

Report on the CELIS Forum on Investment Screening

STEFFEN HINDELANG: PROFESSOR OF INTERNATIONAL INVESTMENT AND TRADE LAW, UPPSALA UNIVERSITY, AND J. HILLEBRAND POHL LL.M., PH.D. RESEARCH FELLOW AND LECTURER AT MAASTRICHT UNIVERSITY.*

On 1–3 June 2022, the Common European Law on Investment Screening (CELIS) Institute organized its fourth annual conference ‘2022 CELIS Forum on Investment Screening’ (CFIS22). The Conference was held in Sweden, at Uppsala University. The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It was set up in 2020 by Steffen Hindelang and J. Hillebrand Pohl, the convenors of this year’s conference, as a permanent successor to the ‘International Conference on a Common European Law on Investment Screening (CELIS)’, convened by Professor Hindelang and Andreas Moberg in 2019.

The aim of CFIS 22 was to debate European investment screening on national security grounds from a strategic perspective on the theme ‘The Emerging Law of Investment Control in Europe: Screening, Sanctions and Subsidies’. CFIS was a major event which brought together, not just leading academic scholars, EU officials, national experts, diplomats, and policymakers, but also business leaders, think tankers, and representatives of the investment community and civil society, as well as the media from across Europe and beyond. The three-day event was generously funded by Riksbankens jubileumsfond, the Center for International Private Enterprise, the Swedish Institute of International Law, Datenna, Blomstein, and the Institute for Democracy Societas Civilis – Skopje. This report summarizes the conference proceedings.

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1. THE STATE OF THE RESEARCH

The conference theme sought to explore an analytical foundation and a common framework for the emerging research field of foreign investment control. There is thus far little systematic empirical evidence of whether the renewed interest in Europe for foreign investment control at the policy level adds up to a coherent strategy that is reflected in relevant and observable outcomes. Specifically, what is lacking is a set of common principles for assessing risks and threats to national security that may be posed by foreign direct investment (FDI) and balancing those risks and threats against the economic interests of private parties concerned and society at large. This makes it difficult to evaluate whether the various instruments of foreign investment control effectively serve their ‘geo-economic’ purposes (i.e., whether they serve as economic tools of geopolitical policies).

While investment screening in Europe has been the subject matter of legal research,¹ it has been addressed only tangentially in the political science and economic literature, with references to investment screening appearing as an element in publications on geoeconomics.² As far as legal research is concerned, no literature

exists addressing the intersection between investment screening and other forms of investment control, most notably subsidies control and sanctions.

In political science³ and economic literature,⁴ investment screening has been addressed or touched upon in several studies. In contrast, subsidized foreign acquisitions have yet to be analysed in academic literature or publicly available think tank notes. While there is an abundance of literature on sanctions,⁵ there are no publications analysing economic sanctions as foreign investment control.

2. THE CONFERENCE

The conference lasted three days. The first day was opened by the Dean of the Faculty of Law of Uppsala, Professor Anna Singer, followed by the convenors’ opening remarks and consisted of three plenary panel debates, two parallel expert sessions, an opening conference keynote address, and a high-level roundtable debate. The following two days of the conference each consisted of four sessions, which included papers presented by scholars who had taken part in the conference call for papers.

* Email: sh@celis.institute, jhp@celis.institute.

1 See e.g., S. Hindelang & A. Moberg eds, *YSEC Yearbook of Socio-Economic Constitutions: A Common European Law on Investment Screening* (Springer 2020).

2 See e.g., A. Roberts, H. Choer Moraes & V. Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22(4) *J. Int’l Econ. L.* 655–676 (2019), <https://doi.org/10.1093/jiel/jgz036> (accessed 24 Nov. 2022).

3 See e.g., Z. T. Chan & S. Meunier, *Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union*, *Rev. Int’l Org.* (2021).

4 See e.g., S. Bauerle Danzman, *Investment Screening in the Shadow of Weaponized Interdependence*, in *The Uses and Abuses of Weaponized Interdependence* (D. W. Drezner, H. Farrell & A. L. Newman eds, The Brookings Institution 2021).

