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A Scrutiny of Foreign Direct Investment Regulation in Light of Evolving National Security Concerns in International Investment Law

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Abstract

In the last three decades, international investment has grown fast. It has impacted almost every state and all sectors of the economy. However, nowadays, the increase in the flow of FDI from developing and emerging countries to developed economies resulted in the adoption of FDI screening on national security grounds. For this, among other things, the sudden relevance of Sovereign Wealth Funds, the changing national security environment, the need to protect core or foundational technologies or critical infrastructures, strategic sectors or industries, and the fear of the socioeconomic effects of M&As of domestic firms by foreigners become evolving national security threats and to introduce tight national security review system.

Though national security is a buzzword, still it lacks a definite meaning in international investment law. Thus, there are times when FDI screening systems use it as a disguise protectionist measure, or as a tool to pursue other economic or strategic goals not achievable by domestic investment and other related laws. Due to its evolving, ambiguous, and context-specific nature of national security and security-related grounds, FDI screening systems' scope of review becomes broader. This problem would be worse when a dedicated policy, legal rules, and institutional structures are absent. For this, this article is aimed at demystifying its meaning, application, and effects of evolving national security in different U.S., China, and EU screening systems.

Keywords: *International Investment Law, Evolving National Security Concerns, FDI Regulation, FDI Screening, US, China, EU, and Africa*

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Introductory Remarks

International investment has grown fast over time; foreign direct investment (FDI, hereafter) flows are higher than ever and impact almost all countries and all sectors of the economy.[1] In recent years, it has been a principal engine of global economic growth. Both developed and developing states have obtained substantial benefits. It has created jobs and increased tax revenue to host states, and enabled MNEs to compete for and earn profits abroad to home states.[2]

To developing countries, emerging economies, and countries in transition, FDI is increasingly serving as a source of economic development and modernization, income growth, and employment via bringing macroeconomic growth and welfare-enhancing processes.[3] FDI is also key to the global economy in financing current account imbalances,[4] and supports development efforts through financing economic growth over the long term and finally eradicates poverty through transferring knowledge and technology, creating jobs, boosting overall productivity, enhancing competitiveness and entrepreneurship.[5]

Notwithstanding that FDI have the aforementioned significance, it doesn't guarantee (but encourage) economic growth. Economic studies uncovered that FDI didn't lead to increased economic growth in developing countries; it would rather depend on the state at stake, the nature and use of FDI as well as its regulation.[6] Foreign investment may not bring meaningful economic development. Foreign investment is good for an economy; but not a panacea, however. According to the dependency economic theory, it causes resource outflow to developed home states, and to achieve their desired return, foreign investors may be engaged in corrupting the ruling class and politicians. This unlawfully enriches those in power at the expense of the poor.[7] That means the benefits of FDI don't arise spontaneously and [distributed] evenly across countries, sectors, and local communities, albeit it is an integral part of an open and effective international economic system and a major catalyst to development.[8] While it is ascertained global investment is advantageous and necessary to bring economic prosperity worldwide, foreign acquisition of companies also causes problems for the government to balance the benefits of foreign investment

[1] Carlos Esplugues, *Foreign Investment, Strategic Assets and National Security,* 1st edition, Intersentia, (2018), p. 23, [hereinafter Carlos, *Foreign Investment, Strategic Assets and National Security*].
[2] David Marchick and Matthew Slaughter, *Global FDI policy: Correcting a Protectionist Drift*, The Bernard and Irene Schwartz Series on American Competitiveness, Council on Foreign Relations, CSR No. 34, (2008), p. V, [hereinafter David and Matthew, *Global FDI policy: Correcting a Protectionist Drift*].
[3] OECD, *Foreign direct investment for development: Maximising benefits, minimising costs*, (2002), p. 5.
[4] David and Matthew, *Global FDI policy: Correcting a Protectionist Drift*, pp. 13-24.
[5] United Nations, *Monterrey Consensus of the International Conference on Financing for Development*, (2003), p. 9.
[6] Leon Trakman, Foreign Direct Investment: Hazard or Opportunity, *Geo. Wash. Int'l L. Rev., 41*, (2009), p. 5.
[7] Getahun Seifu, Regulatory Space in the Treatment of Foreign Investment in Ethiopian Investment Laws, *The Journal of World Investment & Trade*, *9*(5), (2008), pp.405-426.
[8] OECD, *Foreign direct investment for development: Maximising benefits, minimising costs*, p. 3.

with national security concerns. Especially, post-September 11 [terrorist attack on the U.S.], world security policies increasingly become imperative for corporate transactions.[9]

1. Global FDI Development, Regulatory Issues, and Policy developments at Glimpse

Notwithstanding the aforementioned strains and approaches, the recent history of FDI is that of success.[10] FDI flows are by far faster than have the flows of goods and services. Worldwide flows of FDI, from 1990 to 2006, increased by 12.4% annually, as contrasted from a 7.7% increment in total exports of goods and services, and 5% of overall economic growth.[11] The rise of FDI is mainly due to enabling environment countries created through liberalizing their national entry requirements to Multinational Enterprises (hereinafter MNEs), especially since the 1980's the investment climate has been conducive for foreign direct investors.[12]

In 2007, world annual FDI inflows rose to $1.9 trillion from an average of $50 billion during 1981-1985. Later, by the end of 2007, till it was failed by 15% due to the financial crisis and recession, world FDI flows had accumulated to a stock of $15 trillion by over 80, 000 state-owned MNEs having more than 800, 000 foreign affiliates. Still, though there was a decline, the stock of FDI is [anemically] increasing and the level of flows is above the 1980s.[13]

As it is conveyed in the foregoing paragraphs, the FDI underlying trend shows a continually falling annual growth rate: in the 1990's it was 21%; from 2000-2007 it reached 8%, and post-crisis it much lowered to 1%.[14] Accordingly, global FDI flows sustained their slide in 2018, decreasing by 13% to $1.3 trillion. This third year's consecutive decline of annual FDI flows is due to large-scale repatriations of accumulated foreign earnings by U.S. MNEs, within the first two quarters of 2018, as a result of tax reforms introduced in the same country at the end of 2017.[15]

The global FDI challenges being observed are more related to investment policy measures. A more critical stance towards foreign investment is observed in new national investment policy measures. 112 measures affecting investment were introduced in some 55 economies in 2018. More than 1/3 of the measures introduced new restrictions and regulations which is the highest number for the [last] two decades.[16] As a reason for their measures, countries chiefly mentioned national security

[9] Bashar Malkawi, Balancing Open Investment with National Security: Review of US and UAE Laws with DP World as a Case Study, *U. Notre Dame Austl. L. Rev., 13,* (2011), p. 153, [hereinafter Bashar, Balancing Open Investment with National Security: Review of US and UAE Laws with DP World as a Case Study].
[10] *See generally* Carlos, *Foreign Investment, Strategic Assets and National Security*. The recent success history of FDI resulted regardless of the existence of some structural limitations expressed in terms of the lack of an overwhelming international legal framework on FDI or the absence of a single and commonly agreed notions of FDI itself.
[11] UNCTAD, *World Investment Report, Transnational Corporations, Extractive Industries and Development*, (2007), p, [hereinafter UNCTAD, World Investment Report 2007].
[12] Karl Sauvant, *FDI Protectionism is on the Rise*, The World Bank, Policy Research Working Paper 5052, (2009). p. 3, [hereinafter Karl, *FDI Protectionism is on the Rise*].
[13] *Id.*, Karl, *FDI Protectionism is on the Rise*, p. 2.
[14] UNCTAD, *Special Economic Zones*, World Investment Report, (2019), p. 5, [hereinafter UNCTAD, World Investment Report 2019].
[15] *Id.*, UNCTAD, World Investment Report 2019, p. 12.
[16] *Id.*, UNCTAD, World Investment Report 2019, p. 15.

concerns regarding foreign ownership of critical infrastructure, core technologies, and other sensitive business assets. Moreover, twice as many as in 2017, 22 large M&A proposals were withdrawn or blocked for regulatory or political reasons.[17]

Since free capital movements beget concerns about loss of national sovereignty and other possible adverse consequences, attitudes and policies towards liberalization of international capital flows have been subject to considerable controversy. Even more than other types of capital flows, since FDI involve a controlling stake by often large MNEs that are powerful to be governed by domestic authorities, it has historically given rise to such concerns. That is why governments have sometimes put restrictions on inward FDI; though a reconsideration of these restrictions has been made under formal agreements on such capital flows after an increasing consensus about the benefits of inward FDI reached in recent decades.[18]

Although attracting investment remains a priority and new investment policy measures tailored towards liberalization via removing or lowering restrictions for foreign investors in a variety of industries; administrative procedures are continually streamlined or simplified, and several countries provide fiscal incentives in specific industries or regions, coincidentally, screening mechanisms for foreign investment are also getting a prominence.[19]

Depending on how state governments balance the benefits and shortcomings, approaches to FDI (both inward and outward) have been changed in the past and they will most probably change again in the future. A new era of FDI slowdown may occur for reasons of the current wave of nationalism and protectionism attached to it. States may also be compelled to limit the flow of outward FDI when there is no robust economic growth that overcomes the negative effects of globalization in the job markets. To control the national economy or just because they consider enough FDI has been attracted, states may also be inclined to be more selective concerning inward FDI through restricting areas of FDI or by limiting it on national security grounds.[20]

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[17] *Id.*, UNCTAD, World Investment Report 2019, p. 16; Rumu Sarkar, Sovereign wealth funds as a development tool for ASEAN nations: from social wealth to social responsibility, *Geo. J. Int'l L., 41,* (2009), p. 621; Bashar, Balancing Open Investment with National Security: Review of US and UAE Laws with DP World as a Case Study, p. 154. Especially, SWFs which are government investment vehicles (state-owned or state-controlled) funded by foreign exchange assets and managed separately from official reserves; and having high risk-tolerance, no explicit liabilities, and high long-term investment horizons have undertaken several high-profile acquisitions, nowadays.

