

Winds of Change: The Evolving Landscape of Foreign Investment Regimes in Trying Times

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Introduction

Adam Smith, in his seminal work, *The Wealth of Nations*,¹ identified the importance of land, labour and capital to productivity while emphasising the crucial role that the efficient and harmonious utilisation of these factors plays in the economic development of a society. After half a century of large-scale wars, which defined the world order for years to come, various affected nations opted to adopt a protectionist approach. It gave these newly independent fragile countries a chance to survive and consolidate before pursuing economic expansion. Thereafter, it was soon realised that foreign investment, particularly long-term commitment in greenfield sectors, was of immense importance for economies to achieve the coveted balance between land, labour and capital. This led to the governments offering additional incentives to investors from the developed world in

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1 Adam Smith, *The Wealth of Nations* (W Strahan and T Cadell 1776).

the process of economic courtship.² In order to commit vast resources for a considerable period of time, the investors primarily demanded a decentralised, less regulated and more stable environment for their investments to grow and flourish.³

The lasting interest showcases the intention of the foreign investor to develop a long-term relationship with the enterprise receiving the investment; and a mutual goal for growth through active involvement and influence in corporate governance.⁴ Foreign investment is extremely coveted as it helps in alleviating myriad problems that developing economies face. Its immense importance can be highlighted by focusing on some of its significant benefits, which include reducing unemployment, developing human resources, introducing new technology, and providing a base for further innovation and exchange rate stability by ensuring an equivalent flow of foreign exchange between strategic partners.⁵ The economic implications are evident from the vast sum of cross-border investment in 2019, which amounted to approximately US\$1.3tn.⁶ However, for all its advantages, we are witnessing a sharp change in the attitude of various countries, which have been made aware of the potential limitations to the presence of foreign capital in certain key sectors.

‘The importance of nationalism has too frequently been underestimated; and in a time such as the present when the world is experiencing a marked revival of nationalistic feeling, and when nationalism is revealing itself in new and varied forms or manifestations, a new attempt to evaluate nationalistic influence upon economic science appears to be fully justified’.⁷ This observation made by the renowned economist, James E Moffat almost a century ago appears to be equally relevant in present times, in the light

2 Margarita M Kalamova, ‘Foreign Direct Investment and Decentralization’ in *Essays in International Trade and Public Economics* (Peter Lang AG 2012) www.jstor.org/stable/j.ctv9hj9c0.5 accessed 5 September 2020.

3 World Bank, ‘Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications’ (World Bank 2017) www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-report accessed 5 September 2020.

4 OECD, ‘OECD Benchmark Definition of Foreign Direct Investment’ (OECD 2008) www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf accessed 5 September 2020.

5 Prakash Loungani and Assaf Razin, ‘How Beneficial Is Foreign Direct Investment for Developing Countries?’ (2001) 38(2) *Finance and Development* www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm accessed 5 September 2020.

6 UNCTAD, ‘World Investment Report 2019: Special Economic Zones, Key messages and Overview’ (UNCTAD 2019) https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf accessed 5 September 2020.

7 James E Moffat, ‘Nationalism And Economic Theory’ (1928) 36 *Journal of Political Economy* 417.

of the changing economic landscape and rise of a nationalistic fervour as countries attempt to keep certain opportunistic entities and a deadly virus at bay. Covid-19 has forced governments across the globe into an unenviable position of seeking to revive their stagnant economies, while at the same time regulating, screening and in some instances, restricting foreign investment in key sectors to protect the 'national interest'.

As countries begin to ease the restrictions to business operations imposed as a part of economic lockdowns, various entities are in dire need of liquidity. This would provide an opportunity for foreign investors to form strategic alliances, provided they can act expeditiously. However, prior to committing capital and other resources, investors wishing to make the most of these circumstances will be required to evaluate the possibility of investment regulators carefully scrutinising their investment and creating roadblocks for them.

While foreign investment is likely to be the engine that provides impetus to the growth of struggling economies, projections by the Organisation for Economic Co-operation and Development (OECD) state that even under highly optimistic circumstances, foreign investment flows are likely to fall by a minimum of 30 per cent in the year 2020, compared to 2019.⁸

This article will look at the changing trends of foreign investment by perusing the foreign investment regimes of major and diverse economies of India, the United States, Australia and China. The authors will map the changes to the regulatory framework brought about in these jurisdictions, analyse the reasons behind these changes and determine if there is any link between the changing attitudes of these countries.

