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Foreign Ownership Bans and Private Security: Protectionism or Security Sector Governance?

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EXECUTIVE SUMMARY

In recent years, a consensus has developed among intergovernmental organizations, international donor states, various non-governmental organizations and certain business interests – that the conduct of private security companies (PSCs) tends to be under-regulated by local laws, and the public must be protected from various potential abuses, including violence, harassment, trespass and false arrest. These concerns are often levelled against international firms, which are thought by some to operate with greater impunity. This paper discusses the practice of banning or restricting foreign ownership of PSCs. It outlines the current trends of expansion and consolidation in the global private security industry and presents a survey of foreign ownership legislation in a variety of case study countries. The research indicates that the practice is relatively common globally, but is not strictly motivated by a desire to exert greater governance over the domestic security sector. Rather, local governments responded to a range of relevant factors, including security concerns, economic and political interests, and obligations under international free trade agreements. The attitudes and assumptions of states enacting foreign ownership restrictions represent an important critical perspective on efforts to improve the governance of transnational private security provision, and should be given careful consideration by policy makers, researchers and industry representatives.

INTRODUCTION

The provision of security services by private actors is a feature of all societies, embedded in economies and communities and increasingly indispensable to global systems of banking, trade and investment.¹ In many countries, it is common for private security agents to outnumber police officers. One study estimated that out of every 100,000 people, 348 worked as civilian private security agents, while 318 were employed as police officers (Van Dijk, 2008: 215). Yet one of the industry's most striking features is how easily it recedes into the background, functioning as a normal and necessary part of everyday transactions. PSCs are not part of an illicit, ungoverned space, but rather are "deeply interlaced with contemporary structures of authority and legitimacy, both public and private" (Abrahamsen and Williams, 2011a: 28). While abuses committed by private military and security companies (PMSCs) in conflict-affected environments like Iraq and Afghanistan typically garner more public attention, the expansion of the global private security industry has had a more profound impact on the everyday lives of people living outside conflict zones. As scholars have noted, across much of the world, "everyday security is increasingly in the hands of private companies, and the uniformed guards of literally thousands of companies have become a ubiquitous feature of daily life" (Abrahamsen and Williams, 2010). As the industry has expanded it has also experienced high levels of consolidation. Over time the private security industry, which was originally characterized by a large number of smaller independent firms, has transformed into a global market featuring an increasingly smaller number of large multinational corporations.

The everyday operations of private security companies (PSCs) rarely garner much interest or attention unless something has gone seriously wrong. As Rita Abrahamsen and Michael C. Williams (2010) have noted, "while much has been written in recent years about the activities of mercenaries and private military companies on the continent, the privatization of everyday security has gone largely unnoticed." In spite of its relative anonymity, the industry's underlying potential to harm innocent members of society has necessitated a robust legal framework for regulation to avoid violence, harassment, trespassing and false arrests (Prenzler and Sarre, 2014). Some form of regulation exists in all countries where PSCs operate, but levels of governance, oversight and accountability vary significantly depending on the PSC's country of origin, operating environment and the nature of services it provides. Yet in recent years, a consensus has developed among intergovernmental organizations, international donor states, various non-governmental organizations and certain business interests that the conduct of PSCs tends to be under-regulated by local laws. While a nascent body of international soft law instruments has emerged in the last two decades to build consensus around important norms of civilian oversight and security sector governance, regulation at the local level remains a patchwork of different approaches and measures.

A number of countries around the world have extended their national regulation of the sector to include limitations or bans on the foreign ownership of firms providing private security services. Foreign ownership bans range in severity from mandating a certain percentage of local ownership to banning foreign investment altogether. Large international corporations and free trade advocates argue that banning or limiting the foreign ownership of security companies violates the spirit, principles, and legal obligations of the global trading regime. Specifically, their opponents argue that foreign-ownership bans violate the terms and conditions of the World Trade Organization's (WTO's) General Agreement on Trade in Services (GATS). Indeed, opponents often characterize the implementation of foreign ownership bans as a form of protectionism designed to benefit local firms at the expense of their international competitors. Proponents of the bans, however, argue that the expansion of private companies into all areas of the contemporary global security system, including activities such as intelligence collection, which were traditionally the exclusive reserve of states, necessitates a more restrictive approach. This tension, therefore, leads to an important question about whether the regulation of the private security is a matter of national security or trade policy.

This paper begins by examining the two dominant themes in the contemporary global private security industry, expansion and consolidation. It then provides an overview of the current status of foreign ownership bans across the globe, including desk-based research on the legal instruments, conditions and motivations for these bans. The research suggests that foreign ownership bans are common and come in various forms. The paper will outline the rationale provided for private ownership bans in a number of cases and analyze the range of factors motivating the bans. The research indicates that concerns about national security are only one possible motivation for foreign ownership bans. In other cases, foreign ownership bans may be influenced by economic, political and international free trade considerations. Indeed, little evidence could be found that foreign ownership in the private security industry necessarily exposes a country to greater national security risks.