[18] Stephen Golub, Measures of restrictions on inward foreign direct investment for OECD countries, *OECD Economic Studies, Issue 1,* (2003), p. 88-122.

[19] See generally UNCTAD, World Investment Report 2019. According to the report, from 2011 onwards, while at least 11 countries have introduced a new screening framework, existing regimes have made at least 41 amendments. As a new regulation, disclosure obligations of foreign investors expanded; statutory timelines of screening procedures extended; and civil, criminal or administrative penalties introduced upon failure of respecting notification obligations. Among the changes under the existing regimes, sectors or activities subject to screening added; triggering thresholds lowered; and the definition of foreign investment broadened.

[20] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 3; Karl Sauvant, *Driving and countervailing forces: A rebalancing of national FDI policies,* (2009), p. 262, [hereinafter Karl, *Driving and countervailing forces: A rebalancing of national FDI policies*].

As far as sovereign states exercise power within the international legal fora, national security is an exception to international law. Likewise, national security concerns also come to the limelight of the international investment law regime to protect host states' interests. Now, this practice has been recognized under international investment treaties and international investment tribunals. The problem comes when we question whether this exemption provision can balance the interests between international investors and host states. Since protectionism is uprising throughout the world, national security exception which is recognized in international [investment] law is exposed for abuse by host states.[21]

In recent years, as discussed in the foregoing paragraphs, national investment policies are increasingly giving national security prominence, and, as a result, it started to encompass wider national economic interests. Intensified threats of terrorism have also further accentuated national security concerns before national authorities.[22]

Though each country is sovereign to screen foreign investment for national security grounds, recent trends pose the following policy challenges:

Firstly, countries use different concepts of national security. National security has been approached by domestic policies from a relatively narrow definition of security and security-related industries to the broader interpretation outstretching investment review procedures to critical infrastructures and strategic industries. Secondly, countries vary as to the content and depth of investment screening processes and they also require prospective investors' information to different extents and amounts. Thirdly, concerning the possible consequences when an investment is taken sensitive from a national security perspective, countries do have considerable differences. Thereupon, policy measures bear outright or partial investment prohibitions or investment authorization under certain [stipulated] conditions. For this, different entry conditions are adopted for foreign investors in different countries for similar or even the same economic activities. Besides, whereas sector-specific foreign investment restrictions need to be ostensibly defined and made transparent, limitations based on national security grounds make them less predictable and pave room for disguised investment protectionism.[23]

From legal parlance, as it is evidenced by the security exceptions of the 1948 GATT, economic security has essentially become similar to national security and it is prioritized by countries worldwide. National security has not yet been defined either in the U.S. or Japan, which are much familiar with this concern. But there is a legal reference about this concept from the U.S. Supreme Court Justice Hugo Black's concurring opinion on the Pentagon papers in 1971. According to him, national security is defined as *"a broad and vague generality"* And, any endeavor to enact regulations on FDI related to national security suffers from ambiguity and varied interpretations

[21] Ji Ma, International Investment and National Security Review, *Vand. J. Transnat'l L.*, *52*, (2019), p. 899.
[22] UNCTAD, *World Investment Report, Investor Nationality: Policy Challenges*, (2016), p. 94, [UNCTAD, *World Investment Report 2016*].
[23] *Ibid,* UNCTAD, *World Investment Report 2016.*

in U.S. and Japan. For this, the 1988 Exon-Florio amendment which gives the U.S. president a veto power to halt foreign takeovers perceived to hamper national security can be mentioned.[24]

Yet again, the U.S. adopted the FIRRMA in August 2018 to update and further fortify the CFIUS which is empowered to review *covered foreign investment transactions*[25] like any M&As or takeovers bearing foreign control of any person in interstate commerce in the U.S. FIRRMA is signed to regulate evolving national security threats not addressed by the pre-existing enactments that CFIUS has been working on.[26] Likewise, last April, the EU has also enacted an FDI screening regulation framework on security grounds to protect strategic sectors from foreign state-backed acquisitions of key European technology and infrastructure sectors. Many individual countries are also introducing new national security review mechanisms and are reshuffling their investment policies. All these evolving national security review practices inevitably result in significant influences on FDI flows worldwide.[27]

2. **(Re)defining and Conceptualizing the Traditional Notions of National Security**

There is neither a universal consensus on what national security does mean nor what it contains. It is vaguely and indeterminately understood to encompass several goals beyond the conventional conception of securing national survival.[28] To encapsulate the common elements in various conceptions of security would, *inter alia*, be found useful for rational policy analysis by unclogging comparison of one type of policy from another, first, it is quite essential to define and conceptualize what (national) security does mean.[29]

The earliest, national security centers on military might, now it has a broad range of facets, all of which connotes the non-military or economic security of the nation and the values supported by the national society. Principally, the concept of *national security* is developed in the U.S. after World War II. Americans understand national security as a must-to-have condition to maintain the

[24] Rikako Watai, US and Japanese national security regulation on foreign direct investment, *Asia Pacific Bulletin No. 219,* (July, 2013), pp. 1-2, [hereinafter Rikako, US and Japanese national security regulation on foreign direct investment].
[25] 50 U.S. Code § 4565 - Authority to review certain mergers, acquisitions, and takeovers, , LII / LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/uscode/text/50/4565 (last visited Apr 17, 2020). The term 'covered transaction' means *any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.*
[26] New policy on foreign investment and national security is open to abuse, BUSINESSLIVE, https://www.businesslive.co.za/bd/opinion/2019-02-25-new-policy-on-foreign-investment-and-national-security-is-open-to-abuse/ (last visited Apr 17, 2020), [hereinafter BusinessLIVE, New policy on foreign investment and national security is open to abuse].
[27] Control Risks, *Navigating National Security Rules in the Global Economy*, FORBES, https://www.forbes.com/sites/riskmap/2019/05/02/navigating-national-security-rules-in-the-global-economy/ (last visited Apr 17, 2020).
[28] Melvyn Leffler, National security, *The Journal of American History*, 77(1), (1990), pp. 143-152.
[29] David Baldwin, The concept of security, *Review of International Studies*, *23*(1), (1997), p. 6, [hereinafter David, The Concept of Security].

survival of the state through the use of economic power, diplomacy, power projection, and political power. [30]

Before sixty years ago, connoting national security as *an ambiguous symbol*, Wolfers further emphasized this garbling term with the essence of its ambiguity as follows: *"It would be an exaggeration to claim that the symbol of national security is nothing but a stimulus to semantic confusion, though closer analysis will show that if used without specifications it leaves room for more confusion than sound political counsel or scientific usage can afford."*[31] Wolfers, in using the term *specifications* above, need to instill in us the concept of national security to be understood as both an end (as policy objective by itself), and as a means (as national security policy used to accomplish other policy objectives).[32] He stressed approaching the concept of national security from both perspectives so that its ambiguity would be meaningful, and it can be conceived virtuously.

Grizold, affirming several changes in the international community and emerging situations in Europe and the rest of the world after the 1990's cold war period, called modern states for revising and redefining the content of national security policy. Grizold, underscoring the diminishing role of the military factor which is mainly driven by the principle of armed security, insisted on a broader application of common security measures ensuring common security objectives of individual states, groups of states, and the international community. This could respond to the current needs of states that are thriving to understand security as a complex of ingredients encompassing multifarious economics, politics, social welfare, health, education, culture, ecology, military affairs, and so on.[33] Nobilo also defined national security as a complicated combination of political, economic, military, ideological, legal, social, and other internal and external factors helping individual states to maintain their sovereignty, territorial integrity, physical survival of their population, political independence, and to bring a balanced and rapid social development.[34]

Nobilo's, definition enlists relatively holistic features of national security with their complicated relationship and the states' reason for juxtaposing these numerous features and attempts of legitimizations for attaining their purposes sought. Seemingly, this concept of national security depicts the current challenges regarding evolving national security concerns in general and in the world of FDI regulation. In addition to the trial to define and answer the claim for a redefinition of the term, Nobilo's conception also pinpoints that the modern concept of security, explicitly or

[30] National security, SCIENCEDAILY, https://www.sciencedaily.com/terms/national_security.htm (last visited Apr 17, 2020).
[31] Arnold Wolfers, "National security" as an Ambiguous symbol, *Political Science Quarterly*, 67(4), (1952), p. 483.
[32] David, The Concept of Security, pp. 5-26.
[33] Anton Grizold, The concept of national security in the contemporary world, *International Journal on World Peace*, 11 (3), (1994), pp. 37-38, [hereinafter Anton, The concept of national security in the contemporary world].
[34] Mario Nobilo, The Concept of Security in the Terminology of International Relations, *Political Thought*, (1988), pp. 72-73.

implicitly, is made up of all significant and diverse elements of security from the state, societal and human security perspectives.[35]

According to Dimitrijevic, national security helps to ensure the existence of a political community and the nation; protect territorial integrity; maintain political independence; ensure the quality of life, and keep vital interests of the state.[36] The quest for an analogous and broadening definition of national security comprising resource, environmental and demographic issues, etc. could help us to cope with a complex environment we have confronted, nowadays.[37] So, redefinition of national security in light of vital economic and political interests determining fundamental values and survival of a state is quite essential than ever.[38] Therefore, the upcoming discussions on national security concerns will also take the evolving and broad conceptualizations into account and will try to expound the current understandings and practices in the world of FDI regulation.

