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Sovereignty and Security: Constraints on Foreign Investment Control Arising from International Law

Dylan Geraets & Leo Gargne*

Abstract

Does international law impose constraints on States adopting, implementing or maintaining investment screening measures (ISMs)? Is the sovereignty of States in respect of whose investments and what types of investments to 'permit' into their territories unfettered? Or does that sovereignty only exist insofar as it is compatible with the (national) security exceptions provided for in many instruments of international economic law, as encompassing both international trade law and international investment law? These are the main questions that this contribution seeks to answer. ISMs have increased both in number and in scope in the past decades and the fact that they are included in the regulatory toolbox of many States raises questions as to the compatibility of these mechanisms, and the manner in which they are applied in specific instances, with norms of international law. The relevant norms are found, for example, in the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) and in international investment (protection) agreements (IIAs). This contribution assesses the international legal norms that ISMs need to be compatible with if they are implemented and applied by host States seeking to exercise control over inward foreign investment on the basis of (national) security considerations. Thereto, after an Introduction (Section 1), the contribution sets out in Section 2, the key considerations in terms of sovereignty and international law, and the relationship between international legal norms and the desire to safeguard the domestic (legal) order from unwanted foreign influence. Thereafter, in Section 3, the contribution discusses the key considerations under the GATS in terms of ISM, and, in particular, the need to grant services and service suppliers of WTO Members treatment no less favourable than that is granted to the like services and like service suppliers from any other country. In addition, Section 3 examines potential considerations in respect of the Market Access and National Treatment obligation of the GATS, as well as the possibilities of relying upon the (security) exceptions in Articles XIV and XIV*bis* GATS to justify otherwise GATS-inconsistent ISMs. Finally, in Section 4, the contribution considers norms of international investment law that may restrict the ability of host States to implement or apply ISMs.

* Dylan Geraets, PhD, is Professor at the University of Antwerp in Belgium. Leo Gargne is a PhD Candidate at the Faculty of Law of Tilburg University in the Netherlands.

Keywords: FDI, FDI screening GATS, investment law, investment protection, sovereignty.

1 Introduction

Growing concerns over the genuineness or benevolence of certain foreign investors as well as the potential risks posed by their investments in host States have led a significant number of countries to adopt, or indeed strengthen, their ISMs in an effort to shield themselves from undesirable foreign investments, or to make such investments subject to conditions.[1] Typically, ISMs provide for the review of an investment in the event that the said investment presents certain triggering characteristics. More often than not, such a process will be conducted negatively. In other words, specific conditions shall not exist with respect to the prospective foreign investor or the investment itself before the latter is authorised by the domestic authorities. More specifically, screening mechanisms may be triggered by the value of the investment, its origin or the targeted sector in the host State.[2] For present purposes, we define the term 'Investment Screening Measures' (ISMs) broadly; the term not only refers to the 'negative requirements' that one may find in the law but will also include the institutional apparatus utilised to decide whether a specific investment is approved (i.e. the Investment Screening Mechanism), as well as the decision that follows an investment screening process. At the heart of this legal and policy endeavour lie national security considerations,[3] a term that reflects many factual situations and

1 T. Ishikawa, 'Investment Screening on National Security Grounds and International Law: The Case of Japan', 7(1) *Journal of International and Comparative Law* 71, at 72 (2020); T. Voon and D. Merriman, 'Incoming: How International Investment Law Constrains Foreign Investment Screening', 24(1) *The Journal of World Investment & Trade* 2 (2022); S. Robert-Cuendet, 'Filtrage des Investissements Directs Etrangers dans l'UE et Covid-19: Vers une Politique Commune d'Investissement Fondée sur la Sécurité de l'Union', 5(1) *Carnets Européens - European Papers* 597, at 599 (2020).

2 J. Bonnitcha, 'The Return of Investment Screening as a Policy Tool' (IISD, 19 December 2020), www.iisd.org/itn/en/2020/12/19/the-return-of-investment-screening-as-a-policy-tool-jonathan-bonnitcha/ (last visited 7 November 2022).

3 Voon and Merriman, above n. 1, at 2, citing OECD, 'Investment Policy Developments in 62 Economies between 16 October 2020 and 15 March 2021' (May 2021) 5.

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which is, if not all-encompassing, at least rather broad.[4] In that regard, it should be noted that geopolitics, and more specifically the increasing trade and political tension between the United States and China,[5] as well as the Covid-19 pandemic, have played a revealing and intensifying role.[6]

In the European Union (EU),[7] the sanitary crisis has pushed a number of issues to the fore and unveiled several weaknesses, as can be seen from the disruptions caused to global supply chains or from instances of attempted 'predatory' takeovers or acquisitions.[8] These vulnerabilities are in part due to the openness of the EU's market. Indeed, pursuant to Article 63 of the Treaty on the Functioning of the European Union (TFEU), 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.[9] Admittedly, this freedom is not boundless. Indeed, (i) the rules on the freedom of establishment do not extend to third countries pursuant to Article 49 TFEU[10][11] and (ii) Article 65 TFEU provides that Article 63 is 'without prejudice to the right of Member States … to take measures which are justified on grounds of public policy or public security'.[12] Notwithstanding these limitations, the freedom of capital movements is highly relevant, as foreign investors can benefit from it in the same way that intra-EU investors can.

Importantly, as of 2020, the EU applies its FDI Screening Regulation, which provides a framework to screening taking place at the level of Member States.[13] Notably, Recital (3) of the FDI Screening Regulation provides that

> [p]ursuant to the international commitments undertaken in the World Trade Organization (WTO), in the Organisation for Economic Cooperation and Development, and in the trade and investment agreements concluded with third countries, it is possible for the Union and the Members States to adopt restrictive measures relating to foreign direct investment on the grounds of security or public order, subject to certain requirements. The framework established by this Regulation relates to foreign direct investments into the Union. Outward investment and access to third country markets are dealt with under other trade and investment policy instruments.[14]

These contextual and structural elements shed light on some of the reasons why, as of late, several Member States have reinforced their capacity to screen inbound foreign investment.[15] Such is the case of the Netherlands where the Tweede Kamer (House of Representatives) and the Eerste Kamer (Senate) passed an Investments, Mergers and Acquisitions Security Screening Bill (*Wet veiligheidstoets investeringen, fusies en overnames*) (Wet Vifo) in the spring of 2022. The passing of the bill is representative of the policy shift that has taken place in many countries in recent years, even in jurisdictions that are traditionally considered to be investment friendly. As noted by one commentator, the Netherlands has 'historically been opposed to the introduction of a general investment screening mechanism on the basis of national security'.[16] However, the author pinpoints (i) the linkage of foreign investments with 'the implementation of geopolitical objectives', (ii) 'the shift of economic and geopolitical power to China' as well as the (iii) 'the United States trade policy under the Trump presidency and the Covid-19 pandemic' as key factors in the growing recognition that foreign investments may pose security threats and that the establishment of a screening regime is needed.[17]

Suffice it to say, the establishment of such a framework at the EU level is meaningful in an area where the EU has always opted to defer to Member States despite benefiting from the exclusive competence under Article 207

4 G. Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune & S. Jusoh (eds.), *Handbook of International Investment Law and Policy* (2021) 510, at 538.

5 Voon and Merriman, above n. 1, at 2.

6 P.A. Lorfing, 'Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines', in C. Titi (ed.), *Public Actors in International Investment Law - European Yearbook of International Economic Law* (2021) 186.

7 Robert-Cuendet, above n. 1, at 599; Voon and Merriman, above n. 1, at 2.

8 Robert-Cuendet, above n. 1, at 599, who gives the example of Curevac, a German biopharmaceutical company, and notes that « Le risque que des prises de contrôle étranger détournent les industries européennes de leur vocation à satisfaire d'abord les besoins des citoyens européens est réel ».

9 Robert-Cuendet, above n. 1, at 602-3; S.W. Schill, 'The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization', 46(2) *Legal Issues of Economic Integration* 105, at 115 (2019).

10 Robert-Cuendet, above n. 1, at 603; Schill, above n. 9, at 117.

11 The question then becomes: at what point can it be determined that a foreign investor is seeking to establish itself in the EU? For an analysis of this question, see Schill, above n. 9, at 117ff.

12 Robert-Cuendet, above n. 1, at 603; Schill, above n. 9, at 116; J. De Kok, 'Investment Screening in the Netherlands', 48(1) *Legal Issues of Economic Integration* 43, at 47 (2021).

13 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening of foreign direct investments into the Union, OJ L 79I, 21 March 2019, 1–14 (the FDI Screening Regulation).

14 Recital (35) also refers to the fact that '(35) [t]he implementation of this Regulation by the Union and the Member States should comply with the relevant requirements for the imposition of restrictive measures on grounds of security and public order in the WTO agreements, including, in particular, Art. XIV(a) and Art. XIV *bis* of the General Agreement on Trade in Services (12) (GATS). It should also comply with Union law and be consistent with commitments made under other trade and investment agreements to which the Union or Member States are parties and trade and investment arrangements to which the Union or Member States are adherents.'

15 Robert-Cuendet, above n. 1, at 599, who cites France, Italy, Spain. In the case of France, see Décret n° 2018-1057 and the Arrêté dated April 27 2020. In the Netherlands, see the National Security Screening Act. In the case of Germany see The Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*). The realisation the EU and its Member States came to is perhaps best represented by the following statement by Jean-Claude Juncker, then President of the European Commission: 'Europe must always defend its strategic interests and that is precisely what this new framework will help us to do. This is what I mean when I say that we are not naïve free traders. We need scrutiny over purchases by foreign companies that target Europe's strategic assets'. See European Commission, Commission Welcomes Agreement on Foreign Investment Screening Framework Press Release (20 November 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1052 (last visited 7 November 2022).