5 R. Gordon, M. Smyth & T. Cornell, *Sanctions Law* (Hart Publishing 2019).

2.1. First Day of the Conference

An opening plenary debate moderated by the convenors and addressing the conference theme included interventions by Professor Carlos Esplugues Mota (University of Valencia), Professor Christoph Herrmann (University of Passau), Carolina Dackö (Partner, Mannheimer Swartling law firm), Naboth van den Broek (Partner, Akin Gump law firm), Jaap van Etten (CEO, Datenna), and Claus Zimmermann (Associated Partner, Noerr law firm). The panellists broadly subscribed to the premise that legally distinct instruments affecting foreign investment flows on security or public order grounds could fruitfully be analysed comparatively so as to avoid 'silo thinking' and to promote synchronization and streamlining of administrative processes where appropriate.

Thereafter followed a panel on the link between responsible investment and democratic resilience in the context of foreign investment screening chaired by Kim Holmes (Center for International Private Enterprise) and featuring Sarah Bauerle Danzman (University of Indiana), Sofia Bournou (Business Europe), Jonas Parello-Plesner (Alliance of Democracies), and Ruslan Stefanov (Center for the Study of Democracy). The debate engaged with the notion of like-mindedness among democracies and how that affects the determination of risks or threats against national security.

The conference participants then joined one of two parallel expert sessions. Parallel session A addressing 'Investment screening and the role of different measures to mitigate national security concerns', was chaired by Leonard von Rummel (Blomstein) and included as panellists: Damien Levie (Head of Unit, European Commission), Clémence Largé (French Ministry of the Economy), and Angelika Milger (German Federal Ministry of Business and Climate). Parallel session B discussed 'Toward regulatory convergence with EU investment screening: the case of the Western Balkans' and was chaired by Eric Hontz (Center for International Private Enterprise), who was joined by Jovana Marovic (Deputy Prime Minister of Montenegro), Dragan Tilev (State Councillor, Government of North Macedonia), Ivana Gardasevic (Regional Cooperation Council), Damir Asceric (Centre for Civilian Initiatives), and Zoran Nechev (Institute for Democracy Societa Civilis – Skopje). Each parallel session included a concise introductory speech and then concentrated on discussion among the invited experts.

The third plenary panel of the day, entitled 'Hidden defence investors from China: the future of screening mechanisms in Europe', featured a presentation by Jaap van Etten, Julia Kern, and Gareth Heywood from Datenna. The panellists demonstrated their latest technology for investigating foreign ultimate beneficial ownership in the context of investment screening procedures.

The Conference opening keynote speaker, Denis Redonnet (Deputy Director General, DG Trade, and Chief Trade Enforcement Officer, European Commission), was introduced by Tobias Pierlings

(Common European Law on Investment Screening (CELIS) Institute, International Board of Advisors). In his keynote, Mr Redonnet updated the audience on the Commission's work on trade and technology, placed investment screening in the context of the EU's overarching policy priorities in the area of trade and investment, and emphasized the increasing need to coordinate policy analysis, not just between the Member States and the Commission, but also across areas of responsibility affected by the interface between security, public order, trade, technology, and investment.

The keynote was followed by a high-level roundtable on investments and national security strategy, moderated by Jonathan Hackenbroich (European Council on Foreign Relations) and J. Hillebrand Pohl, in which participated Léa Berthiau-Jézéquel (Court of Justice of the European Union), Laura Black (Committee on Foreign Investment in the United States), Daniel Fiott (European Union Institute for Security Studies), Professor Maria-Chiara Malaguti (UNIDROIT), Professor Peter Muchlinski (School of Oriental and African Studies, University of London), Damien Levie, Tobias Pierlings, and Jaap van Etten. The debate focused on the nature of national security as a political and quasi-legal concept and as an organizing principle for investment screening. It emerged that, notwithstanding attempts to apply the security concepts in the law, these have been incomplete to this day, reflecting enduring judicial deference to executive decision making whenever security is invoked.