EXPANSION AND CONSOLIDATION IN THE GLOBAL PRIVATE SECURITY INDUSTRY

The global market for private security services is expected to grow at a rate of 7.4 percent annually, reaching a size of US\$244 billion by 2016 (Freedonia Group, 2015). Contract guarding makes up more than half of this market, but it also includes alarm monitoring services, armoured car transport and related cash handling, teller machine (ATM) services, private investigations and security consulting (ibid.). PSCs vary in size from small-scale local operations to larger national- and regional-level firms, all the way to several massive transnational PSCs. There is also significant regional variation in number and average size of private security firms. For instance, in Europe, there are 60,000 firms employing 2.2 million private security guards, giving an average size per company of 36.6 guards (CoESS, 2011). In South Africa, the average size of firms is significantly larger, with more than 8,000 private security firms collectively employing over 1.5 million agents, or an average of 187.5 guards per company (*African Business Magazine*, 2012). In Nigeria, there are approximately 1,200 PSCs, employing at least 100,000 people in total (Abrahamsen and Williams, 2005). In the Caribbean, the level of concentration and international market penetration varies. In St. Lucia, 16 PSCs employ 868 guards, averaging 54.3 per firm; 55 percent of guards work for one of the three largest firms (Montoute and Hill, 2013). In Trinidad and Tobago, there is a core group of approximately 20 to 25 firms that make up the vast majority of the market for security services, but perhaps as many as 500 small, unregulated firms “operating at a largely informal/local level” (Bishop, 2013: 59). Jamaica’s approximately 320 PSCs employ a total of 19,100 guards, or roughly 60 per company, while the largest three firms in Jamaica make up 37 percent of the market (Epps, 2013).

China is an emerging frontier for the private security industry. Outlawed until 2010, private security in the Chinese market is now growing at an annual rate of 20 percent per year (Duchâtel, Bräuner and Hang, 2014: 54). Most of the activity for Chinese PSCs is domestic, encompassing a range of protection services from bodyguarding to facility security (Feng, 2013). However, there is also a growing international market for Chinese PSCs. More than a dozen Chinese-owned private security firms are now operating in other countries, primarily in Africa and the Middle East (Lee, 2014). The Chinese security industry is still relatively underdeveloped compared to many of its international competitors. While many of the personnel working in these firms are drawn directly from police and special forces units, few veterans have any substantial combat experience or overseas training and exposure (ibid.). There are also structural and legal barriers that have limited the expansion of these companies. China has restrictive firearms laws that prevent individuals and private entities from purchasing, carrying or conducting training with firearms (ibid.). In addition, many Chinese PSCs are closely linked to China’s official security forces, in some cases even employing active personnel. Given that many of the businesses these PSCs would be protecting abroad are state-owned, the actions of these PSCs could be

interpreted as state-sanctioned, which is especially problematic given China's historical commitment to non-interference (Duchâtel, Bräuner and Hang, 2014: 56). As a result, many Chinese firms subcontract foreign PSCs to provide frontline staff (ibid.: 55).

Regardless of regional variations, the overall trend in the private security industry has been toward greater market consolidation in the hands of a dwindling number of firms. For instance, Group4Securicor (G4S) is the world's largest PSC, and the second-largest private company in any sector. It now employs approximately 600,000 people in more than 115 countries. Another large transnational corporation, Securitas, employs more than 300,000 people in 52 countries. By comparison, the entire United Nations Secretariat employs only 41,426 people, although it operates in a similarly wide range of countries and service areas (United Nations, 2015). In addition to scale and scope, the large global PSCs also occupy substantial market share. Securitas's share of the market, for example, varies from 14 percent in Latin America, Portugal and Spain, to 18 percent in the United States, and 19 percent in the remainder of Europe (Securitas, 2012). At the national level in Europe, the average combined market share of the three largest PSCs is 54.7 percent (CoESS, 2011). In the United States, the six largest PSCs control 44 percent of the market (Service Employees International Union, 2015). Table 1 illustrates the number of firms, average size and market concentration for a range of selected countries. The movement toward consolidation in the global private security industry has followed broader societal trends.

In *The McDonaldization of Society*, George Ritzer (2007) describes how the rational principles – predictability, efficiency, calculability and control – of the popular fast-food chain McDonald's have deeply penetrated modern society. According to Ronald van Steden and Jaap de Waard (2013), a similar analysis applies to large PSCs, like G4S and Securitas, as they attempt to enforce recognizable worldwide company policies. In order to give customers a sense of predictability, these multinationals pursue the delivery of standardized uniforms, products and services and attempt to implement identical corporate standards with respect to training and performance.

One of the keys to the growth of the private security industry has been the steady shift toward viewing security as a commodity that can be purchased by companies and individual citizens alike. The commodification of security has created a large consumer market for security products and services, and led to a boom in the private security industry (Abrahamsen and Williams, 2011b: 156). Market consolidation and the competitive commodification of private security have created an industry that is now highly competitive and globalized. According to Abrahamsen and Williams (2008: 449), as a result of the globalization of the industry, "local PSCs may struggle to survive in competition with well-resourced global giants, and local labour may struggle to have their demands heard against such powerful global employers." Indeed, private security scholar Deborah Avant notes that there has been a trend since 2000 of greater consolidation in the

global suppliers of what had previously been a domestically oriented industry (Avant, n.d.). Critics would argue that greater consolidation and globalization in the private security industry could threaten the diversity and representativeness of PSCs operating in local environments. However, proponents counter that the growth of a highly competitive and globalized industry is the inevitable result of market dynamics that have similarly shaped other industries.

Table 1: Average Firm Size and Industry Concentration, Selected Countries

Country/ Region	Number of Firms	Number of Agents	Agents per Firm	Concentration
Australia	5,500	52,750	9.6	Five companies accounted for 44.5 percent of market share.
Europe	60,000	2,200,200	36.6	The average combined market share of the largest three PSCs is 54.7 percent.
Haiti	41	12,000	292.7	Largest company has 2,000 agents or 16.7 percent of market.
Jamaica	320	19,100	60.0	Largest three firms make up 37 percent of market.
Liberia	87	7,000	80.4	Largest firm, Inter-Con, makes up 18.5 percent of market.
Nigeria	1,200	100,000	83.3	NA
Peru	540	90,500	167.6	40 percent employed with the top six firms, many of which are transnational.
South Africa	8,000	1,500,000	187.5	NA
St. Lucia	16	868	54.3	55 percent of guards work for one of the three largest firms.
United States	16,000	1,000,000	62.5	The six largest PSCs control 44 percent of the market.