The authors are focusing on these particular jurisdictions because they represent large economies that have varying economic ideologies and distinct demographic characteristics. By analysing the routes taken by these key players in the geopolitical system, the authors will attempt to showcase the direction in which the global economy is likely to move. Lastly, the authors will draw insights from the struggling global economy and provide an outlook on cross-border investment in the near future, including its potential impact on globalisation.

8 OECD, 'Foreign direct investment flows in the time of COVID-19' (OECD 2020) https://read.oecd-ilibrary.org/view/?ref=132_132646-g8as4msdp9&title=Foreign-direct-investment-flows-in-the-time-of-COVID-19 accessed 5 September 2020.

Country-wise study

India

The need for an influx of foreign funds and resources for a fast-developing nation with huge needs and limited resources cannot be understated. Despite this reality, policy-makers in India often struggle to walk the thin line, balancing the socialist⁹ ideals envisaged by its founding leaders and the necessities of leveraging capitalism for a liberalised India in a globalised world.¹⁰ Despite the regulatory challenges and mediocre ‘ease of doing business’,¹¹ investors see huge potential for growth in India, given the vast population base headlined by a young and ambitious demography. This trend is reflected in the figure for cumulative foreign direct investment (FDI) from April 2000 until March 2020, which amounts to a massive US\$680.91bn,¹² with the year 2019 witnessing the highest inflow of funds.

LEGAL FRAMEWORK

Foreign investors, intending to play an active part in the business of an Indian company, primarily route their investments in the form of FDI.¹³ Foreign investment can be made by subscribing to or purchasing equity instruments,¹⁴ subject to compliance with the caps for certain sectors, pricing guidelines and industry-specific conditions, if any. The regulatory framework governing such investments comprises the provisions set out under the Foreign Exchange Management Act 1999; the Foreign Exchange Management (Non-Debt Instruments) Rules 2019

9 The term ‘Socialist’ was inserted in the Preamble to the Constitution of India; see The Constitution (Forty-second Amendment) Act 1976 with effect from 3 January 1977.

10 Government of India, ‘The New Economic Policy’ (1991).

11 India ranks 63 in the ease of doing business index 2020. World Bank, ‘Ease of Doing Business’ (World Bank 2020), see <https://www.doingbusiness.org/en/rankings> accessed 1 September 2020.

12 Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, ‘Fact Sheet on Foreign Direct Investment (FDI) From April, 2000 to March, 2020’ (2020), see https://dipp.gov.in/sites/default/files/FDI_Factsheet_March20_28May_2020.pdf accessed 1 September 2020.

13 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 2(r) defines ‘FDI’ or ‘Foreign Direct Investment’ as investment through equity instruments by a person resident outside India in an unlisted Indian company; or in ten per cent or more of the post-issue paid-up equity capital on a fully diluted basis of a listed Indian company.

14 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 2(r) of defines ‘equity instruments’ as equity shares, convertible debentures, preference shares and share warrants issued by an Indian company.

(the 'Non-Debt Rules')¹⁵ issued thereunder; and the consolidated FDI policy (the 'FDI Policy')¹⁶ issued by the Department For Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry, from time to time, and updated through press notes.

The intention of policy-makers to promote the liberal inflow of FDI can be gauged from the fact that the FDI Policy permits 100 per cent FDI under the automatic route¹⁷ in all those sectors that are not prohibited¹⁸ or restricted (by specifying sectoral caps/limits) by foreign exchange laws and other applicable laws.¹⁹ The automatic route of investment entails investment by a person/entity resident outside India without obtaining the prior approval of the Reserve Bank of India (India's central bank) or the central government. However, even investment through an automatic route requires regular compliance with specific conditions as may have been laid out for a particular sector. Investment in very few sectors, such as gambling, atomic energy and railways, is prohibited outright for foreign investors.²⁰

RECENT CHANGES AND TERRITORIAL RESTRICTIONS

In addition to the aforementioned prohibited sectors, the Non-Debt Rules prescribe that any investment from Pakistan and Bangladesh would be subject to prior government approval.²¹ However, for the purpose of 'curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic', the scope of monitoring foreign investments on the basis of geography was expanded by governmental authorities by issuing

15 Foreign Exchange Management (Non-debt Instruments) Rules 2019. Please note that the Foreign Exchange Management (Non-debt Instruments) Rules 2019 superseded the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2017.

