THE ESTABLISHMENT OF SCREENING SYSTEMS ON NATIONAL SECURITY GROUNDS: A KOREAN PERSPECTIVE.*

ABSTRACT:

The process of liberalization of international trade and of Foreign Direct Investment (FDI) has constituted a broadly accepted trend during the last few decades and FDI inflows have expanded constantly since the end of the 1980's. However, signs of a certain crisis of the positive and one-way attitude towards international trade and FDI exist nowadays. The financial crisis, the change in the origin of the FDI derived from the new geo-strategic reality arising out of the crisis, the growing participation of foreign sovereign actors in international trade and investment, the changing environment for national security or the quest to protect technologies and sectors of the economy considered vital for the host country, its sovereignty and competitiveness have led many countries to set forth mechanisms to evaluate FDI proposals before they are implemented. Korea is not alien to this trend.

As a matter of principle the protection of national security is a legitimate goal of any state. However, there is a risk of these kinds of instruments being politicised, and the potential negative consequences of a broad interpretation of the notion of national security remain. The creation of these screening systems has taken place in an atmosphere of liberalisation of investment, and their introduction has ultimately constituted a sort of exception to it. But this atmosphere is changing negatively very quickly and the peril to use these screening systems as an excuse to impose hidden limitations on free trade and investment increases. The Republic of Korea, as many other countries in the world, is not vaccinated against this danger.

KEY WORDS.

Foreign Direct Investment (FDI)
Foreign investment and national security
Freedom of Investment
Control of FDI
Barriers to foreign investment

Screening systems of control of FDI

Restrictions to foreign investment

Republic of Korea

SUMMARY

1. Foreign Direct Investment under debate… once again!

The process of liberalization of international trade and of Foreign Direct Investment (FDI) has constituted a broadly accepted trend during the last few decades.[1] However, signs of a certain crisis of the positive and one-way attitude towards international trade and FDI exist today.[2] The atmosphere of growing prevention as regards some of the consequences arising out of globalization is rapidly favouring protectionism and creating a new element of pressure on the freedom of FDI. Liberalization of FDI constitutes a strong trend that

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[1] Stephen S. Golub, *Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries*, OECD Economic Department Working Papers, No. 357, OECD Publishing, Paris, 2003, 1; Karl P. Sauvant, *FDI Protectionism Is on the Rise*, Policy Research Working Paper 5052, The World Bank Poverty Reduction and Economic Management Network (International Trade Department World Bank, Washington, September 2009) 3.

[2] Note Carlos Esplugues, *Foreign Investment, Strategic Assets and National Security*, Cambridge, intersentia, 2018, 3 ff.

will probably continue in the future. However some signs of "backlash against FDI"[3] exist that make the regulatory framework less welcoming in certain countries as regards foreign investments or, at least, as regards foreign investments coming from certain countries, sovereign-driven FDI or FDI directed to certain areas of the economy.

A double-edged attitude towards FDI is growing nowadays in many parts of the world. As a matter of principle most states encourage FDI, but at the same time many of them are increasingly beginning to adopt a more selective approach in relation to it. That finally means that FDI is welcomed as a general rule, but some FDI or some kinds of FDI are not that welcome in certain cases or as regards particular targets. National security, national essential security interests or similar vague and elusive terms are some of the grounds used to protect the host state from undesired FDI.[4]

The changing environment for national security or the quest to protect technologies and sectors of the economy considered vital for the host country, its sovereignty and competitiveness are creating a new reality that will necessarily affect both, the legal framework and the global fluxes of FDI. This becomes especially manifest as regards the protection of certain strategic industries and of some critical infrastructures.[5] The changing origin of FDI and the possibility of certain areas of the economy to be dominated by foreigners have raised national security anxieties in many western economies as well as have fostered economic nationalism.[6] This dissatisfaction increases in relation to sovereign driven FDI.

The traditionally rather innocuous area of investment law is nowadays under pressure.[7] FDI both inwards and outwards is not as welcome as before.[8] More and more some

[3] Lisa E. Sachs and Karl P. Sauvant, 'BITs, DTTs, and FDI Flows: An Overview', in Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP, Oxford, 2009) xxvii & lix.
[4] As regards the meaning of these terms, note Carlos Esplugues, above n 2, 76 ff.
[5] UNCTAD, *The Protection of National Security in IIAs.* UNCTAD Series on International Investment Policies for Development, UNCTAD/DIAE/IA/2008/5 (UNCTAD, New York/Geneva 2009), xiv.
[6] Stuart S. Malawer, 'Global Mergers and National Security' (2006) December *Virginia Lawyer Magazine* 33, 34.
[7] José E. Alvarez, 'Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?' (2009) 60 *Alabama Law Review* 943, 970.
[8] Crispin Waymouth, 'Is 'Protectionism' a Useful Concept for Company Law and Foreign Investment Policy? An EU Perspective' in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism New Challenges to European Integration* (OUP, Oxford, 2010) 35-6.

developed countries are starting to feel disquiet with respect to the FDI regime that they have helped construct for decades.[9] And the contradictions and tensions that have traditionally accompanied FDI are now superseded by the rising mistrust towards globalization and free trade that is arising in certain countries.[10] There is a strong trend to provide governments with broader powers to decide what FDI they want, and which one they don't. These objectives are ensured and reached through different mechanisms and policies fixed by the state itself. And it may lead governments, now also from developed countries, to pay more attention, among other things, to some competing objectives like the safeguard of special national interests or of essential security interests, the promotion of national champions or the protection of certain national industries and critical infrastructures.[11].

2. The building of a more cautious approach towards foreign investment.

FDI legislation reflects the balance between the benefits that host and home countries expect from foreign capital and the potential risks that FDI has for them.[12] And it is increasingly under pressure, especially in many western countries, which are currently re-evaluating the cost-benefit trade-off of certain types of FDI. Consequently, in certain places not all FDI is considered welcome but only some types of FDI and different instruments and devices are used to control it.[13]

No state has ever granted unrestricted entry to foreign investors and some limits to them have always existed. But nowadays some states and political actors are starting to think of whether they have relinquished "too much 'policy space'" in signing International Investment Agreements (IIAs) that through their interpretation by international arbitration panels may cast a "regulatory chill" over domestic measures that are considered to be needed to achieve legitimate, non-investment policy objectives, not only

[9] José E. Alvarez, above n 7, 972 & 975.
[10] Note Karl P. Sauvant, 'Driving and Countervailing Forces: A Rebalancing of National FDI Policies" (2008-9) *Yearbook on International Investment Law & Policy* 215, 234.
[11] Vid., OECD, *Building Trust and Confidence in International Investment. Report by countries participating in the "Freedom of Investment" Process March 2009* (OECD, Paris, 2009) p 10.
[12] Karl P. Sauvant, 'Driving and Countervailing Forces: A Rebalancing of National FDI Policies" (2008-9) *Yearbook on International Investment Law & Policy* 215, 233.
[13] Vid., Carlos Esplugues, above n 2, 221 ff.