16 De Kok, above n. 12, at 54.

17 *Ibid*., at 58.

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TFEU[18] ('foreign direct investment' being part of the common commercial policy (CCP) ever since the Lisbon Treaty).[19] The Regulation itself does not put into question this practical arrangement between Member States and the EU – an understanding arguably founded on Article 4(2) of the Treaty on European Union (TEU), which provides that the EU 'shall respect [Member States'] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.[20] Nevertheless, the novel posture adopted by the Commission seems to signal that the latter is ready to adopt a more assertive role in the protection of the Union's interests as regards FDI.[21] This protective trend is not specific to the EU, and many countries around the world have tightened their investment screening laws. Notably, such is the case in the United States with the passing of the Foreign Investment Risk Review Modernization Act (FIRRMA), which extends the array of reviewable transactions by the Committee on Foreign Investment in the United States (CFIUS).[22] In China, the Measures for the Security Review of Foreign Investments (FISR Measures) also widen the scope of transactions that may be reviewed.[23]

The legal ramifications of this shift towards more scrutiny over foreign investment are many and cross-cutting. First, it should be determined whether, as a matter of public international law, States can resort to adopting such screening mechanisms or whether their ability to do so is curtailed or limited in some way (Section 2). Second, the potential for conflicts of norms is glaring. The rise of ISMs entails a higher probability that clashes will occur between, on the one hand, the screening regimes put into place by governments at the domestic level and, on the other hand, the international obligations these same governments might have previously undertaken, be it at the multilateral level within the WTO (Section 3), or at the regional or bilateral levels through International Investments Agreements (IIAs) (including Preferential Trade Agreements with an investment chapter) (Section 4). Addressing these compatibility issues is vital in a context where 'the tension between economic globalisation and security issues will continue to increase'.[24]

2 International Law and the Concept of Sovereignty

Our first inquiry relates to the question of whether public international law provides any rules that would restrict States' *suprema potestas*, that is, their sovereignty, to screen inbound foreign investments by establishing control mechanisms.[25] One difficulty in this examination has to do with the meaning one should ascribe to the concept of sovereignty. Many commentators have underlined its rather equivocal and indefinite character in international law.[26] This article does not attempt to elucidate further the various ways in which one may understand the term and its evolution through time. For present purposes, it is sufficient to give the term its 'common modern usage', which Crawford describes as being 'in a "catch-all" sense … the collection of rights held by a state'.[27] Rather than focusing on sovereignty as such, it is, therefore, practical to zoom in on some of its integral elements or aspects. One such feature of sovereignty is the notion of jurisdiction. Admittedly, jurisdiction itself may be broken down into several branches[28] and may refer to various principles or doctrines. We shall here only describe the notion in more general terms as one that refers to the power States have, within their territories, 'to regulate the conduct of natural and juridical persons',[29] 'impact upon people, property and circumstances'[30] and, more broadly, determine the social and economic organisation of society.[31] As recalled by Shaw, the exercise of sovereign States' jurisdictional authority can be carried out through any of the three traditional branches of power, that is, at the legislative,

18 Robert-Cuendet, above n. 1, at 602; see also Alan Hervé, 'Mise en place d'un mécanisme de filtrage des investissements: quand l'Union européenne montre ses dents … de lait' (2019) RTD Eur., 749; see also on the question of competence Schill, above n. 9, at 109.

19 Schill, above n. 9, at 109; T. Destailleur, 'Une occasion manquée pour l'Union de s'affirmer en tant qu'acteur international du droit des investissements étrangers', 56(1) *Revue Trimestrielle de Droit Européen* 89 (2020). For a more in-depth analysis of the division of competence between the EU and the MS and whether the CCP is, or should be, the predominant legal basis for the proposed FDI screening framework in the context of energy policy, see L. Reins, 'The European Union's Framework for FDI Screening: Towards an Ever More Growing Competence over Energy Policy?' 128 *Energy Policy* 668ff (2019), noting: 'The proposal lays down rules for the operation of FDI screening mechanisms in EU member states … The mechanism is essentially internal … it is hence questionable whether this should be done under the Common Commercial Policy'.

20 J. Snell, 'EU Foreign Direct Investment Screening: Europe qui protège?' 44(2) *European Law Review* 137 (2019).

21 Robert-Cuendet, above n. 1, at 607.

22 Dimitropoulos, above n. 4, at 521; Ishikawa, above n. 1, at 73; Voon and Merriman, above n. 1, at 11.

23 S. Yu and J. Huikuang, 'China's New National Security Review Rules: How Will It Affect Foreign Investments' (*Lexology*, 8 March 2021), www.lexology.com/library/detail.aspx?g=fdfb340c-3f69-4973-819f-e1e55ca6965f (last visited 7 November 2022); Voon and Merriman, above n. 1, at 8.

24 Ishikawa, above n. 1, at 78.

25 For an analysis of state sovereignty in the context of measures implemented by governments which screen inward investment based on national security considerations, see C. Bian, *National Security Review of Foreign Investment – A Comparative Legal Analysis of China, the United States and the European Union* (2020), at 32ff.

26 J.E. Viñuales, 'Sovereignty in Foreign Investment Law', in Z. Douglas, J. Pauwelyn & J.E. Viñuales (eds.), *The Foundations of International Investment Law* (2014) 317, citing H. Kalmo and Q. Skinner, 'Introduction: A Concept in Fragments', in H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept* (2010) 1-5; J. Crawford, *Brownlie's Principles of Public International Law* (2019) 432.

27 Crawford, above n. 26, at 432.

28 C. Ryngaert, *Jurisdiction in International Law* (2008), at 1, citing F.A. Mann, 'The Doctrine of Jurisdiction in International Law', (1964-I) 111 RCADI 1, 23.

29 Crawford, above n. 26, at 440.

30 M.N. Shaw, *International Law* (2021), at 555.

31 A. Nollkaemper, *Kern van het internationaal publiekrecht* (2011), at 67.

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executive or judicial level,[32] which echoes the distinction operated between '*prescriptive* jurisdiction' and '*enforcement* or *adjudicative* jurisdiction'.[33] More specifically, legislative jurisdiction refers to the constitutional power bestowed upon the relevant arms of government to enact laws within their territories.[34] Such legislation may 'include specific decisions addressed to a limited number of people or entities'.[35] The notion of jurisdiction has been recognised in international jurisprudence. Notably, in its Judgment of 27 June 1986 rendered in the *Nicaragua* v. *United States of America* case, the International Court of Justice (ICJ) found that

> [a] State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems.[36]

It is also possible to establish the power States have, as a matter of principle, to enact domestic rules (e.g., regarding investment screening) by focusing on more concrete manifestations of the concept of sovereignty in international law. In that regard, Viñuales advances that one way for the concept of sovereignty to 'be brought down to earth' is to understand it as 'a set of more specific actionable legal concepts'.[37] One such 'actionable legal concept' is the police powers doctrine.[38] The doctrine has been applied and recognised in jurisprudence at the international level as well as in American constitutional law.[39] Interestingly in the present context, the police powers doctrine has also been invoked and applied in international economic law, and more specifically, in investment disputes. The doctrine is therefore especially relevant to the question whether screening measures are compatible with investment substantive standards. In that context, the Partial Award rendered in the case *Saluka* v. *Czech Republic* is often cited. At paragraph 262, the arbitrators noted that:

> [i]n the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today.[40]

Other notable cases that include such references include *Methanex* v. *US* or *Chemtura* v. *Canada* as well as the case law of the Iran–US Claims Tribunal.[41] On the cautionary side, however, it should be noted that one of the issues sometimes highlighted with regard to the police powers doctrine concerns its complex delineation and the identification of which acts and measures fall within its ambit.[42] Moreover, its status as part of customary international law is not yet fully settled in the academic sphere. For instance, while Viñuales views the doctrine as an 'autonomous customary concept'[43] existing 'as a matter of customary international law' and deems arbitral practice to be 'unanimous on this point', Titi argues that '[t]he broad cast of existing arbitral interpretations does not allow the assumption that the police powers doctrine will be treated as reflective of customary international law, or as a general principle of law'.[44]

To conclude, as a matter of principle, international law does not seem to impose any restrictions or limitations on the implementation of investment screening mechanisms by sovereign States. However, this is not to say that such constraints are not to be found in more specialised regimes. Specifically, it is essential to analyse the obligations undertaken by States at the multilateral level under the WTO's General Agreement on Trade in Services (GATS) (Section 3) as well as those commitments entered into in international investment treaties (Section 4). As noted before, the risk that a conflict can arise between the screening measures put into force by governments at the domestic level and the international commitments they are bound to is real. The following sections endeavour to clarify what forms these conflicts may take, as well as the ways in which they might be anticipated or resolved.

3 WTO Law: The Applicability of the GATS and Its Impact on the Legality of ISMs Implemented by WTO Members

One of the main reasons why the GATS is relevant in the context of foreign investment screening laws relates to the substantial volume of FDI in services.[45] The WTO's

32 Shaw, above n. 30, at 555.
33 Crawford, above n. 26, at 440.
34 Shaw, above n. 30, at 559.
35 C. Rose et al., *An Introduction to Public International Law* (2022), at 104.
36 International Court of Justice, *Nicaragua* v. *United States of America* (27 June 1987) 258.
37 Viñuales, above n. 26, at 317-18.
38 *Ibid*., at 326.
39 *Ibid*., at 326ff.
40 P. Award, *Saluka Investments B.V.* v. *The Czech Republic* (17 March 2006) UNCITRAL.
41 C. Titi, 'Chapter 14 – Police Powers Doctrine and International Investment Law', in A. Gattini, A. Tanzi & F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (2018) 326, 334, 336; P. Ranjan and P. Anand, 'Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal', in L. Choukroune (ed.), *Judging the State in International Trade and Investment Law* (2016) 133; see for instance, *Too* v. *Greater Modesto Insurance*, and *Sedco Inc* v. *National Iranian Oil Co*.
42 Ranjan and Anand, above n. 41, at 136.
43 Viñuales, above n. 26, at 329ff.
44 Titi, above n. 41, at 341.
45 UNCTAD, 'Press release – New FDI Pattern Emerging, Says UNCTAD' (*UNCTAD*, 28 October 2003), UNCTAD/PRESS/PR/2003/105, https://unctad.org/press-material/new-fdi-pattern-emerging-says-unctad#endnote1 (last visited 7 November 2022).