The growth and consolidation of the private security industry has raised an important question: can security really be understood as a typical service industry, like telecommunications or hospitality? Or is it a special form of private enterprise that should be regulated differently? As it has grown the industry has tried to position itself as falling within the realm of a traditionally regulated sector. However, critics contend that the globalization and expansion of PSCs into activities that were formerly executed exclusively by the state, such as “patrolling of public areas, investigation of crimes, the exercise of powers such as search and arrest and the provision of armed guard services,” (United Nations Office on Drugs and Crime [UNODC]: 2014, 2) should give governments the latitude to regulate the industry as they see fit, regardless of their obligations under international free trade agreements. Yet, private security is not the only industry where governments have tried to limit or control foreign investment. There are a number of precedents from other sectors where governments have introduced special regulatory measures, or overturned proposed foreign investments as a result of security concerns. For instance, in the fall of 2014, the government of Canada rejected a proposal that would have seen the sale of Manitoba Telecom Services Inc. to a conglomerate that included Egyptian billionaire Naguib Sawiris, based on concerns about the potential security implications of selling off a major piece of critical infrastructure to a foreign entity (Mayeda, 2014). Similar concerns forced the state-owned Dubai company DP World to withdraw its bid to take over terminal operations at several American ports. The proposal had generated widespread opposition in Congress, where the House Appropriations Committee had passed a 62-2 vote in favour of rejecting the deal for its potential negative implications on national security (Sanger, 2006).

FOREIGN OWNERSHIP BANS

It is worth noting that a preference for local ownership and control of PSCs is a relatively common feature of national legal frameworks regarding private security. Among the countries that have enacted foreign ownership bans, it is often believed that the globalization of private security is a threat to the provision of security at the local level. The reshaping of the global market in a way that favours large-scale, national and transnational firms at the expense of local firms is therefore a matter of concern for those who believe that the provision of security at the local level is best done by those who have knowledge of local communities, actors and values.

The consolidation of the private security industry has been met with resistance by a number of countries, especially in the developing world. Some countries, such as Kenya, Honduras, the Philippines, Saudi Arabia, Switzerland, Mozambique, Botswana, Brazil, Colombia, Jordan, India, Niger, and Senegal, to name a few, have sought to limit the influence of large international PSCs by enacting bans or limitations on the foreign

ownership of PSCs within their country. At one end of the spectrum, legislation may merely require that PSCs be legally registered in the country (UNODC, 2014: 56). Foreign ownership bans typically require that PSCs be wholly owned by a citizen of the country where they operate. While restrictions may not completely bar a particular company from operating on its soil, they generally place limitations or restrictions on the percentage of a company that can be held by foreign nationals. In some countries these bans are partial, for instance clause 29(c) of Kenya's Private Security Regulatory Act requires a minimum of 25 percent national ownership. In others, bans are conditional and exceptions can be granted in certain circumstances. For example, sec. 21(1) of Botswana's Private Security Services Bill, 2008, gives the minister responsible for defence, justice and security the power to regulate licencing of the security service industry to non-citizens of Botswana (Hendricks and Musavengana, 2010). Similarly, Jordan has banned foreign ownership in PSCs, but allows exceptions to be made by the Council of Ministers (Malhas, 2009). Other countries, such as Nigeria, India, Brazil and more recently South Africa, have tried to maintain more stringent bans. Nigeria's Private Guard Companies Act No. 23, 1986 prohibits any company from watching, guarding or patrolling, unless wholly owned by Nigerians, in accordance with the Nigerian Enterprises Act (Ingram, 2015). Similarly, India's Private Security Agencies (Regulation) Act, 2005, requires foreign-owned companies in the security industry to have a "proprietor or a majority shareholder, partner, or director" who is an Indian citizen. For additional information on this, based on a review of available literature, Annex I presents a list of over 20 countries that currently have foreign ownership bans in place, as well as an overview of the legal instruments enabling the bans.

THE RATIONALE BEHIND FOREIGN OWNERSHIP BANS

National Security Concerns

Most countries that have enacted bans on foreign ownership in the private security industry justify the measure on the basis that foreign control of PSCs poses a potential threat to national security. Similar justifications have been used by governments to regulate and limit foreign investment in critical infrastructure. Indeed, limitations on FDI in critical infrastructure are commonplace and widely accepted. In an OECD study on foreign investment and critical infrastructure, all 39 countries studied had some form of discriminatory measures, in order to protect their critical infrastructure, including blanket restrictions, sector-specific licensing provisions, and investment approval procedures (OECD, 2008: 7). Many industrialized countries, including Australia, the United States, the United Kingdom, Canada and the Netherlands as well as the European Union, have policies in place to protect critical infrastructure in a variety of sectors, including energy, ICT, finance, and transportation (ibid.: 5). Similarly, many countries make use of a foreign investment review process, for cases where foreign companies want to become involved

in sensitive infrastructure projects. Canada's Investment Canada Act allows the minister of industry to review any investment that s/he believes to be "injurious to Canadian national security" (Mayeda, 2014). The government of Canada maintains a committee of senior officials, including the deputy minister of public safety, heads of both Canadian intelligence agencies, and the prime minister's national security advisor, who vet foreign investment proposals to determine whether or not there are any associated national security risks. Similarly, in the United States investments are reviewed by the Committee on Foreign Investment in the United States (CFIUS), which consists of 12 members from different government agencies, including representatives from the Departments of State, Defense, Homeland Security, Justice, and the National Security Council. CFIUS reviews potential investments, and any concerns can trigger a 45-day investigation, which concludes with a recommendation to the president to approve or reject the proposal (Kaplan and Teslik, 2007).