16 The Consolidated FDI Policy 2017.

17 Foreign Exchange Management (Non-debt Instruments) Rules 2019, para 3(a)(i) of sch I defines 'automatic route'.

18 Foreign Exchange Management (Non-debt Instruments) Rules 2019, para 2 of sch I prescribes a list of nine broad sectors in which FDI is prohibited, including lottery business, gambling, real estate business, atomic energy and railways.

19 Foreign Exchange Management (Non-debt Instruments) Rules 2019, para 3(b)(iii) of sch I.

20 See n 18 above.

21 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 2(v) defines 'government approval' as the approval from the erstwhile Secretariat for Industrial Assistance (SIA), Department of Industrial Policy and Promotion, Government of India and/or the erstwhile Foreign Investment Promotion Board (FIPB) and/or any of the ministries/departments of the Government of India, as the case may be.

Press Note No 3 of 2020,²² to amend the FDI Policy, on 17 April 2020. This change was given effect through the Foreign Exchange Management (Non-debt Instruments) Amendment Rules 2020 issued on 22 April 2020²³ (the 'NDI Amendment Rules').

The NDI Amendment Rules provide, inter alia, that 'an entity of a country, which *shares land border with India or the beneficial owner of an investment into India* who is situated in or is a citizen of any such country, shall invest only with the Government approval' [emphasis author's own].²⁴ It further provided that 'in the event of the *transfer of ownership* of any existing or future FDI in an entity in India, *directly or indirectly*, resulting in the beneficial ownership falling within the restriction or purview of the above provisos, *such subsequent change in beneficial ownership shall also require government approval*' [emphasis author's own].²⁵

Shortly after notifying the NDI Amendment Rules, the government issued Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules 2020²⁶ to plug an often-exploited loophole in the NDI Rules. These amendment rules introduced a new provision,²⁷ which restricted an investor from bypassing the prescribed pricing requirements on issue of shares²⁸ by subscribing to shares of a company pursuant to the renunciation

22 Press Note No 3 (2020 Series) on Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current Covid-19 pandemic issued by Ministry of Commerce & Industry, Department for Promotion of Industry and Internal Trade.

23 Foreign Exchange Management (Non-debt Instruments) Amendment Rules 2020, issued vide Notification No SO 1278 (E), on 22 April 2020.

24 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 6(a), First Proviso as amended by the Foreign Exchange Management (Non-debt Instruments) Amendment Rules 2020.

25 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 6(a), Third Proviso as amended by the Foreign Exchange Management (Non-debt Instruments) Amendment Rules 2020.

26 Foreign Exchange Management (Non-debt Instruments) Amendment Rules 2020, issued vide Notification No SO 1374 (E), on 27 April 2020.

27 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 7A inserted vide Foreign Exchange Management (Non-debt Instruments) Amendment Rules 2020.

28 Foreign Exchange Management (Non-debt Instruments) Rules 2019, rule 21.

of shares by existing shareholders (offered as part of a rights issue)²⁹ to any other foreign investor, subject to such pricing guidelines.³⁰

These changes directly impact the economic ties with India's land neighbours: Bangladesh, Bhutan, China, Myanmar, Nepal and Pakistan.

REASONS FOR CHANGE

The trigger point for this change appears to be the increase in stake by the Chinese state-owned company, People's Bank of China, in one of India's largest companies, Housing Development Finance Corporation Limited (HDFC), during the January–March 2020 quarter to 1.01 per cent of the total shareholding, which took a lot of interested parties by surprise.³¹ The news of this stake purchase came to the forefront only upon submission of the quarterly shareholding pattern of HDFC on 12 April 2020 to the concerned stock exchange (BSE), in accordance with applicable disclosure regulations.³² The NDI Amendment Rules were issued shortly thereafter, which was in line with similar monitoring related curbs being imposed by various other countries.³³