3. The Current Essence of Evolving National Security and Security Related Concerns in International Investment Law

In customary international law, the host state has an absolute right of control, which is unaffected by treaty, over the entry and establishment, and the whole of the process of foreign investment. From the outset, the right of a state to control the entry of foreign investment is unbounded because it is a right that stems from sovereignty. That means the entry of any foreign investment can be debarred by a state; albeit that a sovereign entity can cede its rights even over a purely internal matter based on a treaty.[39]

Though modern states do have fidelity with an open economy, they can have a considerable amount of regulatory means to control the economy. Especially, as of the 2008 global economic crisis and recession of liberalization, foreign investment regulation is escalating, particularly, in developed countries. Investment protectionism which evidences controls over the entry of foreign investment is carried out using, *inter alia*, national security as one means. Such investment controls are also found in developing countries and this may arise when they respond to an economic crisis.[40] Hence, undisputedly, regulating foreign investment through imposing restrictions for national security grounds is the sovereign right of host countries. And, it is left to host countries to define national security and screen circumstances bringing this interest to fall at risk. If so,

[35] Anton, The concept of national security in the contemporary world, pp. 37-53.
[36] Vojin Dimitrijevic, The Concept of Security in International Relations, *Beograd: Savremena Administracija*, (1973), p. 11.
[37] Jessica Mathews, Redefining security, *Foreign Affairs*, 68(2), (1989), p. 162.
[38] William Bundy, Priorities and Strategies in Foreign Policy: 1985-1989, *Presidential Studies Quarterly*, 15(2), (1985), p. 261.
[39] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 4th edition, Cambridge University Press, (2018), p. 88, [hereinafter Sornarajah, *The International Law on Foreign Investment*].
[40] *Id.*, Sornarajah, *The International Law on Foreign Investment*, p. 77.

determination of whether foreign investment is a menace to national security and pass decisions therewith is the broader discretionary power of states concerned.[41]

The national security issue is quite common in a liberal country where multifarious cases show that foreign investors are rejected for national security reasons or subjected to other measures after the establishment of their investment. It would rather be anomalous when national security reason is invoked to the protection of strategic industries and critical infrastructures, and at times of economic crisis as well. So, when this paper questions why and how these evolving national security concerns arise, the following justifications will come at frontline; these are:[42]

3.1. *The Growing Global Threat Perception*

Firstly, although the Cold War has surcease, there are several local and regional conflicts, and terrorist attacks as well. This has substantially further supersized the global threat perception, and as a consequence actual or perceived threats to national security become multitudinous. Accordingly, foreign investment policies cannot ignore this progress and begin to probe whether an investor from a country that is labeled as an actual or potential adversary or where the investors themselves are perceived as a potential national security threat.[43]

3.2. **The Huge Wave of Privatization**

Secondly, the last decades have resulted in an abrupt wave of privatization that caused many countries to sense that they are more vulnerable to security risks than ever before. Foreign control over vital domestic industries like energy, telecommunications, transportation, or water is believed to have its possible implications for national security. However, if these aforementioned strategic industries remain under state ownership, governments might not be anxious that they could fall under foreign influence. And, in many countries where a substantial number of industries were privatized, the possibility of foreign takeovers becomes real.[44]

3.3. **For Reasons of Competitiveness**

Thirdly, countries may be having a sentiment that domestic ownership of strategic industries is beneficial for competitiveness. Specifically, the concern of competitiveness has a significant development dimension for developing countries. Once economic competitiveness is dropped, and economic and social development are abated, the next fate is a severe financial and social crisis. Hence, from this proposition, the relation between national security and foreign investment does matter. Among the case which drew much attention regarding this issue is the state-owned China National Offshore Oil Corporation (CNOOC) takeover attempt of Unocal, the ninth-largest oil firm in the U.S. in 2005. The bid which brought the proposal for the takeover was canceled by the U.S. Congress for reasons of alleged unfair competition and the risk of technology leakage.

[41] UNCTAD, *The Protection of National Security in IIAs, Series on International Investment Policies for Development*, (2009), pp. 3-15, [hereinafter UNCTAD, *The Protection of National Security in IIAs*].
[42] *Ibid*, UNCTAD, *The Protection of National Security in IIAs.*
[43] *Id.*, UNCTAD, *The Protection of National Security in IIAs*, p. 26.
[44] *Id.*, UNCTAD, *The Protection of National Security in IIAs*, pp. xv, 14, 19, 56, & 135.

Finally, CNOOC's attempt to takeover become ineffective and Unocal was merged with the U.S.-based Chevron Corporation.[45]

3.4. **To Safeguard Strategic Industries and/or Critical Infrastructures**

Fourthly, though infrastructure transactions have long been catchy to national security review regulators, recently they have begun to heighten the sensitivity of the issue because of shared recognition that investments in infrastructure pave for increased access to population centers and facilities. And, this would, in turn, widen the gate for parties having bad intent to involve in sabotage or surveillance. For this, Australia, Canada, UK, Germany, and Belgium governments, and recently EU's Europe-wide FDI screening frameworks upgraded foreign investment review on national security grounds mainly to avert the long-range impact of Chinese industrial policies. Reviews on the electricity grid and power networks inbound investment by China's State Grid Corporation can be good examples.[46]

The terms strategic industries and critical infrastructures are usually dubbed as a single concept and used synonymously; some other times they are used as two different terminologies. Here below, for bringing their appropriate use, the terms are used as to the context and wordings applied in different countries and documents. Regarding the usage of these terminologies, beyond the language game, identifying sectors the foreign investment controls are purported to safeguard is also difficult. Some countries, such as the U.S. consider how foreign investment could affect national security and critical infrastructure, while other countries consider only on impacts to certain industries like residential real estate, agriculture, broadcasting and newspapers, health services, airlines, gambling, telecommunications, electricity and other utilities, and transportation.[47]

Governments trying to privatize critical infrastructure assets have encountered a significant challenge to maintain national security while sustaining the benefits of global economic liberalization. As indicated under the introductory section, post 11 September 2001, the positive contributions of FDI to an economy began to be questioned and compromised when, concomitantly, national security threats are ascertained. In the world of economic liberalization where privatization and deregulation attracting foreign investors are quite common, as a feasible economic strategy, critical infrastructures become controlled and owned by foreign corporations and governments. And, associated with their higher dependence on information and communications technologies and their inherent susceptibility to physical and cyberattacks, critical infrastructures are easily exposed to cyber threats, which in turn, jeopardizes national

[45] *See generally* UNCTAD, *FDI from Developing and Transition Economies: Implications for Development*, World Investment Report, (2006).
[46] National security investment reviews go global: key policy themes and recommendations, , FINANCIER WORLDWIDE, https://www.financierworldwide.com/national-security-investment-reviews-go-global-key-policy-themes-and-recommendations (last visited Apr 17, 2020).
[47] Laura Fraedrich and et al, Foreign Investment Control Heats Up: A Global Survey of Existing Regimes and Potential Significant Changes on the Horizon, *Global Trade and Customs Journal*, 13(4), (2018), pp. 141-156.

security. For this, governments become so anxious about security threats on critical infrastructures.[48]

Global security, nowadays, is entwined with a range of economic, privacy, and national security concerns. Principally, regarding cybersecurity concerns, there are two general divisions: actions targeting to damage a cyber system (cyberattacks); and actions that exploit, without causing damage, the cyberinfrastructure for unlawful purposes (cyber exploitation).[49]

Regarding what critical infrastructure does mean, the U.S. Critical Infrastructure Act of 2001 defined it as follows*: "those systems and assets, whether physical or virtual, so vital to the U.S. that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."*[50] Based on this definition, the U.S. has identified and listed out eighteen critical infrastructure sectors.[51] Likewise, South Africa when it deals with the question of national interest, in its national security review, the following critical infrastructures: defense, sensitive technology, security infrastructure, the supply of vital goods and services, enablement of espionage, foreign relationship, economic and social stability, and terrorism are listed out. [52] Unlike the U.S., critical infrastructure has not been defined in South Africa. It is left to the Minister of Police to declare an infrastructure as critical infrastructure after consideration of the application, the recommendation of the Critical Infrastructure Council, and any other information which he or she deems appropriate.[53]