Concerns with FDI are generally associated with mergers, acquisitions and takeovers of established firms that operate in critical or sensitive sectors, by foreign-owned entities. While, in some cases, state ownership of foreign companies may be benign, there is nevertheless concern that a company's decisions will be motivated by a foreign government's policy interests, rather than the commercial interests of the firm. Gazprom's decision to cut gas supplies to Ukraine in 2006 is a good example of a politically motivated business decision (Masters, 2013). Most countries have enacted legislation that allows for deals to be restricted or even blocked if there is a risk that they may endanger sensitive technologies, lead to outsourcing of jobs, or potentially create risk or vulnerability for a country's essential assets (*ibid.*). The terrorist attacks of September 11, 2001, however, prompted a number of countries to reconsider the safety of their infrastructure and realign the balance between security and FDI more strongly toward security. In the last 10 years, a number of countries have introduced more restrictive policies to govern FDI in sensitive sectors (Jackson, 2013: 6). There has been growing concern about the impact that foreign investments may have on the industrial capacity of a country, and the capacity of that country's economy to meet its defence and security needs (*ibid.*: 1). Yet there is still a debate about how to balance economic openness with national security and how involved foreign-owned companies should be in the critical infrastructure of another country (Kaplan and Teslik, 2007).

Many economists warn that imposing overly strict or burdensome restrictions on FDI will result in retaliatory action taken by other nations. To avoid this, a number of countries signed on to an initiative led by the OECD requiring them to pledge not to treat foreign-controlled firms less favourably than their domestically owned competitors. The pledge, however, is non-binding and signatories maintain considerable latitude to create national security exemptions (Masters, 2013). Since early 2006, the OECD has also operated a Freedom of Investment project as a forum for discussing strategies for governments to

reconcile the competing demands of security and openness to investment (OECD, 2008: 3). However, there is still no consensus about what constitutes the correct balance between openness to trade and securing a country's critical assets. It is clear that states have a right to restrict foreign investment, but in which industries and to what extent is still unclear. The question then is whether the provision of security services should be given the same consideration as other critical industries in trade policy. Security-focused arguments for foreign ownership bans typically assume one of three forms.

First, the fact that large transnational firms may be involved in different activities depending on the country means that a firm providing only security guard services in one country may provide military or intelligence services in another. As one report noted: "Private security companies undergo a metamorphosis depending on the market opportunities. It is not unusual to find a PSC involved in the provision of security services in country A, military services in country B, humanitarian assistance in country C and construction services in country D. This also includes foreign companies operating in South Africa while providing other services other than security services in other parts of the world" (Parliamentary Monitoring Group, n.d.).

Second, the involvement of PSCs in intelligence-gathering activities is a particularly sensitive area: "Private Security Companies (PSCs) are also increasingly used in the field of human intelligence. This involves primarily smaller companies supplying former intelligence agents as actual bodies on the ground' in sensitive locations" (ibid.). PSCs are currently employed to conduct a wide variety of intelligence tasks: "from the gathering of intelligence from satellites and sophisticated sensors, to interpreting and analysing results and distributing information among relevant government bodies" (Holmqvist, 2005: 37). The US Department of State, and even the International Monetary Fund, have contracted private firms to provide intelligence (ibid.).

Third, as private security firms increasingly overlap with the information technology (IT) sector, concerns over data security are often raised. A report by Caroline Holmqvist at the Stockholm International Peace Research Institute (SIPRI), noted that:

Frequent links between PSCs and companies within the information technology (IT) and electronic systems industries make private security actors seem well placed for the technology-intensive aspects of intelligence gathering. Indeed, many of the important actors within the 'intelligence branch' of the private security sector have originated as IT or telecommunications companies, only to then diversify their portfolios to cover security-related services (ibid.).

Despite these three justifications, however, critics of foreign ownership bans argue that there is little empirical evidence to support the claim that foreign-owned PSCs are truly national security threats. There is no substantial body of cases where foreign-owned PSCs

have been caught acting in the interests of the country of their ownership (Burger, 2014). Moreover, while the consolidation of the industry has created large international and multinational companies, most of these firms still rely heavily on local partners and local employees. As a result, foreign-owned private security firms operating in South Africa, for example, would most likely still be employing primarily South Africans, or potentially even using South African-owned firms as sub-contractors (*ibid.*). Additionally, the large multinational companies like G4S tend to be comprised of employees from a variety of countries and backgrounds, rather than exclusively from the country of their ownership. Indeed, the research conducted for this paper indicates that states who impose ownership bans of PSCs are motivated to do so by a range of incentives.

Economic Motivations

In some cases, such as Haiti, considerations of foreign ownership bans are largely economic. Unlike many of the countries listed in Table 2, there is a movement underway in Haiti to relax foreign ownership restrictions in order to spur investment and growth in the industry by attracting foreign capital. Banned during the Duvalier regime, private security is a relatively recent phenomenon in Haiti (Burt, 2012: 9). Haiti has a small number of security agents, both private and public, compared to other countries in the region, though the industry is growing at a rapid rate. International organizations are the biggest clients, forming approximately 50 per cent of the market (*ibid.*: 7-8). It was not until a 1988 decree issued by President Prosper Avril that PSCs were legalized in Haiti, with an amended decree in 1989 providing the country's principal legal framework on PSCs. Article 4 of the 1989 decree stipulates that PSCs must be exclusively Haitian-owned and operated and cannot have an affiliation with outside countries. A legal reform plan that surfaced in 2012, backed by Haitian Senator Youri Latortue, however, would have seen the government relax its domestic ownership requirements and allow up to 25 percent foreign ownership of PSCs. The rationale behind this proposal was that it would enable an infusion of foreign capital into PSCs, allowing them to access better equipment and generally improve their operations (*ibid.*: 16). This was also part of a broader strategy to improve security and instability in the country, which was seen as a major roadblock to foreign investment (World Economic Forum, 2011).