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Council for Trade in Services notes that 'over 60 per cent of the global stock of foreign direct investment (FDI) now relates to the tertiary sector'.[46] In that context, the prospect of a conflict between domestic investment screening laws and the commitments made by States at the WTO level is manifest. To determine the role that the GATS might play with regard to ISMs and ascertain the impact of the obligations undertaken by States under its umbrella, it seems appropriate to offer a few general remarks on the way the GATS operates to limit measures imposed by WTO Members that affect 'trade-in services'. By doing so, the next section aims to show that while the applicability of Article XVI on market access and Article XVII on national treatment depends on the specific commitments undertaken by Members, the application of the Most-Favoured Nation (MFN) treatment obligation does not. Consequently, absent specific commitments made by the Member in question, any ISM put in place would *a priori* not be contrary to WTO law – and the GATS more specifically – to the extent that its application is carried out in a manner that is compliant with Article II:1 GATS.[47]

3.1 Mode of Supply

The disciplines included in the GATS only apply to services. In that regard, while the GATS does not offer a definition of 'services', the agreement describes the notion of 'trade-in services' as relating to the 'supply of a service'. Such supply can take place via four modes of supply. The third mode of supply, most commonly designated as Mode 3, is of particular relevance to the present discussion. Mode 3 is defined in Article I:2(c) of the GATS, which refers to the supply of a service 'by a service supplier of one Member, through commercial presence in the territory of any other Member'. Article XXVIII(d) of the GATS defines 'commercial presence' as

> any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.[48]

Importantly, this definition seems to indicate that Mode 3 covers both the pre-establishment stage and the post-establishment stage.[49] According to the WTO Secretariat in a Background Note prepared for the Council for Trade in Services, this inference can indeed be drawn from the words 'constitution', 'acquisition' or 'creation', all indicating a broad understanding of the notion of 'commercial presence'.[50] The latter would not only encompass situations where a commercial presence is *established*, but also situations where a commercial presence is *in the process of being established*. The Panel in *China – Publications and Audiovisual Products* endorsed such a view, at least with respect to the national treatment obligation contained in Article XVII of the GATS (discussed in more detail in the following text). Indeed, specifically with regard to the latter provision, the Panel found that

> the term "service suppliers of another Member" supplying a service through commercial presence includes entities that have established a commercial presence in the host Member and/or entities that seek to establish in the host Member.[51]

Finally, it should be noted that Mode 3 has been interpreted by the Panel in *Mexico – Measures Affecting Telecommunications Services*, in which it noted that Mode 3

> makes explicit the location of the service supplier [but is] silent with respect to any other territorial requirement (as in cross-border supply under Mode 1) or nationality of the service consumer (as in consumption abroad under Mode 2).[52]

Therefore, it seems that Mode 3 is to be read rather broadly and may potentially embrace a rather large pool of foreign investors, the only requirement being that of a commercial presence, which may be existing or prospective.

46 WTO Council for Trade in Services, Background Note by the Secretariat, 'Mode 3 – Commercial Presence' (7 April 2010) S/C/W/314, para. 3.

47 As noted by the Working Group on the Relationship between Trade and Investment operating under the aegis of the WTO, '[i]f a Member does not list a specific commitment to allow foreign service suppliers to establish a commercial presence in a particular service sector, then subject to its MFN obligation it is not required to grant them entry to that sector', see WTO, Working Group on the Relationship between Trade and Investment, 'Modalities for Pre-establishment Commitments Based on a GATS-Type, Positive List Approach' (19 June 2002) WT/WGTI/W/120. The Working Group, at paragraph 10, also notes that '[t]he use of screening mechanisms to select which foreign investment projects to admit into a host country has been discussed. One view has been that screening mechanisms create important barriers to the entry of foreign investment. Another view has been that while inappropriate screening mechanisms can retard investment flows, particularly those based on non-transparent procedures, a properly administered screening mechanism which provides for an expeditious assessment of an investment proposal on the basis of transparent criteria is not a hindrance to investment flows. On the contrary, it can provide an element of predictability in a host country's administration of the entry of foreign investment'. See also, Guidelines on the Treatment of Foreign Direct Investment by the World Bank (1992), which embodies 'commendable approaches which would not be legally binding as such but which could greatly influence the development of international law in this area', Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, Introductory Note, at 5.Guideline II:4 provides that 'a State may, as an exception, refuse admission to a proposed investment: (i) which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security; or (ii) which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest'.

48 WTO, *Mexico – Measures Affecting Telecommunications Services – Panel Report* (2 April 2004) WT/DS204/R [7.374].

49 WTO Council for Trade in Services, Background Note by the Secretariat, 'Mode 3 – Commercial Presence' (7 April 2010) S/C/W/314 [9].

50 WTO Council for Trade in Services, Background Note by the Secretariat, 'Mode 3 – Commercial Presence' (7 April 2010) S/C/W/314 [9].

51 WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Panel Report* (12 August 2009) WT/DS363/R [7.974]; WTO Council for Trade in Services, Background Note by the Secretariat, 'Mode 3 – Commercial Presence' (7 April 2010) S/C/W/314 [9].

52 WTO, *Mexico – Measures Affecting Telecommunications Services – Panel Report* (2 April 2004) WT/DS204/R [7.375].

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3.2 General Obligations

The GATS comprises several general obligations that apply to all WTO Members, amongst which the MFN treatment obligation included in Article II GATS plays a prominent role. Article II:1 of the GATS sets out the scope of the obligation and provides as follows:

> [w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

In contrast to several other GATS disciplines discussed directly below, the application of Article II:1 is not conditioned by the specific commitments inscribed by Members in their Schedule. Therefore, the obligation is 'in principle, applicable across the board by all Members to all services sectors, not only in sectors or sub-sectors where specific commitments have been undertaken'.[53]
Whether a specific measure is deemed inconsistent with Article II:1 depends on a number of factors. The Appellate Body in *Canada – Autos* set out a specific test to determine whether an inconsistency has occurred. First, 'a threshold determination must be made under Article I:1 that the measure is covered by the GATS'.[54] This notably entails that the measure(s) at issue must be 'affecting trade in services' within the meaning of Article I:1 GATS. Crucially, this concept has been interpreted broadly by the Appellate Body and may therefore concern a wide array of measures as long as they have an effect on trade-in services,[55] including on the supply of services through commercial presence (Mode 3). Second, the treatment by one Member of services and service suppliers of any other Member should be compared to the treatment of 'like' services and service suppliers of any other countries.[56] In essence, Article II:1 GATS establishes a 'mechanism through which advantages granted by a state to a third state are incorporated into the relations with another state'.[57] Importantly, the notion of advantage is relative, and a direct benefit does not necessarily have to be granted. An advantage will also be conferred to certain States, albeit indirectly, in cases where some other States are put at a disadvantage. In both scenarios, the treatment accorded will differ. By way of illustration, an investment screening measure implemented by Member A, and targeting investors from Member B, does not in itself grant an advantage to investors from Member C, at least not directly. Nevertheless, by limiting the competitive opportunities offered to investors from Member B, the measure will indirectly benefit investors from Member C, thereby resulting in discrimination. In that regard, the Appellate Body in *EC–Bananas III* confirmed that '"treatment no less favourable" in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination'.[58] For present purposes, this finding appears to entail that Article II:1 would not only be concerned with the manner in which a given ISM is legally designed. Article II:1 would also proscribe the biased application of an otherwise formally neutral ISM if it renders the latter discriminatory in practice. It should be noted that domestic screening laws applying different thresholds based on the origin of the investment(s) at issue – and which are by that very feature discriminatory – do not necessarily constitute a breach of Article II:1 if the beneficiary of the preferential treatment is a party to an agreement liberalising trade-in services as per Article V GATS (counterpart of Article XXIV GATT). The Investment Canada Act (ICA) is quite representative of such a scenario. Pursuant to the ICA a review and approval by the competent Canadian authorities may be carried out and required whenever a non-Canadian acquires control of a Canadian business. The ICA, however, sets different limits for WTO investors, on the one hand, and for trade agreement investors, on the other. More specifically, a combined reading of Article 14.1 (1) and (2) of the Act, along with the specific amounts as determined by the Minister on a yearly basis, indicate that for 2022 an investment by a WTO investor is reviewable if its value is equal or greater than 1.141 billion dollars, while an investment by a trade agreement investor is only reviewable if its value is equal or greater than 1.711 billion dollars.[59] Whereas such a differentiation is arguably discriminatory; it may nonetheless be consistent with the GATS, if it can be justified under Article V of the GATS.
While the MFN obligation contained in the GATS is a general obligation, it is not uniform follows a variable geometry approach. This is so because its scope is partially reduced by the exemptions made by some Members as per Article II.2 of the GATS. The latter provides that '[a] Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions'. These exemptions were allowed on a one-off basis at the entry into force of the GATS in 1995 (or at a subsequent date if the Members concerned only later acceded to the WTO).[60] For the most part, they do not seem to create an insurmountable hurdle to the application of the MFN obligation, at least in the specific con-

53 WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Panel Report* (22 May 1997) WT/DS27/R/USA, WT/DS27/R/MEX, WT/DS27/R/ECU [7.298].

54 WTO, *Canada – Certain Measures Affecting the Automotive Industry – Appellate Body Report* (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R [170].