in the economic field but also as regards other ambits like health and safety policy objectives, or national security as well as human rights or environmental protection.[14]

Fears increase further when the investment is undertaken by multinational enterprises (MNEs) belonging to emergent countries, some of them with a high participation of foreign governments in their control, governance and determination of their final aims.[15] More and more, some states wonder whether it is acceptable that key elements of the economy or prominent industries become controlled by foreign investors, some of them sovereign driven investors belonging to countries that do not always fully share their social, economic or democratic ideas. There are growing concern by states and public opinion about the compatibility of FDI, or at least of FDI coming from certain countries and targeting certain areas of the economy, with the protection and safeguarding of some values, policies and objectives of the host state in certain areas.[16]

2.1. Potential threats related to national security issues generated by FDI.

In addition to certain purely social and economic problems related to the potential change of domicile of the acquired enterprise, the loss of jobs that it can imply or the change in its management, some particular fears specifically related to national security issues exist in relation to FDI. Authors speak of at least three threats of diverse kinds potentially generated by FDI: the dominance of supply that penalizes the host country, the transfer of technology that harms host country interests, or the possibility of engaging in sabotage or espionage.[17]

[14] Suzanne A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13:4 *Journal of International Economic Law* 1037, 1039-1040. Also consider, OECD, *Interim report approved by the OECD Investment Committee at the fourth OECD Roundtable on Freedom of Investment, National Security and "Strategic" Industries on 30 March 2007* (reproduced in OECD, *International Investment Perspectives: Freedom of Investment in a Changing World* (OECD, Paris, 2007) 55.

[15] Note, Carlos Esplugues, above n 2, 178 ff.

[16] OECD, *Novel Features in OECD Countries' Recent Investment Agreements: An Overview*, OECD, Paris 2005, 4 at No. 11; Albertina Sara Vadi, 'Fragmentation or Cohesion? Investment versus Cultural Protection Rules' (2009) 10 *Journal of World Investment and Values* 573, 579ff.

[17] Theodore H. Moran, 'Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries?' in Zdenek Drabek and Petros C. Mavroidis (eds), *Regulation of Foreign Investment Challenges to International Harmonization* (Singapore World Scientific, World Studies in International Economics (Vol. 21), Columbia University, New York, 2013) 372-373.

In any case, taking these three different threats into account and leaving aside the potential political and media impact of some of the mergers and acquisitions (M&As) undergone in recent times, it is necessary to differentiate when approaching particular FDI proposals between genuine threats and generic which in some cases may be just excuses for the host state to adopt hidden protectionist measures. This is something to be determined on case by case bases. However, and generally speaking, all those countries endorsing these kinds of measures on security related grounds should share the challenge of ensuring that these security-related objectives are duly achieved at the same time that unnecessarily restrictive measures are not endorsed.[18]

Acquisitions of national corporations by foreign investors either private or public coming on many occasions from emerging markets and targeted at different sectors of the economy or firms of the host state has spread social alarm and regulatory reactions against FDI in many places of the world, or at least against FDI coming from certain countries or that which is targeting certain areas of the national economy. This refers to developing countries –the extractive industry is a good example of that- but also increasingly to developed ones. Developed countries fear they will lose control of strategic sectors of the economy and national champions in favour of foreign corporations coming in many cases from geopolitical or economic competitors.[19]

In this scenario it is indispensable to distinguish between the protection of the state and its economic and social viability, through the reference to terms like national security or essential security interests and the protection of the economic interests of the state, of its economic development or any other critical objective which may or may not be linked to the previous idea of national security and that in certain cases may even run against the notion of the free market. The line between protecting legitimate public policy objectives and protectionism is very fine and not always easy to be determined.

2.2. Some factors to be taken into account in evaluating the potential threat.

The acceptance of FDI on national security grounds becomes increasingly qualified and made dependent on factors such as the sector or specific industry targeted by the

[18] OECD, above n 11, 10.
[19] See Carlos Esplugues, above n 2, 63-67.

investment, its nature –either greenfield or through M&A of an already existing undertaking, its condition –purely private or sovereign driven- or its origin. Reference to these factors opens the question of determining which foreign investment can be dangerous for the host state, in other words, to specify against "what" or against "whom" is protection sought. And this is done by every state on its own. Any of these factors, alone or a combination of some of them, activate in most cases the national system of evaluation of FDI on national security or related grounds.

1) The origin of the FDI constitutes an essential element in the current security related discourse towards foreign investment.[20] Against whom is protection sought? The primary response to this question is: against certain investors who come from individual countries, those which are perceived as hostile or with which the host country has an unfriendly relationship.[21]

2) The nature of FDI constitutes an additional element of concern and potential control. Many cases of acquisitions of existing firms by some Sovereign Wealth Funds (SWFs) and, mostly by, State Owned Enterprises (SOEs)[22] since the beginning of the financial crisis in 2007 have been published.[23] This growing role played by SWFs and SOEs in recent times, and the wide potential for influence over their objectives and activities by foreign governments directly or indirectly owning or controlling them, has created certain concerns in host states regarding the real purpose of the investment to be made: whether it is purely commercial or it primarily responds to some political and geo-strategic reasons.[24]

3) In addition to the origin and/or the nature of the investment, the particular sector where it is to be made or the specific firm targeted constitute a landmark for the evaluation and acceptance of FDI proposals. For different reasons, the host country may wish to

[20] Carlos Esplugues, above n 2, 166 ff.
[21] Note UNCTAD, above n 5, 17.
[22] George Gilligan, Megan Bowman and Justin O'Brien, *The Global Impact of State Capital* (The University of New South Wales School of Law, Centre for Law, Markets and Regulation, CLMR Research paper series, Working Paper No. 13-2, Sydney, July 2013) 16.
[23] Note Thomas Jost, 'Sovereign Wealth Funds and the German Reaction' in Karl P. Sauvant, Lisa E. Sachs and Wouter P.F. Schmit Jongbloed (eds), *Sovereign Investment. Concerns and Policy Reactions* (OUP, Oxford, 2012) 453.
[24] Vid. Carlos Esplugues, above n 178-219.

retain control over certain key areas of its economy or to prevent "flagship" companies falling under the control of foreigners, even if they come from friendly countries.[25]