Concerning critical infrastructures, safeguarding national security seem somehow complicated. This is because, by the time when the internet and digital trade agenda were developed based on inseparability, openness, and interoperability, they were guided by national and international digital standards for their better use. [54] As the potential damage from cyberattack is exacerbated by the interdependence existing between critical infrastructures, governments are compelled to adopt national standards aimed at tightening national security protections. Despite using national standards and putting an increasingly positive impact on international trade, making use of them

[48] Tyler Moore and Sujeet Shenoi, Critical Infrastructure Protection, Fourth Annual International Conference on Critical Infrastructure Protection, (eds.), *Springer Science & Business Media, Revised Selected Papers*, 342, (2010), p. 17 ff., [hereinafter Tyler and Sujeet, Critical Infrastructure Protection].
[49] Alberto Oddenino, Digital standardization, cybersecurity issues and international trade law, *Questions of International Law, Zoom-in 51*, (2018), p. 35, [hereinafter Alberto, Digital standardization, cybersecurity issues and international trade law].
[50] 42 U.S. Code § 5195c-Critical infrastructures protection, LII/LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/uscode/text/42/5195c (last visited Apr 17, 2020).
[51] Agriculture and food; defense industrial base; energy; healthcare and public health; banking and finance; water; chemicals; commercial facilities; critical manufacturing; dams; emergency services; nuclear reactors; information technology; communications; postal and shipping; transportation; government facilities; and national monuments and icons.
[52] *See at* BusinessLIVE, New policy on foreign investment and national security is open to abuse.
[53] South Africa, *Critical Infrastructure Protection Bill*, National Assembly, (2015), Section 1 cum 20 (4).
[54] Alberto, Digital standardization, cybersecurity issues and international trade law, pp. 31-33.

to invoke national security exceptions bears wider interpretations and is a backlash to its inherent use. [55] At the end of the day, this would, in turn, adversely affect FDI.

3.5. **The Need to Control Natural Resources**

Fifthly, throughout the 1950s, faced with the legacy of colonialism and sustained foreign control over resources developing states cast about asserting their economic independence. For this, as one means of asserting economic independence, the UN General Assembly passed the first of seven resolutions on Permanent Sovereignty Over Natural Resources in 1952.[56] Then, in the late 1950s, the UN Commission on Permanent Sovereignty over Natural Resources was formed to study the question of national control over resources. Consequently, in 1962, the General Assembly passed Resolution 1803 declaring that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[57] This means the Resolution reasserted that the admission of foreign investment was conditional upon the authorization, restriction, or prohibition of the state.[58] Once a foreign investment is admitted, it is regulated under national and international law.[59]

Therefore, stemming from the stronger need to control natural resources in some countries, new restrictions for foreign investors are introduced or renegotiations on existing investment contracts are called for. Particularly, in the extractive industries, the restrictions become tight. All these policies are often prompted by national security considerations.[60]

3.6. **State-owned Enterprises (SOEs) and Sovereign Wealth Funds (SWFs)**

In the six places, the role of state-owned enterprises and SWFs from the south become more vibrant and rampant so that this further toughen national security concerns in connection with foreign investment. Here, the fear is that their goodly financial power could enable them in a position to buy up any industry they would like to have. Besides, there is also trepidation that they would not only pursue economic goals but also other political objectives.[61]

Nowadays, SWFs are used as a new form of traditional state activity or management of public funds.[62] They are directly or indirectly state-owned, state-funded or state-managed investment

[55] Tyler and Sujeet, Critical Infrastructure Protection, p. 18.
[56] Andrew Newcombe and Lluís Paradell, *Law and practice of investment treaties: standards of treatment*, Kluwer Law International BV, (2009), p. 387.
[57] UN, General Assembly resolution 1803 (XVII) of 14, Permanent Sovereignty Over Natural Resources, (1962), DECL.2, p. 2.
[58] Stephen Schwebel, The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources, *ABAj, 49*, (1963), p. 463.
[59] Antony Anghie, *Imperialism, sovereignty and the making of international law, (37),* Cambridge University Press, (2007), pp. 216-220.
[60] UNCTAD, *The Protection of National Security in IIAs*, pp. xv-xvi, 1, 4, 19 & 72.
[61] *Ibid,* UNCTAD, *The Protection of National Security in IIAs.*
[62] Larry Backer, Sovereign investing in times of crisis: global regulation of sovereign wealth funds, state-owned enterprises, and the Chinese experience, *Transnat'l L. & Contemp. Probs., 19,* (2010), p. 3.

vehicles established by national governments for macroeconomic reasons,[63] and managed independently of other state financial institutions.[64] Hence, state-owned enterprises, as bearers of states and commercial interests, emphasize strategic acquisitions like advanced technologies on non-market terms so that investment policies related to national security revive and start to pay due attention.[65]

In the U.S., an obligatory investigation is adopted in case of foreign government-controlled investment; in the Russian Federation, State-owned enterprises cannot have majority interests in businesses entities having strategic importance for national defense and state security, plus governmental approval is mandatory even for minority stakes; and in Australia, foreign government investors have to meet additional notification requirements and generally must obtain prior governmental approval.[66]

In sum, increased FDI flows from SWFs and state-owned enterprises have resulted in new concerns about the impact of such investment on national security and brought a ripple effect of legislation and guidelines to govern sovereign investment.[67]

3.7. **The Problem of Economic Crisis**[68]

Last, in the seventh place, in addition to the aforementioned reasons, the economic crisis has also triggered national security concerns in recent years. Regarding this, the Argentina case that happened at the beginning of this century can be a good example. To respond to the crisis, the Argentinian government took several measures that restricted operations of foreign investors like transfer restrictions on the already established investments in the country. Unlike the previous national security grounds like restrictions to protect strategic industries usually at the entry of foreign investments, national security issues invoked by the economic crisis is a post establishment measure on foreign investments.

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[63] Cornelia Hammer and et al, Sovereign wealth funds: current institutional and operational practices, *IMF Working Paper*, WP/08/254, (2008), p. 6.

[64] Victoria Barbary and Bernardo Bortolotti, Sovereign Wealth Funds and Political Risk: New Challenges in the Regulation of Foreign Investment, World Scientific Book Chapters, in: Zdenek Drabek and Petros Mavroidis (eds.), *Regulation of Foreign Investment Challenges to International Harmonization*, World Scientific Publishing, (2013), p. 313.

[65] State-owned enterprises, international investment and national security: The way forward, OECD INSIGHTS BLOG, (2017), http://oecdinsights.org/2017/07/19/state-owned-enterprises-international-investment-and-national-security-the-way-forward/ (last visited Apr 17, 2020).

[66] UNCTAD, World Investment Report, *INVESTMENT AND NEW INDUSTRIAL POLICIES*, (2018), pp. 160-161.

[67] Karl Sauvant and Jennifer Reimer, *FDI perspectives: Issues in international investment*, (eds.), 2nd edition, Bepress, Vale Columbia Center on Sustainable International Investment, (2012), p. 95.

[68] It should be noted that there is a key difference between national security interests in respect of strategic industries and/or critical infrastructures on the one hand, and with regard to economic crisis on the other hand. In case of the former, measures taken by host countries usually have a precautionary character (from foreign takeovers), whereas in the latter case, measures do have a reactive nature (to mitigate or alleviate the already happened trouble) since it is a post-establishment investment policy measure.

Argentina, to invoke national security reasons and impose restrictions on foreign investors, took domestic upheavals and social tensions to reflect internal security interests as justifications. Similarly, since this kind of severe economic crisis can affect any country, especially developing countries, the Argentinian scenario will also be a case in any other country. Concerning the Argentinian case, some investment treaties bind public emergencies with national security. This is because; economic crises do result in public emergencies, in that the conditions of poverty and hunger that they bring about are bound to create violent disturbances. On that ground, the possibility of equating economic crisis with military threats may arise.[69]

4. Demystifying Evolving National Security and Security Related Concerns in International Trade Law

With the decentralized and hybrid feature, international investment law is constituted of the fragmented and multisource area since its development is linked to fill the gaps of the conventional public international law concerning the protection of the interests of private economic actors, following the unsuitability of diplomatic protection for executing commercial contracts. The emergence of international investment law is related to resolving disputes between investors mainly from developed capital-exporting countries and developing capital importing nations. Yet, the solutions gained from diplomatic protection were weak and since customary law found it impotent to afford investors further rights and protection, states began to conclude treaties. And, that is the reason why FDI has inadequate multilateral solutions connected to WTO treaty provisions that slightly deal with FDI with a strong bilateral and regional focus.[70]

Therefore, even if FDI merits global regulation due to its scope and significance, yet, neither a comprehensive, clear, and overwhelming international legal framework nor developed institutional structure is established. When international trade and FDI regulation departed in the post-colonial period, FDI left without a standalone regulatory tool while trade has got GATT. [71] The lack of an FDI legal framework does have its direct implication to the problem of responding to evolving national security concerns.

