021 Foreign Investment Reforms* (Final Report, 10 December 2021) <https://treasury.gov.au/sites/default/files/2022-02/p2022-244363.pdf>; The Treasury, Australian Government, *Enhancing Australia's Foreign Investment Framework: Government Response to the Evaluation of the Foreign Investment Reforms and Discussion Paper* (February 2022) <https://treasury.gov.au/sites/default/files/2022-02/c2022-244363-dp.pdf>, archived at <https://perma.cc/MVW4-V9TR>. The Treasury's evaluation led to the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (Cth), amending *FATR* (n 4) from 1 April 2022. These amendments do not affect the analysis in this Article. See also Senate Economic References Committee, Parliament of Australia, *Greenfields, Cash Cows and the Regulation of Foreign Investment in Australia* (Report, August 2021) <https://www.aph.gov.au/parliamentary_Business/Committees/Senate/Economics/Foreigninvestment/Report>, archived at <https://perma.cc/XQ3X-4HPL>; Australian Government, *Australian Government Response to the Senate Economics Reference Committee Report: Greenfields, Cash Cows and the Regulation of Foreign Investment in Australia* (April 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreigninvestment/Government_Response>, archived at <https://perma.cc/Q63A-UK5H>.

77 *Australia–Uruguay IPPA* (n 36).

78 *Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland*, 17 December 2021, [2022] ATNIF 3 (not yet in force) ('*A–UKFTA*').

79 See *Australia–India Economic Cooperation and Trade Agreement*, signed 2 April 2022, [2022] ATNIF 6 annex 8D (not yet in force).

80 See generally Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015) ('*Proportionality*').

81 See below Part II(B)(4).

investment and exclusion of other treaties from the most-favoured-nation ('MFN') obligation.

Our analysis reveals that the introduction of last resort and call-in powers increases risks under Australia's IIAs (particularly in relation to non-discrimination, fair and equitable treatment, and expropriation) because these powers may be applied to investments that have already been lawfully established in Australia. Screening of proposed investments creates fewer risks because Australia's BITs generally apply only to the post-establishment stage,[82] and seven of Australia's modern IIAs allow ISDS only for post-establishment claims (with four of these IIAs not excluding foreign investment policy from ISDS or SSDS claims).[83] Although Australia's modern IIAs contain a large variety of explicit and implicit protections for foreign investment screening (indicating a growing awareness by the Australian government of the potential clash between these domestic laws and its treaty obligations), these techniques are applied in an inconsistent and non-comprehensive manner, as they have been developed over time and as a result of negotiation with different partners. This inconsistency may also be attributed to the fact that Australia unfortunately lacks a model investment treaty text, instead considering investment provisions on an ad hoc basis. Overall, *ACLFTA* appears to contain fewer protections for Australian foreign investment policy at the post-establishment stage than Australia's other modern IIAs. Most of these protections are also essentially lacking from Australia's BITs, which provide further scope for claims against Australia. We note in conclusion the added complication of multiple IIAs applying between Australia and some countries, exacerbating the inconsistencies between them.

These challenges are not isolated to Australia. Many other countries have also been introducing or expanding their foreign investment screening regimes in recent years.[84] Screening decisions have also increasingly given rise to tensions in international economic law, including (as discussed further below) in the ISDS claim *Global Telecom Holdings SAE v Canada* ('*Global Telecom v Canada*')[85] and in connection with Chinese telecommunications companies.[86] Changes to a state's domestic screening regulations must be designed and implemented with an understanding of that state's obligations under international investment law, because screening has the potential to violate those obligations. Similarly, treaty drafters need to be aware of the impact of particular provisions on domestic screening regimes. Our demonstration of the complex interaction between screening and IIAs highlights the importance of a whole-of-government approach to these issues, bringing to bear expertise from both domestic and

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82 See below Part III(B).

83 See below n 155 and accompanying text.

84 See, eg, OECD, *Investment Screening in Times of COVID-19 — and Beyond* (Report, 7 July 2020); Simon J Evenett, 'What Caused the Resurgence in FDI Screening?' (Policy Note No 240, SUERF, May 2021) 1–2. See also Tania Voon and Dean Merriman, 'Incoming: How International Investment Law Constrains Foreign Investment Screening' (2022) 22(3) *Journal of World Investment Law and Trade* (advance).

85 *Global Telecom Holding SAE v Canada (Award)* (ICSID Arbitral Tribunal, Case No ARB/16/16, 27 March 2020) ('*Global Telecom v Canada*'). See below Parts II(A)(1), IIB(2)(a), IIB(2)(b).

86 See below Part II(A)(1).

international settings. Further research on the economic and political implications of foreign investment screening is required to be able to guide states in developing best practice approaches to both screening and IIAs in connection with screening.

II MODERN APPROACHES TO PROTECT AUSTRALIA'S FOREIGN INVESTMENT SCREENING

Australia's 18 modern IIAs (as defined in Part I) include several clarifications and exclusions not generally seen in its traditional BITs. Here we first consider reforms that explicitly refer to Australia's foreign investment policy (the strongest form of protection of Australia's foreign investment screening in its modern IIAs) and then those that are not specific to foreign investment policy but may nevertheless provide protections for that policy. The former type of reform provides greater certainty of the coverage of foreign investment screening, but as it is not implemented comprehensively in all of Australia's modern IIAs, the potential for ISDS or SSDS claims remains in some of them. The latter type of reform provides less certain protection for foreign investment screening from ISDS or SSDS claims (especially post-establishment), while enhancing the potential for Australia to justify its screening activities on public welfare grounds and particularly national security.

A *Reforms Explicitly Directed at Foreign Investment Policy*

As we will address in turn, common approaches in Australia's modern IIAs that explicitly protect Australia's foreign investment policy from claims of treaty breach are to: exclude foreign investment policy from the scope of dispute settlement (ISDS and/or SSDS); and list foreign investment policy as a 'non-conforming measure' ('NCM') with respect to non-discrimination obligations (national treatment and/or MFN treatment). These techniques provide considerable policy space to Australia, but they do not eliminate all risks of claims because they are not found in a comprehensive manner in every modern IIA (some do not exclude foreign investment policy from both ISDS and SSDS; some do not apply NCMs to the MFN obligation or do not apply fully to existing and future foreign investment policies), and because the NCMs do not cover all potentially relevant obligations (namely regarding fair and equitable treatment, and expropriation).[87] Moreover, disputes may arise as to whether a given measure or decision falls within a dispute settlement exclusion or NCM.[88] Finally, the fact that a claim may not be brought through ISDS or SSDS does not preclude the potential for Australia to be in breach of its obligations under an IIA.

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[87] Apart from non-discrimination, the NCMs often apply to obligations concerning performance requirements and/or senior management and boards of directors, but not to fair and equitable treatment or expropriation.

[88] Some of Australia's IIAs allow for a joint determination by the states party in this regard: see, eg, *KAFTA* (n 45) art 11.23; *A–HKIA* (n 42) art 32.

1 *Exclusion of Foreign Investment Policy from Dispute Settlement*

As shown in Table 1, some of Australia's modern IIAs exclude its foreign investment policy from ISDS (and, more rarely, SSDS). For example, *KAFTA* excludes from ISDS (but not SSDS) any 'decision by Australia with respect to whether or not to refuse, or impose orders or conditions on, an investment that is subject to review under Australia's foreign investment policy'.[89]

These exclusions will not necessarily be effective. For example, in *Global Telecom v Canada*, an arbitral tribunal found by majority that a carve-out of foreign investment screening from ISDS did not apply in the circumstances of that dispute, essentially because the majority considered that the acquisition of voting control did not constitute an 'acquisition of an existing business enterprise or a share of such enterprise'[90] as specified in the relevant treaty provision.[91]

Nevertheless, these provisions do provide significant protection for Australia against ISDS claims with respect to foreign investment screening, except in the four IIAs indicated that do not contain them. The *CPTPP* also removed the possibility (created under its predecessor the *Trans-Pacific Partnership* ('*TPP*')) of ISDS claims alleging a breach of an investment authorisation.[92] The 11 instances in which foreign investment policy is not excluded from SSDS still provide the potential for a dispute settlement claim to be brought by a treaty party instead of an investor. Such a claim may ultimately involve monetary compensation[93] or the suspension of concessions under the treaty,[94] although the frequency of claims and any amount awarded might be expected to be lower than in the ISDS context.[95]

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89 *KAFTA* (n 45) annex 11–G.

90 *Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, signed 13 November 1996, 2025 UNTS 289 (entered into force 3 November 1997) art II(4)(b).

91 *Global Telecom v Canada* (n 85) [328], [334]. See also Joshua Paine, '*Global Telecom Holding v Canada*: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties' (2021) 38(4) *Journal of International Arbitration* 533.

92 *CPTPP* (n 53) art 2, annex II para 2.

93 See, eg, *AUSFTA* (n 52) art 21.11(5).

94 See, eg, *JAEPA* (n 44) art 19.15(2).

95 A state might initiate such a dispute to espouse a claim on behalf of its investors, interpret an IIA, or seek declaratory relief: see Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55(1) *Harvard International Law Journal* 1. See, eg, *Italy v Cuba (Final Award)* (APPRI Arbitral Tribunal, 1 January 2008) (Italy unsuccessfully espousing a claim on behalf of, and in conjunction with, its investors); *Ecuador v United States (Award)* (Permanent Court of Arbitration, Case No 2012–5, 29 September 2012) (on the interpretation of the US–Ecuador BIT); *Cross-Border Trucking Services (Mexico v United States) (Final Award)* (North American Free Trade Agreement Ch 20 Arbitral Tribunal, Case No USA–MEX–98–2008–01, 6 February 2001) (Mexico seeking a declaration that US measures regarding Mexican-owned trucking firms were inconsistent with (inter alia) the national treatment and MFN provisions in *NAFTA*).

Table 1: Exclusion of Foreign Investment Policy from Dispute Settlement in Australia's Modern IIAs

IIA	Year signed	Foreign investment policy explicitly excluded from ISDS	Foreign investment policy explicitly excluded from SSDS
AUSFTA	2004	(no ISDS)	×
TAFTA	2004	✓	×
ACLFTA	2008	×	×
AANZFTA	2009	×	×
ANZIP	2011	(no ISDS)	×
MAFTA	2012	(no ISDS)	×
KAFTA	2014	✓	×
JAEPA	2014	(no ISDS)	×
ChAFTA	2015	×	×
SAFTA	2016[96]	✓	✓
PACER Plus	2017	(no ISDS)	×
CPTPP	2018	✓	✓
PAFTA	2018	✓	✓
IA–CEPA	2019	✓	✓
A–HKIA	2019	✓	✓
Australia–Uruguay IPPA	2019	×	×
RCEP	2020	(no ISDS)	✓
A–UKFTA	2021	(no ISDS)	✓

2 *Listing Foreign Investment Policy as a Non-Conforming Measure with Respect to Non-Discrimination Obligations*

As shown in Table 2, most of Australia's modern IIAs include non-discrimination obligations (national treatment and MFN treatment) that extend to prospective investors with respect to the 'establishment' and 'acquisition' (as well as the 'expansion') of investments, meaning that they cover the pre-establishment phase and therefore offer protection with respect to investors that are in the process of undergoing foreign investment screening under Australian law.

[96] The investment chapter of *SAFTA* was last amended by signature in 2016, with the amendments entering into force in 2017: see above n 50.

In the absence of a relevant exclusion or exception, Australia's approach to foreign investment screening could breach these obligations. For example, screening of foreign investment but not domestic investment[97] could be contrary to the national treatment obligation, which generally requires each party to accord 'investors of the other Party' (defined to include those seeking to make an investment)[98]

> treatment no less favourable than it accords, in like circumstances, to its own investors … with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[99]

Screening of investments from some PTA partners at a lower threshold than other PTA partners could breach the MFN obligation, which generally requires each party to accord to 'investors of the other Party … treatment no less favourable than it accords, in like circumstances, to investors of any non-Party' (that is, third country) with respect to establishment, acquisition, expansion etc.[100]

Australia has foreseen these potential non-discrimination violations and partially addressed them by including in its modern IIAs an explicit reference to Australia's foreign investment policy as an NCM that is allowed notwithstanding these obligations, subject to certain conditions. For example, *AUSFTA* provides that the national treatment and MFN treatment obligations do not apply to any existing NCM maintained by a party at the central level of government, as set out by that party in its Schedule to Annex I.[101] The exclusion extends to the continuation or prompt renewal of any such NCM,[102] as well as amendments to an NCM 'to the extent that the amendment does not decrease the conformity of the measure' with the relevant obligation 'as it existed immediately before the amendment'.[103] These obligations also do not apply to measures adopted or maintained by a party with respect to sectors, subsectors or activities set out in its Schedule to Annex II.[104]

Australia's Schedule to Annex I refers, with respect to national treatment, to 'Australia's Foreign Investment Policy', comprising *FATA* and associated materials.[105] The Schedule then elaborates in detail on the investments that may be subject to screening, for example, investments in existing Australian businesses with total assets valued at more than AUD50 million in the telecommunications sector.[106] Australia's Schedule to Annex II lists Australia's foreign investment policy with respect to national treatment, in connection with

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97 *FATA* (n 7) ss 4 (definition of 'foreign person'), 66A(1), (2), (5).

98 Some IIAs clarify that an investor who seeks or attempts to make an investment is an investor that has initiated the relevant notification or approval process to do so, where one applies: see, eg, *RCEP* (n 55) art 10.1(e) n 9*; MAFTA* (n 46) art 12.2(d) n 17.

99 *ANZIP* (n 48) arts 1(f), 5.

100 Ibid art 6(1). See also *IA–CEPA* (n 43) arts 14.1, 14.5(1), (2).

101 *AUSFTA* (n 52) art 11.13(1)(a)(i).

102 Ibid art 11.13(1)(b).

103 Ibid art 11.13(1)(c). See also *RCEP* (n 55) art 10.8(3).

104 *AUSFTA* (n 52) art 11.13(2).

105 Ibid annex I Schedule of Australia.

106 Ibid. Specific foreign ownership restrictions also apply, for example, with respect to Telstra, Qantas, other international airlines, and newspapers.

preferential treatment to Indigenous Australians and foreign investment in Australian urban land, other than developed non-residential commercial real estate.[107] Although a tribunal might disagree as to whether a particular screening decision or process fell within one of these NCMs,[108] their inclusion provides some protection to Australia's screening regime.

This *AUSFTA* example nevertheless demonstrates two risks for Australia's foreign investment screening that arise from the delineation of NCMs in connection with non-discrimination obligations. First, as indicated in Table 2, four of Australia's modern IIAs that cover pre-establishment MFN list Australia's foreign investment policy as an NCM only with respect to national treatment, and not MFN treatment (among which, *ACLFTA* does not exclude foreign investment policy from ISDS or SSDS).[109] Similarly, three of Australia's modern IIAs include an NCM in connection with MFN for foreign investment policy only with respect to agribusiness and agricultural land.[110] In these seven IIAs (or four in the agribusiness/agricultural land context), treating another country more favourably, for example by applying a higher screening threshold, may violate the MFN rule.