4) In addition to the origin or nature of the foreign investment and to the target of the investment, also the amount of the investment or the future degree of involvement of the foreign investor in a specific firm is relevant. Thresholds for invoking national security concerns are usual fixed in some FDI review systems on national security grounds. It is important to specify how much involvement a foreign investor must have in a specific firm in the host state before it is considered to be a risk for its national security. If it is necessary for the foreign investor to fully own the firm in order to become a risk for the host state or whether it is enough when an effective control or just certain voting rights exist, and how this is actually determined. All these elements are for states to determine and different responses to them are found worldwide.[26]

2.3. Measures a State could adopt.

The study of FDI has been traditionally very much linked to the analysis of International Investment Agreements (IIAs), especially of Bilateral Investment Treaties (BITs) and, consequently, to the dimension of its protection *ex post*; once the specific investment project has already been implemented in the host country. Only some isolated BITs, mostly those entered into by the US and Canada and more recently Japan,[27] cover both the pre-establishment and the post-establishment phase of FDI.[28] Habitually, the majority of them, irrespective of their bilateral and multilateral dimension, basically include rules referring to the traditional dimension of the promotion and protection of FDI.[29]

[25] UNCTAD, above n 5, 18.
[26] UNCTAD, above n 5, 24-5; Carlos Esplugues, above n 2, 177.
[27] Consider, Peter T. Muchlinski, 'Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order' (2011) 1:4 *Oñati Socio-Legal Series* 3, 3-4.
[28] Also the OECD Code of Liberalization of Capital Movements (OECD, Paris, 2013) and the OECD Code of Current Invisibles Operations (OECD, Paris, 2013) consider the pre-establishment phase, note Katia Yannaca-Small, 'Essential Security Interests under International Investment Law' in OECD, *International Investment Perspectives: Freedom of Investment in a Changing World* (OECD, Paris, 2007) 94.
[29] Note Leon E. Trakman and Nicola W. Ranieri, 'Foreign Direct Investment: A Historical Perspective' in Leon E. Trakman and Nicola W. Ranieri (eds), *Regionalism in International Investment Law* (OUP, Oxford, 2013) 19).

Nevertheless, this traditional *ex post* approach linked to the IIAs entered into worldwide is now combined in many states with an increased focus on the phase previous to the actual implementation of the investment in the host country. The goal to balance the commitment towards the free circulation of FDI with the preservation of certain areas of the national economy and firms from control by foreign investors has not -always or only- given place to broader areas where access of FDI is not allowed, but to the establishment of mechanisms aimed to control *ex ante* foreign investment in certain fields or coming from certain countries on national security or national interests' bases.

3. The establishment of mechanisms to control FDI (*ex ante*) on national security or related grounds.

Despite the generally positive attitude maintained as regards FDI flows a truly "open door policy" towards foreign investment does not seem to exist, or to have ever existed, anywhere. No country accepts foreign capital to enter its economy with total freedom and to be freely invested in any area of the country.[30] In fact, and despite the maintenance of a global trend in favour of the liberalization of FDI, many national regulations that include provisions aimed to enhance the entrance of FDI and which usually grant investors many benefits and guarantees, now increasingly vest at the same time in host states the possibility to control FDI and to prevent it from entering their economy or some firms on certain different grounds.[31] Some of these changes relate to the introduction of control systems on the entry of FDI into their economies on national security or related grounds.[32]

The state is granted the power to regulate and to stop some FDI proposals, at least those that, according to it, pose national security concerns.[33] In some cases the final

[30] Jeswald W. Salacuse, *The Three Laws of International Investment. National, Contractual and International Frameworks for Foreign Capital* (OUP, Oxford, 87.
[31] In fact, when UNCTAD analysed the legislative changes on FDI implemented between 1990 and 2009 it stressed the incidence of the promotion and liberalization of FDI during this period UNCTAD, *World Investment Report 2010. Investing in a Low-Carbon Economy* (United Nations, New York and Geneva, 2010) 76-7.
[32] As well as, significantly, to the promotion and incentives of FDI, note Andrew Sumner, 'Foreign Direct Investment in Developing Countries: Have We Reached a Policy 'Tipping Point'?' (2008) 29:2 *Third World Quarterly* 239, 242.
[33] J. Anthony Vanduzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (prepared for the Commonwealth Secretariat by the authors)* (London, 2012) 39 & 224; UNCTAD, *Investment Policy Framework for Sustainable Development*, Doc. UNCTAD/DIAE/PCB/2015/5 (UNCTAD, Geneva, 2015) 8.

consequence is that the investment policy of the country and its investment law are becoming increasingly considered and treated as an additional tool to foster national security policies amid an increasingly securitized world.[34] In fact, the OECD already stated in 2006 that "(I)ssues of security and other strategic concerns have moved to the forefront of domestic and international investment policy making",[35] and recently warned of the rise of "hidden protectionism" and protectionism abuse based, among other factors, on national security and related grounds.[36]

No specific rules controlling the entrance of foreign investment on national security, national essential security interests and related grounds existed for a long time in many countries.[37] But this has changed in the last few decades and now more and more specific rules on FDI govern this issue in many countries. States are nowadays fully concerned about the problems that FDI may cause to them in some cases and special relevance is being given to sovereign FDI. Even countries that are investing abroad are progressively aware of the national security aspects of FDI.

Governments are increasingly eager to screen, and in some cases even restrict, condition or block foreign investment implemented through takeovers of already existing domestic corporations on grounds of national security or related grounds. FDI is still wanted and encouraged as a general rule, and policies in favour of attracting FDI are implemented almost worldwide. But this fact does not supersede the increasing desire of many states to preserve certain areas of their economies or firms from foreign control or, in a less invasive way, to control certain FDI of a particular nature –basically sovereign driven FDI-, coming from certain countries or targeting particular firms or sectors of the national economy.

According to the World Bank's Survey Investing Across Borders in 2010, a fifth of the 87 countries analysed require foreign companies to go through a foreign investment approval process before proceeding with investment in certain areas of their economy.

[34] OECD, *Protection of "Critical Infrastructure" and the Role of Investment Policies Relating to National Security* (OECD, Paris 05.2008) 9.
[35] OECD, *International Investment Perspectives. 2006 Edition* (OECD, Paris, 2006) 32.
[36] OECD, above n 14, 9.
[37] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (CUP, Cambridge, 3rd ed., 2010) 97.