However, Haiti is not the only country where economic considerations have motivated, or at least influenced, a decision to implement a foreign ownership ban in the private security sector. Brazil, for instance, has a complete ban on foreign ownership of PSCs. The stated motivation of the ban is to protect, maintain and improve the country's economic growth, ensuring that the domestic security market is able to consolidate its hold on the market (Novais, 2011). In this sense the ban is seen as part of an ongoing effort to protect the national economy by limiting competition from foreign companies (Puin, 2012). Brazil has

a large market for private security as a result of endemic urban violence and crime in some sections of the country (University of Denver Sié Chéou-Kang Centre, 2016).

Senegal is another country with a similarly restrictive private security regime that is tied largely to economic drivers. A Senegalese decree from June of 2003 restricts the provision of private security to natural or legal persons of Senegalese nationality. The decision to restrict foreign ownership of PSCs in Senegal was also designed to protect the native industry and prevent large multinationals from cornering the market. For many Senegalese citizens, private security is viewed favourably as a source of entry-level employment in a struggling economy (O'Brien, 2008). Relative political stability and a low crime rate has made Senegal a desirable destination for international business and foreign investment in the region. As a result, the expansion of international companies in Senegal has been accompanied by a boom in the private security industry, as the influx of foreign companies and expatriates has created new opportunities to provide a range of guarding and protective security services (University of Denver Sié Chéou-Kang Centre, 2016).

Finally, economic considerations can be found in China's decision to formally allow the creation of PSCs in 2010. Chinese companies presently operate in many unstable parts of the world. Illustrating the risks associated with these investments, in March of 2011 China was forced to evacuate more than 35,000 of citizens from Libya, most of whom were working for Chinese oil and construction companies, as that country slowly slipped into revolution and then civil war (Duchâtel, Bräuner and Hang, 2014: i). There is a growing international market for ensuring the safety of Chinese businesses, and the Chinese Foreign Affairs Office is increasingly under pressure to protect the millions of Chinese citizens and workers who go abroad every year (Arduino, 2015, 5). In 2012 alone there were more than 20,000 Chinese companies operating abroad, and more than 83 million Chinese travellers, workers and tourists (Feng, 2013). Many Chinese companies are either owned or at least closely aligned with the state. There is a strong economic impetus to protect Chinese companies, as a way of protecting China's broader economic interests. New privately owned security companies are starting to spring up in response to the overseas demand. For example, Dewei Security Group Ltd. works in Kenya to advise the Chinese Road and Security Company on security, and China Kingdom International was active in Libya in 2011 and 2013 (Lee, 2014). The defense of "overseas interests" is increasingly gaining political traction in China, and has slowly led the country's policy makers to reconsider their long-held policy of non-interference (Duchâtel, Bräuner and Hang, 2014: 3).

Political Factors

Foreign ownership bans can have multiple motivations – in the case of South Africa, national security rhetoric may have masked underlying political considerations. In March 2015, South African Police Minister Nkosinathi Nhleko caused a stir by declaring the government of South Africa's intention to implement the 2012 Private Security and Industry Regulation Act. At issue was a provision in the bill that required PSCs to maintain a minimum of 51 percent South African ownership. Controversial enough on its own, the bill would also require South Africa to abandon its commitments under the WTO's GATS. The government claimed that foreign-owned PSCs threatened South Africa's national security because its growth had far outstripped the growth of the industry in other countries, was large enough "destabilize the security situation" in the country and was increasingly performing functions that "used to be the sole preserve of the police" (Burger, 2014). The argument put forth by the South African government was essentially that the restriction on foreign investment in a sector, such as private security, is justifiable given the potential of this industry to affect the security of the South African state. There are approximately 445,000 registered private security "guards" operating in South Africa, vastly outnumbering the 270,000 public security officers currently employed in the country – including both the South African Police Service and the South African National Defence Force (ibid). The growth of the industry has also been tied fairly consistently to the increase in officially reported crime rates (ibid.).

Documents leaked to Al Jazeera reveal that the South African security establishment has expressed concern about the role of PSCs. In a classified security vulnerability assessment, intelligence officials were concerned that PSCs could operate as a "perfect conduit" for "organizations hostile to the state." According to the document, there is a revolving door in South Africa between the government and the private sector, including those working in the government security establishment (Government of South Africa, 2009: 8). This includes former senior intelligence officials who have been dismissed by South African intelligence agencies and gone on to find employment with PSCs (Jordan, 2015). However, the situations described in this national security briefing note apply primarily to South African citizens and domestic PSCs. Indeed, less than 10 percent of the industry in South Africa is actually foreign owned, while almost all of the 445,407 security officers in the country are either permanent residents or citizens. In addition, despite assertions by the police minister that the growth of the industry in South Africa has outstripped other countries, a 2011 report by the UNODC indicates that the industry in South Africa has grown at the same pace as a number of other countries, including India, Guatemala, Honduras, Australia and the United States (UNODC, 2011). All managers and executives of PSCs in South Africa must be registered as security service providers, a designation requiring either citizenship or permanent residency – calling into question the fear that PSCs are a hotbed of foreign agents waiting to "destabilize the security situation" (Cronjé,

2015b). The PSC industry in South Africa is also fairly fragmented, consisting of over 9,000 different businesses operating in 20 different categories of security services (Burger, 2014). Private contractors also account for only 1.6 percent of the legal firearms in the country (Diavastos, 2015).