Under Australia's current laws, outside the national security context, a prospective private foreign investor will need to make a foreign investment application to the Treasurer where they propose, for example, to acquire a substantial interest[111] in an Australian entity that is valued above a specified monetary threshold.[112] Where the entity is not carrying on a sensitive business (for example, telecommunications, transport, military),[113] the threshold is AUD1,250 million for investors from some but not all of Australia's PTA partners and AUD289 million for other investors.[114] Four of the five PTAs in force to which this observation does not apply do not appear to create a current MFN problem: *MAFTA* and *AANZFTA* (which have no MFN obligation in force, as shown in Table 2); and *PACER Plus* and *IA–CEPA* (which include NCMs for MFN with lower screening thresholds than the AUD281 million currently applied to them).[115] The fifth PTA in force that does not benefit from the lower threshold in this context is *TAFTA*.[116] Although ambiguously drafted, we read

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107 Ibid annex II Schedule of Australia.

108 See, eg, *Mobil Investments Canada Inc v Canada (Decision on Liability and on Principles of Quantum)* (ICSID Arbitral Tribunal, Case No ARB(AF)/07/4, 22 May 2012) [413].

109 See above Table 1.

110 *CPTPP* (n 53) art 1(1), incorporating *TPP* (n 53) annex II (Australia); *PAFTA* (n 49) annex II (Australia); *SAFTA* (n 50) annex 4–II(A).

111 Substantial interest is defined as an interest of at least 20%: *FATA* (n 7) s 4 (definition of 'substantial interest').

112 Ibid ss 47(2)(b), 47(3), 51 item 2A.

113 *FATR* (n 4) reg 22.

114 Ibid reg 51. For thresholds as indexed; see 'Monetary Thresholds', *Foreign Investment Review Board* (Web Page) <https://firb.gov.au/general-guidance/monetary-thresholds>, archived at <https://perma.cc/G8XQ-MTAL>. Regulation 5 defines the favoured countries as the United States, New Zealand, Chile, Japan, the Republic of Korea, China, Peru, Singapore, countries for whom the *CPTPP* (n 53) has entered into force and Hong Kong.

115 *PACER Plus* (n 54) annex 9–A Schedule of Australia sets the threshold at AUD252 million; *IA–CEPA* (n 43) annex I Schedule of Australia sets the threshold at AUD266 million.

116 Thailand is also left out of the exemption for certain agribusiness screening that applies to the United States, New Zealand and Chile: *FATR* (n 4) regs 5 (definition of 'agreement country or region'), 40(1); *FATA* (n 7) ss 40(2)(a), 41(2)(a).

the MFN obligation in *TAFTA* as extending to foreign investment screening at the pre-establishment stage.[117] Although *TAFTA* excludes foreign investment policy and pre-establishment claims from ISDS,[118] this reading leaves scope for a potential SSDS claim in the pre-establishment context under *TAFTA*.

Second, eight of Australia's modern IIAs (including *ACLFTA* and *TAFTA*) list Australia's foreign investment policy only in a limited respect in the Annex II-type context. For example, under *AUSFTA*, as noted above, the Annex II NCM for foreign investment policy relates only to preferential treatment of Indigenous Australians and foreign investment in Australian urban land.[119] Amendments to foreign investment screening beyond those contexts are protected as an NCM under Annex I only to the extent that they do not decrease conformity with non-discrimination obligations. The recent removal of screening thresholds in the context of national security reviews and the associated introduction of call-in and last resort powers arguably decreases conformity with the national treatment obligation, as these are additional reviews and powers to which domestic investors in like circumstances are not subject.

Five IIAs refer to Australia's foreign investment policy as an NCM for national treatment and MFN with respect to any measure Australia considers necessary for protection of its essential security interests, mostly in an annex II-type context.[120] *RCEP* also lists such measures in an annex II-type NCM without specific reference to foreign investment policy.[121] These approaches raise similar issues to essential security exceptions, as discussed further in Part II(B)(4) below.

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117 *TAFTA* (n 51) arts 908(2), 910(1): no mention of 'establishment' or 'acquisition' (or 'expansion'), but 'investor' in art 908(2)(a) is defined at art 103(m) to include prospective investors, and 'investment' is used in art 908(2)(b) rather than 'covered investment', which is defined to cover the post-establishment stage only as discussed in Part II(B)(2)(b) below.

118 See above Table 1 and below n 145.

119 *AUSFTA* (n 52) annex II Schedule of Australia. See also *ACLFTA* (n 39) annex II Schedule of Australia; *ANZIP* (n 48) annex II Schedule of Australia; *SAFTA* (n 50) annex 4–II(A); *CPTPP* (n 53) art 1(1), incorporating *TPP* (n 53) annex II Schedule of Australia; *PAFTA* (n 49) annex II Schedule of Australia; *A–HKIA* (n 42) annex I Schedule of Australia, which is the annex II equivalent, cf art 7.1. *TAFTA* (n 51) does not contain annex II-type NCMs: see arts 904, 907, annex 8 (Australia).

120 *ChAFTA* (n 40) annex III Schedule of Australia s B; *IA–CEPA* (n 43) annex II Schedule of Australia; *JAEPA* (n 44) annex 7 Schedule of Australia; *KAFTA* (n 45) annex II Schedule of Australia; *PACER Plus* (n 54) annex 9–A Schedule of Australia , annex I Schedule of Australia, not distinguishing between annex I and annex II-type contexts in the way that most other modern Australian IIAs do.

121 *RCEP* (n 55) annex III Australia list B.

Table 2: Existence of Non-Discrimination NCMs with Respect to Foreign Investment Policy in Australia's Modern IIAs

IIA	Year signed	Pre-and post-establishment national treatment[122]	NCM: foreign investment policy regarding national treatment[123]	Pre- and post-establishment MFN treatment[124]	NCM: foreign investment policy regarding MFN treatment[125]
AUSFTA	2004	✓	✓[126]	✓	✗
TAFTA	2004	only in specified sectors for pre-establishment[127]	✓	✓[128]	✗
ACLFTA	2008	✓	✓	✓	✗
AANZFTA	2009	not in force[129]	—	to be negotiated[130]	—
ANZIP	2011	✓	✓	✓	✗
MAFTA	2012	not in force[131]	—	not in force[132]	—
KAFTA	2014	✓	✓	✓	✓
JAEPA	2014	✓	✓	✓	✓

122 National treatment obligation extending to prospective investors with respect to acquisition, establishment and expansion of investments.

123 NCM for foreign investment policy with respect to national treatment.

124 MFN treatment obligation extending to prospective investors with respect to acquisition, establishment and expansion of investments.

125 NCM for foreign investment policy with respect to MFN treatment.

126 Side letters dated 18 May 2004 impose procedural (consultation) requirements in respect of Australia's foreign investment screening of US investments: letter from Mark Vaile, Australian Minister for Trade, to Robert B Zoelick, United States Trade Representative, 18 May 2004.

127 Pre-establishment national treatment applies in specified sectors only: *TAFTA* (n 51) art 904. Post-establishment national treatment does not explicitly cover expansion: at art 907.

128 See above n 109 and accompanying text.

129 National treatment obligation applies to prospective investors with respect to acquisition and establishment of investments but does not apply until the parties have agreed schedules of reservations: *AANZFTA* (n 38) ch 11 arts 2(d), 4, 16(5).

130 Ibid ch 11, art 16(2)(a).

131 National treatment obligation extends to prospective investors with respect to establishment and acquisition of investments but does not apply until the parties have agreed schedules of NCMs: *MAFTA* (n 46) arts 12.2(d), 12.4, 12.16(4).

132 The MFN obligation extends to prospective investors with respect to establishment and acquisition of investments but does not apply until the parties have agreed schedules of NCMs: ibid arts 12.2(d), 12.5, 12.16(4).

IIA	Year signed	Pre-and post-establishment national treatment[122]	NCM: foreign investment policy regarding national treatment[123]	Pre- and post-establishment MFN treatment[124]	NCM: foreign investment policy regarding MFN treatment[125]
ChAFTA	2015	✓[133]	✓	✓[134]	✓
SAFTA	2016[135]	✓	✓	✓	limited[136]
PACER Plus	2017	only in specified sectors[137]	✓	✓	✓
CPTPP	2018	✓	✓	✓	limited[138]
PAFTA	2018	✓	✓	✓	limited[139]
IA–CEPA	2019	✓	✓	✓	✓
A–HKIA	2019	post-establishment[140]	implicit[141]	post-establishment[142]	implicit[143]
Australia–Uruguay IPPA	2019	✗	—	post-establishment[144]	✗
RCEP	2020	✓	✓	✓	✓

133 Australia's national treatment obligation applies to prospective investors with respect to establishment and acquisition of investments, but China's does not: *ChAFTA* (n 40) art 9.3.1; cf art 9.3.2.

134 The MFN obligation excludes preferential treatment of investors of Hong Kong, Macao or Chinese Taipei: ibid art 9.4 n 2.

135 The investment chapter of *SAFTA* was last amended by signature in 2016, with the amendments entering into force in 2017: see above n 50.

136 See above n 110 and accompanying text.

137 *PACER Plus* (n 54) ch 9 art 6(1).

138 See above n 102 and accompanying text.

139 Ibid.

140 The national treatment obligation does not apply to prospective investors or establishment or acquisition of investments; it applies to expansion subject to law: *A–HKIA* (n 42) arts 1, 4(1), 4(3).

141 Foreign investment policy is not specified; all existing measures are covered in annex I-type manner: ibid art 7(1).

142 The MFN obligation does not apply to prospective investors or establishment or acquisition of investments; it applies to expansion subject to law: ibid arts 1, 5(1), 5(3).

143 See above n 141.

144 The MFN obligation does not apply to investors (whether prospective or otherwise) or establishment or acquisition of investments (nor does it explicitly cover expansion of investments): *Australia–Uruguay IPPA* (n 36) arts 1.1(c), 5.1.

IIA	Year signed	Pre-and post-establishment national treatment[122]	NCM: foreign investment policy regarding national treatment[123]	Pre- and post-establishment MFN treatment[124]	NCM: foreign investment policy regarding MFN treatment[125]
A–UKFTA	2021	✓	✓	✓	✓[145]

B *General Reforms That May Shield Foreign Investment Screening*

Australia's modern IIAs contain numerous 'reforms' compared to its earlier BITs, which may enhance policy space for the host state in general, including with respect to foreign investment screening. These include, as we will examine in turn: the exclusion or restriction of ISDS (for example, to allow only post-establishment claims); clarifications and exceptions within positive obligations (we focus on non-discrimination, fair and equitable treatment, and expropriation, although provisions on performance requirements and senior management conditions may also be relevant to the conditions that may be imposed following screening); general exceptions such as those related to public health measures; and security exceptions.

All of these reforms provide greater scope for Australia to defend its foreign investment screening in general and in particular instances in which it may be applied. These reforms may be particularly important to the extent that a given IIA does not exclude foreign investment policy from ISDS or SSDS or does not include a comprehensive NCM with respect to foreign investment policy in the context of national treatment or MFN treatment.[146] Some of the reforms mirror developments in the reasoning of arbitral tribunals (for example, the relevance of regulatory purpose to an examination of like circumstances in non-discrimination obligations,[147] or the recognition of police powers in the context of expropriation),[148] such that even those IIAs lacking these drafting techniques may still benefit from the underlying concerns. A central issue in relation to these various provisions will often be the policy justification for or proportionality of the conduct in question. Where ISDS or SSDS is available, the

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145 *A–UKFTA* (n 78) precludes the application of national treatment and MFN treatment obligations to 'activities carried out in the exercise of governmental authority', with respect to 'the establishment, expansion or acquisition of an investment': at art 13.2(4). This exclusion would appear to cover actions or decisions by FIRB or the Australian Treasurer. Whether the exclusion would cover legislation such as *FATA* (n 7) and its associated regulations is less clear. A limited MFN NCM with respect to foreign investment policy applies under *A–UKFTA* annex II Schedule of Australia. But see below n 193 discussion of art 13.13(4), which would not apply to the 2021 *FATA* amendments as they are already in force.

146 See above Part II(A).

147 See, eg, *TPP* (n 53) *Drafters' Note on Interpretation of 'In Like Circumstances' under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)* [4]–[5]. See also below Part II(B)(2)(a).

148 See below n 260.

justification would be more easily made out in the six IIAs containing a broad security exception,[149] in the context of a national security review.

1 *Exclusion or Restriction of Investor–State Dispute Settlement*

As shown in Table 1 above, six of Australia's modern IIAs do not contain ISDS mechanisms (unlike all of Australia's traditional BITs discussed in Part III below), thus precluding ISDS claims against Australia's foreign investment screening. Five of these six IIAs would allow SSDS claims against Australia's foreign investment screening, as foreign investment policy is not excluded from such claims.[150] Side letters also exclude ISDS as between Australia and New Zealand under *AANZFTA*[151] and the *CPTPP*.[152]

Five of Australia's modern IIAs are best interpreted as allowing ISDS claims only with respect to established investments, and not pre-establishment protections, because of their restriction to covered investments, which are not defined to encompass prospective investments.[153] Two more of Australia's most recent IIAs effectively allow only post-establishment ISDS claims because they do not contain pre-establishment protections.[154] Four of these seven IIAs do not exclude foreign investment policy from ISDS or SSDS claims[155] and would therefore allow post-establishment claims regarding foreign investment screening. A fifth, *TAFTA*, would allow only SSDS claims of this kind.[156] *A–HKIA* and *IA–CEPA* would not allow ISDS or SSDS claims regarding foreign investment screening even with respect to post-establishment issues due to their exclusions for foreign investment policy as shown in Table 1.

SAFTA and *A–HKIA* do not allow ISDS claims with respect to tobacco control measures,[157] while the *CPTPP* allows a host state to elect to deny the benefits of the ISDS provisions with respect to challenges to such measures.[158] On their own, these provisions might not protect decisions associated with foreign investment screening of tobacco control companies (which would not appear to fall within the definition of 'tobacco control measure'),[159] but these three IIAs

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149 See below Part II(B)(4).

150 See Table 1 above which shows *RCEP* (n 55) as the exception.

151 See letter from Tim Groser, Minister of Trade, New Zealand, to Simon Crean, Minister for Trade, Australia, 27 February 2009, which excludes the investment chapter as a whole, as well as the dispute settlement chapter.

152 See letter from Steven Ciobo, Minister for Trade, Tourism and Investment, Australia, to David Parker, Minister for Trade and Export Growth, New Zealand, 8 March 2018.