A perusal of the details of the inflow of investments from neighbouring countries helps in identifying specific countries, that law-makers believe might be investing with the intention to 'opportunistically takeover/acquire' Indian companies in these trying times. It is evident that the only neighbour that had substantial direct investments in India was China, which invested US\$2.378bn (approximately INR 15,112 crore) between April 2000 and March 2020.³⁴ For the duration of the said period, India attracted US\$3.29m

29 Companies Act 2013, s 62(1)(a).

30 The pricing guidelines under the NDI Rules prescribe that the shares of a company shall not be issued to a non-resident person at a price that is lower than the 'fair market value' of such shares. An exception to this rule is that shares may be issued to existing shareholders through a 'rights issue' at any price, *provided* the price at which it is offered to non-resident shareholders is not less than the price offered to resident shareholders. The requirement of issuing shares at a 'fair market value' was sometimes circumvented when existing shareholders renounced their rights in favour of any other foreign investor, who could potentially subscribe shares at a lower price than the 'fair market value'.

31 BSE, 'Housing Development Finance Corp Ltd – statement showing shareholding pattern of the Public shareholder for the quarter ended 31 March 2020' (BSE 2020) <https://www.bseindia.com/corporates/shpPublicShareholder.aspx?scripcd=500010&qtrid=105.00&qtrName=March%202020> accessed 1 September 2020.

32 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, reg 31.

33 Liz Alderman, 'Wary of China, Europe and Others Push Back on Foreign Takeovers' *The New York Times* (Paris, 15 March 2018) www.nytimes.com/2018/03/15/business/china-europe-canada-australia-deals.html accessed 1 September 2020.

34 See n 12 above.

(INR 18.46 crore) from Nepal, US\$0.08m (INR 48 lakh) from Bangladesh, US\$8.97m (INR 35.78 crore) from Myanmar and US\$2.45m (INR 16.55 crore) from Afghanistan.³⁵ There were no foreign investments from either Bhutan or Pakistan.³⁶ Even though the FDI from China is substantial, it does not present the entire picture. It is pertinent to note that various foreign entities (including Chinese entities) also route their investments through tax havens, such as Hong Kong, Mauritius and Singapore,³⁷ which collectively account for approximately 52 per cent of FDI³⁸ in India. Such investment, being routed through an offshore entity, is not taken into account when calculating FDI from China.

IMPLICATIONS AND GREY AREAS

Indian start-ups are likely to bear the brunt of this decision. According to a recent study, 18 out of 30 Indian ‘unicorn’ companies (technology start-ups whose market capitalisation has reached US\$1bn or more) have significant Chinese investment.³⁹ In light of the ongoing Covid-19 crisis, it is going to be difficult for these companies to meet operational expenses, and because of the FDI changes introduced in the NDI Amendment Rules, they might hit a roadblock in raising capital by issuing equity instruments to existing Chinese shareholders. Further, there might be contractual implications, preventing or delaying issue of securities to other shareholders due to the operation of the pre-emption right on issuance, which is very common in companies that have private equity investment.

Concerns will also be felt around the fact that the NDI Amendment Rules use, but do not define, the terms ‘beneficial owner’ and ‘beneficial ownership’. These terms could potentially be interpreted by reference to similar terms under either: (1) the Companies Act 2013,⁴⁰ which pegs significant beneficial ownership at holding, indirectly and/or directly, ten per cent or more of the shares of a company; or (2) the Prevention of

35 *Ibid.*

36 *Ibid.*

37 Suraj Jaiswal, *Foreign Direct Investment in India and Role of Tax Havens* (CBGA 2017), see www.cbgaindia.org/study-report/foreign-direct-investment-india-role-tax-havens accessed 1 September 2020.

38 See n 12 above.

39 Amit Bhandari, Blaise Fernandes and Aashna Agarwa, ‘China Investments In India’ (Gateway House: Indian Council on Global Relations 2020) www.gatewayhouse.in/wp-content/uploads/2020/07/Chinese-Investments_2020-Final.pdf accessed 1 September 2020.