55 WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Appellate Body Report* (9 September 1997) WT/DS27/AB/R [220].

56 WTO, *Canada – Certain Measures Affecting the Automotive Industry – Appellate Body Report* (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R [171].

57 R. Wolfrum, 'Article II GATS', in R. Wolfrum, P.-T. Stoll & C. Feinäugle (eds.), *WTO – Trade in Services* (2008) 73.

58 WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Appellate Body Report* (9 September 1997) WT/DS27/AB/R [234].

59 Canada Gazette, Part I, Volume 156, Number 9: Government notices (26 February 2022).

60 R. Adlung and A. Carzaniga, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' 12(2) *Journal of International Economic Law* 357-92 (2009).

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text of investment screening. Nevertheless, several Members have, in fact, listed MFN exemptions that apply to all sectors and are relevant to Mode 3.[61] For instance, Malaysia inscribed that 'measures in existing or future policies limiting foreign equity or interests in companies and businesses in Malaysia [which] shall be carried out in a preferential and differentiated manner' are exempted from the application of the MFN obligation in all sectors concerned and for an indefinite duration.[62] Given that the listing exemptions relating to ISMs has not been carried out on a widespread basis by WTO Members, the relevance of Article II.2 GATS is practically limited.

To conclude, Members enacting investment screening laws that are not origin-neutral and target specific countries will most likely breach the MFN obligation found in Article II:1 GATS. Members should therefore make sure that the screening mechanisms they employ remain origin-neutral (not only in law, but also in effect). Alternatively, they may want to rely on exceptions to justify otherwise inconsistent measures, that is, ISMs that would be in breach of Article II:1. These considerations seem to have been present during the drafting process of the EU FDI Screening Regulation, as Recital 35 provides, in part, that

> '[t]he implementation of this Regulation by the Union and the Member States should comply with the relevant requirements for the imposition of restrictive measures on grounds of security and public order in the WTO agreements, including, in particular, Article XIV(a) and Article XIV*bis* of the General Agreement on Trade in Services (GATS)'.[63]

3.3 Specific Commitments

The GATS also includes 'specific commitments', which are the result of Members' individual decisions to grant market access or national treatment to a certain degree, that is, for certain modes of supply and in predetermined sectors. The specific commitments are therefore optional and voluntary in nature and will vary from one Member to another. Nevertheless, once such commitments have been conceded by Members they must be complied with. Among the substantive provisions that only apply to the extent that a Member has made specific commitments regarding both a given sector and mode of supply, two are especially relevant in the present discussion, that is,[64] Article XVI of the GATS titled 'Market Access' and Article XVII titled 'National Treatment'.

3.3.1 Article XVI GATS: 'Market Access'

Article XVI:1 provides that Members should grant market access – or a 'treatment no less favourable' – to services and service suppliers of any other Member to the extent that they have committed to do so 'under the terms, limitations and conditions agreed and specified' in the relevant Schedule. Article XVI:2 provides a list of specific market access barriers that Members are forbidden to adopt or maintain. For example, Article XVI:2(f) provides that a Member cannot impose 'limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment'. The latter subparagraph would seem to prohibit some forms of foreign investment screening that a Member might choose to adopt. However, and most importantly, these market access barriers are conditioned by the phrase 'unless otherwise specified in [a Member's] Schedule'. As such, the scope of application of Article XVI can, in practice, be greatly reduced by a Member. Additionally, Article XVI:2 is to be read restrictively. Indeed, in *US – Gambling*, the Panel found that the list of market access barriers contained in Article XVII:2 is exhaustive.[65] In the latter case, the Panel notably held that 'the types of measures listed in the second paragraph exhaust the types of market access restrictions prohibited by Article XVI, in particular by the first paragraph of Article XVI'.[66]

3.3.2 Article XVII GATS: 'National Treatment'

Article XVII:1 sets out the national treatment obligation and provides that

> [i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Article XVII lacks a similar list of proscribed measures or types of measure to that included in Article XVI.[67] However, Article XVII:3 provides that

> [f]ormally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Such a distinction between 'formally identical treatment or formally different treatment' is also operated in

61 WTO Council for Trade in Services, Background Note by the Secretariat, 'Mode 3 – Commercial Presence' (7 April 2010) S/C/W/314, at 21, para. 62.

62 WTO, Malaysia – Final List of Article II (MFN) Exemptions (15 April 1994) GATS/EL/52.

63 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening of foreign direct investments into the Union, OJ L 79I, 21 March 2019, at 5.

64 For a discussion on Art. XVI of the GATS and the findings by the AB in *US—Gambling*, see L. Van Den Hende, 'GATS Article XVI and National Regulatory Sovereignty: What Lessons to Draw from *US—Gambling*?' 20(1) *Cambridge Review of International Affairs* 93, at 95 (2007).

65 WTO, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Panel Report* (10 November 2004) WT/DS285/R (Panel Report, *US – Gambling*) [6.259].

66 Panel Report, *US – Gambling*, [6.298].

67 M. Matsushita, T. Schoenbaum, P.C. Mavroidis & M. Hahn, *The World Trade Organization: Law, Practice, and Policy* (2015) 604; G. Muller, 'Troubled Relationships under the GATS: Tensions between Market Access (Article XVI), National Treatment (Article XVII), and Domestic Regulation (Article VI)', 7(3) *World Trade Review* 449, at 452 (2017).

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Article XVII:2. Theoretically, a wide range of ISMs (even indirect ones) could, therefore, fall foul of the national treatment obligation found in Article XVII. Secondly, another specific feature proper to the national treatment obligation contained in Article XVII is its conditional nature. Indeed, contrary to the national treatment obligation found in Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article XVII 'does not have … general application; it does not apply to all measures affecting trade-in services'.[68] Again, this is so because a WTO Member will only be bound by the national treatment obligation contained in Article XVII '*to the extent* that [it] has explicitly committed itself to grant "national treatment" in respect of the specific services sector concerned' and in respect of the specific modes of supply concerned.[69] To establish a breach of the national treatment obligation by one Member, a Panel will have to determine: (i) that a specific commitment has been undertaken by the Respondent in the specific sector and mode of supply concerned, (ii) that the Respondent has adopted a measure that affects the supply of services in that sector and mode of supply, (iii) and finally, that the measure at issue grants a less favourable treatment to the service suppliers of other Members as opposed to the service suppliers of the Respondent Member. An example of how Article XVII may potentially be relevant in the context of ISMs can be found in the Panel Report in *EU – Energy Package*. In examining whether the EU had acted inconsistently with its obligations under that provision, the Panel considered that to the extent domestic (pipeline transport) service suppliers are not subject to a 'security of energy supply assessment', whereas all third-country pipeline transport service Suppliers are,

> the measure in question places an additional burden on third-country service suppliers and thus modifies the conditions of competition in favour of domestic service suppliers compared to like service suppliers of other Members.[70]

By analogy, it could be argued that an ISM which is applied only to third-country service suppliers (in a sector where a country has made relevant commitments under Article XVII), would equally result in different and less favourable treatment to like services and service suppliers of other Members within the meaning of Article XVII GATS.

3.3.3 Areas of Uncertainty

Overlap between Article XVI and XVII GATS

A degree of overlap thus exists between Article XVI and Article XVII of the GATS. The imbrication between the two provisions stems from the fact that

> Article XVII GATS outlaws any form of discrimination [and] since [it] also applies to all measures affecting services supply, it *a fortiori* includes any discriminatory measure of the types mentioned under Article XVI:2 GATS and thus it overlaps with the latter.[71]

Article XVI:2(f) for instance, which sets out a prohibition for a Member to impose limitations on the participation of foreign capital, 'come[s] under the scope of both Articles XVI and XVII'.[72] An in-depth analysis of the relationship between these two provisions is beyond the scope of this study. Suffice it to say that such proximity regarding the scope of application of these provisions can lead to difficulties in practice,[73] especially because the GATS is silent on this issue.[74]

The first difficulty relates to the determination of the applicable provision, either Article XVI or Article XVII, to the measure(s) at issue.[75] In the event of overlap, which provision ought to apply? The answer to that question matters, as the normative content of both provisions differs; that of Article XVI has indeed been described as 'stricter and more demanding' than that of Article XVII.[76] This is so because the measures listed under Article XVI:2 GATS are prohibited irrespective of whether they are discriminatory or not. Article XVII only curtails Members' capacity to enact discriminatory measures.[77] Second, some further complications arise if a Member were to inscribe 'unbound' (lowest commitment possible) regarding market access in its Schedule of Commitments, and 'none' (no limitation made, i.e. highest commitment possible) regarding the national treatment obligation. In the latter scenario, the following question arises: can a Member which explicitly limits its market access commitments with regard to a particular sector and mode of supply (thereby remaining free to adopt the restrictions listed in Article XVI:2 GATS) still have its measure subjected to a national treatment commitment? This issue was addressed by the Panel in *China – Electronic Payment Services*. In the latter case, China inscribed 'Unbound' in the market access column of its Schedule for subsector (d) (all payment and money transmission services) and Mode 1 (cross-border supply); however, it inscribed 'None' (no limitations) in the national treatment column. In essence, the Panel had to determine 'the effect, if any, of

68 P. Van Den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization – Text, Law and Materials* (2017) 925.

69 Van Den Bossche and Zdouc, above n. 68, at 925.

70 WTO, *European Union and its Member States – Certain Measures Relating to the Energy Sector – Panel Report* (10 August 2018) WT/DS476/R. [7.1128-7.1129].

71 P. Delimatsis, 'Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US Gambling* Case', 40(6) *Journal of World Trade* 1059, at 1072 (2006).