153 *TAFTA* (n 51) arts 901(a), 917(1); *ACLFTA* (n 39) arts 2.1(b), 10.14; *AANZFTA* (n 38) ch 11 arts 2(a), 18(1); *ChAFTA* (n 40) arts 9.1(a), 9.12(1); *IA–CEPA* (n 43) arts 1.4, 14.20(1).

154 See above Table 2 regarding *A–HKIA* (n 42) and *Australia–Uruguay IPPA* (n 43).

155 See above Table 1 regarding *ACLFTA* (n 39), *AANZFTA* (n 38), *ChAFTA* (n 40) and *Australia–Uruguay IPPA* (n 36).

156 See above Table 1.

157 *SAFTA* (n 50) ch 8 art 22; *A–HKIA* (n 42) n 14.

158 *CPTPP* (n 53) art 1(1), incorporating *TPP* (n 53) art 29.5.

159 See, eg, *SAFTA* (n 50) ch 8 n 19:

> 'Tobacco control measure' means a measure of a Party related to tobacco products … such as for their production, consumption, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping, and reporting requirements.

exclude foreign investment policy from ISDS and SSDS in any case.[160] *SAFTA* and *A–HKIA* also preclude ISDS claims with respect to Australia's Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator, as well as successors of these programs.[161] Again, these restrictions would not appear to protect foreign investment screening generally, which is not a measure 'comprising or related to' these programs.[162]

PAFTA goes further, adding to these specific references that '[n]o claim may be brought under [the ISDS] Section in relation to a measure that is designed and implemented to protect or promote public health'.[163] *IA–CEPA* uses similar language.[164] Although these IIAs exclude foreign investment policy from ISDS and SSDS claims,[165] it is worth considering whether these kinds of public health exclusions in other treaties might protect against such claims. Australia could contend that a screening decision or process is designed and implemented to protect or promote public health, where the proposed investment relates to health. Given the breadth of the national interest test discussed above,[166] health could certainly be relevant to the extent that it relates to Australian government policies and the impact on the community. However, foreign investment policy or screening in a general sense is not designed or implemented to protect or promote public health specifically.

ChAFTA (in addition to limiting ISDS to post-establishment claims)[167] contains a broader exclusion from ISDS, going beyond public health to other policy objectives. It prevents ISDS claims against '[m]easures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order'.[168] Where a host state invokes this provision in a dispute by issuing a 'public welfare notice',[169] the two states parties then consult on its applicability.[170] If they agree that it is applicable (which may be unlikely in the context of the current investment and diplomatic climate between these countries, as discussed further below),[171] that decision is binding on the tribunal.[172] Australia's foreign investment screening might be more readily characterised as having public welfare objectives associated with public order, regardless of the sector in which the investment is proposed. Whether this screening is non-discriminatory is considered further below.[173] *ChAFTA* also allows ISDS claims only with respect to an alleged

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160 See above Table 1.
161 *SAFTA* (n 50) ch 8 n 18; *A–HKIA* (n 42) n 13.
162 Ibid.
163 *PAFTA* (n 49) ch 8 n 17.
164 *IA–CEPA* (n 43) art 14.21(1)(b).
165 See above Table 1.
166 See above nn 18–19 and accompanying text.
167 See above n 153and accompanying text.
168 *ChAFTA* (n 40) art 9.11(4).
169 Ibid art 9.11(5).
170 Ibid art 9.11(6).
171 See below Part II(B)(2)(a).
172 *ChAFTA* (n 40) art 9.18(3).
173 See Part II(B)(2)(a) below.

breach of the national treatment obligation.[174] However, as mentioned below,[175] ISDS claims with respect to other obligations remain available against Australia under the *Australia–China BIT*.[176]

2 *Clarifications and Exceptions to Key Obligations*

(a) Non-Discrimination

All national treatment and MFN obligations in Australia's modern IIAs include the qualification 'like circumstances'.[177] None of Australia's traditional BITs include this qualification, although the *Australia–Turkey BIT* (the most recent of Australia's traditional BITs as we have defined them in Part I) uses the alternative phrase 'similar situations' in these obligations.[178] Arguably, even non-discrimination obligations without such a qualification require comparison between investors or investments in comparable circumstances.[179] Whether investors or investments are comparable sometimes depends on whether they are in competition or in the same industrial sector.[180] Given the nature of non-discrimination, we consider that investors or investments would not be rendered incomparable simply because they come from different countries. Nor would the existence of an IIA with respect to one home state but not another render the relevant investors/investments incomparable, although that might be a relevant consideration elsewhere in the analysis as discussed further in Part III(D) below.

The relationship between regulatory purpose and like circumstances is clarified in all but one of Australia's most recent IIAs.[181] This clarification began with the amended *SAFTA* investment chapter signed in 2016 (apparently mirroring draft *TPP* texts that had already been publicly released by that time), which remains in force. Under *SAFTA*, a footnote specifies:

> For greater certainty, whether treatment is accorded in 'like circumstances' under Articles 4 (National Treatment) or 5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment

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174 *ChAFTA* (n 40) art 9.12(2)(a)(i).

175 See Part III(A).

176 See *ChAFTA* (n 40) art 1.2(2): '[n]othing in this Agreement shall derogate from the existing rights and obligations of a Party under … any … bilateral agreement to which both Parties are party.'

177 See above nn 99–100 and accompanying text.

178 *Australia–Turkey BIT* (n 35) arts 4(1), 4(2).

179 See, eg, Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd ed, 2017) 337 [7.271].

180 See, eg, *Archer Daniels Midland Co v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/05, 26 September 2007) [201].

181 The exception is *PACER Plus* (n 54), which excludes this clarification but includes (at ch 9 arts 6(2), 7(3)) an exception in relation to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') in the non-discrimination obligations.

> distinguishes between investors or investments on the basis of *legitimate public welfare objectives*.[182]

IA–CEPA contains a further clarification, specifying that the circumstances include 'the relevant economic or business sector or sectors concerned and whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives *or on the basis of nationality*'.[183] Arguably, even without this further clarification, differential treatment on the basis of legitimate public welfare objectives cannot be based on nationality.

Particularly under the seven modern Australian IIAs that include these 'public welfare' footnotes with respect to like circumstances in the national treatment obligation, Australia could argue that the introduction in 2021 of national security reviews including call-in powers and last resort powers do not breach or decrease conformity with this obligation because national security is a legitimate public welfare objective. The same argument could be made even without these footnotes, as tribunals have generally accepted that national treatment requires a consideration of justification or regulatory purpose,[184] either as part of the analysis of like circumstances[185] or less favourable treatment,[186] or (more often)[187] as a separate step.[188] Australia's response to national security concerns might be found to be reasonable and proportionate.[189] Nevertheless, a tribunal might find that a screening regime that applies to all foreign investments and no domestic investments is nationality-based[190] or origin-specific,[191] contrary to the

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182 *SAFTA* (n 50) ch 8 n 8 (emphasis added). See also *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) ch 9 n 14; *PAFTA* (n 49) ch 8 n 7; *A–HKIA* (n 42) n 3; *Australia–Uruguay IPPA* (n 36) n 1 (regarding MFN treatment; there is no national treatment obligation); *RCEP* (n 55) ch 10 n 17 (regarding national treatment), n 19 (regarding MFN); *A–UKFTA* (n 78) ch 13 n 9.

183 *IA–CEPA* (n 43) ch 14 n 9 (emphasis added), which continues: 'Where treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives, that treatment is not inconsistent with Article 14.4 or Article 14.5.'

184 See *Proportionality* (n 80) 81.

185 See, eg, *SD Myers Inc v Canada (Partial Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 13 November 2000) [250]; *GAMI Investments Inc v Mexico (Final Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 15 November 2004) [114].

186 This approach arises in the context of the WTO under *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') art 2.1: see, eg, Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (4 April 2012) [181].

187 See August Reinisch, 'National Treatment' in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 389, 391.

188 See, eg, *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Pakistan (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/29, 27 August 2009) [399]; *Clayton v Canada (Award on Jurisdiction and Liability)* (Permanent Court of Arbitration, Case No 2009–04, 17 March 2015) [720].

189 See, eg, *Parkerings-Compagniet AS v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 14 August 2007) [368] (in the MFN context).

190 See, eg, *Feldman v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1, 16 December 2002) [181]; *Total SA v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 27 December 2010) [213]; *Merrill & Ring Forestry LP v Canada (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 31 March 2010) [94]; McLachlan, Shore and Weiniger (n 179) 337 [7.272].

national treatment obligation. This conclusion might arise based on the tribunal's statement in *Pope & Talbot Inc v Canada* that 'rational government policies' justifying differential treatment must 'not distinguish, on their face or *de facto*, between foreign-owned and domestic companies'.[192]

Another question arises in relation to the MFN obligation. Apart from the application of different thresholds as discussed above in Part II(A)(2), an investor might claim that the screening regime is being applied on a discriminatory basis, against investments from particular countries.[193] For example, in relation to *Global Telecom v Canada*,[194] reports suggest that an adverse outcome arose in the national security review in question due to concerns about Russian ownership of the largest shareholder of the Egyptian parent company and the use of Chinese (Huawei) equipment by that shareholder.[195] In 2021, Canada ordered the winding up or divestment of China Mobile International (Canada) Inc following an investment review on national security grounds, including that China Mobile 'may be subject to the influence or demands of, or control by, a foreign government' and 'may gain access to highly sensitive telecommunications data and personal information that could be used for … military applications or espionage'.[196] Also in 2021, the Federal Communications Commission in the US revoked China Telecom (Americas) Corporation's authority to provide telecommunications services, indicating that its 'ownership and control by the Chinese government raise significant national security and law enforcement risks … allow[ing] them to engage in espionage and other harmful activities against the United States'.[197] Might a similar

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191 Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016) 109.

192 *Pope & Talbot Inc v Canada (Award on the Merits of Phase 2)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 10 April 2001) [78]. But see *Apotex Holdings Inc v United States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/1, 25 August 2014) [8.57].

193 See *A–UKFTA* (n 78) art 13.13(4), which prevents a party from adopting a new measure that requires an investor of the other party, 'by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective'. See above n 145 and accompanying text.

194 *Global Telecom v Canada* (n 85).

195 Damien Charlotin, 'Analysis: In Global Telecom v Canada, Arbitrators Unanimously Reject FET, FPS and Free Transfer Claims, but Disagree on National Treatment Argument and Foreign Acquisition Review Exception', *Investment Arbitration Reporter* (online, 29 April 2020) <https://www.iareporter.com/articles/analysis-in-global-telecom-v-canada-arbitrators-unanimously-reject-fet-fps-and-free-transfer-claims-but-disagree-on-national-treatment-argument-and-national-security-exception/>.

196 *China Mobile Communications Group Co Ltd v (A-G) Canada* [2021] FC 1277, [10] (an interim decision concerning application for judicial review that is ongoing at the time of writing). See also Joshua Hollenberg, Mark Katz and Charles Tingley, 'China Mobile Case Illustrates Breadth of Canada's National Security Review Regime', *JD Supra* (online, 20 December 2021) <https://www.jdsupra.com/legalnews/china-mobile-case-illustrates-breadth-2030870>, archived at <https://perma.cc/CF2U-C6YS>.

197 *China Telecom (Americas) Corp* (Fed. Commc'n Comm'n, No 21-114, 12 November) slip op [2]. See also *China Telecom (Americas) Corp v Federal Communications Commission* (DC Cir, No 21-1233, 2 December 2021) (an interim decision concerning application for judicial review that is ongoing at the time of writing) <https://www.fcc.gov/document/dc-circuit-denies-emergency-motion-stay-china-telecom-v-fcc>, archived at <https://perma.cc/9PMS-PNC4>.

development be expected in Australia with respect to China Telecom (Australia) Pty Ltd, established in 2011?[198]

In Australia, according to media reports, China has alleged its investors (especially state-owned enterprises ('SOEs')) are being targeted in the screening process, with the blocking of 10 foreign investment deals, including an application by China Mengniu Dairy Co to acquire Lion Dairy & Drinks in 2020.[199] Sometimes these rejections are not transparent. For example, in 2021, the China State Construction Engineering Corporation withdrew its proposal to acquire Probuild following a private communication by the Treasurer suggesting that this proposal would be rejected.[200] Australia has also announced a review of a 99-year lease of the Port of Darwin to Chinese firm Landbridge,[201] although this exercise may not involve foreign investment screening under *FATA* and may more directly implicate expropriation obligations.[202] The Treasurer is reported to have stated that he is rejecting Chinese transactions he would previously have approved 'because Australia is dealing with "a different China" under President Xi Jinping'.[203] These developments have arisen alongside trade tensions between the two countries.[204]

Where a foreign investor is government-owned, the FIRB considers 'whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government'.[205] This factor is of considerable importance to China, given the significance of SOEs in Chinese investment in Australia.[206] The FIRB might also consider even non-government-owned investors in view of China's National Intelligence Law, Cybersecurity Law and Data Security Law, which now formally provide for China's national intelligence and other agencies to request organisations and citizens for assistance and

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198 See 'China Telecom (Australia) Pty Ltd', *Dun & Bradstreet* (Web Page) <https://www.dnb.com/business-directory/company-profiles.china_telecom_(australia)_pty_ltd.26d46ada15bb8881d999af5ad430869f.html>, archived at <https://perma.cc/ZWX2-HJ67>.

199 John Kehoe et al, 'Treasurer Blacklists China Investments', *Australian Financial Review* (online, 12 January 2021) <https://www.afr.com/politics/federal/treasurer-imposes-informal-ban-on-china-investments-20210112-p56thm>, archived at <https://perma.cc/K96L-2XZK>.

200 Ibid.

201 Michael Smith, 'Darwin Review Could Be Final Blow to Chinese Investment in Australia', *Australian Financial Review* (online, 3 May 2021) <https://www.afr.com/world/asia/darwin-review-could-be-final-blow-to-chinese-investment-in-australia-20210503-p57oie>, archived at <https://perma.cc/WM6A-YY3U>.

202 See below Parts II(B)(2)(c) and III(C).

203 David Crowe and Eryk Bagshaw, 'Frydenberg Defends Rejecting Investment Deals from "A Different China"', *The Sydney Morning Herald* (online, 7 July 2021) <https://www.smh.com.au/politics/federal/frydenberg-defends-rejecting-investment-deals-from-a-different-china-20210707-p587n2.html>, archived at <https://perma.cc/G9VG-KV4X>.

204 See, eg, @AusWTO (George Mina), (Twitter, 20 October 2021, 8:14pm AEST) <https://twitter.com/AusWTO/status/1450752226482339840>, archived at <https://perma.cc/9H96-9KKC>; Weihuan Zhou and James Laurenceson, 'Demystifying Australia–China Trade Tensions' (2022) 56(1) *Journal of World Trade* 51.