Currently, there is an approach towards agreements on investment including general exceptions which oftentimes befitting host state measures tailored to achieve increasing national security interests and important public policy objectives. To achieve some fundamental legitimate interests

[69] Sornarajah, *The International Law on Foreign Investment*, pp. 458-459.
[70] Ralph Lorz, Fragmentation, consolidation and the future relationship between international investment law and general international law, In Freya Baetens, (ed.), *Investment Law within International Law: Integrationist Perspectives*, Cambridge: Cambridge University Press, (2013), pp. 483-484; Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 30; Joost Pauwelyn, Rational Design or Accidental Evolution?, The Emergence of International Investment Law, In *The Foundations of International Investment Law: Bringing Theory into Practice*, by Zachary Douglas and et al, (eds.), Oxford University Press, Oxfor Scholarship Online, (2014), p. 14-18; Roberto Echandi and Pierre Sauvé, *Prospects in international investment law and policy*, (eds.), World Trade Forum, Cambridge University Press, (2013), p. 167.
[71] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 29*;* Efraim Chalamish, The future of bilateral investment treaties: A de facto multilateral agreement, *Brook. J. Int'l L., 34*, (2009), p. 303.

of the state, many international investment agreements are increasingly enclosing non-precluded measures clauses. Yet, the final number of treaties enclosing such clauses is still minimal.[72]

Most of the provisions enclosing non-precluded clauses don't meet evolving national security issues; they would rather rely on the traditional clauses found in the WTO treaties that emphasize international trade so that they pay a very narrow and partial treatment of FDI using the main provisions - art. XXI GATT and art. XIVbis GATS. Here comes a direct interplay between the regulation of international trade and the regulation of FDI. For this, this relation promotes the transfer of case law solutions and academic exchange or positions on the interpretation of WTO treaty provisions into the world of FDI regulation. But this interaction may not be healthy since there is no straightforward response and solutions there, and the extrapolation of those non-precluded exceptions (by which national security is the one) and reproduction to FDI with their dubious meanings and potential use may cast a problem.[73]

The ambiguousness and broadness of the concept of national security are not only restricted in the academic but also prevail in the practical world. Although it is indisputable that national security should be protected, there is no international agreement that clearly defines national security.[74] The right to protect essential security interests of the state, without directly referring to national security as also indicated above, is vaguely stated in WTO principles which gives nation-states a wider discretion to define their essential security interests.[75]

When we refer to different multilateral or bilateral trade agreements like OECD investment instruments, NAFTA as well as Bilateral Investment Treaties (hereinafter BITs) states have the authority to decide over the issue of their respective essential security interests. Some intergovernmental organizations, without setting a multilateral governing structure, stipulated a platform for participant states and nudge them on how to strike the balance between safeguarding security interests and attracting foreign capital through FDI. For this, national security and essential security interests remained self-judging. But OECD formulated three principles, transparency, predictability, and accountability in the determination of essential security interests.[76]

To evaluate a specific FDI project on security grounds, different countries use different bases.[77] National interest is used in Australia; national economic security in China; public order, public security and the interest of national defense or economic patriotism in France; net benefit for

[72] Tarcisio Gazzini, The role of customary international law in the field of foreign investment, *The Journal of World Investment & Trade*, 8(5), pp. 691-715.
[73] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 17.
[74] Can Zhao, Redefining Critical Industry: A Comparative Study of Inward FDI Restrictions in China and the United States, MA Thesis, University of Victoria, (2015), p. 25.
[75] WTO, Marrakesh Agreement, *The General Agreement on Tariffs and Trade* (GATT), Arts. XXI: Security Exceptions, (1947), p. 13.
[76] OECD, Freedom of Investment, National Security, and 'Strategic' Industries, *Progress Report by the OECD Investment Committee*, (2008), pp. 1-6.
[77] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 74.

Canada or national security in Canada; national security, public order and public safety in Japan; and credible threat to national security in the U.S.[78] The problem is not only the different elusive bases or fluid terminologies but also no clear definition of these concepts habitually given by the legislator so that national governments and administrations do have very broad autonomy for interpretation.[79] The OECD Code of Liberalization, without defining this baffling term, simply allows member states to restrict FDI on the following basis/conditions: maintenance of public order or the protection of public health, morals, and safety; protection of essential security interests; and fulfillment of obligations relating to international peace and security.[80]

Though the aforementioned concepts are not clearly defined, for developed countries, national security, national essential security interests or related concerns may concern the acquisition of some national champions in certain areas of the economy by competitors from other countries, mostly from developing countries, and in some cases state-owned or controlled firms, or to the control or preservation of natural resources or technology chiefly having military or security concerns. On the other hand, for emerging countries, these concepts may have different usage, one concerned more with the control of certain strategic industries considered crucial for the economic development of the country.[81]

5. An Appraisal of FDI Screening Mechanisms on Evolving National Security and Security Related Grounds

5.1. Overview of National Security Review Typologies in Different Countries

States have the right to control the entry of FDI into their territory in an unlimited manner. Henceforth, the entry of any FDI is subject to control, or even exclusion by any host state. Despite its direct link to the sovereignty of the state, the exclusion is governed by the conditions set forth by those treaties to which the host state is a party, however. These treaties can ultimately limit its right to control FDI.[82] Given the limitations possibly found under respective treaties, countries have different types of FDI regulations for their national security and security-related grounds to protect their national security interests relative to foreign investment. These include:[83]

(1) prohibiting, fully or partially, foreign investment in certain sensitive sectors;[84]

[78] *Ibid*, Carlos, *Foreign Investment, Strategic Assets and National Security*; OECD, *International Investment Perspectives 2007: Freedom of Investment in a Changing World*, OECD Publishing, (2007), p. 61.
[79] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 75.
[80] OECD, *OECD Code of Liberalization and Capital Movements*, Part I: Undertakings with Regard to Capital Movements, Public Order and Security, Art. 3, (2019), P. 13, [hereinafter *OECD Code of Liberalization and Capital Movements*].
[81] *Ibid, OECD Code of Liberalization and Capital Movements,* p. 13.
[82] Sornarajah, *The International Law on Foreign Investment*, P. 88.
[83] UNCTAD, *World Investment Report 2016: Investor Nationality-Policy Challenges*, (2016), p. 97, [hereinafter UNCTAD, *World Investment Report 2016]*.
[84] E.g. Algeria, Argentina, Brazil, Chile, China, Egypt, Ethiopia, India, Indonesia, Rep. of Korea, Mexico, Myanmar, Russian Federation, Turkey, and U.S.

(2) maintaining State monopolies in sensitive sectors;[85] and

(3) maintaining a foreign investment review mechanism for a list of pre-defined sectors[86] or cross-sectoral (across the board).[87]

As we have seen in the previous paragraphs, though there are both *ex-ante* and *ex-post* FDI regulations on national security and security-related grounds, FDI screening systems are designed to be used before the implementation of the FDI proposal (*ex-ante*) are gaining popularity worldwide.[88]

Here above, some countries maintain two or more types of FDI review mechanisms. For instance, a sector-specific review procedure is supported by a separate cross-sectoral review mechanism for other foreign investments. The cross-sectoral review mechanism may require all FDI proposals to enter and establish approval procedures or may only require the approval of FDI proposals that fulfill certain monetary thresholds. Some other times, cross-sectoral review mechanisms don't stipulate any prior notifications by investors; it is initiated at the discretion of national authorities instead.[89]

Taking disclosure requirements into consideration, most countries carry out national security-related FDI reviews by requiring investors to provide information at some point in the review process. The extent, nature, and timing of these information requirements differ substantially between countries, however.[90] In addition to basic information sought concerning the identity and nationality of the investor via the disclosure of business relationships, the structure of the group, and links with foreign governments,[91] many countries also require additional information: the investing company's financial statements, the origin of funds, methods of financing;[92] and list of people on the board of directors, agreements to act in concert, business plans, future intentions and sometimes even the reasons for the investment.[93]

5.1.1. **FDI Screening Mechanisms on Evolving National Security Grounds in the U.S.**

The U.S. FDI screening mechanism on evolving national security grounds emerged from the changing calculus of national security interests due to the growing economic and technological challenges making a difference in the structure of the global economy, diffusing the increasingly rapid global technology and, at the end of the day, debilitating the U.S. technological and

[85] E.g. Algeria Brazil, China, Egypt, Ethiopia, Finland, France, Germany, Italy, Rep. of Korea, Mexico, Myanmar, Russian Federation, and Turkey.
[86] E.g. Argentina, Brazil, Chile, China, Ethiopia, Finland, France, Germany, India, Indonesia, Italy, Japan, Rep. of Korea, Mexico, Poland, Russian Federation, Turkey, and UK.
[87] E.g. Canada, Finland, Germany, Rep. of Korea, Mexico, Myanmar, UK, and U.S.
[88] UNCTAD, *World Investment Report 2016*, p. 96.
[89] *Ibid*, UNCTAD, *World Investment Report 2016.*
[90] *Id.*, UNCTAD, *World Investment Report 2016*, pp. 99-100.
[91] E.g. Canada, China, Finland, France, Japan, and Italy.
[92] E.g. Canada, China, France, Japan, Italy, Mexico, Myanmar, Poland, Russian Federation, UK, and U.S.
[93] E.g. Canada, Finland, Japan, Italy, Rep. of Korea, Mexico, Myanmar, Poland, Russian Federation, and UK.