72 Delimatsis, above n. 71, at 1072.

73 On this point, see Delimatsis, above n. 71, at 1072ff; G. Muller, 'Troubled Relationships under the GATS: Tensions between Market Access (Article XVI), National Treatment (Article XVII), and Domestic Regulation (Article VI)', 16(3) *World Trade Review* 449, at 453 (2017); see also G. Muller, 'National Treatment and the GATS: Lessons from Jurisprudence', 50(5) *Journal of World Trade* 819, at 822ff (2016); see also WTO, *China – Certain Measures Affecting Electronic Payment Services – Panel Report* (16 July 2012) WT/DS413/R [7.649]-[7.665].

74 Muller, above n. 73, at 453.

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

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China's market access inscription of "Unbound" on the scope of its national treatment commitment', a point on which the parties disagreed.[78] The Panel stopped short of instituting a substantive hierarchy between Articles XVI and XVII GATS, but it still found 'a certain *scheduling* primacy for entries in the market access column' as per Article XX:2.[79] The latter provides as follows: '[m]easures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well'. Importantly, Article XX:2 does not establish a hierarchy 'as to the substance of these two provisions'.[80] Rather, it is aimed at ensuring that Members do not involuntarily overcommit on national treatment.[81] In that regard, Delimatsis notes that

> no GATS provision gives an answer to the question of whether, in the presence of an unbound market access, the potentially overlapping measures inconsistent with both Articles XVI and XVII should be ruled by the existence of a national treatment commitment, or, rather, by the absence of a market access commitment.[82]

Notwithstanding this lack of textual support, in establishing a scheduling primacy, the Panel opted to view Article XVI as *lex specialis*.[83] In other words, measures that are listed in Article XVI:2 fall exclusively within the ambit of Article XVI (Art. XVII does not apply at all). The Panel's findings entail that Article XVII does not cover all discriminatory measures, but only those that are *not* listed in Article XVI:2. Consequently, the limitations made on market access by a Member will restrict the scope of application of its national treatment commitments. That is to say that a Member that has inscribed 'unbound' in the market access column with regard to a specific sector and mode of supply may maintain any measure that falls within one of the six subparagraphs of Article XVI:2 GATS, irrespective of the full national treatment commitments it may have inscribed.[84] Through the establishment of a scheduling primacy, and despite its statement that 'the main issue is not an ambiguity over the scope of Article XVI and the scope of Article XVII',[85] the Panel seems to have indirectly determined the scope of application of Article XVI and Article XVII,[86] thereby creating a certain substantive relationship between these two provisions (Art. XVI GATS having precedence) without textual legal basis. One commentator notes that

> [t]he Panel did not address the fact that a scheduling hierarchy necessarily dictates the underlying substantive relationship between disciplines – that if it is impossible to have just a scheduling rule that does not also require a particular view of the scope of application Articles XVI and XVII.[87]

It should be noted that the Appellate Body has not confirmed the Panel's findings; therefore, it is uncertain whether this view has properly crystallised in WTO jurisprudence.

In any case, the above analysis illustrates how a certain reading of these provisions may limit even more the applicability of the GATS disciplines that may be relevant to ISMs, in this case Article XVII. Members who remain 'unbound' as regards market access in a given sector will, in the process, also limit the application of Article XVII GATS with regard to the measures listed under Article XVI:2 GATS, even if these Members have made no limitations regarding the national treatment obligation in their Schedule.

The Uneven Applicability of the GATS to ISMs Implemented by WTO Members

Most importantly, the determination of whether Articles XVI and XVII are applicable at all in a given case – for example, where a Member has implemented investment screening laws – depends on the specific commitments made by the relevant Member. In other words, provided that the measure(s) at issue are origin-neutral and comply with the MFN obligation contained in Article II:1, the scope of application of the GATS and its relevance in the determination of whether a specific measure, such as foreign investment screening laws, complies with WTO law will depend on the Member(s) concerned. For instance, the EU's Schedule of Specific Commitments indicates that Spain limited its market access for investments specifically with regard to Mode 3 in the following way:

> Investment in Spain by foreign government and foreign public entities (which tends to imply, besides economic, also non-economic interests to entity's part), directly or through companies or other entities controlled directly or indirectly by foreign governments, need prior authorization by the government.[88]

78 WTO, *China – Certain Measures Affecting Electronic Payment Services – Panel Report* (16 July 2012) WT/DS413/R [7.649].

79 WTO, *China – Certain Measures Affecting Electronic Payment Services – Panel Report* (16 July 2012) WT/DS413/R [7.664].

80 Delimatsis, above n. 71, at 1073.

81 *Ibid.*; see also R. Block, 'Market Access and National Treatment in China-Electronic Payment Services: An Illustration of the Structural and Interpretive Problems in GATS', 14(2) *Chicago Journal of International Law* 652, at 679-80 (2014).

82 Delimatsis, above n. 71, at 1073.

83 See on this issue, Delimatsis, above n. 71, at 1074.

84 WTO, *China – Certain Measures Affecting Electronic Payment Services – Panel Report* (16 July 2012) WT/DS413/R [7.663]; see also Muller, above n. 73, at 455.

85 WTO, *China – Certain Measures Affecting Electronic Payment Services – Panel Report* (16 July 2012) WT/DS413/R [7.656]; Bock posits that '[i]n denying that there is any ambiguity about the scope of, and hierarchy between, Articles XVI and XVII, and instead locating the source of ambiguity in the *inscription* of unbound limitations on market access and no limitations on national treatment in China's schedule, the Panel appears to be trying to limit the scope of its decision', see Block, above n. 73, at 681, footnote 142.

86 Muller, above n. 73, at 455.

87 Block, above n. 81, at 682.

88 WTO, 'European Union – Schedule of Specific Commitments' (7 May 2019) GATS/SC/157, at 8.

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Therefore, beyond the MFN obligation, which is a general obligation that applies to all Members and whose importance has been highlighted earlier – a definite assessment of the potential (il)legality of ISMs by a Member against the supplier of a service from another Member is not feasible in the abstract, and we only attempted here to touch upon the main legal issues that may arise from an international trade law perspective as well as evaluate the general applicability, and thereby relevance, of the GATS in this context. Beyond the limited and variable specific commitments entered into by WTO Members, another reason why the protections offered by the GATS should not be played up in the context of ISMs relates to general and security exceptions. One commentator rhetorically asks the following question:

> while several WTO members … made reservations in their GATS Mode 3 commitment schedules about certain foreign-controlled investments, one could wonder whether making such reservations … is not superfluous in the light of the lax approach to national security exceptions across the board in the international trading system?[89]

The next section is dedicated to a relatively broad analysis of the role played by general and security exceptions and the manner in which they might be used by WTO Members to justify otherwise inconsistent ISMs.[90]

3.4 General and Security Exceptions

The following analysis attempts to determine whether – and to what extent – general and security exceptions can lessen the prospect that a WTO Member sees its ISMs ruled as inconsistent with its WTO rights and obligations. This examination will help us determine a bit more the overall relevance of GATS disciplines with respect to such measures.

3.4.1 Article XIV GATS

In the GATS framework, Article XIV plays the role of the general exception provision, similar to that played by Article XX in the GATT 1994. Admittedly, the former's contribution is less vital in light of the conditional and flexible nature of GATS commitments under Articles XVI and XVII.[91] In fact, the possibility for Members to tailor their commitments might explain why the case law regarding Article XIV is rather scarce compared to that developed with respect to its counterpart; consequently, the WTO adjudicative bodies have interpreted Article XIV in light of the jurisprudence of Article XX GATT 1994. A distinctive feature differentiating Article XIV from Article XX is the added phrase 'public order' in subparagraph a).[92] Theoretically, a reference to 'public order' could be made in an investment screening measure implemented by a WTO Member in the hope to be 'saved' under Article XIV.[93] More generally, one could conceive a situation where a WTO Member invokes Article XIV to justify an investment screening measure that was deemed 'necessary to protect human, animal or plant life or health' as per subparagraph b), or

> necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS] including those relating to … the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts

as per subparagraph c) (ii). Once a measure has been provisionally justified under a subparagraph, it will still have to comply with the *chapeau*, whose main function 'is generally the prevention of "abuse of the exceptions …"'.[94] In essence, '[t]he focus of the chapeau, by its express terms, is on the application of a measure'.[95] Therefore, Members who invoke Article XIV in the hope of seeing their investment screening measure justified would do well to make sure the latter is not applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

3.4.2 Article XIVbis GATS

Following the same parallelism as with the general exceptions, Article XIV*bis* is to the GATS what Article XXI is to the GATT 1994, that is, the security exception. Arguably, Article XIV*bis* may play an even bigger role than Article XIV in allowing Members to adopt ISMs. Formally, Article XIV*bis* is phrased as a carve-out rather than an exception *stricto sensu* ('Nothing in this Agreement shall be construed'). The former operates to 'exclude a given measure from the scope of one or more primary norms' which differs 'from a situation where the primary norm applies to the measure but the tribunal, after assessing the facts, concludes that there is no breach'.[96] This procedural point bears some practical importance as to the burden of proof.

89 J. Chaisse, J. Górski & D. Sejko, 'Confronting the Challenges of State Capitalism: Trends, Rules, and Debates', in J. Chaisse, J. Górski & D. Sejko (eds.), *Regulation of State-Controlled Enterprises: An Interdisciplinary and Comparative Examination* (2022) 13.

90 For an in-depth analysis of Art. XIV of the GATS, see P. Delimatsis and L. Gargne, 'General Exceptions under the GATS: A Legal Commentary on Article XIV GATS', 27 *TILEC Discussion Paper Series* (2020).

91 Delimatsis and Gargne, above n. 90, at 3.

92 *Ibid.*, at 6.

93 See regarding the term 'public order' in the context of exceptions contained in IIAs, Voon and Merriman, above n. 1, at 37.