205 FIRB Policy (n 19) 11.

206 Huiqin Jiang and Weihuan Zhou, 'China's Investment in Australia: A Critical Analysis of Australia's Foreign Investment Review Mechanism' (2018) 10(2) *Tsinghua China Law Review* 187, 221.

cooperation,[207] including data disclosure and reporting.[208] These considerations could have a negative impact on screening decisions involving Chinese investors. In fact, the 'character of the investor' component of the national interest test applied by the FIRB[209] has previously been described as a 'state ownership' test originally introduced in response to concerns about Chinese investments in strategic resources.[210] Nevertheless, China is not the only country with SOEs with potential interests in Australia.[211]

Were this factual context used to support an allegation of discriminatory approaches to Chinese investment in Australian foreign investment policy, contrary to the MFN obligation, any resulting claim would face several hurdles. As noted earlier, under *ChAFTA*, the MFN obligation is not subject to ISDS,[212] and although foreign investment policy is not excluded from SSDS,[213] the broad reference to essential security interests in Australia's NCM for foreign investment policy[214] could protect any Australian practice of scrutinising Chinese investments (pre- or post-establishment) more closely than those of other countries. Under the *Australia–China BIT*, as discussed further below, the MFN obligation is subject to ISDS,[215] but it does not cover pre-establishment,[216] and it covers expansion of existing investments only subject to law.[217] Nevertheless, if a Chinese investment is established from 2021[218] and later subject to call-in or last resort powers in an allegedly discriminatory manner (that is, outside the context of a new acquisition or expansion), a potential MFN problem may arise under the *Australia–China BIT*. Such an allegation might arise on the basis that these powers are being used more frequently with respect to Chinese investments, or that the outcomes (for example, divestment or

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207 «中华人民共和国国家情报法» (2018修正) [National Intelligence Law of the People's Republic of China (2018 Amendment)] (People's Republic of China) National People's Congress, Order No 6, 27 April 2018, art 14.

208 See, eg, «中华人民共和国网络安全法» [Cybersecurity Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 53, 7 November 2016, arts 9, 14, 28, 38, 39, 49; «中华人民共和国数据安全法» [Data Security Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 84, 10 June 2021, arts 29, 30, 35.

209 See above n 19 and accompanying text.

210 Weihuan Zhou, 'Chinese Investment in Australia: A Critical Analysis of the *China–Australia Free Trade Agreement*' (2017) 18(2) *Melbourne Journal of International Law* 407, 422 ('Critical Analysis of *ChAFTA*'). See also Greg Golding, 'Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move towards Xenophobia or Greater Openness?' (2014) 37(2) *Seattle University Law Review* 533, 551–2; Loong Wong, 'The "Liability of Foreignness": Chinese Investment in Australia' (2012) 4(4) *Transnational Corporations Review* 46, 54.

211 See, eg, Jake Lapham, 'KEPCO to Seek Leave to Appeal Bylong Valley Coal Mine Refusal in High Court', *ABC News* (online, 14 October 2021) <https://www.abc.net.au/news/2021-10-14/kepco-to-take-bylong-valley-coal-mine-fight-to-high-court/100539144>, archived at <https://perma.cc/NK28-Q2KC>,with respect to non-FIRB approvals.

212 See above n 174 and accompanying text.

213 See above Table 1.

214 See above Part II(A)(2). The security exception as discussed in Part II(B)(4) below is less helpful because it is confined to the areas specified in the World Trade Organization security exceptions.

215 See below n 332 and accompanying text.

216 See below Part III(B).

217 See below n 360 and accompanying text.

218 See above nn 12, 16 and accompanying text.

imposition of conditions) disfavour Chinese investments in comparison to those of other countries.

Most modern Australian IIAs that contain an MFN obligation[219] exclude dispute settlement or ISDS from the MFN obligation,[220] in contrast to Australia's traditional BITs. For example, *ANZIP* states: '[f]or greater certainty, this Article does not apply to dispute settlement procedures'.[221] Sometimes these exclusions refer to dispute settlement procedures under international agreements, and sometimes they refer to ISDS as an example of such a procedure.[222] Three of Australia's IIAs limit this exclusion to ISDS. For example, *KAFTA* states: '[f]or greater certainty, the treatment referred to in this Article does not encompass Investor–State Dispute Settlement procedures or mechanisms such as those included in Section B'.[223] Under the 13 IIAs containing a dispute settlement exclusion, an investor could not rely on the MFN obligation to invoke an ISDS mechanism from another Australian treaty where ISDS does not exist in the subject treaty; nor do we consider that an investor could use the MFN obligation in one of these IIAs to enable ISDS in connection with Australia's foreign investment policy where such claims are excluded in the subject treaty.[224]

Under the three remaining modern Australian IIAs that do not exclude dispute settlement from the MFN obligation, arguments of this kind would still face difficulties. An investor might try to rely on the MFN obligation in: *AUSFTA* or *PACER Plus* to bring in ISDS from another Australian treaty, notwithstanding the absence of an ISDS mechanism from *AUSFTA* and *PACER Plus*; or *TAFTA* to allow ISDS claims on foreign investment policy based on another Australian treaty, notwithstanding the exclusion of foreign investment policy from ISDS in *TAFTA*.[225] In fact, a US investor has previously commenced a dispute against Australia on the basis that the MFN obligation in *AUSFTA* allowed it to invoke the 'more favorable dispute resolution provisions'[226] (including ISDS) in the now-terminated *Australia–Hong Kong BIT*.[227] However, the use of MFN provisions to invoke dispute settlement provisions from other treaties, although

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219 *AANZFTA* (n 38) does not contain an MFN obligation. *MAFTA* (n 46) contains an MFN obligation that is not yet in force but does exclude dispute settlement: at art 12.5 n 20.

220 The exceptions are *AUSFTA* (n 52), *TAFTA* (n 51) and *PACER Plus* (n 54).

221 *ANZIP* (n 48) art 6(2).

222 See, eg, *JAEPA* (n 44) art 14.4; *SAFTA* (n 50) ch 8 art 5(3); *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 9.5(3); *PAFTA* (n 49) art 8.5(3); *IA–CEPA* (n 43) art 14.5(3); *A–HKIA* (n 42) art 5(4); *Australia–Uruguay IPPA* (n 36) art 5(2); *RCEP* (n 55) art 10.4(3).

223 *KAFTA* (n 45) art 11.4 n 35. See also *ACLFTA* (n 39) art 10.4 n 10-4; *ChAFTA* (n 40) art 9.4(2).

224 See above Table 1.

225 Ibid.

226 Letter from Harold E Patricoff to Malcolm Turnbull, Prime Minister and George Brandis, Attorney-General, 30 November 2016 <https://www.italaw.com/sites/default/files/case-documents/italaw8748.pdf>, archived at <https://perma.cc/8E3Z-M48Y>. But see Jarrod Hepburn, 'US Investors Mired in Australian Dispute Contend that State-to-State Consultations, If Launched, Must Be Followed by Investor–State Arbitration', *Investment Arbitration Reporter* (online, 1 December 2015) <https://www.iareporter.com/articles/us-investors-mired-in-australian-dispute-contend-that-state-to-state-consultations-if-launched-must-be-followed-by-investor-state-arbitration/>.

227 *Australia–Hong Kong BIT* (n 65) art 10.

conceivable,[228] has long been controversial,[229] which helps explain why most modern Australian IIAs explicitly exclude dispute settlement from the MFN obligation.[230] We turn to the potential for using the MFN obligation to 'import' *substantive* obligations from other IIAs in Part III(D) below.

(b) Fair and Equitable Treatment

All of Australia's modern IIA include an obligation to accord fair and equitable treatment ('FET'), apart from *ChAFTA*. *TAFTA* states '[e]ach Party shall ensure fair and equitable treatment in its own territory of investments'.[231] However, the remaining IIAs refer to FET in the context of and limited by the minimum standard of treatment under customary international law ('CIL'), while also specifying that a breach of another provision or treaty does not of itself constitute a breach of FET.[232] This formulation might suggest a high threshold for breach of the FET provision, such as that described in *Neer v Mexico*: 'an outrage, … bad faith, … wilful neglect of duty, or … an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'.[233] However, several tribunals have suggested that the CIL standard has evolved beyond this early description to cover a broader range of conduct.[234] A more recent characterisation of conduct that will infringe the standard is conduct that is 'arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety'.[235] This evolution may

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228 See, eg, *Maffezini v Spain (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 25 January 2000) [56]; *Garanti Koza LLP v Turkmenistan (Decision on the Objection to Jurisdiction for Lack of Consent)* (ICSID Arbitral Tribunal, Case No ARB/11/20, 3 July 2013) [79]; Yannick Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"' (2007) 18(4) *European Journal of International Law* 757.

229 See, eg, Julie A Maupin, 'MFN-Based Jurisdiction in Investor–State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14(1) *Journal of International Economic Law* 157; Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97; *Kimberly-Clark Dutch Holdings BV v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/18/3, 5 November 2021) [167].

230 See International Law Commission, *Final Report: Study Group on the Most-Favoured-Nation Clause*, UN GAOR, 67th sess, UN Doc A/CN.4/L.852 (29 May 2015) [216]: 'Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.'

231 *TAFTA* (n 51) art 909(2).

232 See, eg, *JAEPA* (n 44) art 14.5. Cf NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001).

233 *Neer v Mexico* (Mexico–US General Claims Commission, 15 October 1926) [4].

234 See, eg, *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 28 June 2016) [319] ('*Philip Morris v Uruguay*'); *CMS Gas Transmission Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 25 April 2005) [284].

235 *Waste Management Inc v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3, 30 April 2004) [98].

indicate little difference between the FET standard imposed under *TAFTA* and that under Australia's other modern IIAs.[236]

Many tribunals have also recognised the investor's 'legitimate expectations' as being relevant to an analysis of FET.[237] Seven of Australia's most recent IIAs therefore address such expectations explicitly. For example, *SAFTA* states:

> For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[238]

The FET obligation in Australia's modern IIAs typically applies to 'covered investments', defined, 'with respect to a Party, [as] an investment in its territory of an investor of the other Party, in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter'.[239] Therefore, the FET obligation applies only to existing and not potential investments. This reading is reinforced in the eight modern IIAs that define an investment or covered investment (being the object of the FET clause) as being admitted by the host state 'subject to its relevant laws, regulations, and policies'.[240] Accordingly, the FET obligation applies only to investments that have been lawfully admitted into Australia. Some tribunals have seen such a legality requirement as implicit even in the absence of treaty text.[241]

The mere application of call-in or last resort powers to a lawfully admitted investment is unlikely to create an FET breach, in the absence of some unfairness in the way that these powers are applied. As these powers generally apply only to investments made from 2021, investors making those investments would have knowledge of these new laws and would have difficulty contending that they had a legitimate expectation that such powers would not be used against their investments. Thus, in *Global Telecom v Canada*, in addressing the investor's unsuccessful FET claim, the Tribunal noted that the investor 'had all the means to know, at the time of making its investment, that the ownership of a Canadian wireless business was subject to foreign investment restrictions'.[242] The Tribunal

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236 See also Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013) 166 on the necessity of referring to the CIL minimum standard of treatment as the content or context of FET, even where not explicitly mentioned.

237 See, eg, *Continental Casualty Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [260]–[261].

238 *SAFTA* (n 50) ch 8 art 6(4). See also *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 9.6(4); *PAFTA* (n 49) art 8.6(4); *IA–CEPA* (n 43) art 14.7(4); *A–HKIA* (n 42) art 8(4); *Australia–Uruguay IPPA* (n 36) art 4(4); *A–UKFTA* (n 78) art 13.7(4).

239 *AUSFTA* (n 52) art 1.2(3). See also *ACLFTA* (n 39) art 2.1(b); *ANZIP* (n 48) art 1(a); *KAFTA* (n 45) art 1.4; *JAEPA* (n 44) art 14.2(a); *SAFTA* (n 50) ch 1 art 2(c); *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 9.1; *PAFTA* (n 49) art 8.1; *A–HKIA* (n 42) art 1; *A–UKFTA* (n 78) art 1.4.

240 *RCEP* (n 55) art 10.1(a) (covered investment). See also *AANZFTA* (n 38) ch 11 art 2(a) (covered investment); *MAFTA* (n 46) art 12.2(a) (covered investment); *ChAFTA* (n 40) art 9.1(a) (covered investment); *PACER Plus* (n 54) ch 9 art 1 (covered investment); *IA–CEPA* (n 43) art 1.4 (covered investment); *Australia–Uruguay IPPA* (n 36) art 1.1(a) (investment). The same effect is achieved in *TAFTA* (n 51) arts 901(a), 908(1)(a), 909(2).

241 Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017) 141.

242 *Global Telecom v Canada* (n 85) [603].

also accepted the existence of 'genuine national security concerns assessed by the competent authorities'[243] and that in this context 'the proper standard of transparency … requires taking into account the sensitivity of the information at issue'.[244]

Nevertheless, evidence of arbitrariness, discrimination or a lack of due process in applying the call-in or last resort powers with respect to an existing investment or in the screening of a new transaction sought in connection with an existing investment might give rise to an FET claim. The NCMs discussed above in Part II(A)(2) and the exclusion of other treaties discussed below in Part III(D) do not apply to the FET provision. Thus, for example, the concerns of discrimination mentioned above in relation to the use of call-in or last resort powers against post-2021 Chinese investments could be raised under the FET provision, not under *ChAFTA* (since it lacks such a provision) but under the *Australia–China BIT*.[245] Enforcement of conditions imposed at the time of the investment or expectations underlying an investment approval might also be said to violate the FET standard.[246] The outcome of such a claim would depend on the particular evidence collected, the terms of the relevant treaty and the justification for the challenged conduct.

(c) Expropriation

All of Australia's modern IIAs apart from *ChAFTA* contain provisions concerning expropriation (and the *Australia–China BIT* contains such provisions,[247] along with Australia's other traditional BITs).[248] Like the FET obligation, these provisions apply only to investments that have been lawfully admitted (that is, in the post-establishment stage). *TAFTA* states, for example:

> Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation … the investments of investors of the other Party unless the following conditions are complied with:
>
> (a) the expropriation is for a public purpose related to the internal needs of that Party and under due process of law;
>
> (b) the expropriation is non-discriminatory; and
>
> (c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.[249]

Disputes often centre on whether an act amounts to expropriation at all: if it does, all three conditions will need to be met (or four, if 'due process of law' is

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243 Ibid [616].

244 Ibid [608].

245 *Australia–China BIT* (n 23) art III(a).

246 See, eg, Hugh Hogan and Carrington Clarke, 'Van Diemen's Land Company, Australia's Largest Dairy, in Mutiny amid Animal Welfare Concerns', *ABC News* (online, 27 June 2019) <https://www.abc.net.au/news/rural/2019–06–27/vdl-dairy-in-mutiny-amid-animal-welfare-concerns/11243876>, archived at <https://perma.cc/2DEY-LUDG>.