2.2. Second Day of the Conference

The second day of the conference was devoted to shining light on 'sovereign-driven investment', here understood as FDI undertaken by private- or public-sector investors which are instigated, subsidized, directed, or otherwise supported by the investor's (ultimate) home state. It was meant to be interpreted broadly as approximately synonymous with investors that may be deemed problematic from an investment screening perspective, including sovereign-wealth funds, state-owned enterprises, as well as private-sector businesses undertaking strategic investments with funding support of their home state. The conference day was organized as four ninety-minute panel sessions, where each panellist gave a concise speech, followed by questions and comments from the plenary, moderated by the panel chairs.

2.2.1. *Rise of Sovereign-Driven Investment*

Steffen Hindelang and Lena Hornkohl (Max Planck Institute Luxembourg) chaired the first panel of the day, which concentrated on the phenomenon of sovereign-driven investments, as observed empirically, and its causes or driving forces. First out was Joachim Pohl (OECD) whose presentation 'Investment screening: Evolving policies for a world in change' included updated statistics on the steady proliferation of acquisition- and ownership-related investment policies, including new or amended investment screening mechanisms, including new measures on security-risk mitigation, as

well as on the dramatic rise in investment-screening case load. Next, Adam Dixon (Maastricht University) presented a paper on how the changing landscape of sovereign wealth funds affects investment screening, followed by Alexandr Svetlicinii (University of Macau) who spoke about the geoeconomic challenges posed by international investments by state-owned enterprises. Investment-related subsidies were the topic of the presentation by Sophie Meunier (Princeton University) entitled 'Fair Play? The Politics of Evaluating Foreign Subsidies in the European Union', which traced the process leading up to the European Commission's proposal for a Foreign Subsidies Regulation in 2021. Henrique Choer Moraes (Deputy Head of Mission, Brazilian Embassy in Wellington, New Zealand) closed the panel with an address on 'The Quest for Autonomy and the Rise of Corporate Geoeconomics', outlining the principal trends that are transforming global economic relations and their impact on the business conditions of companies.

2.2.2. *National Security as a Limit to Sovereign-Driven Investment*

The second panel of the day turned to the concept of national security in the context of FDI and the extent to which such concept justifies limiting sovereign-driven investment. The panel, chaired by J. Hillebrand Pohl and Caitriona Heintz (Azure Forum for Contemporary Security Strategy), heard first from Alejandra Torres Camprubí (Foley Hoag law firm), who spoke on the emergence and evolution of the concept of 'national security' and the persistent ambiguities as its definitional delimitation. She was followed by Athanasios Drougkas (ENISA) who presented an analytical perspective of the national security concept from the prism of cybersecurity investments in critical sectors of the economy. Further conceptual illumination was provided from the perspective of a security consultant by a presentation of Alessandro Lazari (F24 AG) on 'Protection of Critical Resources and Strategic Assets'. Against the background of both the theoretical foundations and practical application of the security concept, John Lash (Darkhorse Global) spoke on 'Creating Assessment Methodologies for National Security Threats'. The presentations provided an enriching panoply of aspects to the discussion that followed during the subsequent sessions. The panel concluded with a much-appreciated lecture by Professor Muchlinski entitled 'Inward FDI Regulation in the UK: Closing the "Open Door"?', which critically analysed the UK National Security and Investment Act 2021.⁶

The first half of the second conference day was followed by a host-country keynote address by Lars-Göran Larsson (acting head of the Swedish investment screening authority). Mr Larsson presented a brief historical background to the Swedish legislative reform on investment review. Rafael Coloma Ojeda (Spanish investment screening authority) served as discussant.