94 WTO, *United States — Standards for Reformulated and Conventional Gasoline – Appellate Body Report* (29 April 1996) WT/DS2/AB/R, at 22; see also P.C. Mavroidis, *Trade in Goods* (2012) 355.

95 WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Appellate Body Report* (7 April 2005) WT/DS285/AB/R [339]; see also WTO, *United States — Standards for Reformulated and Conventional Gasoline – Appellate Body Report* (29 April 1996) WT/DS2/AB/R, at 22; WTO – Brazil — Measures Affecting Imports of Retreaded Tyres – Appellate Body Report (3 December 2007) WT/DS332/AB/R [215].

96 J.E. Viñuales, 'Seven Ways of Escaping a Rule – Of Exceptions and Their Avatars in International Law', in L. Bartels and F. Paddeu (eds.), *Exceptions in International Law Lorand* (2020) 69-70.

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Indeed, pursuant to the well-established adage *onus probandi actori incumbit*, it is for the complaining party to prove its claims and allegations. However, the onus will be placed differently depending on whether the provision at issue is interpreted as a regular exception or as a carve-out. As noted by Pauwelyn, in the case of an exception *stricto sensu*

> the rule is, at least prima facie, breached (breach to be established by the claimant) but the limited exception to the rule (to be established by the respondent) nonetheless allows for the measure or conduct.[97]

Inversely,

> when faced with a rule exemption relation, the exemption … excludes a situation from the scope of application of the rule [and] it is for the claimant to demonstrate that the rule it claims is violated applies and that the exemption (or alternative rule) does not apply.[98]

In the latter case, and theoretically, a Member that put in place an ISM that is challenged before the WTO adjudicative bodies would not bear the burden of proof and would not have to prove the application of the exception; it would be for the complainant to demonstrate that the exemption is not applicable to the facts at hand and that the ISM does not elude the scope of application of the primary norm. It should be emphasised here that in spite of its characteristic phrasing typical of carve-out clauses, and irrespective of some ambiguity introduced by the order of analysis adopted by the Panel in *Russia–Traffic in Transit*, Article XIV*bis* is arguably more likely to be interpreted as an exception *stricto sensu* (see the following discussion).

Specifically, Article XIV*bis*:1 addresses three alternative scenarios. It provides that '[n]othing in this Agreement shall be construed' '(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests' or '(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests' or finally, '(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'. Article XIV*bis*:1 lit. b) is further defined by three subparagraphs. The essential security interests at play may either relate (i) 'to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment', (ii) 'to fissionable and fusionable materials or the materials from which they are derived' or (iii) 'taken in time of war or other emergency in international relations'.

Article XIV*bis*:1(b) will be the main focus here, as it arguably is 'at the heart of the provision and the most difficult part from the point of view of interpretation'.[99] Its counterpart, Article XXI(b) GATT 1994, has also been described as 'the most important and controversial portion of this exception'.[100] The controversial aspect of this provision is not hard to grasp. The main concerns relate to 'the ambiguity of the scope of "security interests"', 'the self-defining nature of the security exception' and the fear that Members would rely on it to adopt measures 'without identifiable standards and without any accountability or effective retaliatory remedy'.[101] These concerns are perhaps best embodied in Professor John H. Jackson's remark that Article XXI 'provide[s] a dangerous loophole to the obligations' of the Agreement.[102] Naturally, Article XIV*bis* and Article XXI also fulfil an essential function, namely that of 'indispensable escape mechanism or safety valve'[103] and allow the reconciliation of conflicting interests, some of which relate to Member's liberalisation commitments, some of which are not economic in nature and go to the very heart of a State's sovereignty. Nevertheless, the concerns highlighted above are not ill-founded, and the manner in which Article XIV*bis* and Article XXI are read is decisive. A number of these issues were debated before a WTO Panel for the first time in the recent case *Russia–Traffic in Transit*, in which the Panel ruled on several key aspects of Article XXI GATT 1994.[104] An extensive review of the findings reached by the Panel is beyond the scope of the present paper. Nevertheless, it appears helpful to touch upon some of the main points discussed in the case, as it may provide more clarity regarding several interpretative issues. Most notably, the Panel held that the adjectival clause 'which it considers' – which is included in the chapeau of Article XXI(b) (and Article XIV*bis*) – 'does not extend to the determination of the circumstances in each subparagraph'.[105] In other words, whether a measure meets the requirements of one of the three subparagraphs of Article XXI(b) depends on an objective assessment and review to be conducted by the Panel.[106] In doing so, the Panel arguably attempted to somewhat bridle what would otherwise have been complete and unfettered discretion left to invoking Mem-

97 J. Pauwelyn, 'Defences and the Burden of Proof in International Law', in L. Bartels and F. Paddeu (eds.), *Exceptions in International Law Lorand* (2020) 97.

98 *Ibid.*, at 97.

99 P. Delimatsis and O. Hrynkiv, 'Security Exceptions under the GATS – A Legal Commentary on Article XIVbis GATS', 26 *TILEC Discussion Paper* 21 (2020).

100 R. Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does', 19(2) *University of Pennsylvania Journal of International Law* 263, at 267 (1998); See also S.M. Blanco and A. Pehl, *National Security Exceptions in International Trade and Investment Agreements – Justiciability and Standards of Review* (2020) 8.

101 For an account of these issues, see W.A. Cann, 'Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism', 26 *Yale Journal of International Law* 413, 414, 416 (2001).

102 J.H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (1969) 748.

103 Cann, above n. 101, at 417; see also Dimitropoulos, above n. 4, at 534.

104 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R.

105 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.101].

106 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.102].

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bers. After having established that Article XXI(b) is not entirely self-judging, the Panel went on to find that 'it is left, in general, to every Member to define what it considers to be its essential security interests',[107] which the Panel considered to be

> 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.[108]

While one may argue that this finding somewhat conditions Members' discretion,[109] it arguably still leaves a significant margin of appreciation to Members who retain the power – within a wide perimeter – to determine their essential security interests.[110]

Importantly, the Panel made sure to restrain this substantial room for manoeuvre through the 'obligation [for invoking Members] to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith'.[111] This obligation also extends to the nexus between the essential security interests claimed and the measure(s) at issue, which must meet 'a minimum requirement of plausibility ... as protective of these interests'.[112] The Panel Report was of course rendered in an Article XXI case; nevertheless, in light of the similar wording used in both security exceptions, the findings reached by the Panel certainly bear some weight as regards the reading one should give to Article XIV*bis*.[113] In any case, it is important to note that the Panel Report was not appealed; hence, the above findings do not have the same authority as if they had been reached by the Appellate Body, and future Panels might still veer in a different direction.[114] Such does not seem to have been the case so far, however, as evidenced by the fact that in the subsequent case *Saudi Arabia–IPRs*, the Panel assessed the invocation of Article 73(b)(iii) TRIPS – whose wording is identical to that of Article XXI(b)(iii) – by following the 'analytical framework' developed by the Panel in *Russia–Traffic in Transit*.[115] One notable difference between the two cases, however, relates to the different order of analysis adopted by the two Panels. In a noteworthy departure from previous case law regarding Article XX,[116] the Panel in *Russia–Traffic in Transit* opted to first determine whether it had jurisdiction to review Russia's invocation of Article XXI(b)(iii).[117] Only after that analysis was conducted would the Panel look at whether any of the measures at issue had actually breached the relevant primary rules, that is, Articles V and X GATT. In contrast, the Panel in *Saudi Arabia–IPRs* reaffirmed and applied the traditional order of analysis based on which Panels

> begin with an examination of the claims of inconsistency with the relevant covered agreement, to be followed, if any such inconsistency were found to exist, with an assessment of whether the aspect(s) of the measure(s) at issue would be covered by one or more exceptions.[118]

The order of analysis adopted by the Panel in *Russia–Traffic in Transit* may seem to suggest that it read Article XXI as a carve-out. However, this assumption is not validated by the manner in which the Panel placed the burden of proof onto the parties (see discussion at the beginning of the present section). Notably, the Panel found that it is 'incumbent on the invoking Member [i.e., the Respondent] to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity'.[119] Such an allocation arguably fits with an understanding of Article XXI as an exception *stricto sensu*. The construction of Article XXI(b) as an exception is also reasserted by the Panel in *US–Steel and Aluminium Products* in which it stated that '[i]n providing for "any action" that "[n]othing in this Agreement shall be construed ... to prevent", Article XXI(b) establishes an exception to obligations under other provisions of the GATT 1994'.[120] This is consistent with the order of analysis adopted by the Panel in this case, which consisted in an assessment of the consistency of the measures at issue with the relevant obligations before proceeding to tackle the US's invocation of Article XXI(b).[121] The Panel in *US–Origin Marking* also characterises Article XXI as an exception.[122] However, in the latter case, the Panel reverted back to the rather unexpected order of analysis adopted in *Russia–Traffic in Transit*. Indeed, the Panel decided to consider first the reviewability of action un-

107 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.131].

108 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.130].

109 P. Crivelli and M. Pinchis-Paulsen, 'Separating the Political from the Economic: The Russia–Traffic in Transit Panel Report', 20(4) *World Trade Review* 582, at 590 (2021).

110 In that respect, some commentators have noted that '[t]he panel largely leaves the determination of what are "essential security interests" and whether the measures taken are "necessary" to the invoking Member', see P. Van den Bossche and S. Akpofure, 'The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994', WTI Working Paper No. 03/2020 (2020).

111 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.132].

112 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.138].

113 See notably, T. Voon, 'Russia—Measures Concerning Traffic in Transit', 114(1) *American Journal of International Law* 96, at 100 (2020).

114 *Ibid.*, at 101: 'As the Panel Report was not appealed, a future Panel could still depart from the reasoning of this Panel, whereas a Panel might ordinarily be expected to follow adopted Appellate Body Reports'.