And almost 90 per cent limit foreign companies' ability to participate in some specific sectors of their economies, with stricter limits to their participation in services.[38] Different measures may be adopted by the host state to protect itself –*ex ante*- from foreign investment on national security or similar grounds.[39]

3.1. Market access measures.

Prohibiting, fully or partially, foreign investment in particularly sensitive sectors is the most obvious *ex ante* restriction to FDI. National governments may foresee exclusive national ownership in certain sectors that are considered strategic on different grounds and therefore ban FDI in several areas of the economy.[40]

The state has the right to protect its "essential security interests",[41] and practice shows that the "most heavily restricted sectors" are those considered "highly sensitive to national security or national sovereignty considerations".[42] However, a total ban of FDI is almost unrealistic nowadays. Habitually, the prohibition refers to certain specific areas of the economy or industries and affects both developed and developing countries.[43] In fact, this limited prohibition constitutes a rather habitual measure usually drafted "in grandiose, but vague terms".[44]

Full or partial foreign ownership restrictions usually exist in the defence industry (both production of weapons and war materials); air and maritime cabotage services and air traffic control or the purchase of real estate by foreigners in border areas or near other sensitive sites.[45] Border restrictions, for instance, constitute the most obvious example of

[38] Investment Climate Advisory Services World Bank Group, *Investing Across Borders 2010. Indicators of foreign direct investment regulation in 87 economies* (World Bank, Washington, 2010) 8.
[39] For instance, imposition of other emergency measures, forced disinvestment, denial of benefits based on the existence of a clause in the agreement, see UNCTAD, above n 5, 30-3.
[40] See Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing, Utrecht, 2006) 58-61.
[41] James K. Jackson, *Foreign Investment and National Security: Economic Considerations*, Congressional Research Service, 7-5700, RL34561 (Washington, 4 April 2013) 6.
[42] Golub, above n 1, 24.
[43] Jürgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment' (2002) 243:3 *University of Pennsylvania Journal of International Economic Law* 713, 725-726.
[44] Peter T. Muchlinski, *Multinational Enterprises & the Law* (OUP, Oxford, 2nd ed, 2007) 179-180.
[45] Julien Chaisse, Debashis Chakbaborty and Jaydeep Mukherjee, 'Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies' (2011) 45:4 *Journal of World*

limitation of ownership which has existed for a long time in many countries of the world. Foreigners are prevented –or face limitations- from owing real estate near territorial borders or in areas of strategic significance. Additionally restrictions may also concern electricity power grids and exchanges, seaport or airport management, or oil and gas extraction activities.[46] However, these potential restrictions may have different degrees. However, the degree of restrictiveness is generally higher in the latter group of countries.[47] In some cases no explicit rule exists and a more subtle position is maintained.[48]

In addition to this ban, either total or sectoral, of foreign ownership in certain areas of the economy, also the number of foreign investors admitted into a certain sector of the economy can be limited by certain states.[49]

3.2. Maintenance of state's monopolies.

Another way of preserving some strategic sectors of the economy from foreign investment is through the maintenance of state monopolies in particularly sensitive sectors usually linked to the provision of basic public services and communications in a certain state; railway transport and infrastructure maintenance, landline telecommunications, oil and gas transportation, or electricity and water transmission are usual examples of them.[50]

3.3. Equity limitation.

Some countries have also introduced the requirement of joint ventures or equity restrictions in certain areas of their economy. In fact it is said to be one of the most

Trade 837, 854; UNCTAD, *World Investment Report 2016. Investor Nationality: Policy* Challenges (United Nations, New York and Geneva, 2016) 97-8.

[46] Ibid, 98.

[47] Stephen Thomsen and Fernando Mistura, *'Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index' OECD Global Forum on International Investment* (OECD, Paris, 2017) 16.

[48] In Canada, for instance, the health care sector is considered to be de facto closed to FDI because private hospitals and clinics may not receive payments from provincial health insurance funds, which are deemed critical for the financial viability of operators in the sector. Vid. Investment Climate Advisory Services World Bank Group, above n 38, 98.

[49] Kurtz, above n 43, 725.

[50] UNCTAD, above n 45, 98.

common forms of discrimination against foreign investors, although their effectivity is, once again, under question.[51]

The amount and final transcendence of the FDI implemented in the host state can be controlled in order to ensure local control of the sector or firm affected. For instance, the Open Air Agreement between the EU and USA of 2007 explicitly limits the possibility of foreign ownership, even by an EU citizen or corporation, of US airlines to no more than 25 per cent of the corporation´s voting equity.[52] Similar limitations in other areas of the economy like banking, natural resources and energy,[53] nuclear energy and mining and mineral leases or telecommunications exist in many countries of the world.[54]

In some countries the possibility of golden shares to prevent the acquisition of local firms, usually privatized firms, by unwanted foreign investors also exists.[55]

3.4. Imposition of certain conditions on the future implementation of the FDI.

In addition to the previous systems and not always fully independent of them, the host government can also subject the acceptance of the proposal to the meeting of certain specific conditions for its future implementation. These conditions can be independent of the existence of a screening systems or be included in a prospective conditionality agreement reached as a consequence of the evaluation of the FDI project on national security or related grounds.[56]

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[51] Thomsen and Mistura, above n 47, 4.

[52] REFERENCE "ANNEX 4: *Concerning Additional Matters Related to Ownership, Investment and Control.* Article 1: Ownership of Airlines of a Party. 1. Ownership by nationals of a Member State or States of the equity of a U.S. airline shall be permitted, subject to two limitations. First, ownership by all foreign nationals of more than 25 percent of a corporation's voting equity is prohibited. Second, actual control of a U.S. airline by foreign nationals is also prohibited. …". Note also, United States Government Accountability Office, *Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Sovereign Wealth Funds. Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes*, GAO-09-608 (Washington DC, 05.2009), 15 and Appendix II.

[53] Note Edward M. Graham and David M. Marchick, *U.S. National Security and Foreign Direct Investment* (Institute for International Economics, Washington, 2006), 13-4.

[54] Efraim Chalamish, 'Global Investment Regulation and Sovereign Funds' (2012) 13:2 *Theoretical Inquiries in Law* 645, 651.

[55] See Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing, Utrecht, 2006) 61-2.

[56] Carlos Esplugues, above n 2, 236-238.

Through these mechanisms, host states may try to maximise the benefits of FDI or to control FDI flows by imposing on the investor some performance requirements, although their effectiveness is still a controversial issue.[57] Specific measures can be very different and vary from country to country.

Whether all these measures are adopted to preserve some sectors of relevant national interests from foreign control in general or from certain investors coming from particular countries or with the hidden goal of safeguarding particular areas of the economy from competition is something to be determined on case by case bases. However, and generally speaking, all those countries endorsing these kinds of measures on security related grounds share the challenge of ensuring that these security-related objectives are duly achieved at the same time that unnecessarily restrictive measures are not endorsed.[58]

3.5. The rising star: screening systems of evaluation on national security grounds.

Screening mechanisms of FDI on national security, national essential interests or related grounds are the rising star in this area. Screening and notification procedures constitute mechanisms to control the flux of FDI that are becoming very popular nowadays around the world. Many countries, both developing and developed states, are aware of the need to protect some industries and areas of their economy from certain FDI or FDI coming from certain countries and are progressively referring to this kind of device. States are increasingly designing this kind of instruments which provide the host state administration with the ability to evaluate FDI proposals and decide upon their acceptability or rejection. The recent enactment by the European Union of the Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union[59] or the enactment in the US of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)[60] are, among many others, good examples of this trend.