manufacturing preeminence.[94] This justifies why the concept of national security becomes wider to encompass economic security, critical infrastructure, and homeland security.[95]

National security regulation concerning FDI in the U.S. is traced back to 1987 when a Japanese computer company made a failed attempt to acquire the U.S. semiconductor company, Fairchild, during the Reagan administration. After a year, this gave rise to the Exon-Florio Amendment that empowered the U.S. president to block foreign takeovers perceived to pose a national security threat. Exon-Florio didn't clearly define national security and there was due restraint, however. Later, this Act caused the blocking of the China Aero-Technology Import and Export Corporation (CATIC) acquisition of the air parts manufacturer, MAMCO, in 1990 and made several foreign takeovers to renounce their plan in advance as in the case of Fujistu-Fairchild.[96]

Since the enactment of the Exon-Florio provision to the Omnibus Trade Act of 1988, the U.S. experience on perceived threats to national security from the foreign acquisition of a U.S. company are identified and grouped in the following three distinct categories:[97]

(a) The First Category of Threat: the proposed acquisition would make the U.S. dependent on a foreign-controlled supplier for goods or services crucial to the functioning of the US economy, including, but not exclusively, the functioning of the defense industrial base who could delay, deny, or place conditions on providing those goods or services;

(b) The Second Category of Threat: the proposed acquisition would allow the transfer of technology or other expertise to a foreign-controlled entity that the entity or its government could deploy in a manner harmful to U.S. national interests; and

(c) The Third Category of Threat: the proposed acquisition would allow insertion of some capability for infiltration, surveillance, or sabotage through a human or nonhuman agent, into the provision of goods or services crucial to the functioning of the U.S. economy, including, but not exclusively, the functioning of the defense industrial base.[98]

When we see the organs authorized to screen FDI on national security grounds, the U.S. with CFIUS has institutionalized national security review in FDI regulation and others are following this path though they have a fear of international retaliation that the establishment of this kind of

[94] Panel on the Future Design and Implementation of US Exports, National Academy Sciences Staff and National Academy of Engineering Staff, *Finding common ground: US export controls in a changed global environment*, National Academies Press, (1990), pp. 1-27.
[95] Baban Hasnat, US National Security and Foreign Direct Investment, *Thunderbird International Business Review*, 57(3), pp. 185-196.
[96] Rikako, US and Japanese national security regulation on foreign direct investment, pp. 1-2.
[97] Theodore Moran, CFIUS and national security: Challenges for the United States, opportunities for the European Union, *Peterson Institute for International Economics*, *19*, (2017), p. 55.
[98] Theodore Moran, Foreign acquisitions and national security: what are genuine threats? What are implausible worries?, *Regulation of foreign investment: Challenges to international harmonization*, *21*, (2013), pp. 3-8; Thodore Moran, *Three threats: an analytical framework for the CFIUS process, (89),* Peterson Institute, (2009), pp. 1-6.

dedicated institutions for FDI screening in light of national security concerns could message.[99] Likewise, Australia has also established the Foreign Investment Review Board (FIRB), and other countries like Canada, France, and Germany entrusted the task to a specific ministry. And, regarding the final approval of the FDI proposal after the screening, it ends up with an administrative act, or by way of a contract or agreement between the host government administration and the foreign investor.[100]

CFIUS review, also called the Exon-Florio review, was established by an executive order in 1975[101] is chaired by the Secretary of the Treasury, and is comprised of different department heads[102] aimed at protecting national security as a single objective,[103] unlike other countries' broader investment reviews on national interest grounds.[104] In Exon-Florio Amendment, the U.S. president has delegated CFIUS an initial review and decision-making authority including taking mitigation agreements,[105] and investigative power.[106] Exon Florio empowered the U.S. president to initiate an investigation by CFIUS into national security effects on transactions giving rise to foreign control of a U.S. business or asset. The president could do this when s/he has *credible evidence* of national security threat and no other provisions of the law provide an adequate and appropriate remedy to protect the national security interests of the U.S. In exercising this authority, the president is duty-bound to report to congress and his/her decision is not subject to judicial review. This depicts the president's deference on national security concerns.[107]

Later, FINSA which is the first statutory codification of CFIUS guides on how to define, without directly defining, national security; introduced new rules ensuring the balance between national

[99] Paul Connell and Tian Huang, An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States, *Yale J. Int'l L.*, *39*, (2014), p. 131.
[100] Jeswald Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, Oxford University Press, (2013), p. 109.
[101] The Executive Order, No. 11, National Archives, (1975). Available at: https://www.archives.gov/federal-register/executive-orders/1975.html (last visited Apr 17, 2020). As discussed below, CFIUS originally was established primarily to monitor and evaluate the impact of foreign investment in the United States.
[102] CFIUS membership are comprises the Secretary of Treasury (Chair) Secretary of State, Secretary of Defense, Secretary of Commerce, Secretary of Homeland Security, Attorney General, Director of the Office of Management and Budget, United States Trade Representative, Chairman of the Council of Economic Advisers, Director of the Office of Science and Technology Policy, Assistant to the President for National Security Affairs, and Assistant to the President for Economic Policy.
[103] Omnibus Trade and Competitiveness Act of 1988, H.R Rep., No. 100-576. The Exon-Florio section of the Act is not applicable to transactions which are outside the realm of national security.
[104] John Cobau, Legal developments in US national security reviews of foreign direct investment (2006-2008), *Sovereign investment. Concerns and policy reactions*, Oxford University Press, (2012), pp. 104-119.
[105] David Fagan, The US Regulatory and Institutional Framework for FDI, In *Investing in the United States: Is the US Ready for FDI from China?*, Edward Elgar Publishing, Elgar Online, (2009), pp. 45-84.
[106] David Marchick and Edward Graham, US national security and foreign direct investment. *Peterson Institute Press: All Books*, (2006), p. 34.
[107] Christopher Tipler, Defining National Security: Resolving Ambiguity in the CFIUS Regulations. *U. Pa. J. Int'l L.*, *35*, (2014), p. 1227, [hereinafter Christopher, Defining National Security].

security and FDI; clarified the president's role in evaluating covered transactions, and explicitly authorized to use mitigation agreements resolving national security concerns.[108]

In 2018, FIRRMA maintaining the president's power to block or suspend proposed or pending foreign mergers, acquisitions, or takeovers of U.S. entities including through joint ventures that threaten to impair national security, further strengthened and modernized the current CFIUS process. FIRRMA requires CFIUS to take a more assertive role to safeguard both U.S. economic and national security interests, especially relative to the development of emerging or leading-edge technology, among other things, by expanding CFIUS's scope of review; introducing a discriminatory review of foreign investments based on country of origin and transactions connected to certain countries; shifting filing requirements from voluntary to mandatory and brought two-way investigation - expedite review, and greater scrutiny based on foreign governments control or stake having on the transaction, and stipulating some indicators that help the Congress and the president to determine whether a transaction could impair national security.[109]

5.1.2. **FDI Screening Mechanisms on Evolving National Security Grounds in China**

China has opened its market for foreign investment and can be the major recipient of FDI worldwide. This brought a fast increase in the number of M&As of domestic Chinese firms by foreign investors (particularly, foreign-owned enterprises). Consequently, increased FDI in the country resulted in optimizing the allocation of resources, fostering technical progress, improving business management levels, and these, in turn, advanced the technical capability and enlarged the Chinese economy in terms of performance and size. Concurrently, national security threats are also evident.[110] The general trend shows that China is moving towards a more expansive review of national security. It has established a national security regime of hard law associated with initiatives from both the Ministry of Commerce (MOFCOM) and the state council.[111]

The U.S.'s safeguarding measures are possibly having a great ideological influence on how China could adjust its foreign investment regulations and procedures.[112] China has long been mirroring the U.S.'s operational models in the most complicated legislative reforms and judicial practice. This means the continued use of CFIUS as a mechanism of economic protectionism has resulted in retaliation in the form of restrictions of U.S. foreign investment.[113] Consideration of the U.S.'s

[108] *Id*., Christopher, Defining National Security, pp. 1230-1231.
[109] James Jackson and et al, CFIUS Reform: Foreign Investment National Security Reviews, *Congressional Research Service*, (2019), PP. 1-2.
[110] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 305.
[111] Qingxiu Bu, China's National Security Review: a tit-for-tat response?, *Law and Financial Markets Review, 6*(5), (2012), p. 347, [hereinafter Qingxiu, China's National Security Review: a tit-for-tat response?].
[112] Christopher Weimer, Foreign direct investment and national security post-FINSA 2007, *Tex. L. Rev., 87*, (2008), p. 684.
[113] James Carroll, Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security, *Emory Int'l L. Rev., 23*, (2009), p. 186.