115 WTO, *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights – Panel Report* (16 June 2020) WT/DS567/R [7.241].

116 V. Lapa, 'The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?' Zoom-in 69 *Questioni di Diritto Internazionale* 11 (2020).

117 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.25].

118 WTO, *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights – Panel Report* (16 June 2020) WT/DS567/R [7.6].

119 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.134].

120 WTO, *United States–Certain Measures on Steel and Aluminium Products – Panel Report* (9 December 2022) WT/DS544/R [7.110].

121 WTO, *United States–Certain Measures on Steel and Aluminium Products – Panel Report* (9 December 2022) WT/DS544/R [7.9]-[7.10].

122 WTO, *United States–Origin Marking Requirement – Panel Report* (21 December 2022) WT/DS597/R [7.109].

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der Article XXI(b) of the GATT 1994 given that based on the outcome of this determination, 'it may not be necessary to make any other findings, at least under Article IX:1 of the GATT 1994, as these would not contribute to the positive resolution of the dispute'.[123] Again, while this order of analysis might appear logical from the point of view of judicial economy, it seems in fact rather discordant with the nature of Article XXI(b) of the GATT 1994, that of an exception *stricto sensu* requiring that an inconsistency with a primary norm be first demonstrated by the complainant. Consequently, there appears to be a real split in the methodology and analytical order employed by Panels regarding Article XXI. The specificity and particularity of measures, circumstances or claims, which vary from case to case, do not seem to offer an entirely satisfactory explanation to such variability.

In any event, for present purposes, the findings reached in *Russia–Traffic in Transit* beg the question: could foreign ISMs benefit from Article XIV*bis*:1 lit. b) (iii)? The answer to that question does not only depend on the characterisation of its essential security interests by the invoking Member concerned. Following the Panel's findings in *Russia–Traffic in Transit*, an objective determination of whether the measure(s) at issue were 'taken in time of war or other emergency in international relations' will have to be made. Ultimately, the availability of this provision hinges on how strict an interpretation one should ascribe to the phrase 'emergency in international relations'. In that respect, the Panel noted that 'political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)'.[124] Rather, the Panel held that such an emergency referred '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'.[125] Moreover, the two concepts answer each other, so to speak. In that regard, the Panel held that 'the less characteristic … the "emergency in international relations" invoked by the Member [is] [the more] a Member would need to articulate its essential security interests with greater specificity'.[126] At first sight, and provided these findings are fully transferable to Article XIV*bis*, Members would be hard-pressed to justify foreign ISMs that were taken in a context of heightened commercial or diplomatic tension, for instance. Consequently, one may be tempted to think that these findings put a damper on any aspiration Members might have had to utilise subparagraph (iii) to justify a restrictive investment screening measure. Nevertheless, there is no denying that the concept of national security has evolved over time, just as the types of threats a country may fall victim to. One commentator underscores such evolution away from purely traditional military threats towards 'a variety of non-military security concerns that are equally regarded as essential, such as the protection from the threat of nuclear contamination, severe economic crises and attempted foreign control of domestic strategies'.[127] In the latter scenario, one can easily imagine that the predatory, ill-intentioned acquisition of pharmaceutical companies by foreign governments – in the context of a global pandemic, for instance – be characterised as an 'emergency in international relations' due to the 'general instability engulfing or surrounding a state' that such action would create. Moreover, the findings made by the Panel in *Russia–Traffic in Transit* have recently been nuanced by the Panel in *US–Origin Marking* in the following way:

> [i]n our view, given the gravity of the situation that we believe the concept of 'emergency in international relations' entails, we would expect defence and military matters to normally be implicated. At the same time, recognizing that each situation will need to be considered on its individual merits, we would refrain from suggesting that an emergency must necessarily involve defence and military interests, as the panel in *Russia – Traffic in Transit* seems to suggest.[128]

Finally, let us not forget that Members can make use of the other paragraphs of Article XIV*bis*:1 as well as the other subparagraphs of Article XIV*bis*:1(b), which provide as many grounds for a challenged measure to be considered compliant.

3.5 Concluding Remarks on the Relevance of the GATS

Beyond the general MFN obligation found in Article II:1, the applicability of the GATS is limited by two important factors.[129] First, the GATS does not automatically discipline the imposition by Members of investment restrictive measures insofar as Members must first voluntarily liberalise trade-in services by making specific commitments regarding certain sectors and modes of supply. In practice, a Member can therefore tailor its commitments to its liking. Furthermore, Members who decide to remain 'unbound' as regards market access in a given sector will, in the process, also limit the application of Article XVII GATS with regard to measures listed under Article XVI:2 GATS. This is so even if these Members have made no limitations regarding the national treatment obligation in their Schedule and have, therefore, made a full commitment on national treatment. Secondly, WTO Members may choose to rely on general or security exceptions to justify their measures. Security exceptions in particular are a source of uncertainty due to their po-

123 WTO, *United States–Origin Marking Requirement – Panel Report* (21 December 2022) WT/DS597/R [7.20].

124 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.75].

125 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.76].

126 WTO, *Russia–Measures Concerning Traffic in Transit – Panel Report* (5 April 2019) WT/DS512/R [7.135].

127 Ishikawa, above n. 4, at 92-3.

128 WTO, *United States–Origin Marking Requirement – Panel Report* (21 December 2022) WT/DS597/R [7.301].

129 M. Matsushita, T. Schoenbaum, P.C. Mavroidis & M. Hahn, *The World Trade Organization: Law, Practice, and Policy* (2015) 783.

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tentially broad application in light of the extensive discretion left to Members to identify what their security interests are. While fulfilling an important balancing function in the GATS framework, Article XIV*bis* has the potential to be misused. In effect, there are many ways for Members to make sure the GATS does not apply to their ISMs.

4 Investment Screening and IIAs

Having analysed the relevance and applicability of the GATS, we examine the commitments entered into by States in IIAs. It should be noted that ISMs are typically not explicitly addressed in IIAs.[130] This is not to say that the provisions and standards of protection IIAs include do not apply to such mechanisms. As the following analysis will show, the protective measures that a State might have adopted may be found to have breached them and, consequently, expose that State to liability. The outline of this section will follow the chronological distinction between the pre- and post-establishment phases, that is, before and after the investment has been made.

4.1 Pre-Establishment Phase vs. Post-Establishment Phase

4.1.1 Pre-Establishment Phase

It is essential to clarify the relationship between the pre-establishment phase of an investment and the protections offered under IIAs. Doing so will help shed light on the issue of whether these protections are available to foreign investors in the event that investment screening takes place, which, more often than not, happens *ex ante*. In other words, can a foreign investor benefit from the standards of protection usually found in IIAs, even though the investment has yet to be made? How can the screening of prospective inward investments fall foul of investment treaty protections if these investments do not exist yet? These questions are of particular relevance to the present inquiry, as it is precisely in situations where the application of these protections extends to the pre-establishment phase that the perhaps more unexpected conflicts between domestic law and international investment law occur. The availability of treaty protections will vary depending on the specific language used in the IIA in question. In that regard, both *relative* standards of treatment (such as those reflected in the national treatment and MFN principles), and *non-contingent* ones (such as expropriation or the fair and equitable treatment) are relevant. For instance, national treatment and MFN treatment obligations extend to the pre-establishment phase in a number of treaties that are typically those of developed countries, 'reflecting outward rather than inward investment interests'.[131] However, most IIAs do not allow the application of these relative standards of treatment to the pre-establishment phase; the same observation holds true as regards expropriation and the FET standard.[132]

4.1.2 Post-Establishment Phase

Alternatively, conflicts may also arise when the screening of inward investments takes place after the investment has been established. Notably, this can happen in two scenarios. First, some screening mechanisms may only be triggered if a certain threshold is reached. Therefore, an investment that does not initially cross the relevant threshold may not be vetted at first. In the event that an expansion of the original investment is subsequently carried out – bringing it beyond the threshold – the following question arises: is the screening still taking place before the establishment of the investment and is the latter protected? Pohl submits that '[a]n investment originally not subject to screening would not necessarily lose its investment treaty protection, just because the expansion of such an investment were subject to screening and eventually prohibited'.[133] The author further posits that even though the review of the expansion by the State is conducted before it is realised, because an initial investment had been made already, such review and/or screening is considered to intervene in the post-establishment phase.[134]

Secondly, the scope of application of some screening regimes extends to the post-establishment phase. Such is the case in the Netherlands where both the pre- and post-establishment phases are dealt with in the law.[135] Indeed, Wet Vifo does not only address reviews taking place at the pre-establishment phase, but also addresses the situation where the investment has already been made.[136] Article 15(1) provides that in the event the Minister of Economic Affairs and Climate Policy has announced that a review decision on a notified proposed investment is required, but that the investment still

130 J.H. Pohl, 'The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms', in S. Hindelang and A. Moberg (eds.), *YSEC Yearbook of Socio-Economic Constitutions 2020 – A Common European Law on Investment Screening (CELIS)* (2021) 726.

131 Voon and Merriman, above n. 1, at 17-18. See, e.g., Art. 5 of Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model, which refers, in part, to 'the establishment, acquisition … of an investment in its territory'. See also Art. 3 of the 2012 US Model BIT, which uses similar language.

132 Voon and Merriman, above n. 1, at 17-18.

133 Pohl, above n. 130, at 741.

134 *Ibid.*

135 For reference, the pre-establishment phase is governed by Art. 12 Wet Vifo. Art. 12(1) provides that the Minister of Economic Affairs and Climate Policy shall inform the concerned person whether a review decision is needed within eight weeks, which can be extended up to six months under Art. 12(3). Pursuant to Art. 12(5) the review decision itself shall be issued within eight weeks, which can also be extended up to six months (less the time used as part of the extension under Art. 12(3)). Moreover, pursuant to Art. 12(8), that six month-extension – which is common to both the decision as to whether a review is required and the review itself – can be further extended by up to three additional months in case the proposed investment in question falls within the ambit of Regulation (EU) 2019/452.