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[57] Guoquiang Long, 'China's policies on FDI: review and evaluation' in Theodore H. Moran, Edward M. Graham and Magnus Blomström (eds), *Does foreign direct investment promote development?* (Institute for International Economics, Washington, 2005) 315.
[58] OECD, above n 11, 10.
[59] *OJ* L 79, of 21.3.2019. As regards the Regulation, note, Carlos Esplugues, "A Future European FDI Screening System: Solution or Problem?", *Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues*, No. 245, February 11, 2019 (http://ccsi.columbia.edu/files/2018/10/No-245-Esplugues-Final.pdf, accessed 19.04.2019).
[60] H. R. 5515—538.

These mechanisms are based either on the nature of the specific sector where the FDI project is envisaged, on the existence of a certain threshold or on the nature of the investor, among other potential grounds. States are certainly sovereign to control FDI flows in an absolute manner. However, authors cast some doubts as regards the all-embracing scope of this power and subject the validity of these potential measures to the fact that they are adopted on rational grounds.[61] A case-by-case evaluation of proposed FDI projects by the government of the host country or by a specialized –and, in some cases, independent- body is undertaken with the goal of establishing whether the project is in accordance with the very basic economic or social policies of the host state or runs against its national security.

As a matter of principle, the development of a screening system does not in many cases hamper the openness of the country that designs it towards FDI. At least most developed countries and many emerging economies are clearly aligned with the free movement of FDI. Nevertheless, as practice shows, these kinds of systems have also in many cases the tangential effect of dissuading potential FDI projects that are abandoned by their promotors after some concerns are expressed by public authorities.[62]

4. Screening systems on national security, national essential security interests or related grounds and their foundations.

Rules on market access or ownership limitation certainly remain in some countries, and mechanisms to control the future activity and functioning of foreign acquired national firms are also designed in some places. But, as stated, the very novelty nowadays is the growing development of screening systems of FDI on national security or related grounds by developed and emerging countries which, as a matter of principle and due to their limited scope, do not limit the full support of many of these countries to the idea of free movement of investment. National states may impose conditions on the entrance of aliens

[61] See Muthucumaraswamy Sornarajah, above n 37, 137.
[62] See Andreas Heinemann, 'Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism? Control of Cross-Border M&A' (2012) 15:4 *Journal of International Economic Law* 843, 851.

and they can also impose conditions on the entrance of FDI. All these screening systems stand on different grounds but share the same idea of providing the state with a tool to protect certain industries or areas of the economy from FDI that either because its nature or origin can potentially generate threats to the national security of the host state.[63]

4.1. Goals and key principles of any screening system.

Screening systems are usually mechanisms with a rather limited scope: the control of those particular FDI proposals that can threaten the national security of a specific host country. Because of their own nature they do not target all FDI and they habitually do not put under question the validity of the premise in favour of the free movement of FDI. They only refer to some specific FDI projects that encompass certain traits and that therefore are subject to evaluation on national security grounds by the public authorities of the host state. Which traits those are varies from country to country as does the philosophy on which the evaluation is undertaken and its results do too.[64]

Screening mechanisms of evaluation of FDI on national security grounds are becoming rather popular worldwide. And their popularity poses certain issues as regards the principles and grounds on which they must be drafted for them to be compatible with the freedom of movement of capital and investment. Thus, the OECD identifies four key principles to be taken into account in relation to the development of any evaluation system of FDI on grounds of safeguard of national security interests, public order or related notions: non-discrimination,[65] transparency and predictability of the system developed,[66] proportionality,[67] and accountability.[68]

[63] See, Carlos Esplugues, "La Propuesta de Reglamento estableciendo un marco para la evaluación de las inversiones extranjeras directas en la Unión Europea de septiembre de 2017", *Cuadernos de Derecho Transnacional*, 2018, vol. 10:1, 177-179.
[64] Vid. Carlos Esplugues, above n 2, 254-263.
[65] OECD, *Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security* C(2009)63 (OECD, Paris, 25 May 2009) Annex 1.
[66] OECD, *Accountability for Security-Related Investment Policies* (OECD, Paris, November 2008) 4.
[67] OECD, above n 65, Annex 3.
[68] OECD, above n 66, 4. Four additional principles are mentioned by the World Bank Guidelines on the Treatment of Foreign Direct Investment: 1) Firstly, that the burden of proof should fall on those calling for restricting access to national markets and not the other way round; that is, on the host state. 2) Secondly, that SWFs –as well as SOEs- do not constitute a homogeneous category and that these kinds of actors may vary deeply in major issues like size, funding, objectives, investment styles or sophistication. 3) Thirdly, that instead of stigmatizing the whole category of SWFs –and SOEs- by referring globally to all of them as negative FDI actors and subjecting all their FDI proposals to controls, only those SCEs that actually misbehave should be subject to control and evaluation.[68] And, 4) Fourthly, in addition to all these

The final relevance of the screening system designed by a particular country will depend on the grounds and goals on which the system stands and on the flexibility of its application. Usually, either specific industries or all sectors of the economy in relation, habitually, to FDI projects over certain thresholds are subject to review by an entitled authority.[69] But many possibilities and combinations exist and the revision, like in the US, may also be done simple on grounds of national security implications of the FDI proposal without taking into account the final amount of the investment foreseen or the sector of the economy targeted. Or combine thresholds and other requirements like the need for the FDI proposals to render "net benefit to Canada" in the case of FDI targeting this country.[70] The case of Japan, for instance, is significant of this trend. Article 27(3)(i)(a) & (b) of the Foreign Exchange and Foreign Trade Act[71] allows the Minister of Finance to screen any FDI that may potentially impair "*national security*", disturb the maintenance of "*public order*", hinder the protection of "*public safety*" or have an adverse effect on the "*smooth management of the Japanese economy*". None of these very broad and vague terms are defined and a large amount of discretion is granted to the government to evaluate the acceptance or not of the FDI project. It is finally for it to balance its positive stance towards FDI and its desire to have enough flexibility to stop non-desired FDI.