40 Companies Act 2013, s 89(10), s 90 read with Rule 2(h) Companies (Significant Beneficial Ownership Rules, 2019).

Money-laundering (Maintenance of Records) Rules 2005,⁴¹ which identify a beneficial owner as a person, individually or collectively with other persons/entities, that holds 25 per cent of shares of a company. However, given that these terms are defined very differently under these two pieces of legislation, it would be important to see if clarity emerges within the construct of exchange control laws. The use of the terms 'direct or indirect' will also create a degree of uncertainty as to how to determine the ambit of the restrictions. Despite a considerable period of time having elapsed since the changes were introduced through the NDI Amendment Rules, no attempts have been made by the authorities to remove these ambiguities. The uncertainty is likely to add to deterrence to investment by entities from particular countries, which could possibly be the primary reason behind the introduction of these stringent measures of screening.

The aforementioned changes are not in consonance with the policy on liberalisation of the economy deployed by all the ruling political parties in the last three decades. They represent the rising concerns of the government with regard to the direct or indirect presence of foreign interests in key industries. Such concerns have been exacerbated by continuous tensions at the border with Nepal⁴² and China,⁴³ which have even resulted in skirmishes. These restrictions would help to limit the ability of foreign concerns to exert influence over companies and access information, which the shareholders of an Indian company are privy to. The government is likely to attempt to offset this shortfall by increasing economic ties with other economic and political allies.⁴⁴

US

The approach of the US to international investment traditionally recognised and supported an open⁴⁵ and rules-based trading system that was in line with

41 Prevention of Money-laundering (Maintenance of Records) Rules 2005, rule 9(3).

42 Anbarasan Ethirajan, 'India and China: How Nepal's new map is stirring old rivalries' *BBC News* (10 June 2020) www.bbc.com/news/world-asia-52967452 accessed 2 September 2020.

43 Vedika Sud and Ben Westcott, 'Chinese and Indian soldiers engage in "aggressive" cross-border skirmish', *CNN* (11 May 2020) <https://edition.cnn.com/2020/05/11/asia/china-india-border-dispute-intl-hnk/index.html> accessed 2 September 2020.

44 Suhasini Haider, 'India-Australia Meeting Strengthens Ties' *The Hindu* (New Delhi, 4 June 2020) <http://thehindu.com/news/national/glad-to-be-joining-the-first-india-australia-virtual-summit-pm-modi/article31745133.ece> accessed 2 September 2020.

45 According to the World Bank, the US has the highest absolute net FDI of all monitored countries. World Bank, 'International Financial Statistics and Balance of Payments Databases' (World Bank 2020) <http://data.worldbank.org/indicator> accessed 4 September 2020.

US economic and national security interests. However, the US, like every sovereign country, has sought to moderate its embrace of open markets with the protection of its national security interests. Achieving this balance, which has shifted over time, has meant placing certain limitations on overseas investment in strategically sensitive sectors of the US economy. The federal oversight of foreign investment has evolved over time, often in response to changing economic and security conditions.

LEGAL FRAMEWORK

The initial source of the US regulation of foreign investment was the creation of the Committee on Foreign Investment in the US (CFIUS)⁴⁶ in 1975,⁴⁷ an inter-agency panel that screens transactions involving foreign investment in a US business by foreign persons for potential national security risks. In 1988, amid concerns over the foreign acquisition of certain types of US firms, particularly by Japanese firms, Congress approved the Exon-Florio amendment to the Defense Production Act of 1950,⁴⁸ which specified the basic review process for foreign investments.⁴⁹ This statute granted the US President the authority to block proposed or pending foreign ‘mergers, acquisitions, or takeovers’⁵⁰ of ‘persons engaged in interstate commerce in the United States’⁵¹ that threatened to weaken national security.⁵² There have been several amendments since then to strengthen the CFIUS. Historically, the CFIUS was limited to technology, industries and infrastructure directly involving national security.

In 2007, the Foreign Investment and National Security Act (FINSA)⁵³ further refined the CFIUS process, provided congressional oversight and increased the transparency of decisions by the Committee. FINSA also widened the scope of national security and required greater scrutiny of

46 The CFIUS operates pursuant to s 721 of the Defense Production Act of 1950, as amended, and as implemented by Executive Order 11858, as amended, and the regulations at ch VIII of Title 31 of the Code of Federal Regulations.