247 *Australia–China BIT* (n 23) art VIII(1).

248 See below n 352 and accompanying text.

249 *TAFTA* (n 51) art 912(1); see also arts 901(a), 908(1)(a).

considered a separate condition).[250] Thus, a non-discriminatory expropriation for a public purpose in accordance with domestic law will be only provisionally lawful under the treaty in the absence of compensation.[251]

All of Australia's modern IIAs containing an expropriation obligation (apart from *TAFTA*) contain clarifications regarding this basic obligation, beyond clarifications regarding the compensation requirement. For example, they all (apart from *TAFTA*) include limitations with respect to treatment of intellectual property in accordance with the *Agreement on Trade-Related Aspects of Intellectual Property Rights*,[252] and sometimes with the intellectual property chapter under the relevant IIA.[253] Five contain references to CIL.[254] They all (apart from *TAFTA* and *ANZIP*) include an annex specifying the factors to consider in determining whether indirect expropriation exists, such as 'the economic impact of the government action', 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations' and 'the character of the government action'.[255] These annexes (which may be traced to the *2004 United States Model BIT*, via *AUSFTA*, and which arguably narrow the expropriation obligation)[256] also indicate that indirect expropriation must '[interfere] with a tangible or intangible property right or property interest in an investment'.[257] This clarification accords with a dominant strain of arbitral reasoning, indicating that mere adverse financial impact is insufficient to demonstrate expropriation,[258] which would also apply in the context of *TAFTA* and *ANZIP*.

Ten of the annexes (and a footnote in *ANZIP*) include an important clarification along the following lines:

> Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as

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250 Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards, and Other Materials* (Cambridge University Press, 2nd ed, 2021) 400, 412, 414.

251 See, eg, *Tidewater Investment SRL v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/5, 13 March 2015) [141].

252 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (n 181).

253 See, eg, *AUSFTA* (n 52) art 11.7(5).

254 Ibid art 11.7 n 11–9, annex 11–A, annex 11–B [1]; *SAFTA* (n 50) ch 8 art 13(1)(a) n 13; *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 9.8(1) n 17; *PAFTA* (n 49) art 8.8(1) n 10; *A–UKFTA* (n 78) art 13.9(1)(a) n 13.

255 *AUSFTA* (n 52) annex 11–B [4(a)]: 'although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred'. With respect to *RCEP* (n 55) see below n 265 and accompanying text.

256 See Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press, 2019) 94–7.

257 *AUSFTA* (n 52) annex 11–B [2]. *RCEP* clarifies that a property interest is one 'recognised under the laws and regulations of that Party': *RCEP* (n 55) annex 10B n 1.

258 See, eg, *El Paso Energy International Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [245]; *Pope & Talbot Inc v Canada (Interim Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 26 June 2000) [102]; cf *Metalclad Corporation v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000) [103]; *Philip Morris v Uruguay* (n 234) [286].

> the protection of public health, safety, and the environment, do not constitute indirect expropriations.[259]

These clarifications can be understood as codifying the police powers doctrine applied by many tribunals,[260] which would equally apply under *TAFTA*. *JAEPA* provides an example of rare circumstances: 'such as when an action or a series of actions by a Party is so severe in light of its purpose that it cannot be reasonably viewed as having been applied in good faith',[261] suggesting a high threshold for determining that circumstances are rare enough to fall within this exception. The other five annexes include a similar clarification but without the reference to rare circumstances,[262] thus enhancing the protection of host state policy further.

Some of Australia's most recently signed or amended IIAs include additional clarifications with respect to expropriation regarding public health, investor expectations or land. For example, the *Australia–Uruguay IPPA* specifies '[f]or greater certainty' that 'regulatory actions to protect *public health* include' those regarding

> the regulation, pricing and supply of … pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.[263]

The *CPTPP*, *PAFTA*, *A–HKIA* and *A–UKFTA* specify:

> For greater certainty, whether an investor's *investment-backed expectations* are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.[264]

Rather than referring to reasonable investment-backed expectations, *RCEP* includes as one of the factors to be considered in assessing the existence of indirect expropriation 'whether the government action breaches the government's prior binding written commitment to the investor, whether by contract, licence, or other legal document'.[265] *RCEP* and *SAFTA* also require expropriation relating to land, as defined in the host state's existing domestic law, to be for a purpose and upon payment of compensation in accordance with

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259 *AUSFTA* (n 52) annex 11–B [4(b)]. See also *ACLFTA* (n 39) annex 10–B [3(b)]; *AANZFTA* (n 38) annex on expropriation and compensation [4]; *ANZIP* (n 48) n 7; *KAFTA* (n 45) annex 11–B [5]; *JAEPA* (n 44) annex 12 [4]; *SAFTA* (n 50) annex 8–A [3(b)]; *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) annex 9–B [3(b)]; *PAFTA* (n 49) annex 8–B [5]; *A–HKIA* (n 42) annex II [3(b)]; *A–UKFTA* (n 78) annex 13B [3(b)].

260 See, eg, *Philip Morris v Uruguay* (n 234) [287], [295], [300], [307].

261 *JAEPA* (n 44) annex 12 [4].

262 *MAFTA* (n 46) annex on expropriation [4]; *PACER Plus* (n 54) annex 9–C [4]; *IA–CEPA* (n 43) annex 14–B [4]; *Australia–Uruguay IPPA* (n 36) annex B [3(b)]; *RCEP* (n 55) annex 10B [4].

263 *Australia–Uruguay IPPA* (n 36) annex B n 4 (emphasis added). See also *SAFTA* (n 50) annex 8–A n 22; *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) annex 9–B n 37; *PAFTA* (n 49) annex 8–B n 21; *A–HKIA* (n 42) annex II n 43; *A–UKFTA* (n 78) annex 13B n 25.

264 *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) annex 9–B n 36; *PAFTA* (n 49) annex 8–B n 20; *A–HKIA* (n 42) annex II n 42; *A–UKFTA* (n 78) annex 13B n 24 (emphasis added).

265 *RCEP* (n 55) annex 10B [3(b)].

that law and subsequent amendments regarding the amount of compensation, following general trends in market value.[266]

If the call-in or last resort powers are exercised with respect to an existing investment, say five or ten years after its lawful establishment, the question arises whether a consequential divestment order might constitute an unlawful expropriation. A central issue is likely to be the extent to which such conduct is justified by a legitimate, non-discriminatory regulatory purpose related to public welfare.[267] Public health, safety and the environment are only examples of public welfare objectives. National security may well meet that description, as long as it is being pursued in a non-discriminatory way. As suggested above in relation to fair and equitable treatment,[268] the investor is unlikely to have reasonable investment-backed expectations (let alone binding written assurances) that call-in or last resort powers will not be used; on the contrary, as these powers will apply only prospectively to investments made from 2021, the investor will have been aware of them at the time of making the investment. As with fair and equitable treatment, the outcome of such a claim will depend on the particular circumstances and evidence, as well as the terms of the relevant treaty. If the last resort powers are used because false or misleading information was provided in the initial investment application, the investment may not have been lawfully admitted and therefore may not be protected under the IIA.[269]

3 *General Exceptions*

15 of Australia's 18 modern IIAs include general exceptions covering investment obligations.[270] Two of these IIAs apply general exceptions only in relation to certain obligations, including national treatment and MFN treatment,[271] and not other obligations, including FET and expropriation. The exceptions are all modelled on the general exceptions found in the law of the World Trade Organization. Four of the IIAs expressly incorporate all or part of the WTO general exceptions[272] in art XX of the *General Agreement on Tariffs and Trade 1994* ('*GATT*')[273] and/or art XIV of the *General Agreement on Trade in Services* ('*GATS*').[274] Others use similar language to *GATT*, often with

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266 *SAFTA* (n 50) ch 8 art 13(5); *RCEP* (n 55) art 10.13(5).

267 Ortino (n 256) 97, discussing *Bear Creek Mining Corporation v Peru (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/21, 20 November 2017) ('*Bear Creek v Peru*'), regarding a treaty with a similar expropriation annex.

268 See above Part II(B)(2)(b).

269 See below nn 343–4 and above nn 240–1 and accompanying text.

270 The three exceptions, which have general exceptions not covering the investment chapter, are *AUSFTA* (n 52) art 22.1; *ACLFTA* (n 39) art 22.1; *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 29.1.

271 *ANZIP* (n 48) art 19; *JAEPA* (n 44) art 14.15.

272 *TAFTA* (n 51) arts 1601(2), 1601(3); *AANZFTA* (n 38) ch 15 art 1(2); *RCEP* (n 55) art 17.12; *A–UKFTA* (n 78) arts 31.1, 31.3.

273 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') art XX ('*GATT*').

274 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') art XIV ('*GATS*').

clarifications regarding environmental measures and the addition of 'public order' (which is found in *GATS* art XIV). For example, *A–HKIA* states:

> For the purposes of this Agreement and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures:
>
> (a) necessary to protect public morals or to maintain public order;
>
> (b) necessary to protect human, animal or plant life or health; …
>
> (e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[275]

The addition of 'public order' may increase the scope for reliance on these exceptions with respect to foreign investment screening generally. However, four of the IIAs do not refer to public order.[276] Moreover, the reference to public order is generally accompanied by the same footnote as found in *GATS* art XIV: 'The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'.[277] A screening decision or process falling within this description might often be better addressed as a matter of national security and considered under the security exceptions discussed further below.[278]

Apart from the general category of public morals or public order, foreign investment screening that is related to health or the environment might be justified under these general exceptions. However, particularly if they choose to follow the WTO jurisprudence,[279] arbitral tribunals may apply the exceptions strictly, for example finding a measure 'necessary' only in the absence of a less restrictive alternative that makes an equivalent contribution to the relevant policy objective.[280] Nevertheless, the reference to conservation of exhaustible natural resources requires only that the measure 'relat[e] to' such resources (a lower

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275 *A–HKIA* (n 42) art 18(1) (citations omitted).

276 *MAFTA* (n 46) art 12.18(1); *KAFTA* (n 45) art 22.1(3); *ChAFTA* (n 40) art 9.8; *PAFTA* (n 49) art 8.18.

277 See, eg, *A–HKIA* (n 42) n 9.

278 See Part II(B)(4) below.

279 See Joshua Paine, 'Autonomy to Set the Level of Regulatory Protection in International Investment Law' (2021) 70(3) *International and Comparative Law Quarterly* 697, 722; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016) 198–9; Andrew Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law and Policy 2017* (Oxford University Press, 2019) 305, 339–42. See also *KAFTA* (n 4545) art 20.5, requiring recourse to WTO case law with respect to substantially identical obligations in SSDS).

280 See, eg, Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [156]. See also *Proportionality* (n 80) 99, 125.

threshold according to WTO caselaw),[281] and modern Australian IIAs tend to clarify that these include both living and non-living resources[282] (as found in the WTO).[283] Whichever sub-paragraph is invoked, the 'chapeau' (introductory paragraph) of the exceptions may create a significant barrier to protection of the measure where the impugned state conduct is in any way arbitrary[284] or discriminatory.[285] *MAFTA* adds an additional category of measures 'necessary to protect national security',[286] separate from the security exception discussed below.[287] Although the reference to 'national security' here is broad, it still requires a showing of necessity[288] and compliance with the chapeau. Some tribunals have also (wrongly, in our view) found that even a measure falling within a general exception may generate an obligation on the host state to pay compensation for expropriation[289] or fair and equitable treatment.[290]

Nine of Australia's modern IIAs contain an additional provision in the investment chapter relating to environmental interests. For example, *AUSFTA* states:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[291]

ANZIP contains a similar provision,[292] while six other IIAs expand the provision to cover environmental, health and other regulatory objectives.[293] Finally, *IA–CEPA* refers to 'environmental, health, public morals, social welfare, consumer protection or the promotion and protection of cultural diversity or other regulatory objectives'.[294] However, none of these provisions is a true exception because they all apply only to measures otherwise consistent with the

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281 See, eg, Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) 17–19.

282 See, eg, *IA–CEPA* (n 43) ch 17 n 3; *A–UKFTA* (n 78) art 31.1(2).

283 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [128]–[131].

284 See *Copper Mesa Mining Corporation v Ecuador (Award)* (Permanent Court of Arbitration, Case No 2012–2, 15 March 2016) [6.66]–[6.67].

285 See, eg, Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) [364].

286 *MAFTA* (n 46) art 12.18(1)(a).

287 See below Part II(B)(4).

288 On the relationship between the necessity defence under CIL and security exceptions in IIAs: see, Caroline Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford University Press, 2020) 363, 365–70.

289 See, eg, *Bear Creek v Peru* (n 267) [477].

290 See, eg, *Eco Oro Minerals Corporation v Colombia (Decision on Jurisdiction, Liability and Directions on Quantum)* (ICSID Arbitral Tribunal, Case No ARB/16/41, 9 September 2021) [821], [830], [837].

291 *AUSFTA* (n 52) art 11.11 (emphasis added).

292 *ANZIP* (n 48) art 24.

293 *SAFTA* (n 50) ch 8 art 20; *PACER Plus* (n 54) ch 9 art 19(2); *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 9.16; *PAFTA* (n 49) art 8.16; *A–HKIA* (n 42) art 15; *A–UKFTA* (n 78) art 13.17.

294 *IA–CEPA* (n 43) art 14.16.

investment chapter. As reflected in a recent arbitral award, they therefore cannot be used to justify a breach of an investment obligation.[295]

4 *Security Exceptions*

As noted in Part II(A)(2) above, six of Australia's modern IIAs include as an NCM with respect to national treatment and MFN treatment measures that Australia considers necessary for protection of its essential security interests (in five of these cases, specifically in the context of foreign investment policy). These descriptions are broadly stated, without reference to particular instances of security that need to be established, but they do not apply to the FET or expropriation provisions.

In addition, all of Australia's 18 modern IIAs include a security exception applicable to the whole investment chapter. Two do so by explicit reference to the security exceptions in *GATT* art XXI and/or *GATS* art XIV*bis*.[296] Four use wording corresponding to those provisions. For example, *ACLFTA* states:

> Nothing in this Agreement shall be construed: …
>
> (b) to prevent a Party from taking any action *which it considers necessary* for the protection of its *essential security interests*:
>
> (i) relating to fissionable and fusionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment; or
>
> (iii) taken in time of war or other *emergency in international relations* …[297]

In the WTO context,[298] only two panels have considered equivalent provisions, neither finding them 'self-judging' or 'non-justiciable'.[299] Interpreting *GATT* art XXI(b)(iii), one panel found that although a respondent has freedom in determining what measures are necessary to protect its essential security interests, an obligation of good faith applies in this regard.[300] The respondent must show that the challenged measures are not implausible as a

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295 *Infinito Gold Ltd v Costa Rica (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/5, 3 June 2021) [772], [773], [777]. Cf *Al Tamimi v Oman (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/33, 3 November 2015) [387], [440], [445], [458].