4.2. Existence of different models.

Remarkable differences exist among the several screening systems designed. In some cases, the screening system is solely designed to protect the national security of the country against potential harmful FDI; this would be the case of the US. On the contrary, other states refer to broader goals, such as the protection of "national interest", like in

requirements the World Bank recognizes the right of every state to draft legislation to govern the admission of FDI and the possibility of drafting a restricted list of investments (World Bank Guidelines on the Treatment of Foreign Direct Investment, No. II(3) <https://www.italaw.com/documents/WorldBank.pdf> accessed 18.04.2019). A general approach to all these principles may be found in Carlos Esplugues, above n 2, 245-254.

[69] Mark A. Clodfelter and Francesca M.S. Guerrero, 'National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level', in Karl P. Sauvant, Lisa E. Sachs and Wouter P.F. Schmit Jongbloed (eds), above n 23, 175-7.

[70] Carlos Esplugues, above n 2, 277 & 334.

[71] Foreign Exchange and Foreign Trade Act, Act No. 228 of December 1, 194, available at: http://www.cas.go.jp/jp/seisaku/hourei/data/FTA.pdf (accessed 14.04.2019).

Australia.[72] Or require the investment to be of "the net benefit" of the host country, as happens in Canada. In other nations, like France, the freedom of movement of capital and of investment coexist with the existence of some ideas of "economic patriotism" applied to filter some FDI projects. Some countries, like Germany do not have any special rule as regards sovereign driven FDI, whereas this kind of FDI is subject to a particular treatment in countries like Canada or the US.[73]

Also the designation of specific independent organisms in some countries –CFIUS in the US- contrasts with the broad powers granted to the government in some other systems –Australia, Germany, France or the UK- in order to implement the process of evaluation of FDI on national security or related grounds.[74]

The legal basis referred to for this evaluation on national security grounds varies from country to country too; reference to competition law as a mechanism to control FDI on national security grounds in some countries –in the PRC- is in contrast with the enactment of special rules as regards this issue –US, Germany, France, Australia or, Canada-. Also, these systems are envisaged in certain countries as a last resort instrument only applicable when no other legal device is available –the US-. As a matter of principle these tools should be considered as last resort mechanisms usually dependent on the application of other provisions and systems foreseen in the host state to monitor the market or some specific areas of it.[75]

The 2009 OECD Recommendation on Guidelines for Recipient Country Investment Policies Relating to national security explicitly supports this point. These instruments should then be avoided when there are other existing measures adequate and appropriate to address national security concerns.[76] Consequently, any system designed to control the entrance of foreign capital into the country should then come into play only when those other systems designed to monitor the normal activity of the market –free competition, transparency of the financial market…- have already been applied and not previously or

[72] John Cobau, 'Legal Developments in U.S. National Security Reviews of Foreign Direct Investment (2006–2008)' in Sauvant, Sachs and Schmit Jongbloed (eds), above n 23, 107.
[73] Carlos Esplugues, above n 2, 239-243.
[74] James K. Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, Congressional Research Service, 7-5700, RL33388 (Washington, six March 2014), 30; UNCTAD, above n 100, 94ff.
[75] Carlos Esplugues, above n 2, 239-243.
[76] OECD, above n 65, Annex 3.

in addition to them, as if it were a fully independent system applicable at the same time and level than the other ones.

But this is not the case in many other countries in which the system interplays in different ways with other legal mechanisms designed in the host country. For instance, on the one hand FDI in companies' shares that are listed on a stock or security exchange system will usually be subject to specific regulations and some conditions may be imposed to them. Additionally they may be subject to other applicable rules like those of competition law which are used to prevent dominant firms –national and, in this case, foreign- to enter the market of the host country,[77] or in the case of greenfield FDI the request for the investment to be made only through joint-ventures. They can also be submitted to the existing legislation on the privatization of certain formerly public owned enterprises which may bar certain FDI from state controlled enterprises or allow it only after approval by certain institutions or those that create a certain kind of shares with no sufficient voting rights to control the enterprise object of the investment.[78]

As a matter of fact, only when these rules have been implemented should national systems on control of FDI become applicable. However, reality seems to be rather different. For instance, the rejection in 2011 of the bid by the Singapore Exchange Ltd. to acquire a major interest in the Australian Stock Exchange, both of them private entities, was made not only on the basis of the '*FATA'* but also taking into account that the *Corporations Act 2001*[79] limits ownership by a person in the Australian Stock Exchange to a maximum of 15 per cent unless a special regulation is passed to increase this threshold.[80]

In addition to the existence of different bases and goals in the designation of the several existing national screening systems, as well as relevant disparities as regards their institutional structures, also the concept of national security or security related industries on which they habitually stand varies from country to country; from narrow definitions to broader interpretations that extend investment review procedures to critical

[77] Muthucumaraswamy Sornarajah, above n 37, 92.
[78] Jeswald W. Salacuse, above n 30, 121-2.
[79] *Corporations Act 2001,* No. 50, 2001 s 850B.
[80] Note, *Singapore finally walks from ASX bid*, *The Sydney Morning Herald* (on line), 08.04.2011 <http://www.smh.com.au/business/singapore-finally-walks-from-asx-bid-20110407-1d6o4.html> accessed 16.04.2017. See Vivienne Bath, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China' (2012) 34:5 *Sydney Law Review* 5, 8.

infrastructure and strategic industries. Countries do not provide a "clear-cut definition" of national security in relation to foreign investment. Instead, in some cases only a number of sectors or activities that may potentially pose national security-related threats from a national security stand-point are identified.[81]

Finally, the content and depth of the screening procedure and the degree and amount of information required from the investor is different from jurisdiction to jurisdiction.[82] In addition to these factors, potential consequences for investments considered to be problematic from a national security perspective vary and include full or partial investment prohibitions and the possibility of final approval under certain –present or future- conditions.

4.3. Systems in practice.

Screening systems developed by national legislators have mainly focussed in relation to M&As proposals, mostly in the infrastructure, telecommunications, finance and energy sectors, with special intensity in those cases in which the foreign acquirer is controlled or owned by a foreign state.[83] As figures of the practical implementation of national screening systems show, these systems should not "strike terror into the hearts of foreign direct investors"[84]. However, and despite existing statistics, they are said to play an additional subtle role as regards potential foreign direct investors in so far they both foster the self-constraint and control by foreign investors as regards the goals and conditions of their prospective investment operations, as well as their willingness to enter potential agreements with the administration of the host country.[85]

[81] UNCTAD, above n 45, 94-5.
[82] Ibid, 99-100.
[83] OECD, *Interim report approved by the OECD Investment Committee at the fourth OECD Roundtable on Freedom of Investment, National Security and "Strategic" Industries on 30 March 2007* (reproduced in OECD, *International Investment Perspectives: Freedom of Investment in a Changing World* (OECD, Paris, 2007) 55.
[84] David Zaring, 'CFIUS as a Congressional Notification Service" (2009) 83 *Southern California Law Review* 81, 106, as regards the US screening system before its reform in 2018.
[85] David Zaring, above n 84, 106-9 or John B. III Bellinger and Nicholas L. Townsend, 'Inside 'the CFIUS': US National Security Review of Foreign Investments' (2011) 6:1 *Global Trade and Customs Journal* 1, 2 –stating certain operations that failed because of CFIUS- also as regards the US screening system. In the particular case of the US, the delays derived from a CFIUS investigation and the potentially negative publicity that can be associated to such an investigation have negatively affected some operations and have led the investor to withdraw them. See James K. Jackson, *The Exon-Florio National Security Test for Foreign Investment*, Congressional Research Service, 7-5700, RL33312 (Washington, 29 March 2013), 10 & 14 providing some examples.

