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SCREENING OF FOREIGN DIRECT INVESTMENTS IN THE SPACE SECTOR: THE ISSUE OF
JUSTICIABILITY AND THE CASE OF THE ITALIAN GOLDEN POWER**Abstract**

After the financial crisis caused by the Covid-19 pandemic and the Ukrainian war, small and medium enterprises (SMEs) in the space sector have become vulnerable and attractive to foreign direct investors. The latter, through so-called predatory investments, can acquire and transfer the know-how of space SMEs from the target State to their home State, obtaining access to strategic technology and an overall industrial competitive advantage. For this reason, several domestic legislations – such as Italy, France, Canada and the United Kingdom – now include the space industry under the protection of governmental screening mechanisms. The latter are based often (i.e. in almost 50 States as of February 2023) on the elusive notion of “threat to national security”, which is left to discretionary evaluations of the government. Because of such elusiveness, foreign investors face concrete uncertainties with regard to the judicial review of such measures. All this poses a problematic question: can the legal remedies available at the international level effectively ensure a form of reparation for international investors? In order to answer this question, the present paper uses a case-study. It looks at the Italian regulation on foreign direct investments (FDIs) – i.e. the “Golden Power Decrees” of 2012 and 2019 – and at its application by the Italian Government to restrict foreign direct investments targeted towards aerospace companies, such as the space propulsion company Avio S.p.a. in 2018 and the avionics company Alpi Aviation s.r.l. in 2022. The analysis of the Italian framework offers a practical example of how the use of screening measures to protect the space industry determines a serious problem of justiciability. Under international investment law, investors can rely in theory on so called investor-State dispute settlement mechanisms. However, the present paper demonstrates that many factors hinder their efficiency in the analysed context: the political nature of the screening measure, its exclusion from the scope of protection of international investment agreements that do not include the pre-establishment stage of investments, and the use of the “power to regulate” doctrine. The solution proposed in the present paper is based on the introduction of international standards that can bring the justification for screening FDIs under objective and verifiable criteria, enhancing transparency and predictability of outcomes. Without proper judicial counterweights, the power to screen FDIs, like the Italian Golden Power, risk only to favour protectionist trends, diminishing the virtuous collaboration and transfer of technologies between spacefaring States.