47 Executive Order 11858 (b), 7 May 1975, 40 FR 20263.

48 The Exon–Florio Amendment to the Defense Production Act of 1950, as amended. 50 USC s 4565; PL 100-418, Title V, s 5021, 23 August 1988; 50 USC Appendix s 2170.

49 PL 100-418, Title V, s 5021, 23 August 1988; 50 USC Appendix s 2170.

50 Defense Production Act of 1950, s 721(a)(3).

51 *Ibid.*

52 Defense Production Act of 1950, s 721(d).

53 Foreign Investment and National Security Act of 2007, Pub L No 110-49, 121 Stat 246.

certain types of FDI.⁵⁴ President Barack Obama used FINSA in 2012 to block Ralls Corporation, an American corporation owned by Chinese nationals, from acquiring a US wind farm energy firm located near a Department of Defense facility;⁵⁵ and in 2016 to block a Chinese investment firm from acquiring the US business of Aixtron, a Germany-based firm with assets in the US.⁵⁶ It was observed that the foreign investors rapidly adapted and began structuring investments to avoid national security reviews. Upon close perusal, a pattern of strategic investments by Chinese entities in US firms began to emerge. Despite otherwise heavy polarisation in domestic politics, a bipartisan CFIUS reform bill moved rapidly through Congress, and on 13 August 2018, President Donald Trump signed the Foreign Investment Risk Review Modernization Act (FIRRMA),⁵⁷ which reformed the CFIUS.⁵⁸

FIRRMA also broadened the CFIUS's mandate by explicitly including provisions for review of certain real estate transactions in close proximity to a military installation, or US Government facility or property of national security sensitivities.⁵⁹ In addition, FIRRMA expands the scope and jurisdiction of the CFIUS to review a wider range of transactions, including any:

- non-controlling, however non-passive, investment in US businesses involved in critical technology, critical infrastructure or collecting sensitive data on US citizens;⁶⁰
- change in foreign investor rights;

54 Under FINSA, the CFIUS was mandated to consider a transaction's potential effects on critical infrastructure, including major energy assets; critical technologies deemed essential to national defence; and the long-term projections of US energy requirements. Further, the CFIUS was given a directive to investigate any transaction that would result in a foreign government or foreign government-controlled entity gaining control of a business in the US that may pose a threat to national security.

55 Rachele Younglai, 'Obama Blocks Chinese Wind Farms in Oregon Over Security' *Reuters* (Washington, 29 September 2012) www.reuters.com/article/us-usa-china-turbines/obama-blocks-chinese-wind-farms-in-oregon-over-security-idUSBRE88R19220120929 accessed 3 September 2020.

56 'Presidential Order Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GMBH' (2016) <https://obamawhitehouse.archives.gov/the-press-office/2016/12/02/presidential-order-regarding-proposed-acquisition-controlling-interest> accessed 3 September 2020.

57 Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII of PL 115-232 (13 August 2018), which became effective on 11 November 2018; Federal Register, vol 83 no 197, 11 October 2018, p 51322.

58 With the corresponding speed of its passage, the US Treasury Department implemented a FIRRMA pilot programme less than three months later, in October 2018, creating the first mandatory CFIUS filing. On 13 January 2020, the Treasury Department released final FIRRMA regulations, which came into force on 13 February 2020.

59 Defense Production Act of 1950, s 721(a)(4)(C)(ii).

60 Defense Production Act of 1950, s 721(a)(4)(B)(iii).

- transactions in which a foreign government has a direct or indirect substantial interest;⁶¹ and
- transaction or arrangement designed to evade CFIUS.⁶²

It also increases the review period, gives CFIUS more flexibility to suspend transactions and mandates a separate process to review the export of sensitive US technologies. Further, through a ‘sense of Congress’^{63,64} provision in FIRRMA, the CFIUS can potentially discriminate among investors from certain countries that are determined to be a country of ‘special concern’ that has a ‘demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect U.S. leadership in areas related to national security’.⁶⁵ FIRRMA also shifts the filing requirement for foreign firms from voluntary to mandatory in certain cases involving foreign government interest or critical technologies,⁶⁶ and provides a two-track method for reviewing transactions. As was previously the case, if CFIUS finds a national security concern, it can seek mitigation, block a pending transaction or force the divestiture of completed transactions.