States are increasingly imposing national security or related conditions on the entrance of foreign investment into their territory on specific areas of the economy or firms, or coming from certain countries or investors. Theoretically speaking these mechanisms should combine procedural fairness with the protection of sensitive information, and to ensure a level of flexibility which is enough to offer protection from investments that generate legitimate concerns at the same time that avoid political interference.[86] However, and significantly, the different screening systems introduced usually correspond with each other in the lack of clear definitions of some relevant notions on which they stand -national essential security interests, national security, control, critical infrastructure…-, in the use of some very vague guidelines or criteria to assert whether the investment is acceptable or not, and in the granting of a broad power to the administration in order to perform the requested evaluation.[87]

The drafting of these screening systems has taken place in an atmosphere of liberalization of investment and their introduction has finally constituted a sort of exception to it. Consequently, any security related condition imposed on foreign investment or any system designed to evaluate it on national security grounds should be narrowly-tailored, focussing only on really genuine national security risks.[88] And their use as an excuse to impose hidden limitations to free trade and investment should be prevented. Therefore, it is not the potential benefits for the host country arising out of the FDI project but the risks for the host state that it may generate that should finally be taken into account by these sorts of schemes of evaluation of FDI proposals. However, the peril of politicisation of these kinds of instruments exists and the potential negative consequences derived from a broad interpretation of the notion of national security remain.[89]

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[86] Jackie Vandermeulen and Michael J. Trebilcock, 'Canada´s Policy Response to Foreign Sovereign Investment: Operationalizing National Security Exceptions' (2009) 47 *Canadian Business Law Journal* 392, 394.

[87] Jackie Vandermeulen and Michael J. Trebilcock, above n 86, 394; Jackie Vandermeulen and Michael J. Trebilcock, above n 86, 394; A. Edward Safarian, 'The Canadian Policy Response to Sovereign Direct Investment' in Sauvant, Sachs and Schmit Jongbloed (eds), above n 23, 446.

[88] *Statement of the European Union and the United States on Shared Principles for International Investment* of April 2012 < http://trade.ec.europa.eu/doclib/press/index.cfm?id=796&title=EU-and-US-adopt-blueprint-for-open-and-stable-investment-climates > accessed 18.04.2019.

[89] Thus, the White House statement on the US-China economic relations of 2015, explicitly states that, "*The United States and China commit to limit the scope of their respective national security reviews of foreign investments (for the United States, the CFIUS process) solely to issues that constitute national security concerns, and not to generalize the scope of such reviews to include other broader public interest or economic issues. The United States and China commit that their respective national security reviews apply*

5. South Korea as a paradigm of this evolution.

South Korea is a very open economy and a very relevant economic actor worldwide. After the Asian financial crisis in 1997, Korea was forced to finish with its less than receptive attitude towards FDI and to pursue a FDI-friendly policy.[90] Reforms designed were considered both rapid and far-reaching and the "aggressive FDI inducement policy" implemented has fostered a continuous increase in the flows of FDI in the country ever since.[91]

The Korean Government enacted the Foreign Investment Promotion Act (FIPA) in 1998.[92] The main goal was to regain the confidence of foreign investors and to attract FDI: "(*T*)*he purpose of this Act is to promote foreign investment in this nation by providing incentives and inducements with the ultimate view of contributing to the sound development of this nation's economy*."[93] At the same time, and with the aim of attracting FDI, the Korea Trade-Investment Promotion Agency (KOTRA)[94] established the Korea Investment Service Center (KISC) in July 1998. The Center was relaunched in December 2003 as Invest KOREA (IK), Korea's national investment promotion agency.[95]

This extremely open attitude towards FDI does not impede the existence of certain limitations on FDI in Korean Law. Thus, Korean legislation designs some specific review

the same rules and standards under the law to each investment reviewed, regardless of country of origin…." (The White House. Office of the Press Secretary, *Fact Sheet: U.S.-China Economic Relations*, Washington D.C., 25 September 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-us-china-economic-relations> accessed 19.04.2019).

[90] Choong Yong Ahn, *New Direction of Korea's Foreign Direct Investment Policy in the Multi-Track FTA Era: Inducement and Aftercare Services*, OECD VII Global Forum on International Investment, 27-28 March 2008, OECD Investment Division, 2; Charles Harvie & H.H. Lee, Korea's Fading Economic Miracle 1990-97, Working Paper 05-09, Department of Economics, University of Wollongong, 2005, 9-11.

[91] Françoise Nicolas, Stephen Thomsen & Mi-Hyun Bang, *Lessons from Investment Policy Reform in Korea*, OECD Working Papers on International Investment, 2013/02, Paris, OECD Publishing, 2013, 18; Choong Yong Ahn, above n 90, 7. As regards current figures of FDI in Korea, note https://tradingeconomics.com/south-korea/foreign-direct-investment, accessed 20.04.2019.

[92] Official English version available at http://legal.un.org/avl/pdf/ls/Shin_RelDocs.pdf, accessed 19.04.2019.

[93] Art. 1 FIPA. Note Gyooho Lee, "The Korean Foreign Investment Law and Investor-State Dispute Settlement", in Carlos Esplugues (ed), *Foreign Investment and Investment Arbitration in Asia*, Cambridge, intersentia, 2019, 139, 141. Also, Françoise Nicolas, Stephen Thomsen & Mi-Hyun Bang, above n 91, 19 ff.

[94] https://www.kotra.or.kr/foreign/kotra/KHENKT010M.html, accessed 19.04.2019.