use of national security review as a protectionist tool has resulted in a protectionist backlash from the side of China.[114]

Chinese national security review traced back to 2006 when MOFCOM promulgated the rules requiring the notification and review of M&As transactions that may impact China's national economic security. According to this rule, concerned parties are required to apply for approval from MOFCOM when the acquisition of a domestic enterprise by a foreign investor bears actual control; involves key industries; has factors imposing or possibly imposing material impact on the economic security of the state, and results in the transfer of actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands.[115]

China's national security considerations are designed in a complex regime and are currently undertaken in an additional opaque level of regulatory review.[116] To regulate inbound M&As in sensitive industries and with the substantial increase in cross-border M&As, China has established a long-anticipated state-level national security review system undertaken by a multi-ministry panel which is jointly headed up by the National Development and Reform Commission (NDRC) and MOFCOM. To set national security review in motion, relevant government agencies or within upstream and downstream industries of the target should initiate a case. For this, MOFCOM as a gatekeeper works with relevant entities to obtain necessary details and additional government agencies with close relevance to a particular acquisition may also participate on an *ad hoc* basis.[117] With the greatest interest or expertise in the matter is designated to conduct most of the review and report back to the panel for each transaction, a lead agency is required.[118]

In sum, as compared to CFIUS, China has defined national security broader. CFIUS expressly precluded economic security though it practically considers economic issues affecting national security. The Chinese National Security Review Notice explicitly defined national security to include economic concerns as far as it has an impact on the domestic economy. However, it is not known when a transaction will be subject to national security review since industrial sectors falling within the ambit of the reviewing rules have not yet been identified or clarified.[119]

[114] George Georgiev, The Reformed CFIUS Regulatory Framework: Mediating between continued openness to foreign investment and national security, *Yale J. on Reg.*, *25*, (2008), p. 134.
[115] Eileen Schneider, Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession, *Brook. J. Corp. Fin. & Com. L.*, *2*, (2007), p. 280, [hereinafter Eileen, Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession]
[116] Vivienne Bath, Foreign investment, the national interest and national security-foreign direct investment in Australia and China. *Sydney L. Rev.*, *34*, (2012), p.5.
[117] China Overhauls Its Foreign Investment Regulatory Regime | Global law firm | Norton Rose Fulbright, https://www.nortonrosefulbright.com/ru-ru/knowledge/publications/a885f4c3/china-overhauls-its-foreign-investment-regulatory-regime (last visited Apr 17, 2020).
[118] Qingxiu, China's National Security Review: a tit-for-tat response?, p. 347.
[119] Qingxiu, China's National Security Review: a tit-for-tat response?, p. 348.

Moreover, the interagency review system together with the application of competition law has created an institutional and rule overlapping which ostensibly affects predictability, transparency, and efficiency of the FDI screening system on national economic security in the country.[120]

5.1.3. FDI Screening Mechanisms on Evolving National Security Grounds in the European Union

With a traditionally open-door policy to FDI, the EU has been the world's largest exporter of international investment and the leading recipient of FDI in the world. [121] Fifty percent of all investment agreements concluded worldwide go to the current 28 [including the recently exited UK] EU member states. This refers that the EU is an open space committed to free trade and investment. And now, it becomes a major player in international investment law since the entrance into force of the Treaty of Lisbon,[122] Despite contending arguments, the Treaty of Lisbon has expanded the EU's common market policy to trade and investment, and it has also eased the regulation of non-EU or third-country investment access and treatment both by the Union and member states.[123] Although the Chinese total value of investments is still limited in the EU, the concern is growing higher across Europe following the foreign control of important European economies, particularly by China. And, since the Chinese investment is highly connected to the state, this caused a fear concerning politically driven FDI and, inter alia, the potential acquisition of key sectors of the European economy.[124]

On February 14, 2019, the European Parliament approved a regulation on the FDI Screening system amidst a global sprint to strengthen and establish FDI laws that are found in France, the UK, Germany, and Hungary as well as the U.S. and China. The regulation introduces formalizes and sets criteria among member states and with the commission maintaining individual member states' authority to screen (investigate, condition, prohibit, or unwind) FDI. In the regulation, the European Commission has been given the competence to intervene with an official opinion on the grounds of public order and security and it sets an official forum for member states to weigh in and potentially affect the course of foreign investment activities across the EU.[125]

The EU regulation on the FDI screening system has been adopted on last March 19, 2019; entered into force on April 10, 2019; and will be applicable from October 11, 2020, onwards established, for the first time, a framework for the screening of FDI into the EU via subjecting a broad category of foreign investments affecting security or public order. In doing so, the regulation is a tiebreaker

[120] Qingxiu, China's National Security Review: a tit-for-tat response, p. 349.
[121] Julien Chaisse, Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI affect the Emerging Global Regime?, *Journal of International Economic Law*, *15*(1), (2012), p. 52.
[122] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 377.
[123] Steffen Hindelang and Niklas Maydell, The EU's common investment policy–connecting the dots, In *International Investment Law and EU Law*, Springer, (2011), pp. 1-27.
[124] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 378.
[125] New EU-wide Foreign Direct Investment Screening System Approved, CLEARY INTERNATIONAL TRADE AND SANCTIONS WATCH, (2019), https://www.clearytradewatch.com/2019/02/new-eu-wide-foreign-direct-investment-screening-system-approved/ (last visited Apr 17, 2020).

for EU Merger Regulation that is used to review mergers, acquisitions, and joint ventures impeding an effective competition in the EU.[126]

In subject matter, the regulation allows whether a proposed FDI likely affects security or public order by identifying the non-exhaustive list of strategic sectors (critical infrastructure, critical technologies, critical inputs, sensitive information, and media freedom and plurality) with expansive definitions.[127] This means, unlike CFIUS, the regulation stops short of introducing any form of blocking way or suspension powers at the EU-level concerning foreign investment. It would rather introduce comprehensive cooperation and information-sharing framework between the Commission and EU member states, which will bring a material procedural (and timing) impact for European deal-making within the ambit Regulation in the future. It also nudges individual EU countries that do not currently have foreign investment controls in place to introduce new CFIUS-style review processes and screening mechanisms at the national level. Mainly, this will create a more complex procedural environment for certain categories of foreign investment activity in Europe ahead.[128]

The EU FDI Regulation also designed three different sets of cooperation and review mechanisms; these are:

5.1.3.1. **A Cooperation Mechanism for FDI Undergoing Screening**[129]

A member state screening any FDI under its national rules must provide detailed information on the transaction to the other member states and the Commission as soon as possible,[130]

When they determine that the FDI is likely to affect its security or public order, or that it has relevant information about that FDI, other member states may make a comment on the transaction to the Screening member state. The Commission may also give an opinion on the transaction to the screening member state when it considers that the FDI is likely to affect security or public order in more than one member state, or that it has relevant information concerning that FDI.[131] An opinion must be provided where it is justified in that at least one-third of EU member states do have concerns.[132] The Commission may also be requested by the screening member state to give an opinion or for other member states to provide comments, and the comments and the opinions need to be duly justified.[133] In doing so, the screening member state doesn't have an obligation to

[126] The new EU Regulation on the screening of Foreign Direct Investments | May - 2019 | A&L Goodbody, https://www.algoodbody.com/insights-publications/the-new-eu-regulation-on-the-screening-of-foreign-direct-investments (last visited Apr 17, 2020).
[127] REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, [E]stablishing a framework for the screening of foreign direct investments into the Union, Official Journal of the European Union, (19 March 2019), Art4, [hereinafter REGULATION (EU) 2019/452, A Framework for the Screening of FDI].
[128] Qingxiu, China's National Security Review: a tit-for-tat response?, p. 347.
[129] REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6.
[130] *Id.*, REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Arts. 6 (1) & 9 (2).
[131] *Id.*, REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (2) & (3).
[132] *Id.*, REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (3).
[133] *Id.*, REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (5).

reflect any opinion or comment received but to give due consideration. Lastly, the screening member state is free to pass the FDI review without delegation to the commission or any other supranational body.[134]

5.1.3.2. **A Cooperation Mechanism for FDI Not Undergoing Screening**[135]

This is a mechanism where the regulation enshrines an additional type of review out of a formal screening for FDI that is not screened by the member state in which the transaction takes place (affected member state). In this scenario, a member state which believes that the planned or completed FDI in a member state that is not undergoing screening is likely to impact its security or public order, or that it has relevant information concerning that FDI, may provide comments to the affected member state.[136]

5.1.3.3. **A Mechanism for FDI Likely to Affect Projects or Programs of Union Interest**[137]

For the need to protect projects or programs (a substantial EU funded or established by Union legislation concerning critical infrastructure, critical technologies, or critical inputs) which serves the Union as a whole or do have an essential contribution to its economic growth, jobs, and competitiveness, the Commission may issue an opinion addressed to the member state where the FDI is planned or has been completed.[138]

In sum, the EU FDI Regulation doesn't equate with the FIRRMA of the CFIUS in that it doesn't impose an obligation on parties to a transaction but onto EU member states. Depending on member states' reaction to the regulation, CFIUS-like review boards, and screening and blocking mechanisms may be established at a national level in the EU jurisdiction. Since the cooperation provisions insist, member states likely will introduce national screening systems (the recent Hungary and Netherlands national screening systems can be mentioned); or those fourteen member states who have already introduced FDI screening system shall maintain, amend and adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions;[139] and are required to notify the Commission.[140] At the end of the day, though it adds a layer of procedural complexity for foreign investments in the EU, the Regulation is expected to result in increasing convergence between the different systems of the EU member states with predictable and transparent FDI screening systems on security and public order grounds.