2.2.3. *Economic and Other Public Order Justifications for Restricting Sovereign-Driven Investment*

The topic of the third panel was the role and meaning of 'public order' as a ground for investment screening, focusing on economic reasons that may justify restricting FDI. The panel was chaired by Sarah Bauerle Danzman and J. Hillebrand Pohl. The opening speech was given by Naoise McDonagh (University of Adelaide) on the sometimes-fine distinction between (legitimate) protection and (illegitimate) protectionism. By looking at Chinese FDI in Europe, Dr McDonagh illustrated many economic risks that pose systemic challenges to openness to foreign investment. Turning to protection against risks to monetary stability, Claus Zimmermann discussed balance-of-payment related restrictions on the freedom of investment, as exemplified by foreign exchange reserve management and capital controls and conceptualized their role as investment control. Lena Hornkohl continued by looking at the efforts underway to put in place an EU Regulation on Foreign Subsidies, focusing on the rationale and anticipated operation of the regulation. Another type of investment restrictions was the topic of Yulia Levashova (Nyenrode Business University), who spoke about restrictions on capital transfers in connection with investment in the context of investor obligations to the host state, notably creditor protection and criminal sanctions. The last speaker was Francesca Ghiretti (Mercator Institute for China Studies) whose presentation analysed the concept of 'economic security' weaving together the many types of security vulnerabilities discussed by the previous speakers, as well as economic sanctions, as a form of investment control.

2.2.4. *Foreign Investment Control and International Law*

Having thus far heard mostly perspectives from a variety of social science disciplines other than law, the final panel of the day eventually turned to the legal aspect of investment control, notably that of international law. The panel, which was chaired by Joanna Warchoń (European Parliament) and Dominik Eisenhut (Airbus), heard from four speakers, the first of whom was Pascale Accaoui Lorfing (CREDIMI) who addressed the international legal framework for investment control, including from the perspective of Article XXI of the General Agreement on Tariffs and Trade and so-called 'non-precluded measures' clauses in international investment agreements. She was followed by Tamás Szabados (Eötvös Loránd University) on the topic of 'Economic Sanctions as an Instrument of Foreign Investment Control' and how investment-related sanctions partly serve the same or similar ultimate purposes as investment screening. The prospects of regulating sovereign-driven investment in future international trade and investment agreements were the topic of Georgios Dimitropoulos (Hamad Bin Khalifa University). Professor Carlos Esplugues Mota was the final speaker of the day, exploring the search for common principles that could guide states towards an international regime for investment screening. With a

⁶ National Security and Investment Act 2021, c. 25, <https://www.legislation.gov.uk/ukpga/2021/25> (accessed 25 Nov. 2022).

healthy dose of realism, Professor Esplugues concluded that beyond a few well-accepted general principles of international law, the future of international coordination in this field is highly uncertain.

2.3. Third Day of the Conference

The organization of the third and final day of the conference followed the same structure of four ninety-minute panel sessions. Each of these sessions focused on different aspects of investment screening from a domestic, international, and comparative legal perspective.

2.3.1. *Scope of Foreign Investment Controls*

The legal notions of ‘security’, ‘investment’, and ‘investor’ were the topics of the presentation of the first panel, chaired by Naboth van den Broek and Carolina Dackö. The first presentation, by Hannes Lenk (Aarhus University), discussed how international courts and tribunals approach security and stressed the extent to which they show deference to the state parties raising security considerations. Marek Jaśkowski (Cardinal Stefan Wyszyński University in Warsaw) addressed national security and essential security interests in CJEU jurisprudence and discussed whether and to what extent it significantly shapes Member States’ discretion when applying the notion of security. Turning to investments subject to screening, the next speaker Yarik Kryvoi (British Institute of International and Comparative Law) analysed the ‘investment’ concept from the perspective of international investment law as a potentially limiting factor of national investment screening mechanisms. The panel’s final speaker was Jochem de Kok (University of Amsterdam and Allen & Overy) who took aim at the notion of ‘foreignness’ inherent in FDI screening, questioning its value-neutrality and drawing parallels with earlier episodes of heightened threat perception directed towards Asian nations, notably the ‘Yellow peril’ discourse in the Europe and North America of the late nineteenth and early twentieth centuries, as well as the more recent ‘Japan bashing’ in the United States in the 1980s and today’s Sinophobia.