[95] http://www.investkorea.org/en/ik/investkorea.do, accessed 19.04.2019.

mechanisms based on national security, national safety and public order. As a matter of principle, article 4(1) FIPA states that "(*E*)*xcept as otherwise prescribed by any relevant Act of the Republic of Korea, a foreigner may conduct, without restraint, various activities of foreign investment in the Republic of Korea*." However, this statement in favour of the free entrance of FDI is qualified in the next paragraphs of the provision, and some entry conditions and limitations are set forth:

> *"(2) Except for the following cases, a foreigner shall not be restricted in the investments prescribed in this Act:*
> *1. Where it threatens the maintenance of national safety and public order;*
> *2. Where it has harmful effects on public hygiene or the environmental preservation of the Republic of Korea, or is against Korean morals and customs; and*
> *3. Where it violates any relevant Act of the Republic of Korea."*

In accordance to this last provision, the specific categories of business in which foreign investment is restricted, and the meaning and scope of the restriction, have been prescribed by articles 5 and 5-2 of the Enforcement Decree of the Foreign Investment Promotion Act.[96] Both provisions deal with the areas in which foreign investment may be restricted or prohibited, the ratio of total foreign investment permissible in certain areas or the qualification of foreign investors, among other issues. They also set forth rules on the potential request of review of the investment by the Korean Government and the dates to carry them out. In addition to that, article 4(4) FIPA establishes an obligation for the Minister of Commerce, Industry and Energy to inform on yearly basis about additional restrictions on foreign investors.[97]

As a matter of principle, and in line with other national regulations, the Government is granted broad power to control FDI on certain cases that may impede national security as set forth in article 4(2)1 FIPA, although a public disclosure when the approval process results in the blocking of an investment on national safety and public order grounds.[98]

[96] http://www.investkorea.org/InvestKoreaWar/data/bbs/20081006/fdi_law2.pdf, accessed 18.04.2019. Vid. Gyooho Lee, above n 93, 144 ff.
[97] See, Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security: A Survey of Country Practices*, OECD Working Papers on International Investment 2016/02, Paris, OECD, 2016, 30 & 61-62.
[98] Art. 5(8) Enforcement Decree. Note Frédéric Wehrlé & Joachim Pohl, above n 97, 63-64.

This is done without establishing a clear-cut definition of national security in relation to foreign investment.[99]

As in many other nations, some other pieces of Korean legislation may also affect the entry of FDI in Korea. Thus, the Act on Prevention of Divulgence and Protection of Industrial Technology (APDPIT) of 2006,[100] the Foreign Exchange Transaction Act (FETA) of 2010,[101] the Foreigner's Land Acquisition Act (FLAA) of 2008,[102] or the Monopoly Regulation and Fair Trade Act (MRFTA) of 2009[103], among others, cast some potential limitations on the implementation of FDI in the country.

1) Article 1 APDPIT states that the purpose of the Act, "*is to prevent undue divulgence of industrial technology and protect industrial technology in order to strengthen the competitiveness of Korean industries and contribute to national security and development of the national economy*." Article 9 of the Act provides the Government with the power to designate, Change, cancel, etc. of National Core Technology. According to article 2(2) "National Corte Technology" means "*industrial technology designated under Article 9, which has high technological and economic values in the Korean and overseas markets or brings high growth potential to its related industries and is feared as a technology to exert a significantly adverse effect on the national security and the development of the national economy in the event that it is divulged abroad*." This designation leads to the establishment of certain measures for its protection –art. 10- and some limits for its export –art. 11-. Also some special requirements of all kind are established in relation to the overseas acquisition, merger, etc. of institutions possessing industrial technology which possess national core technology –art. 11-2-.

2) Secondly, as a matter of principle the FETA liberalizes the payment and receipt for current transactions –the object of the Act is, among others, "to facilitate foreign transactions"-[104] but, at the same time, certain transactions are subject to notification,

[99] Vid. Carlos Esplugues, above n 2, 240.
[100] http://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=24351, accessed 21.04.2019.
[101] http://www.moleg.go.kr/images/common/ico_pdf.gif, accessed 20.04.2019.
[102] http://www.moleg.go.kr/FileDownload.mo?flSeq=34253, accessed 20.04.2019.
[103] http://www.moleg.go.kr/FileDownload.mo?flSeq=34252, accessed 20.04.2019.
[104] Art. 1 FETA.

confirmation or, even, suspension.[105] Although article 4(1) FETA requires to impose any restrictions as referred to in the Act "*only within the minimum extent necessary*".

3) The FLAA –art. 4- requires the submission of a report of the land acquisition –art. 4(1) & art. 5-, continuous possession –art. 6- or authorization when the land is located near military basis or has some cultural and ecologic relevance –art. 4(2)-. In accordance to articles 7 to 9 FLAA, failure to comply with the obligations set forth by article 4 may entail a fine for negligence –in the case of art. 4(2)- or, even, imprisonment –in case of breaching art. 4(2)-.

4) Finally, the prohibition of cartel practices and cross-border equity investment among affiliated companies may lead to the application of the MRFTA and affect the prospective FDI project.[106]

6. An uncertain and unclear future.

The process of liberalization of international trade and of Foreign Direct Investment has constituted a broadly accepted trend during the last few decades and FDI inflows have expanded constantly since the end of the 1980's. However, signs of a certain crisis of the positive and one-way attitude towards international trade and FDI exist nowadays. The financial crisis, the change in the origin of the FDI derived from the new geo-strategic reality arising out of the crisis, the growing participation of foreign sovereign actors in international trade and investment, the changing environment for national security or the quest to protect technologies and sectors of the economy considered vital for the host country, its sovereignty and competitiveness have led many countries to set forth mechanisms to evaluate FDI proposals before they are implemented. Korea is not alien to this trend.

As a matter of principle the protection of national security is a legitimate goal of the state. However, there is a risk of these kinds of instruments being politicised, and the potential negative consequences of a broad interpretation of the notion of national security remain. The creation of these screening systems has taken place, so far, in an atmosphere of

[105] PWC /SAMIL, *Doing Business and Investing in Korea*, Seoul, PWC, 2012, 18.
[106] Françoise Nicolas, Stephen Thomsen & Mi-Hyun Bang, above n 91, 26.

liberalisation of investment, and their introduction has ultimately constituted a sort of exception to it. But this atmosphere is changing negatively very quickly and the peril to use these screening systems as an excuse to impose hidden limitations on free trade and investment increases. The Republic of Korea, as many other countries in the world, is not vaccinated against this danger.

States have the power to control FDI and its imposition does not necessarily have a negative impact on foreign investment flows. However, many of these systems are opaque and susceptible to political influence. And in many cases, the combination of the vast powers granted on the administration, the absence of clear-cut definitions of some basic notions like national security, the changing attitude towards multilateralism or the fast geostrategic changes that are taking place in the world –also in Asia- may support the temptation to use these screening systems both to control the functioning of the market or to adopt hidden economic or strategic goals. The more international trade, FDI and globalization are attacked, the more this temptation will grow.