136 The following account of the legislation loosely translates and paraphrases the text of the Bill, in Dutch in its original version.

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went through without such review being conducted, the Minister shall, *ex officio*, take a review decision and assess the investment in question against national security threats. Article 15(3) specifies that such review shall be carried out by the Minister within eight weeks of becoming aware that the investment has taken place or within eight weeks after notification that a review decision is required (in case the notification was not yet made when the Minister became aware of the investment). Pursuant to Article 18(1), this timeframe can be extended up to six months. The latter extension can itself be extended another three months in case the proposed investment falls within the ambit of the EU's FDI Screening Regulation. To conclude, in a situation where the review decision by the Minister intervenes after the investment has been made, chances are that from an international investment law perspective, the investment may be considered as existing and protected already, which places the screening in the post-establishment phase.[137]

4.2 Shielding ISMs from the Application of IIAs: An Overview of Anticipatory or Circumvention Techniques

One way ISMs may elude the scope of investment treaty protections is for treaty drafters to list investment screening laws as nonconforming measures (NCMs) in the relevant treaty, which as noted by Voon and Merriman, 'allow host States to maintain specified measures that may not conform to particular obligations'.[138] Illustratively, Article 14.12(1)(a) of the United States–Mexico–Canada Agreement (USMCA) titled 'Non-Conforming Measures' excludes the application of, inter alia, Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment) and Article 14.10 (Performance Requirements) to 'any existing non-conforming measure that is maintained by a Party … as set out by that Party in its Schedule to Annex I'. Both Annex 1 by Canada and Annex 1 by Mexico list measures pertaining to the admission of investments within their territories.[139] Arguably, the inclusion of such NCMs will bring a certain level of protection to host States in terms of allowing them to maintain a degree of regulatory leeway and ensure that their screening laws do not clash with their liberalisation commitments under IIAs. Nevertheless, host States ought to make sure that the specified measures are broad enough to encompass amendments in their screening rules.[140] This is especially so in the case of 'ratchet obligations', which allow amendments to specified NCMs only to the extent that they do not decrease the conformity of the measure any further.[141] In such a scenario, broadening the scope of reviewable transactions or reducing the relevant screening threshold might not be covered by the NCMs in question and the relevant standards of protection might apply again. In fact, the aforementioned USMCA provision includes such a limitation, as Article 14.12(1)(c) USMCA provides that the relevant standards of protection do not apply to 'an amendment to any non-conforming measure referred to in subparagraph (a) *to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment*'.[142]

Although different in nature, sectoral restrictions operate in a similar way to NCMs, at least when they are formulated following the 'negative list approach'.[143] In the latter case, treaty drafters exclude specific sectors from the scope of application of the commitments contained in the IIA. Article 8.6(2) of the EU-Japan excludes 'cabotage in maritime transport services', 'air services' and 'audio-visual services' from the scope of application of its investment liberalisation section.

Sovereign States might also opt to exclude their screening laws from the scope of Investor-state dispute settlement (ISDS). One example is the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. Article 8.45 CETA exclude matters referred to in Annex 8-C – which relate to a 'decision by Canada following a review under the *Investment Canada* Act, R.S.C. 1985, c. 28 (1st Supp.), regarding whether or not to permit an investment that is subject to review' – from the scope of the dispute settlement provisions of the agreement.[144] One caveat here relates to the fact that the interpretation of such a clause might be carried out by the arbitral tribunal itself, which might give rise to uncertainty as well as inconsistency in their application.[145] One important case with regard to such carve-outs is the *Global Telecom* v. *Canada* case, in which the tribunal notably had to interpret Article II. 4(b) of the Canada-Egypt BIT. The latter provision reads as follows:

> [d]ecisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XIII of this Agreement [on the Settlement of Disputes between an Investor and the Host Contracting Party].

The tribunal found that the provision did not apply and, by extension, that it did not exclude jurisdiction as regards reviews carried out under the Investment Canada Act.[146] The tribunal based its decision on the finding

137 Pohl, above n. 130, at 742.
138 Voon and Merriman, above n. 1, at 34.
139 Available at Office of the United States Trade Representative, Agreement between the United States of America, the United Mexican States and Canada, 7/1/20 Text, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited 7 November 2022).
140 Voon and Merriman, above n. 1, at 35.
141 See Ishikawa, above n. 1, at 86 citing Art. 9.12 CPTPP. See also Voon and Merriman, above n. 1, at 35.
142 Emphasis added.
143 Voon and Merriman, above n. 1, at 36.
144 See Pohl, above n. 130, at 726; see Voon and Merriman, above n. 1, at 32-3.
145 See *Global Telecom* v. *Canada*, cited in Voon and Merriman, above n. 1, at 32.
146 *Global Telecom Holding S.A.E.* v. *Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020) paras. 325-326; see also, e.g., J. Paine, '*Global Telecom Holding* v. *Canada*: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties', 38(4) *Journal of International Arbitration* 544 (2021).

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that it 'must determine the scope of its jurisdiction with reference to the terms of the BIT' and that there is no specific reference to the ICA in the BIT even though the former predates the latter.[147] It is interesting to distinguish the latter omission with the above quoted Article 8.45 CETA, which includes an explicit reference to the ICA. *Global Telecom* v. *Canada* certainly demonstrates the great care with which parties ought to draft such clauses.

Finally, States may choose to invoke general or security exceptions in order to justify the adoption of ISMs. While older IIAs did not typically contain such provisions, more recent IIAs increasingly include exceptions mirroring those found under the GATT or the GATS.[148] However, relying on these security exceptions is not without its uncertainties. Indeed, the growth in the number of essential security interest (ESI) clauses finding their way in IIAs over the years has led to some interpretative difficulties. As a consequence, arbitral case law is rather inconsistent as regards the application of these clauses. The recent awards rendered in *CC/Devas* v. *India*[149] and *Deutsche Telekom* v. *India (DT)*[150] bear witness to this unfortunate variability in the decisions reached by different panels. The inconsistency in interpretation is all the more striking that the same set of circumstances underlies these two disputes.[151] This is certainly reminiscent of the arbitral saga and of the divergent results reached in the disputes that arose out of the Argentinian crisis in the late 1990s and early 2000s. As with Article XXI(b) GATT and XIVbis GATS, the extent to which these essential security clauses are self-judging is a predominant matter. It should be noted that while arbitrators in an investment dispute may be influenced by the recent findings on security exceptions reached by WTO Panels, which we looked at earlier, they are certainly not bound by them. In any case, the relevance of these Panel Reports is to some extent limited by the fact that they do not seem to entirely crystallise a coherent and homogeneous jurisprudence on the matter, which is partially due to the lack of review by the Appellate Body.

147 *Global Telecom* v. *Canada*, para. 326.

148 See C. Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?' 59(8) *Boston College Law Review* 2825 (2018), who notes that 'Exceptions have become an increasingly popular mechanism in investment treaties, appearing in 43% of investment agreements concluded between 2011 and 2016, compared to 7% of agreements signed between 1959 (when the first investment treaty was signed) and 2010'; see also L. Knight and T. Voon, 'The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China', 21(1) *Journal of World Investment and Trade* 104, at 108 (2020); see also Dimitropoulos, above n. 4, at 535.

149 *CC/Devas (Mauritius) Ltd* v. *India*, PCA Case No 2013–09, Award on Jurisdiction and Merits (25 July 2016).

150 *Deutsche Telekom AG* v. *India*, PCA Case No 2014–10, Interim Award (13 December 2017).

151 See, e.g., R. Kabra, 'Return of the Inconsistent Application of the "Essential Security Interest" Clause in Investment Treaty Arbitration: *CC/Devas* v. *India* and *Deutsche Telekom* v. *India*', 34(3) *ICSID Review* 723-53 (2019).

5 Conclusion

An increasing number of countries worldwide have instituted foreign investment screening regimes and introduced ISMs. The latter may be triggered by a myriad of factors, such as the overall value of the investment at issue, the origin of the investment, the degree of ownership of foreign entities, or whether the destination of the investment is a sector considered strategically sensitive. Fundamentally, national security considerations are the engine of this shift towards more control over inward flows of foreign investment. This paper aimed to offer a general analysis of the potential conflicts such a development may cause with regard to States' obligations on the international plane. As a matter of principle, international law does not seem to curtail the introduction of such mechanisms by host States. However, the same cannot be said of more specialised regimes. In that regard, both the relevance of the disciplines found in the GATS as well as the standards of protection offered in IIAs were examined. While Articles XVI (market access) and XVII (national treatment) of the GATS only apply to the extent that Members have made specific commitments regarding both a given sector and mode of supply, Article II:1 GATS (MFN) sets out a general obligation that applies to all Members. Therefore, WTO Members intending to put ISMs in place should make sure that these mechanisms are origin-neutral and comply with the latter provision. Should an investment screening measure be deemed inconsistent, it would be judicious for Members to design their measures in a way that allows them to invoke exceptions successfully. In that regard, we explored both the roles, and applicability, of Article XIV (general exceptions) and Article XIV*bis* (security exceptions). With respect to IIAs, an examination of whether the provisions and standards of protection they include apply to ISMs, and whether a State may be found to have breached them, greatly depends on the phase that the investment is in, that is, whether it is prospective (pre-establishment) or already existing (post-establishment). Ultimately, the specific language used in the IIAs in question will be decisive. Nevertheless, certain overall trends may be perceived. Most IIAs do not allow the application of relative standards of treatment and non-contingent ones to the pre-establishment phase. The risk that ISMs fall foul of these standards of protection in the post-establishment phase is, however, quite blatant. In this respect, we explored ways in which host States may attempt to shield their ISMs from the application of IIAs.

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