296 *TAFTA* (n 51) art 1602(2); *ChAFTA* (n 40) art 16.3.

297 *ACLFTA* (n 39) art 22.2(1) (emphasis added). See also *ANZIP* (n 48) art 20; *KAFTA* (n 45) art 22.2; *JAEPA* (n 44) art 1.10.

298 See Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 *AJIL Unbound* 45.

299 Panel Report, *Russia — Measures concerning Traffic in Transit*, WTO Doc WT/DS512/R (5 April 2019) [7.102]–[7.103] ('*Russia — Traffic in Transit*'). See also Panel Report, *Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights*, WTO Doc WT/DS567/R (16 June 2020) [7.23] ('*Saudi Arabia — IPRs*') (unadopted).

300 *Russia — Traffic in Transit*, WTO Doc WT/DS512/R (n 299) [7.132]–[7.133].

means of protecting such interests,[301] which refer to 'those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally'.[302] In addition, the words 'which it considers' in the chapeau do not qualify the meaning of the sub-paragraphs,[303] such that whether measures taken by Russia in that case were 'taken in time of war or other emergency in international relations' as specified in *GATT* art XXI(b)(iii) was a matter for 'objective determination'.[304] An 'emergency in international relations' within the meaning of that provision refers to 'a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state'.[305] A subsequent WTO panel interpreting the corresponding exception under the *Agreement on Trade-Related Aspects of Intellectual Property Rights*[306] adopted the same 'analytical framework'.[307]

In the investment context, arbitral decisions have varied depending on the wording of the relevant security exception and also according to the level of deference granted by the relevant tribunals,[308] but they have also not regarded these exceptions as entirely self-judging in the absence of language to this effect.[309] These cases highlight tensions in the potential expansion of the meaning of security interests.[310] Tribunals have reached different conclusions regarding whether the security exception in a BIT between Argentina and the US encompassed responses to economic crisis.[311] Two tribunals assessing claims under a BIT between Mauritius and India suggested that military-related activities fell under the security exception but others ('railways and other public utility services',[312] 'broader societal needs')[313] did not. Neither of these BITs

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301 Ibid [7.138].

302 Ibid [7.130].

303 Ibid [7.82].

304 Ibid [7.77].

305 Ibid [7.111]. See also Tania Voon, 'International Decision: *Russia — Measures concerning Traffic in Transit*' (2020) 114(1) *American Journal of International Law* 96; Daria Boklan and Amrita Bahri, 'The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box? (2020) 19(1) *World Trade Review* 123; Pramila Crivelli and Mona Pinchis-Paulsen, 'Separating the Political from the Economic: The *Russia — Traffic in Transit* Panel Report' (2021) 20(4) *World Trade Review* 582.

306 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (n 181) art 73(b)(iii).

307 *Saudi Arabia — IPRs*, WTO Doc WT/DS567/R (n 299) [7.241]; see also [7.242], [7.257], [7.285].

308 See, eg, Esmé Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge University Press, 2021) 255.

309 See, eg, *CC/Devas (Mauritius) Ltd v India (Award on Jurisdiction and Merits)* (Permanent Court of Arbitration, Case No 2013–09, 25 July 2016) [219] ('*Devas v India*'); *Deutsche Telekom AG v India (Interim Award)* (Permanent Court of Arbitration, Case No 2014–10, 13 December 2017) [231] ('*Deutsche Telekom v India*'). See further cases discussed in Sebastián Mantilla Blanco and Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Springer, 2020) 40–7.

310 On the expansion of the concept of national security: see J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129(4) *Yale Law Journal* 1020, 1031–50.

311 See, eg, Giovanni Zarra, 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State Necessity' (2017) 34(4) *Journal of International Arbitration* 653.

312 *Devas v India* (n 309) [354].

used the words 'which it considers' or enumerated specific areas of security interests in the way that the WTO provisions and those referred to above from some of Australia's modern IIAs do. Nevertheless, J Benton Heath describes the latter two decisions as establishing 'a strong presumption against including civilian infrastructure under the treaties' security provisions'.[314]

Perhaps in response to concerns about narrow interpretations of security exceptions, five of Australia's modern IIAs, while retaining the general WTO framework for the exception, add an explicit reference to 'critical public infrastructures', 'whether publicly or privately owned', including 'communications, power and water infrastructures'[315] (as well as transport, in one IIA).[316] Some of these changes were introduced even before the cases involving India mentioned above. However, three of these exceptions relate to measures taken to protect such infrastructure 'from deliberate attempts intended to disable or degrade such infrastructures'.[317] Screening decisions or processes are unlikely to qualify as measures taken to protect against attempts to disable or degrade infrastructure; this addition may therefore add little in this regard. *IA–CEPA* refers simply to essential security measures 'taken so as to protect critical public infrastructure',[318] which could extend to foreign investment screening on national security grounds, as discussed further below. *A–HKIA*'s security exception might also cover such screening, as it refers to 'deliberate attempts intended to disable, degrade or otherwise interfere with such infrastructures (including measures taken to prevent such attempts)' as well as measures taken in time of 'national emergency', in an explicitly inclusive rather than exhaustive list of possible security measures.[319] The meaning of critical public infrastructure under these exceptions might overlap with the meaning of critical infrastructure asset as described above in the Australian foreign investment screening context.[320] However, *IA–CEPA* and *A–HKIA* exclude foreign investment policy from ISDS and SSDS anyway, as shown in Table 1.

The remaining seven modern Australian IIAs contain broader security exceptions that would provide greater protection to Australia's screening decisions and processes. For example, *AUSFTA* states:

> Nothing in this Agreement shall be construed: …
>
> (b) to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of

313 *Deutsche Telekom v India* (n 309) [265], [281].

314 J Benton Heath, 'Making Sense of Security' (2022) 116(2) *American Journal of International Law* 289, 303.

315 *AANZFTA* (n 38) ch 15 art 2(1); *MAFTA* (n 46) art 18.2(1); *PACER Plus* (n 54) ch 11 art 2(1); *IA–CEPA* (n 43) art 17.3. *RCEP* (n 55) art 17.13 adopts the same approach, but *RCEP* also contains a broader security exception in the investment chapter: see below n 321 and accompanying text.

316 *A–HKIA* (n 42) art 19.1 n 10.

317 *AANZFTA* (n 38) ch 15 art 2(1)(b)(iii); *MAFTA* (n 46) art 18.2(1)(b)(iii); *PACER Plus* (n 54) ch 11 art 2(1)(b)(iii). *RCEP* (n 55) art 17.13(b)(iii) adopts the same approach.

318 *IA–CEPA* (n 43) art 17.3(b)(iii).

319 *A–HKIA* (n 42) art 19.1 n 10.

320 See above Part I.

> international peace or security, or the protection of its own essential security interests.[321]

Although the invocation of this type of exception might be justiciable and subject to an obligation of good faith,[322] it appears to grant considerable leeway to the host state by virtue of the inclusion of the words 'that it considers' and the removal of defined circumstances in which the security interests must arise. Australia would have grounds to argue that any national security review in the context of foreign investment screening falls within this exception: here, Australia considers 'the extent to which the investment will affect Australia's ability to protect its strategic and security interests'.[323] Moreover, even reviews based on the national interest test rather than the national security test could fall to some extent within this exception, given that the national interest test includes consideration of national security.[324] However, of these seven agreements, most already either exclude ISDS altogether or exclude Australia's foreign investment policy from ISDS and SSDS, as shown in Table 1. Only *AUSFTA* might need to protect foreign investment screening from SSDS claims through this security exception, while the *Australia–Uruguay IPPA* might do so with respect to both ISDS and SSDS.

III TRADITIONAL APPROACHES THAT MAY SHIELD AUSTRALIA'S FOREIGN INVESTMENT SCREENING

In this Part, we focus on Australia's 15 traditional BITs, defined above in Part I as Australia's 15 BITs in force, apart from the *Australia–Uruguay IPPA*, plus the terminated BIT with India, under which some claims remain possible.[325] Australia's first BIT, with China, entered into force in 1988,[326] more than a decade after the introduction of foreign investment screening in 1975 through *FATA*.[327] Australia's most recent traditional BIT, with Turkey, was signed in 2005,[328] more than two years after signature of Australia's first PTA: *SAFTA*.[329] Nevertheless, even the BIT with Turkey does not explicitly exclude Australia's foreign investment policy from ISDS or list it as an NCM (NCMs not being used in the traditional BIT format of Australia).

Instead, four main approaches in Australia's traditional BITs may protect foreign investment policy space, as we will explore in turn: restrictions on ISDS; exclusion of the pre-establishment stage (covered by some of Australia's modern IIAs with respect to non-discrimination);[330] limitations on post-establishment obligations; and (as a specific major example of a limitation on a post-

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321 *AUSFTA* (n 52) art 22.2. See also *SAFTA* (n 50) ch 17 art 2; *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) art 29.2; *PAFTA* (n 49) art 28.2; *Australia–Uruguay IPPA* (n 36) art 15(2); *RCEP* (n 55) art 10.15; *A–UKFTA* (n 78) art 31.2.

322 See, eg, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

323 FIRB (n 19) 11.

324 Ibid 8.

325 See above n 61 and accompanying text.

326 *Australia–China BIT* (n 23).

327 *FATA* (n 7).

328 *Australia–Turkey BIT* (n 35).

329 *SAFTA* (n 50).

330 See above Table 2.

establishment obligation) exclusion of other treaties from the MFN obligation. The first two approaches are still being used in some of Australia's modern IIAs, as discussed above in Parts II(B)(1) and II(A)(2) respectively and elaborated further in some respects in Part III(B) below. The third approach is quite different from the clarifications and exceptions found with respect to key obligations in modern IIAs, as discussed above in Part II(B)(2). The fourth approach remains common in Australia's modern IIAs, as shown in Part III(D) below.

We find that the strongest protections under Australia's 15 traditional BITs for foreign investment screening in Australia arise from the exclusion of pre-establishment protections and the exclusion of preferences arising from other treaties from the MFN obligation. An investor could still bring an ISDS claim against Australia in relation to foreign investment screening, but only where applied to an established investment (for example, through the call-in or last resort powers, or where the investor is seeking to expand, which is covered under most of the BITs). Moreover, while an FET claim could be raised, a breach of MFN could not be made out on the basis that Australia is granting preferences (such as higher screening thresholds) to investments from certain countries where those preferences arise from an international agreement such as a PTA. Instead, an MFN breach would need to be based on discriminatory treatment in the relevant regulations or the application of screening processes, separate from PTA preferences. More scope exists for MFN claims to be brought under Australia's modern IIAs with respect to preferences granted pursuant to other PTAs, because most of these IIAs do not generally exclude future PTAs from the MFN obligation.

A *Restrictions on Investor–State Dispute Settlement*

All of Australia's 15 traditional BITs include some form of ISDS mechanism, but some limitations apply. In particular, the *Australia–China BIT* explicitly provides for investors to bring ISDS claims (under its Annex A) only with respect to the amount of compensation payable for expropriation.[331] However, we read the BIT as now also allowing ISDS claims against Australia via ICSID with respect to all BIT obligations, including fair and equitable treatment and MFN.[332] Although China might reasonably contend that its intention was not to allow broader ISDS claims against it under the *Australia–China BIT*, on the basis

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331 On the meaning of this limitation: see, eg, *Tza Yap Shum v Peru (Decision on Jurisdiction and Competence)* (ICSID Arbitral Tribunal, Case No ARB/07/6, 19 June 2009) [151], [188]; *RosInvestCo UK Ltd v Russia (Award on Jurisdiction)* (Stockholm Chamber of Commerce, Case No V 079/2005, October 2007) [110]; *Berschader v Russia (Award)* (Stockholm Chamber of Commerce, Case No 080/2004, 21 April 2006) [153].

332 See Tania Voon and Elizabeth Sheargold, 'Australia, China and the Coexistence of Successive International Investment Agreements' in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China–Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing, 2018) 215, 221, 223–4.

of its prevailing treaty practice at the time,[333] the same cannot be said of Australia's treaty practice.[334]

Many of Australia's traditional BITs use wording that might suggest that further action by the host state is required to consent to ISDS pursuant to ICSID, beyond the treaty itself. For example, the Tribunal in *Planet Mining Pty Ltd v Indonesia* found that the *Australia–Indonesia BIT* (now terminated) does not contain a 'standing offer' for ICSID arbitration[335] because it states that where an investor submits a dispute to ICSID, the host state 'shall consent in writing' to such arbitration within a specified time.[336] This (arguably incorrect)[337] reading potentially limits the use of ICSID arbitration under some of Australia's BITs, although other forms of ISDS are available under some of these BITs, and ISDS is available under other Australian IIAs with respect to some of the relevant countries.[338] Moreover, the ICSID Tribunal in *Tethyan Copper Co Pty Ltd v Pakistan*[339] accepted jurisdiction without reference to the similar wording in the *Australia–Pakistan BIT*.[340] This potential jurisdictional limitation therefore provides a very uncertain basis for protection of Australia's foreign investment policy.

B *Exclusion of the Pre-Establishment Stage of Investment*

Australia's 15 traditional BITs do not protect prospective investors or the establishment or acquisition of investments in a way that could impinge Australia's foreign investment policy regarding investments that have not yet been admitted into the country. None of Australia's traditional BITs define 'investor' (or the equivalent, 'national') to include someone seeking or attempting to make an investment (unlike all but two of Australia's modern IIAs: those with Hong Kong[341] and Uruguay).[342] Similarly, all of these BITs define 'investment' or 'covered investment' as arising subject to the host state's laws and investment policies:[343] an investment does not exist if it has not been

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333 See, eg, G Matteo Vaccaro-Incisa, *China's Treaty Policy and Practice in International Investment Law and Arbitration: A Comparative and Analytical Study* (Brill, 2021) 133–4.

334 See also Andrew D Mitchell and James Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements' (2017) 28(3) *European Journal of International Law* 669.

335 *Planet Mining Pty Ltd v Indonesia (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case Nos ARB/12/14 and ARB/12/40, 24 February 2014) [198].

336 *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, signed 17 November 1992, 1770 UNTS 301 (entered into force 29 July 1993) arts XI(2)(b), (4)(a). This treaty was terminated on 6 August 2020.

337 See Luke Nottage, 'The Limits of Legalization in Asia-Pacific Investment Treaty Arbitration?' in Julien Chaisse and Tsai-yu Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press, 2016) 153, 170.

338 See ibid 170–6.

339 *Tethyan Copper Co Pty Ltd v Pakistan (Decision on Claimant's Request for Provisional Measures)* (ICSID Arbitral Tribunal, Case No ARB/12/1, 13 December 2012) [123].