2.3.2. *Administrative Procedure for Investment Screening*

The Head of the European Commission’s investment screening unit, Damien Levie chaired the second panel together with Bärbel Sachs (Partner, Noerr law firm), which analysed a range of pertinent issues relating to the administrative procedure involved in investment screening. The first presentation set the scene by outlining the authorities charged with carrying out screening. Jacques Bourgeois and Alessandra Moroni (both of Sidley Austin law firm) examined these screening authorities with respect to their delegated powers, independence, transparency, structure, and operating procedure. They were followed by Christoph Arhold and Henning Berger (both of White & Case law firm) whose presentation dealt with the phenomenon of co-existing special screening mechanisms for particular sectors, including the defence, security, and dual use sectors,

energy, water, telecommunications, transport, financial services, and media sectors. The challenge of coordinating a multiplicity of potentially overlapping, general and sector-specific, domestic screening procedures was the topic of the presentation by Professor Sabrina Robert-Cuendet (Le Mans University). The final presentation addressed the topical issue of international coordination of national screening procedures and was delivered by Fabien Gehl (European Commission).

2.3.3. *Treatment of Foreign Investors and Targeted Investments Undergoing Screening*

The third panel, chaired by Professor Gerd Morgenthaler (University of Siegen), focused on problems associated with the treatment of the investors and their investments in the screening procedure. The first presentation, by Wolf Zwartkruis (University of Leiden), asked ‘Foreign Direct Investment and Security: What is Actually the Problem?’ and provided an outline of security-risk factors arising out of FDI. The trade-off between security-risk mitigation and economic opportunity was highlighted by the presentation of Jonas Hallberg and Patrik Tingvall (both of the Swedish National Board of Trade) on the ‘Economic perspectives when screening FDI’. Csaba Rusznak (Sovereign Arbitration Advisors) addressed the international-law limitations applicable to the treatment of investors and investments and was followed a presentation by Pim Jansen (Erasmus University Rotterdam) on key recent changes in FDI screening.

2.3.4. *Review of Investment Screening Decisions*

The Conference concluded with a panel on the availability, scope, and standards of recourse and remedies against investment screening decisions. The panel was chaired by Robyn Briese (Australian Government Solicitor) and Roland Stein (Blomstein law firm). Non-adjudicatory remedies were the topic of the first two presentations. Tatiana O. Sullivan (Skadden Arps law firm) discussed mitigation arrangements whereby screening authorities and investors address investment-security risks by means of legal devices that enable the relevant investments to be authorized conditionally. James M. Brower (Morrison & Foerster law firm) concentrated on non-adjudicative national administrative remedies, including resolving disagreements through negotiation. The next two presentations addressed international remedies, focusing on investor-state arbitration, as a means of challenging investment screening decisions. The paper presented by Kilian Wagner (University of Vienna) concentrated on the ‘investment’ definitions of investment treaties and the applicability of treaties in the pre- and post-establishment phases of the investments. Dini Sejko (Chinese University of Hong Kong) turned the focus to the question of sovereign investors’ standing before investment tribunals.

The Conference closing keynote was delivered by Damien Levie who reflected on the tendency for scholars, civil servants, policy-makers, and practitioners to join together to exchange practice

insights and reflections and form a new epistemic community around the emerging field of foreign investment control.

3. CONCLUDING ANALYSIS

Foreign investment control is a rapidly growing area of law with a great deal of room for further research. The Conference facilitated and promoted the development of a common understanding and foundation for future interdisciplinary research into foreign investment control. Specifically, further research is needed comparing the manner in which investment-control instruments are applied across instrument types. A better understanding of the national interest concepts of security and public order as they are applied in investment screening,

economic and financial sanctions, export control, trade sanctions, and subsidies control, so as to uncover the underlying policy rationale. The Conference also identified a need for further knowledge about the costs and benefits associated with achieving resilience against the potentially harmful behaviour of foreign investors. From a practical policy perspective, future research should seek to reveal whether and to what extent rules restricting third-country investments into the EU and their enforcement, viewed holistically, are sufficiently coordinated and, if not, how to remedy the same. The Conference itself was a testament to the utility of an open forum of international exchange, providing opportunities for connecting researchers and stakeholders that otherwise do not often discuss in person.