Some have argued that the move to ban foreign ownership was actually influenced by political calculations. Following this reasoning, the decision to ban foreign ownership of PSCs was merely the latest in a series of government decisions designed to distract public attention from the controversy surrounding the governing regime. South African President Jacob Zuma has been accused of deceiving South Africa's parliament about the amount of public funds used to install security and other upgrades at his private residence. A report prepared by the country's anti-corruption watchdog (entitled "Opulence on a Grand Scale") found that Zuma improperly spent millions of dollars of taxpayer's money on non-essential upgrades, including a pool. Johan Burger (2014) of the Institute for Security Studies in South Africa, argues "the term 'national security' is being used to justify government decisions or behaviour that cannot properly be explained...much of what the current administration refers to as national security threats, appears to have more to do with removing the duty to account for political decisions, rather than any real danger to South African sovereignty."

The South African case helps to contextualize the motivations that lead governments to implement foreign ownership bans. Similar to the cases of Haiti, Brazil and Senegal, the impetus for the South African decision was located primarily in domestic factors, and not concern about manipulation, infiltration or undue influence being exerted by a foreign state. Indeed, in all of the cases reviewed for this paper, there were a range of motivations for limiting the ownership of foreign PSCs, but national security was not often the most persuasive. The research for this paper suggests that there can be an array of factors, including economic and political motivations, that prompt a country to institute a ban on foreign ownership of PSCs. However, it also suggests that, in some cases, the rhetoric of national security may be used to obscure other motivations.

Free Trade Agreements and Foreign Ownership Bans

One important external factor influencing the decision to implement foreign ownership bans is the role of the WTO and other trade agreements that increasingly carry legal obligations protecting foreign investment. The GATS conditions require that signatories not impose terms, limitations or conditions on the participation of foreign capital in their economy. For instance, a country like South Africa (which was a founding member of the WTO) is required to comply with the entire set of WTO agreements, and not to selectively pick and choose which agreements to participate in and which to abstain from (Cronjé,

2015a). Therefore, provisions banning foreign participation in the private security industry run the risk of violating commitments under the GATS, and becoming subject to appeal to the WTO. However, there is some leeway for states that want to extricate themselves from some of their free trade commitments. GATS Article XXI does allow a member to modify any commitment in the schedule of agreements. This provision also allows other GATS members whose interests may be affected to register a claim, and the modifying member is obligated to negotiate a compensation agreement, which requires commitments in other service sectors. This measure ensures that any state that wishes to withdraw from their GATS commitments cannot do so unilaterally, and must compensate any other country that is affected.

Additionally, if a country's motivation to protect its private security industry from the influence of foreign-owned companies is sufficiently strong, it can impose a foreign ownership ban and subsequently negotiate agreements with any countries lodging complaints. These compensatory agreements must all be negotiated on a most-favoured-nation basis, which means that whatever benefits the WTO member enacting the ban reaches with any affected member state, those same benefits must be extended to all WTO members. Both the European Union and the United States have attempted to modify their GATS commitments, and both countries spent years negotiating complex compensatory packages with affected member countries (Cronjé, 2015b). In other words, member states have the right to negotiate exceptions and exemptions to their GATS commitments, but must be willing to pay the associated costs.

Beyond the GATS, bilateral investment treaties (BITs) may include provisions relevant to private security regulations and foreign ownership restrictions. In South Africa, BITs with the United Kingdom and Sweden include provisions protecting foreign investment in specific industries, including the private security industry. G4S and Chubb are UK companies and Securitas is Swedish, which means the organizations can use these BITs to fight against the proposed law banning whole foreign ownership of PSCs. Both BITs (SA-UK and SA-Sweden) include provisions meant to guarantee fair and equitable treatment of investors in the host country (South Africa). The treaties also discuss the legal action and compensation that can be claimed if South Africa alters or prohibits investments in their local economy. For example, Article 2 of the SA-UK BIT states, "Investors shall at all times be accorded fair and equitable treatment." The treatment goes on to discuss the ability of investors to sue the host country, under international investment law, for any changes/restrictions placed on the investment environment in an unreasonable and discriminatory way. This provision is found in multiple BITs, including South Africa's BIT with Sweden.

CONCLUSION

This paper provided an overview of the current state of foreign ownership bans in the private security sector. In practice, foreign ownership bans are motivated by a range of factors including national security concerns, economic interests and political considerations. Although they are often framed as necessary responses to the expansion and consolidation of the global private security industry, these bans may also be the result of a range of other factors. While there is evidence from some countries that foreign firms have been responsible for human rights abuses,⁴ there is presently little empirical evidence to substantiate the fear that foreign ownership necessarily exposes a country to greater national security risk. While there is no doubt that the expansion of PSCs into a wider range of security-related services places them at a critical intersection between the state and national security, there is not yet any reason to believe that foreign ownership necessarily compromises state security. Regardless of the motivation, however, these bans have highlighted the tension between openness to trade and foreign investment, and the rights of a sovereign state to limit that trade or investment in the interests of protecting its own security. Ultimately, the question remains whether the regulation of foreign ownership of the private security industry is primarily a matter of national security or trade policy.

There is no reason to believe that the unprecedented expansion and consolidation of the global private security industry over the past several decades will not continue. Driven by these twin trends, the industry will likely continue to be dominated by a relatively small number of large multinational corporations, whose operations will increasingly intersect with, replace and complement national security institutions. The wide range of policy responses outlined in this paper show that each country will have a unique approach to the issue of foreign ownership in the private security industry, based on a variety of contextual factors including perceived national security interests, economic motivations and political calculations.

Scholars and policy makers should consider the various motivations for foreign ownership bans as representative of the underlying fears and anxieties of governments regarding recent trends in the industry. For instance, contemporary initiatives on private security governance have focused on particular industries, for instance, the extractive industry (for example, the Voluntary Principles on Security and Human Rights); the responsibility of states regarding private security (for example, the Montreux Document); and the conduct of PSCs themselves (for example, the International Code of Conduct for Private Security Providers). The countries presently enacting foreign ownership restrictions or bans can be viewed as skeptics of the ability of states to properly govern the conduct of foreign PSCs. Critically, these states draw a distinction between the viability of governing domestic and foreign PSCs. Concerning the former, these countries have developed regulatory

regimes covering acceptable standards of conduct, processes for licensing, registration and reporting and mechanisms for enforcing and punishing non-compliance. A more systematic survey of the assumptions and attitudes of such states could better inform policies designed to improve the governance of transnational PSCs.