However, the FIRRMA-amended CFIUS process maintains the President’s authority to block or suspend proposed or pending foreign mergers, acquisitions or takeovers of US entities, including through joint ventures, that threaten to weaken national security. To exercise his authority under the CFIUS, the President must: (1) conclude that other US laws are inadequate or inappropriate to protect national security; and (2) have ‘credible evidence’ that the foreign interest exercising control might take action that threatens to impair US national security.⁶⁷ In addition, final determinations by the President are not subject to judicial review.⁶⁸

61 Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII, s 1703 amending s 721(a) (4) (B) (iii) (II) of the Defense Production Act of 1950.

62 Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII, s 1706 amending s 721(b) (i) (C) (v) of the Defense Production Act of 1950.

63 One or both houses of Congress may formally convey opinions about the subjects of current national interest through freestanding simple or concurrent resolutions (commonly referred to as ‘sense of the House’, ‘sense of the Senate’ or ‘sense of the Congress’ resolutions). A sense of Congress resolution is a concurrent resolution, wherein both the House and Senate must approve such measures. It is not legally binding because it is not presented to the President for his signature. Even if it is incorporated into a bill that becomes law, such provisions merely express the opinion of Congress or the relevant chamber. They have no formal effect on public policy and have no force of law.

64 Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII, s 1702.

65 Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII, s 1702(c) (1).

66 Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII, s 1706(v) (IV).

67 Defense Production Act of 1950, s 721 (d) (4) (50 USC App 2170) as amended by the Exon Florio Amendment.

68 Defense Production Act of 1950, s 721 (e) (50 USC App 2170) as amended by the Exon Florio Amendment.

In addition to the above, the US imposes some restrictions on foreign investment in select regulated industries. Typically, companies in these sectors are required to obtain a licence from the government to operate in the sector, and federal law limits the foreign ownership of such licensees.⁶⁹ Proposed foreign investment in such sectors to the extent ordinarily permitted is subject to review and approval by sector-specific regulators. The regulations issued by the sector-specific agency outline the process and standards applicable to the review of foreign investment in the sector.

INCREASED WARINESS OF INVESTMENT FROM CERTAIN COUNTRIES

For several years, US law-makers and other government officials have increasingly expressed apprehensions regarding the ability of some foreign investors, particularly (but not exclusively) Chinese investors, to exploit the CFIUS's limited jurisdiction by structuring transactions just below the threshold of 'control' or by acquiring assets (including real estate) that would not constitute a 'US business'. However, adapting to the emerging challenges, the CFIUS has become critical to the operation of the US economy. In 2018, even before FIRRMA extended the CFIUS's reach, the CFIUS made headlines when its review led to the prohibition of Broadcom Limited's acquisition of Qualcomm Corp, which would have been the largest technology merger in history, with a deal value of approximately US\$117bn.⁷⁰ Similarly, in 2017, President Trump blocked the acquisition of Lattice Semiconductor Corp by the Chinese investment firm Canyon Bridge Capital Partners.⁷¹

As a fallout of the Huawei scandal and due to the growing threats of cyber-espionage, the US authorities have become more proactive in using the veto power bestowed on them, while permitting foreign investment and involvement in companies.⁷² With the advent of FIRRMA in 2019, the CFIUS

69 Eg, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, restricts foreign governments, individuals and corporations from holding more than 20 per cent of the interests of a broadcast licensee.

70 Alan Rappeport and Cecilia Kang, 'Trump Administration Stalls Largest Tech Merger In New Sign Of Protectionism' *The New York Times* (New York, 5 March 2018) www.nytimes.com/2018/03/05/business/dealbook/broadcom-qualcomm-cfius.html accessed 4 September 2020.

71 'Presidential Order Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited' (2017) www.whitehouse.gov/presidential-actions/order-regarding-proposed-acquisition-lattice-semiconductor-corporation-china-venture-capital-fund-corporation-limited accessed 4 September 2020.