340 *Australia–Pakistan BIT* (n 29) art 13(3)(a). See also Bohmer (n 62).

341 *A–HKIA* (n 42) art 1.3.

342 *Australia–Uruguay IPPA* (n 36) art 1(1)(c).

343 See, eg, *Australia–Argentina BIT* (n 22) art 1(1)(a):

lawfully admitted into the country.[344] All Australian BITs refer to activities associated with investment in their definition of investment or covered investment[345] and/or (less frequently) within non-discrimination obligations,[346] but not in a context that suggests that such activities include acquisition or establishment of an investment[347] (with one possible exception).[348] No BITs refer to 'establishment' in a non-discrimination context. Only one BIT refers to 'acquisition' in a non-discrimination context, but 'subject to law'.[349] All the BITs impose an obligation to admit investments (not found in Australia's modern IIAs), but only in accordance with the host state's laws and investment policies.[350]

C *Limitations on Post-Establishment Obligations*

As regards post-establishment (that is, investments that have already been admitted into Australia in accordance with its laws), BITs do impose some relevant obligations. Most Australian BITs include no national treatment obligation; those that include some form of national treatment do so subject to

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> 'investment' means, in conformity with the laws, regulations and investment policies of the Contracting Party in whose territory the investment is made, every kind of asset owned or controlled, and invested by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws, regulations and investment policies …

344 See below nn 367–8 and accompanying text.

345 See, eg, *Australia–Czech Republic BIT* (n 24) art 1(1)(a). See also *Australia–Argentina BIT* (n 22) art 1(3). None of Australia's modern IIAs do this.

346 *Australia–China BIT* (n 23) arts I(1)(f), III(b), III(c); *Australia–Lithuania BIT* (n 28) arts 1(1)(a), 4; *Australia–PNG BIT* (n 30) arts 1(1)(a), 3(4), 4; *Australia–Poland BIT* (n 32) arts 1(1)(b), 4; *Australia–Turkey BIT* (n 35) art 4(1). Only one of Australia's modern IIAs does this: *JAEPA* (n 44) arts 14.2(d), 14.3, 14.4.

347 See below nn 362, 365–6 and accompanying text.

348 One exception that might arguably extend the MFN obligation in *Australia–Lithuania BIT* (n 28) art 4 (which is not expressed as subject to law) to the pre-establishment stage is the inclusive definition at art 1(1)(b): '"associated activities" include the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange'. The *ejusdem generis* or *noscitur a sociis* rules of interpretation might suggest that the examples given preclude the extension of such activities to the pre-establishment stage. On whether 'associated activities' (under a different IIA) require a pre-existing investment: see *Bosca v Lithuania (Award)* (Permanent Court of Arbitration, Case No 2011– 05, 17 May 2013) [166], [171], [172], leaving the question open because a pre-existing investment was found.

349 *Australia–PNG BIT* (n 30) art 3(4) (emphasis added):

> Each Contracting Party shall ensure *subject to its law* that the management, maintenance, use, enjoyment, *acquisition* or disposal of investments, rights related to investments and activities associated with investments in the territory of the other Contracting Party shall not in any way be subjected to or impaired by arbitrary, unreasonable or discriminatory measures.

350 See, eg, *Australia–Sri Lanka BIT* (n 34) art 3(1): 'Each Party shall encourage and promote investments in its territory by investors of the other Party and, in accordance with its laws and investment policies applicable from time to time, admit such investments'. Bath describes these provisions as 'preserving Australia's right to screen investments prior to entry and maintaining its consistent refusal to include pre-establishment commitments': 'Australia and the Asia-Pacific' (n 1) 151.

the host state's laws,[351] meaning that these obligations may have little impact as long as an investment or investor is treated in accordance with domestic law. However, all Australian BITs include obligations regarding expropriation[352] without any of the clarifications described in Part II(B)(2)(c) above. Nor do Australia's BITs include security exceptions or general exceptions of the kind discussed in Parts II(B)(3) and II(B)(3) above, apart from the terminated *Australia–India BIT*.[353] Australia's application of call-in and last resort powers to established investments therefore creates a risk of unlawful expropriation under its BITs. The defence of necessity under CIL might nevertheless apply in some very narrow and temporary circumstances, with respect to all of Australia's IIAs, but its examination falls outside the scope of this Article.[354]

In addition, a risk of breach could arise under Australia's traditional BITs with respect to the expansion of an existing investment. All these treaties include obligations on FET[355] (without the clarifications discussed in Part II(B)(2)(b) above) and MFN[356] (without an exclusion for dispute settlement or public welfare, as discussed in Part II(B)(2)(a) above). These obligations could potentially pose difficulties for the screening of new transactions by an existing investment, where unfairness or discrimination are alleged to arise in the application of screening requirements,[357] or to the extent that Australian regulations continue to impose higher thresholds for some investors of some PTA partners with respect to some transactions.[358] However, at least in respect of MFN, the latter problem is addressed by the exclusion from that obligation of preferences arising under other treaties, as discussed in Part III(D) below.

Reference in Australia's BITs to 'activities' associated with investments (and the absence of explicit reference to 'expansion' of investments, which appears in

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351 *Australia–Argentina BIT* (n 22) art 5; *Australia–China BIT* (n 23) art III(b); *Australia–PNG BIT* (n 30) art 3(4); *Australia–Sri Lanka BIT* (n 34) art 4(1); *Australia–Turkey BIT* (n 35) art 4(2); *Australia–India BIT* (n 61) art 4(1): 'Each Contracting Party shall, subject to its laws, regulations and investment policies, grant to investments made in its territory by investors of the other Contracting Party treatment no less favourable than that which it accords to investments of its own investors.'

352 See, eg, *Australia–Lao PDR BIT* (n 27) art 7(1):

> Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation … the investments of nationals of the other Contracting Party unless the following conditions are complied with: (a) the expropriation is for a public purpose related to the internal needs of that Contracting Party and under due process of law; (b) the expropriation is non-discriminatory; and (c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.

353 *Australia–India BIT* (n 61) art 15:

> Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.

354 See above n 288.

355 See, eg, *Australia–Hungary BIT* (n 26) art 3(2): 'A Contracting Party shall ensure fair and equitable treatment in its own territory to investments.'

356 See, eg, *Australia–Egypt BIT* (n 25) art 4: 'Each Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country …'.

357 See above Parts II(B)(2)(a) and II(B)(2)(b).

358 See above n 114 and accompanying text.

most of Australia's modern IIAs with respect to MFN)[359] complicates the application of FET and MFN. These obligations apply to such activities under the *Australia–China BIT*, but such activities are defined to include acquisition of property of all kinds and the purchase of equity shares 'subject to the law of the Contracting Party which has admitted the investment',[360] removing the potential for these obligations to constrain screening in connection with the expansion of an existing investment, provided that the screening is undertaken in accordance with Australian law. Similar approaches arise under the BITs with Papua New Guinea, Poland and Sri Lanka.[361] The BIT with Turkey explicitly covers 'investments, and activities associated therewith' (without a separate definition) in the MFN obligation, but the whole MFN obligation is 'subject to its laws and regulations and investment policies',[362] rendering it largely ineffective.

In contrast, the BITs with Argentina and Lithuania cover associated activities with respect to MFN and FET and define such activities to include the acquisition of property rights, without limiting the definition to activities conducted subject to law.[363] These obligations therefore appear to extend to expansion of an existing investment.

The remaining BITs include activities associated with investments in the definition of investment and therefore in both the MFN and FET obligations. Although, as noted above, the BITs make the definition of investment subject to law,[364] we read them as requiring the investment to be lawfully admitted and not as making any subsequent associated activities subject to law. For example, the *Australia–Czech Republic BIT* defines investment as

> every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time including activities associated with investments[365]

with 'activities associated with investments' being undefined. A slightly different and more common formulation, which defines such activities more fully, is found in the *Australia–Egypt BIT*:

> 'investment' means every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time and includes: …
>
> (vi) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights,

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359 See above Table 2.

360 *Australia–China BIT* (n 23) arts I(1)(f), III(a), (c).

361 *Australia–PNG BIT* (n 30) arts 1(1)(a), 4 (MFN), 3(3) (FET, not covering activities at all); *Australia–Poland BIT* (n 32) arts 1(1)(b), 3(2), 4; *Australia–Sri Lanka BIT* (n 34) arts 1(1)(a)(vi), 3(2), 4(2).

362 *Australia–Turkey BIT* (n 35) art 4(1). See also at art 4(2). Associated activities also form part of the definition of investment: at art 1.1(a)(vi).

363 *Australia–Lithuania BIT* (n 28) arts 1(1)(a), 3(2), 4; *Australia–Argentina BIT* (n 22) arts 1(3). 4, 5. See also above n 348.

364 See above n 343 and accompanying text.

365 *Australia–Czech Republic BIT* (n 24) art 1(1)(a).

> the raising of funds and the purchase and sale of foreign exchange …[366]

Both of these formulations suggest that the relevant assets must be initially admitted in accordance with law, but not that subsequent activities associated with such investments are subject to law. Accordingly, these BITs encompass the expansion of an investment for the purposes of the MFN and FET obligations. Our interpretation is consistent with previous arbitral decisions, which have read these kinds of clauses as conditioning protection of the investment on compliance with law upon admission, that is, whether the investment was lawfully made.[367] Subsequent illegality related to an investment affects the merits of a claim rather than the jurisdiction of the tribunal.[368]

D *Exclusion of Other Treaties from Most-Favoured-Nation Treatment*

All of Australia's 15 traditional BITs include an exclusion from the MFN provision with respect to privileges arising from other treaties such as PTAs. Four of these BITs explicitly exclude both pre-existing and future treaties. For example, the *Australia–Philippines BIT* states:

> The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of any third State shall not be construed as to oblige one Party to extend to investors of the other Party the benefit of any treatment, preference or privilege resulting from:
>
> (a) any *existing or future* customs union, common market, free trade area, [or] regional economic organisation … to which either Party is or may become a member …[369]

The remaining 11 BITs may be read as implicitly excluding future treaties as well as existing treaties. For example, the *Australia–Egypt BIT* qualifies the MFN obligation as follows:

> provided that a Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:
>
> (a) any customs union, economic union, free trade area or regional economic integration agreement *to which the Party belongs*.[370]

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366 *Australia–Egypt BIT* (n 25) art 1(1)(a). See also *Australia–Hungary BIT* (n 26) art 1(1)(a)(vi); *Australia–Lao PDR BIT* (n 27) art 1(1)(a)(vi); *Australia–Pakistan BIT* (n 29) art 1(1)(a)(vi); *Australia–Philippines BIT* (n 31) art 1(1)(a)(vi); *Australia–Romania BIT* (n 33) art 1(1)(a)(v); *Australia–India BIT* (n 61) art 1(c)(v).

367 See, eg, *Inceysa Vallisoletana SL v El Salvador (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/26, 2 August 2006) [246].

368 See, eg, *Gustav F W Hamester GmbH & Co KG v Ghana (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/24, 18 June 2010) [127]. See also August Reinisch, 'Jurisdiction and Admissibility in International Investment Law' (2017) 16(1) *Law and Practice of International Courts and Tribunals* 21, 38–40.

369 *Australia–Philippines BIT* (n 31) art 4(3) (emphasis added). See also *Australia–Lithuania BIT* (n 28) art 4(a); *Australia–PNG BIT* (n 30) art 5(a); *Australia–Turkey BIT* (n 35) art 4(4)(a).

Although these words do not specify whether such agreements must be pre-existing, they might be understood to mean agreements to which the party belongs at any given time. On that reading, the MFN obligation in Australia's traditional BITs does not preclude Australia from granting preferential treatment to investments of PTA partners (that is, the 16 PTAs including investment obligations),[371] pursuant to those PTAs (which could be described as 'free trade areas' or, possibly, 'regional economic integration agreements', unlike Australia's BITs), as happens to some extent in practice.[372]

Australia's approach to this issue is more complicated under its 16 modern IIAs that contain an MFN obligation.[373] 14 of these IIAs list other international agreements in an annex II-type NCM (or equivalent) with respect to the MFN obligation. The initial approach, found in *AUSFTA*, states:

> Australia reserves the right to adopt or maintain any measure that accords more favourable treatment to the … investors of non-Parties under any bilateral or multilateral international agreement in force or signed *prior to* the date of entry into force of this Agreement.[374]

The NCM goes on to permit Australia to accord more favourable treatment to investors of non-parties under any bilateral or multilateral international agreement that is 'in force or signed *after* the date of entry into force of' the *AUSFTA*, where such agreement '[involves]: (a) aviation; (b) fisheries; or (c) maritime matters, including salvage'.[375] *ANZIP* adopts the same approach.[376] Thus, Australia's subsequent IIAs are not exempted from the MFN provision in *AUSFTA* and *ANZIP*, except perhaps to the extent that they cover the three listed areas. At least beyond those areas, Australia could not rely on the existence of a later PTA with another state to justify giving preferential treatment to investments of that state in comparison to those of the US or New Zealand, for example in the form of higher screening thresholds.[377] However, a claim of breach could be brought only in SSDS, as these agreements contain no ISDS mechanism, as shown in Table 1 above.

This approach also forms the core of the relevant NCMs in the other 12 IIAs that include international agreements in an annex II-type NCM, with further additions to the NCM as new IIAs have been concluded over time. *ACLFTA* and *KAFTA* add to the NCM any future protocol under *ANZCERTA*.[378] *JAEPA*,

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370 *Australia–Egypt BIT* (n 25) art 4(a) (emphasis added). See also *Australia–Argentina BIT* (n 22) art 5(a); *Australia–China BIT* (n 23) art III(c)(i); *Australia–Czech Republic BIT* (n 24) art 4(a); *Australia–Hungary* BIT (n 26) art 4(a); *Australia–Lao PDR BIT* (n 27) art 4(a); *Australia–Pakistan BIT* (n 29) art 4(a); *Australia–Poland BIT* (n 32) art 4(a); *Australia–Romania BIT* (n 33) art 4(a); *Australia–Sri Lanka BIT* (n 34) art 4(2)(a); *Australia–India BIT* (n 61) art 4(4)(a).

371 See above Part I.

372 See above n 114 and accompanying text.

373 Here we exclude *MAFTA* (n 46), as its MFN obligation is not yet in force. We include *A–UKFTA* (n 78), although this treaty as a whole is not yet in force.

374 *AUSFTA* (n 52) annex II Schedule of Australia (emphasis added).

375 Ibid.

376 *ANZIP* (n 48) annex II Schedule of Australia.

377 *AUSFTA* (n 52) and *ANZIP* (n 48) contain no NCM with respect to foreign investment policy in connection with MFN: see above Table 2.