NOTES

1. In this paper, the term private security company (PSC) is distinguished from private military and security company (PMSC). PSC refers to non-military actors typically functioning in a preventive, guarding function; PMSC as a term includes the rather more controversial military element operating in war zones.
2. For instance, see Gumedze (2007) and UNODC (2014).

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ANNEX I - LIST OF COUNTRIES AND LEGAL INSTRUMENTS

Based on a review of available literature, this Annex presents a list of over 20 countries that currently have foreign ownership bans in place, as well as an overview of the legal instruments enabling the bans.

Antigua and Barbuda

According to the section 4(1)(f)(i) of the Private Security Registration Act of 2006, an application for the issue of a license to operate a security service provider shall be made to the National Security Council (established under the national Security Act) and must be accompanied by proof that the applicant is a citizen or resident of Antigua and Barbuda.

Bahamas

Section 4(1) of Inquiry Agents and Security Guards Act of 1976 states that “no person shall...engage in the business of providing...security guards or act ...as a security guard, unless he is a Bahamian and is a holder of a licence thereof.” A “Bahamian” means “a citizen of The Bahamas [or] ...a company registered under the Companies Act in which all the shares are beneficially owned by ‘Bahamians.’”

Botswana

The prohibition of foreign ownership is reflected in the Regulation of Private Security Services Bill of 2008. Clause 21(1) provides that “the Minister [responsible for defence, justice and security] may make regulations on licenses for a reserved trade or business in the security service industry that is issued only to citizens of Botswana.” According to the Bill, the regulations made in accordance with clause 21(1) may further provide that “only citizens of Botswana shall ...be entitled to be security service provider...or ...engage in certain security services.” The Bill also introduces an exemption clause in that “a joint venture between a citizen security service provider and a noncitizen security service provider may be approved by the Private Security Industry Regulatory Board.”

Brazil

There is a complete ban of foreign ownership of PSCs in Brazil (Puin, 2012). Law 7102/83 and Administrative measure 91/92 prohibit foreign participation in the area of security services and transport of valuables. Motivations for the prohibition include “to maintain

and improve the country's economic growth and to consolidate the national industry" (Novais 2011), as well as "ethical and patriotic reasons" (Puin, 2012). It is seen as part of "an ongoing effort by Brazil to protect the national economy by reducing or limiting products and services provided by foreign companies on the national market" (ibid.).

China

PSCs were not legalized in China until Order of the State Council No. 564, on "Regulation and the Administration of Security and Guarding Services," was adopted by the State Council on September 28, 2009, and entered into force on January 1, 2010. Before the new regulation PSCs had to be owned or managed solely by the Public Security Bureau, but there were numerous off-the-books operators. Legitimate PSCs were registered as "consulting firms," where they were registered at all. Under the new regulations, all employees of the private security industry are required to pass a formal qualifying exam, and have their application reviewed by each municipal government, who will keep their fingerprints on file. New PSCs filling for a business licence are required to pay a minimum 1 million yuan start-up fee (Stratfor, 2009).

Columbia

Only those companies constituted under Colombian law as "Limited Responsibility Societies" or "Private Security and Surveillance Cooperatives" may provide security and surveillance services in Colombia. Their shareholders may only be Colombian nationals. Those companies constituted with foreign capital prior to February 11, 1994 cannot increase the share of foreign capital. Those constituted after that date can only have Colombian nationals as shareholders. Colombia rarely places restrictions on foreign direct investment (FDI). They usually maintain an open and encouraging environment for foreign investment. However, FDI is forbidden or prohibited in certain sectors. The Colombian government has restricted foreign ownership of PSCs to protect the national security of Colombia (Deloitte, 2014).

Djibouti

According to Law No 202/AN/07/5, no one may practise individually or collectively provide private security services or be a leader or manager of a company "if not of Djiboutian nationality."

Honduras

Article 91 of the Law of the National Police and Private security Services Decree No. 156-98 provides that foreign companies wishing to apply for permission to provide security services in Honduras should partner with Honduran companies engaged in the same activity and that the manager of the partnership should be a Honduran by birth. In practice, however, the majority of security companies are not registered and operate without state regulation, and foreign PSCs are not being forced to abide by regulations and laws. (United Nations General Assembly, 2007). Indeed, criminal groups in Honduras are allegedly taking advantage of the proliferation of private security firms by setting up their own companies to cover up their activities (Bargent, 2013).

Jordan

Article 6 of Regulation No. 54 (2000) holds that foreign investment is prohibited in the sectors of private security and investigation services (Organisation for Economic Cooperation and Development [OECD], [2013]). However, exceptions can be made. Restrictions can be lifted or eased under some bilateral agreements. To qualify, projects or investments have to be deemed valuable for various aspects of the country's economy and security. Jordan's Council of Ministers is also entitled to waive any restrictions on foreign equity in cases where national interest is served or where the project will develop the economy, increase exports and create jobs for Jordanians (Malhas, 2009). The council may approve of easing restrictions upon the recommendation of the Investment Promotion Committee, comprised of senior officials from the Ministry of Industry and Trade, Income Tax Department, Customs Department, the private sector, and the Jordan Investment Board (Obalade, 2014). However, there are no documented cases of that happening to date.