5.1.4. **A Cursory Look on the African Investment Regime from (Evolving) National Security and Security Related Concerns**

[134] *Id.*, REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (9).
[135] *Id.*, REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 7.
[136] *Id*., REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 7 (1).
[137] *Id*., REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 8.
[138] *Id*., REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 8 (1).
[139] REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 3 (6).
[140] REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 3 (7).

The international investment law regime in Africa is characterized as a complex, fragmented, and heterogeneous web of bilateral, regional, and international legal instruments. Just so, the regime consists of customary international law rules, bilateral, regional, and plurilateral investment treaties, and free trade agreements with investment provisions.[141] Most of the international investment agreements (IIAs), which are commonly called North-South BITs, were concluded since the 1960s with developed economies made for investment promotion and standardization. These IIAs were motivated by social, economic, and political reasons: to strengthen economic integration, and nurture diplomatic and economic relations. However, though voluminous FDI has been attracted, still under development, abject poverty, and high unemployment remain bottlenecks to the content. This triggers to question the role of FDI for Africa's economic growth and development.[142]

It is witnessed Africa has signed IIAs as an incentive to attract FDI from the developed economies. The developed economies, on their part, have signed IIAs to protect their investors and investments from expropriation and nationalization.[143] This kind of non-aligned relation can be expressed result of developed countries being investment treaties designers and pro-investor by denying host countries substantive right to regulate.[144] Host African countries, hoping for future FDI inflow, remain investment-rule consumers losing consideration of the nature and content of the agreements they signed.[145] As a reason for this, Africa doesn't have a legally binding and continent-wide tool to regulate investment. In 2016, the African Union adopted a continent-wide investment code, The Pan-African Investment Code (PAIC). Still, it is a nonbinding instrument. PAIC is designed to create a balanced investment regime: providing investment protection while maintaining host states' policy space for regulation.[146]

PAIC is expected to have a multiplier effect in shaping agreements coming in the future and those under negotiation so that it aids to meet the continent's transformation objectives.[147] Unlike the U.S., China, and EU rules discussed above, PAIC doesn't clearly show evolving national security concerns. This may be due to the wider objectives it aimed to achieve. It states national security interests as one of the general exception clauses left for states to decide over it.[148] PAIC can also be used as yeast to develop FDI screening framework rule in the future as in the case of the EU

[141] Talkmore Chidede, The Right to Regulate in Africa's International Investment Law Regime, *Or. Rev. Int'l L., 20*, (2018), pp. 437-438, [hereinafter Talkmore, The Right to Regulate in Africa's International Investment Law Regime]
[142] *Id.*, Talkmore, The Right to Regulate in Africa's International Investment Law Regime, p. 438.
[143] Africa and bilateral investment treaties: To "BIT" or not?, POLITY.ORG.ZA , https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23 (last visited Apr 20, 2020).
[144] Emmanuel Layrea and Franziska Sucker, Introduction: The Importance of an African Voice in, and Understanding and Use of, International Economic Law, In *International Economic Law: Voices of Africa, Siber Ink Cape Town, chapter, 4*, (2012), p.10.
[145] Talkmore, The Right to Regulate in Africa's International Investment Law Regime, p. 467.
[146] Talkmore, The Right to Regulate in Africa's International Investment Law Regime, p. 443.
[147] Mouhamadou Kane, The Pan-African Investment Code: a good first step, but more is needed, Columbia FDI Perspectives, Columbia Center on Sustainable Investment, 217, (2018), pp. 1-3.
[148] The African Union, Economic Affairs, The Draft Pan-African Investment Code, (2016), Art. 14.

and to reform domestic investment policies in general and concerning evolving national security interests in particular.

Beyond responding to evolving national security threats in the world of FDI, African countries should also reassure their sovereignty over its abundant natural resources by overcoming the internationalization of investment contracts and stabilization clauses that paralyzed the use of their domestic legislative jurisdiction. African countries should also preserve their judicial jurisdiction and limit the almost uniform adoption of international arbitration as a means of settling investment disputes. These can be carried out through developing continental and regional common positions; by reviewing BITs and other investment agreements, contracts, and national legislations; and by terminating or renegotiating those which compromised national interests using harmonized policy frameworks.[149]

Concluding Remarks and Ways Forward

Though investment liberalization and opening of an economy for FDI is still a working fashion of the day, in recent years, evolving national security and security-related concerns have gained more attention in investment policies of several countries. The cause of the problem is not only on the subjective and political nature of national security and its evolving feature at different times but also hidden protectionist agendas and economic or strategic goals that make FDI regulation fall short of having a common legal framework.

To restrict FDI based upon national security and security-related grounds, different review mechanisms are evident across various countries, ranging from formal investment restrictions to complex review mechanisms. And, broad definitions and scope of application of national security are giving rise to a wider discretion for the host state through screening FDI in general and based upon national security grounds, in particular, is emanated from the inherent sovereignty of states.

The critical point is on how to balance the legitimate demands of national security and FDI. Unless a balance is made, invoking the ambiguous and blurred evolving concerns of national security, it affects FDI and free trade as well. This problem is getting worse since FDI screening on national security grounds is undertaken without clearly defined national security interests in a dedicated policy legal rules, and institutional structure. In this regard, despite their respective drawbacks, the U.S.'s CFIUS review system, China national security review regimes, the recent EU FDI Screening Regulation on security and public order grounds, and other individual countries' screening frameworks can give other countries and economic blocs a lesson on how to regulate FDI based on evolving national security grounds. Someday, all these practices would give rise to developing a common legal framework that can be used as a guide for FDI screening on (evolving) national security grounds in different states. In doing so, pretextual protectionist measures or

[149] Melaku Geboye, Competition for Natural Resources and International Investment Law: Analysis from the Perspective of Africa, In *Ethiopian Yearbook of International Law*, Springer, (2016), pp. 117-149.

sought of hidden goals taken under the guise of national security interests will be lessened and the essence of FDI will be maintained worldwide.

Throughout this article, (evolving) national security interests have been identified as a legitimate public policy concern. Hence, regulating FDI on this legitimate policy concern is lawful and directly attached to the sovereignty of states. So, hereby, the recommendations will revolve around how to identify real national security interests; define the concept and scope of national security; design a sound standalone policy and legal framework; institutional structure, and develop a clear and justified screening practice at a national level. At the international level, how to establish a framework policy and law on a multilateral basis to the matter have also been indicated.

Firstly, in dealing with their respective national security interests without affecting the inward FDI they receive, countries need to ostensibly identify their real national security interests and set a clear and predictable mechanism on how to entertain evolving national security interests. This measure of providing more clarity to the concept and scope of national security can be encapsulated in their investment and investment-related policies and legislations.

Secondly, after identifying their real national security interests, countries need to discern and utilize alternative policy approaches that would help solve national security-related issues in their FDI regulation. In this way, national security measures will not be abused for security-related and protectionist measures so that a host country can rip benefits of FDI, and freedom of investment can be guaranteed to a foreign investor.

To overcome retaliation measures among countries concerning FDI screening on national security concerns, and set a predictable, transparent, and responsible investment environment, countries are advised to enact standalone national security review policies and rules at the national level. Besides, formulating a framework policy and law helps them to guide their national policies, legal rules, and actions, (potential) trading partner countries exchanging foreign trade and investment should conclude bilateral or multilateral framework agreements.

Thirdly, to respond to evolving national security issues, beyond enacting a dedicated policy and law, compatibility of existing national investment, competition, and other related policies and laws need to be revised and tailored as to the spirit and notions of the current national security interests. For this, policy dichotomy, rule or institutional overlapping, inconsistencies, and lack of predictability and transparency of FDI screening on national security grounds can be lessened.

Fourthly, if (evolving) national security concerns are linked to free trade while designing a legal framework for FDI screening on national security grounds should also be connected to WTO free trade rules. It is believed that WTO free trade rules can give a yeast and catalyze the development of the legal frameworks required for governing FDI worldwide in general and essentially concerning evolving national security grounds. Besides, as a step forward, for letting free trade and investment unencumbered by national security policies, international investment law and policy regime need to have declaratory rules setting framework on how to regulate FDI screening on evolving national security grounds.

Fifthly, any stakeholder's multilevel initiatives on FDI regulation are also commendable to mitigate FDI hurdles on evolving national security concerns. This can be done through facilitating intergovernmental dialogue, harmonization, norm-setting, and development of soft laws, in the long run, nudging to reform fragmented and hostile national screening systems worldwide.