378 *ACLFTA* (n 39) annex II Schedule of Australia; *KAFTA* (n 45) annex II Schedule of Australia.

ChAFTA, *SAFTA* and *PACER Plus* then add, beyond *ANZCERTA*, subsequent reviews or amendments to other existing agreements.[379] *CPTPP*, *PAFTA*, *IA–CEPA*, *A–HKIA*, *RCEP* and *A–UKFTA* then add, beyond *ANZCERTA* and other reviews or amendments, any existing or future international agreement in relation to investors of a Pacific Island Forum Member State.[380] So, for example, Australia could not on the basis of its PTAs apply higher screening thresholds to investments from China, Japan, Korea, Peru or Singapore[381] compared to those from Chile[382] (although an ISDS claim would be available only for a post-establishment breach, that is, an existing investment pursuing expansion).[383] Nor, for example, could Australia apply higher screening thresholds with respect to investments from jurisdictions with which it is currently negotiating new PTAs, such as the EU, compared to those it applies to Singapore, Peru or *CPTPP* countries, outside agricultural land and agribusiness.[384] However, a claim of breach in this regard could be made only through SSDS because the *CPTPP*, *PAFTA* and *SAFTA* exclude foreign investment policy from ISDS, as shown in Table 1 above.

In addition to the NCM referring to international agreements, *A–HKIA* prevents an investor from bringing an ISDS claim 'alleging a breach of, or otherwise invoking', the MFN provision 'on the basis that another bilateral or multilateral agreement contains more favourable rights or obligations'.[385] Like Australia's traditional BITs, this provision could be read as excluding both existing and future agreements. However, the same provision goes on to state, '[f]or greater certainty', that 'this paragraph shall not prevent a claim challenging measures of a Party, including measures taken in accordance with another bilateral or multilateral agreement, on the basis that such measures' breach the MFN obligation.[386] *IA–CEPA* contains a similar provision.[387]

While this provision prevents ISDS claims that try to use the MFN clause as a basis to obtain more favourable treatment via another IIA or to allege a breach arising from the existence of more favourable treatment in another IIA, it does not prevent ISDS claims that allege a breach of MFN on the basis of actual

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379 *JAEPA* (n 44) annex 7 Schedule of Australia; *ChAFTA* (n 40) arts 9.4.(3), 9.4(4), annex III Schedule of Australia s B; *SAFTA* (n 50) annex 4–II(A); *PACER Plus* (n 54) annex I Schedule of Australia.

380 *CPTPP* (n 53) art 1.1, incorporating *TPP* (n 53) annex II Schedule of Australia; *PAFTA* (n 49) annex II Schedule of Australia; *IA–CEPA* (n 43) annex II Schedule of Australia; *A–HKIA* (n 42) annex II Schedule of Australia; *RCEP* (n 55) annex III Australia list B; *A–UKFTA* (n 78) annex II Schedule of Australia.

381 Although *SAFTA* (n 50) was in force when *ACLFTA* (n 39) entered into force, *SAFTA* has since been amended. The MFN exclusion in *ACLFTA* would not appear to cover such subsequent amendments to *SAFTA*.

382 *ACLFTA* (n 39) contains no NCM with respect to foreign investment policy in connection with MFN: see above Table 2. Chile also does not exclude foreign investment policy from ISDS or SSDS: see above Table 1.

383 See n 153 and accompanying text.

384 *SAFTA* (n 50), *PAFTA* (n 49) and *CPTPP* (n 53) contain limited NCMs with respect to foreign investment policy in connection with MFN: see above n 110.

385 *A–HKIA* (n 42) art 5(5). See also *Comprehensive Economic and Trade Agreement*, signed 30 October 2016, [2017] OJ L 11/23 (provisionally entered into force 21 September 2017) art 8.7(4) ('*CETA*').

386 *A-HKIA* (n 42) art 5(5).

387 *IA–CEPA* (n 43) art 14.21(1)(a).

preferential treatment, including where that treatment is the result of another IIA. The existence of another IIA with better terms will not be sufficient to justify discriminatory treatment against investors or investments from Hong Kong or Indonesia. However, both of these treaties exclude foreign investment policy from ISDS (as shown in Table 1 above), so a breach could be claimed only through SSDS. Moreover, minimal risk arises for Australia because the MFN obligation in *A–HKIA* applies only post-establishment and its coverage of expansion activities is subject to law,[388] while *IA–CEPA* contains a broad reference to security interests in its Annex II NCM for MFN concerning foreign investment policy (which could protect against discriminatory thresholds or other discriminatory treatment, at least to the extent based on security concerns).[389]

The remaining two modern Australian IIAs with MFN obligations take different approaches. The *Australia–Uruguay IPPA* is similar in approach to most of Australia's traditional BITs, potentially covering future treaties in its MFN exclusion.[390] *TAFTA* includes a broad exception explicitly excluding both existing and future international agreements:

> nothing in this Agreement shall be regarded as obliging a Party to extend to the other Party the benefit of any treatment, preference or privilege arising from any *existing or any future* … free trade arrangement … or similar international agreement or other similar forms of bilateral or regional cooperation to which either of the Parties is or may become party …[391]

However, this exclusion does not apply to art 908(2), which we read as imposing an MFN obligation at the pre-establishment stage with respect to investment screening.[392]

To the extent that some of Australia's modern IIAs do not exclude all future IIAs from the MFN obligation, and do not include a comprehensive NCM with respect to foreign investment policy in connection with MFN, the question arises whether an investor in an ISDS claim could use the MFN provision in an Australian IIA to invoke a more favourable treaty provision under a newer Australian IIA with a third State (as opposed to demonstrating a breach on the basis of treatment actually applied to other investors or investments, beyond the mere terms of an IIA).[393] Only *A–HKIA* and *IA–CEPA* make clear that such an approach is invalid. We have discussed this issue in connection with procedural matters (dispute settlement) in Part II(B)(2)(a) above. But what about substantive obligations?

Traditionally, tribunals and commentators have accepted that an investor may use the MFN obligation in the subject IIA to invoke a more favourable

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388 See above Table 2.

389 *IA–CEPA* (n 43) annex II Schedule of Australia.

390 *Australia–Uruguay IPPA* (n 36) art 5(1)(a).

391 *TAFTA* (n 51) art 1907(1) (emphasis added), excluding arts 908(2), 917(3) and 1605 from the scope of the exception. A party is required only to 'consider a request by the other Party for the incorporation in this Agreement' of more favourable treatment pursuant to a future investment agreement or unilateral investment liberalisation: at art 919(2).

392 See above n 117 and accompanying text.

393 See David D Caron and Esmé Shirlow, 'Most-Favored-Nation Treatment: Substantive Protection' in Meg N Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 399, 407.

substantive provision from another IIA of the host state.[394] For example, in *MTD Equity Sdn Bhd v Chile*, the Tribunal agreed to interpret the obligation to accord FET under the bilateral investment treaty between Malaysia and Chile to include protections articulated in the FET provisions in BITs between Chile and Denmark and Chile and Croatia, by virtue of the MFN clause in the subject treaty.[395] However, in more recent years, debate has arisen regarding investors' ability to use the MFN obligation to invoke substantive protections from other treaties.[396] Some states' concerns about the use of MFN obligations in this way has led to provisions such as those in *A–HKIA* and *IA–CEPA*.

In any case, where a tribunal is prepared to allow invocation of more favourable substantive protections from other IIAs of the host state, limits still apply. A prospective investor is unlikely to succeed in expanding the jurisdictional scope of an IIA, for example by using the MFN obligation to obtain pre-establishment protection where the subject treaty does not extend to this stage.[397] Tribunals may also be reluctant to allow an investor to use the MFN obligation to invoke an IIA that does not contain security exceptions or general exceptions in order to eliminate such exceptions from the subject treaty.[398] An investor would likely have more success in invoking a provision in another IIA where a less favourable version of that provision applies in the subject IIA.[399] However, the implications of such an approach may be limited by the fact that several of the clarifications found in Australia's modern IIAs regarding non-discrimination, FET and expropriation are arguably reflected in established lines of arbitral reasoning anyway.[400]

IV CONCLUSION

Australia has a clear awareness of the potential for foreign investment screening to fall afoul of its obligations under international investment law,

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394 See, eg, Lim, Ho and Paparinskis (n 250) 386, referring to the 'mainstream view'.

395 *MTD Equity Sdn Bhd v Chile (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/7, 25 May 2004) [104].

396 See especially Facundo Pérez-Aznar, 'The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements' (2017) 20(4) *Journal of International Economic Law* 777; Simon Batifort and J Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2017) 111(4) *American Journal of International Law* 873. But see Martins Paparinskis, 'MFN Clauses and Substantive Treatment: A Law of Treaties Perspective on the "Conventional Wisdom"' (2018) 112 *AJIL Unbound* 49; Michael Waibel, 'Putting the MFN Genie Back in the Bottle' (2018) 112 *AJIL Unbound* 60. See also *İçkale İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/24, 8 March 2016) [329], [332]; *Muhammet Çap v Turkmenistan (Award)* (ICSID Arbitral Tribunal, Case No ARB/12/6, 4 May 2021) [789], [793].

397 See, eg, *Metal-Tech Ltd v Uzbekistan (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/3, 4 October 2013) [145], [153], [156], on using the MFN obligation to invoke a more favourable definition of investment; *Krederi Ltd v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/17, 2 July 2018) [295]; *Louis Dreyfus Armateurs SAS v India (Decision on Jurisdiction)* (Permanent Court of Arbitration, Case No 2014–26, 22 December 2015) [146].

398 See, eg, *CMS Gas Transmission Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005) [377].

399 See James M Claxton, 'The Standard of Most-Favored-Nation Treatment in Investor-State Dispute Settlement Practice' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer, 2021) 271, 287.

400 See above Part II(B)(2).

reflected in provisions in many of its modern IIAs explicitly excluding foreign investment policy from ISDS (and sometimes SSDS). However, such ISDS claims are allowed under four of Australia's modern IIAs (11 in the case of SSDS), and its traditional BITs contain no such exclusion. Moreover, the exclusion of foreign investment policy from dispute settlement does not ensure its compliance with international investment law. On that question, we must look to substantive legal protections of such policy space. Explicit references to foreign investment policy are found in variously worded NCMs with respect to national treatment (and sometimes MFN treatment) in Australia's modern IIAs, but not its BITs. These explicit exclusions of foreign investment policy from dispute settlement and non-discrimination are the strongest protections of Australian foreign investment screening in its modern IIAs. Further general reforms in Australia's modern IIAs that may shield foreign investment screening (for example, by clarifying positive obligations or including general or security exceptions) from investment law breaches or claims may be subject to greater uncertainty than the explicit provisions and are largely missing from its BITs. Nevertheless, Australia's BITs more consistently restrict themselves to the post-establishment stage and exclude both existing and future treaties from the MFN obligation: these are the strongest protections in Australia's BITs of policy space with respect to Australia's foreign investment screening.

Because of this restriction of Australia's BITs to established investments, along with the restriction of ISDS in some of its modern IIAs (including *ACLFTA*) to the post-establishment stage, the risk of conflict between Australia's foreign investment screening and its obligations under international investment law has increased with the introduction of last resort and call-in powers. An ISDS or SSDS claim against Australian screening under one of Australia's modern IIAs that does not exclude foreign investment policy from both forms of dispute settlement (for example, *ACLFTA*) will depend on a detailed analysis of the evidence and IIA in question. The inconsistency in the reforms adopted in these IIAs makes it difficult to identify in the abstract whether such a claim would succeed. Much would depend on Australia's justification for the relevant screening regulation and its application. However, the potential does exist for claims regarding non-discrimination (particularly in IIAs that do not include an NCM for foreign investment policy in connection with MFN, or that include only a limited annex-II type NCM in connection with national treatment: both observations apply to *ACLFTA*), FET or expropriation. At least in connection with national security concerns, a strong argument could be made that such screening falls within the broad security exception (requiring only a minimal showing of justification in the context of good faith) found in six of Australia's modern IIAs. However, most of these six treaties preclude ISDS in general or with respect to foreign investment policy anyway.

In DFAT's review of its BITs,[401] as well as its negotiation, drafting, amendment and termination of IIAs,[402] Australia needs to keep in mind the

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401 See above n 75.

402 See Joint Standing Committee on Treaties, Parliament of Australia, *Strengthening the Trade Agreement and Treaty-Making Process in Australia* (Report No 193, August 2021) <https://www.aph.gov.au/parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193>, archived at <https://perma.cc/VMF5-YWXJ>.

interaction of IIAs with foreign investment screening policy, as well as the current inconsistencies and uncertainties in its existing treaties. These inconsistencies, and the complexities of the approaches used to address foreign investment policy in Australia's IIAs, are exacerbated by the co-existence of multiple IIAs with respect to some countries. For example, we have mentioned the simultaneous operation of *ChAFTA* and the *Australia–China BIT*, which creates some uncertainties to the extent of conflict.[403] Including those not yet in force, Australia has five IIAs with New Zealand, four with each of Singapore and Malaysia, and three with each of Brunei Darussalam, China, Indonesia, Japan, Lao PDR, the Philippines, Thailand and Viet Nam. These overlapping obligations enhance the difficulties in determining the treatment required with respect to investors and investments from these countries in connection with foreign investment screening, and the extent of Australia's regulatory autonomy in creating and implementing screening regulations. Concerns about inconsistency, overlap and potential conflict between Australian IIAs and domestic law and policy also go beyond foreign investment screening and will continue to challenge Australia's approach to IIAs in the future. The screening context further highlights the value to be gained by conducting a public consultation into a model Australian investment treaty, which would enhance both transparency and consistency in treaty drafting,[404] as well as the need for interagency coordination.

These kinds of difficulties are likely to be multiplied on a global scale, as countries worldwide introduce and tighten their approaches to foreign investment screening.[405] Further empirical and non-legal research is needed to understand and evaluate international developments in foreign investment screening, alongside Australia's own evaluation of the 2021 investment screening reforms.[406] What are the national and international economic and political implications of enhanced foreign investment screening? Are these developments a new form of protectionism analogous to the international trade context? To what extent, if any, do increased screening and complexity and inconsistency in the associated international investment laws act as a disincentive to inward foreign investment in Australia and other countries? To what extent does increased screening protect national interest and national security? The answers to these questions may help identify best practice approaches to both foreign investment screening and international investment law. In the meantime, at least for Australia, no blanket argument can be made that foreign investment screening clearly complies with international investment law.

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403 See Critical Analysis of *ChAFTA* (n 210) 419.

404 See, eg, Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Blind Agreement: Reforming Australia's Treaty-Making Process* (Report, June 2015) [5.35]; Mitchell, Sheargold and Voon (n 62) 255–6.

405 See, eg, *Investment Screening in Times of COVID-19 – and Beyond* (n 84); Evenett (n 84).

406 See above n 76.