Haiti

It was not until a 1988 decree issued by President Prosper Avril that PSCs were legalized in Haiti. An amended decree in 1989 remains the principal legal framework under which PSCs operate in Haiti. Article 4 stipulates that PSCs must be exclusively Haitian-owned and operated and cannot have an affiliation with outside countries.

India

The Private Security Agencies (Regulation) Act, 2005 (No. 29 of 2005) provides that "A company, firm or association of persons shall not be considered for issue of a licence under this Act if it is not registered in India, or having a proprietor or a majority shareholder,

partner or director, who is not a citizen of India.” Prior to the introduction of the act, PSCs functioned without government control or regulations for almost 15 years. Therefore, the act and regulation were seen as a need to establish regulatory framework and environment (Sarita, 2012). Recently, suggestions have been made regarding allowing 100 percent FDI in private security firms. This has been met by opposition from domestic firms. They have expressed concerns about putting the activities these firms do in foreign hands. Certain aspects of the private security sector are of concern, bringing in foreign investment will further complicate the situation (Menon, 2013).

Kenya

Clause 29 (c) of the Private Security Regulatory Act provides for requirements for licensing with the condition that, “if a foreign company, is registered whether as a limited liability company or a partnership in accordance with the laws of Kenya and that it must have at least twenty five percent local shareholding” (Private Security Regulation Act, No. 13 of 2016).

Latvia

PSCs in which foreign investors (with the exception of EU and European Economic Area member states) have acquired a controlling interest are not entitled to receive a licence to perform security guard activities, according to the Law on Security Operations (Official Journal No337/338 of 11.11.1998) (OECD, 2013).

Mozambique

Earlier amendments from 1993 and 1995 were replaced by Decree No. 43/2009 in August 2009, which provided new regulations to the Investment Law. The law and its regulations generally do not make distinctions based upon investor origin, nor do they limit foreign ownership or control of companies. With the exception of PSCs, media companies and certain game hunting concessions, there was no legal requirement that Mozambican citizens own shares of foreign investments until 2011.

Nigeria

The Private Guard Companies Act No 23 of 1986 (the Act) prohibits any organization from performing the service of watching, guarding, patrolling or carrying of money for the purpose of providing protection against crime unless it is registered as a company under

the Companies and Allied Matters Act, and is wholly owned by Nigerians in accordance with the Schedule to the Nigerian Enterprises Promotion Act. In terms of section 13(1)(e) of the Act, the licensing authority shall not grant any license or approval under the provision of the Act if any director of the company or the person applying for approval “is not a citizen of Nigeria.” The Nigerian state’s reliance on PSCs has increased its involvement in complex political and ethical situations (Ingram 2015). The heavy involvement of the country’s private security sector in the public sector could be one of the reasons behind restricting foreign ownership of PSCs.

Philippines

The Republic Act No. 5487, the Private Security Agency Law (1969), states that security and watchman agencies must be one hundred percent owned and operated by Filipino citizens (Republic of the Philippines House of Representatives, 2013). The law also sets out the basic requirements for licensing an operator or manager of a security agency. The operator or manager of an agency must be a Filipino citizen, must be not less than 25 years of age, must be a college graduate/or a commissioned officer not in active service or retired from the Armed Forces of the Philippines or the Philippine National Police (UNODC, 2014). The law seeks to professionalize the industry by intensifying the requirements for training and professional certification of security practitioners. It also intends to increase the efficiency of the security industry by introducing amendments to lessen bureaucracy with respect to licensing, operation and regulation of private security agencies (Republic of the Philippines House of Representatives, 2013).

Saudi Arabia

Article 1 of the Private Security Guard Law of 2007, “establishments or companies for private civil security guard” are “individual establishments wholly owned by a Saudi or the Company wholly owned by Saudis, which undertake - with a special license - to prepare and secure the private civil security guard to whoever requires in return of pay.” Article 4(a)(1) of the Private Security Guard Law provides that one of the conditions for individual establishments and companies that can be licensed to practise private civil security guard is that “the individual establishment shall be wholly owned by a Saudi and the company shall be owned by Saudis.”

Senegal

According to the Decree No. 2003-447 of June 18, 2003, the exercise of any activity related to the provision of security to property is subject to prior authorization by the minister of interior. Such authorization is granted to natural or legal persons of Senegalese nationality. The decree requires that the request to provide private security services must, among other things, be accompanied by a certificate of Senegalese nationality (O'Brien, 2008). The decision to restrict foreign ownership of PSCs was made by Senegal to allow more regulation of the industry and to prevent multinational companies from making inroads. The private security sector is also viewed, by the majority of the population, as a form of employment in a struggling economy. The government been commended for its efforts to bring the private security sector into domestic hands (ibid.).

South Africa

In March of 2015, South African Police Minister Nkosinathi Nhleko declared the government of South Africa's intention to implement the 2012 Private Security and Industry Regulation Act. At issue was a provision in the bill that required PSCs to maintain a minimum 51 percent South African ownership. The bill would also require South Africa to abandon its commitments under the WTO's GATS. The government of South Africa has claimed that foreign-owned PSCs threatened South Africa's national security.

Switzerland

In terms of article 5(1)(a) of the Concordat on the Provision of Security by Private Persons of November 12, 2010, any person may obtain permission to operate a security guard if he or she is a "Swiss citizen, a citizen of a member of European Union or a State Association European Free Trade Agreement, or the holder of a residence permit or establishment for at least two years."

Tunisia

Security guard services are among the listed services that "unless they are wholly for export, are subject to approval by the Investment Commission when foreign participation in the enterprises concerned exceeds 50% of their capital" (OECD, 2013).

The Centre for Security Governance (CSG) is a non-profit, non-partisan think tank dedicated to the study of security and governance transitions in fragile, failed and conflict-affected states. Based in Canada, the CSG maintains a global, multi-disciplinary network of researchers, practitioners and academics engaged in the international peace and security field.

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