72 Raymond Zhong, Paul Mozur and Jack Nicas, 'Huawei and ZTE Hit Hard as U.S. Moves Against Chinese Tech Firms' *The New York Times* (New York, 17 April 2018) www.nytimes.com/2018/04/17/technology/huawei-trade-war.html accessed 4 September 2020.

raised concerns over Beijing Kunlun Company's investment in Grindr LLC, an online dating site, over concerns of foreign access to personally identifiable information of US citizens. Subsequently, the Chinese company divested itself of Grindr.⁷³

On 20 May 2020, the Department of the Treasury issued proposed regulations that would revise the provision requiring declarations to be filed with the CFIUS for certain foreign investment transactions involving a US business that produces, designs, tests, manufactures, fabricates or develops one or more critical technologies.⁷⁴

More recently, the Trump administration passed a couple of orders placing restrictions on the functioning of several apps owned by Chinese companies. An executive order dated 6 August 2020 prohibited any transaction related to WeChat (an app owned by Chinese company Tencent Holdings Limited) by any person or with respect to any property within the US.⁷⁵ By another order on 14 August 2020, Chinese company ByteDance Limited was ordered to divest all interests and rights in any property that enables the operation of TikTok in the US, and to destroy all the data of US application users collected by it within 90 days of the issuance of the order (the 'TikTok order'). Effectively, the TikTok order has forced ByteDance to spin off or sell its TikTok business in the US, with various suitors eyeing the lucrative business.⁷⁶ The TikTok order also retroactively invalidates ByteDance's purchase of interest in Musical.ly, another app that was merged with TikTok. It further mandates ByteDance to keep the CFIUS informed of all actions undertaken by it to comply with the said order, and requires prior approval of the CFIUS for effecting any sale or transfer of the interest held by ByteDance in the US.⁷⁷

FIRMA has confirmed that the policy of the US continues to be that of welcoming foreign investment and maintaining an open investment attitude.

73 Echo Wang, 'China's Kunlun Tech Agrees To U.S. Demand To Sell Grindr Gay Dating App' *Reuters* (London 14 May 2019) <https://in.reuters.com/article/grindr-m-a-beijingkunlun/chinas-kunlun-tech-agrees-to-u-s-demand-to-sell-grindr-gay-dating-app-idINKCN1SJ297> accessed 4 September 2020.

74 'Provisions Pertaining to Certain Investments in the United States by Foreign Persons' (2020) Federal Register www.federalregister.gov/documents/2020/05/21/2020-10034/provisions-pertaining-to-certain-investments-in-the-united-states-by-foreign-persons accessed 4 September 2020.

75 'Executive Order on Addressing the Threat Posed by WeChat' (2020) www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-posed-wechat accessed 5 September 2020.

76 'The Time for TikTok's Talks is Ticking Down' *The New York Times* (New York, 28 August 2020) www.nytimes.com/2020/08/28/business/dealbook/tiktok-microsoft-walmart-oracle.html accessed 5 September 2020.

77 'Order Regarding the Acquisition of Musical.ly by ByteDance Ltd' (2020) www.whitehouse.gov/presidential-actions/order-regarding-acquisition-musical-ly-bytedance-ltd accessed 5 September 2020.

However, FIRRMA also clarifies that any such investment must be completely in tandem with the protection of national security. With a growing awareness of the uses and potential misuses of data, the scope of national security is growing to cover potential intangible threats to the economy and society.

Australia

Australia's relative geographical isolation puts this country in a very unique position. It is not constantly worried about the possibility of an ambush by a hostile neighbour or physically imposed embargos. The ties that bring this island nation close to the rest of the world are primarily economic in nature, and are truly representative of the globalised world. Having said that, it is interesting to note that the Australian Government has recently introduced certain 'temporary measures'⁷⁸ to monitor incoming foreign investment, in order to protect Australia's 'national interest' as it continues to deal with the economic implications that have arisen from the spread of Covid-19.⁷⁹ The authorities are of the view that the present situation potentially threatens the viability of critical sectors and the economic security of Australian businesses, and envisage that there may be a rise in debt restructuring transaction opportunities for investments in distressed entities.⁸⁰

LEGAL FRAMEWORK

The primary legislation governing foreign investment in Australia is the Foreign Acquisitions and Takeovers Act (FATA) 1975,⁸¹ which regulates: (1) the acquisition of interests in securities, assets or Australian land; and (2) actions taken in relation to entities and businesses that have a connection to Australia.⁸² The said legislation extends the regulatory outreach of the government to foreign investment (direct as well as indirect) in entities and businesses set up in Australia, land rich entities, agricultural land and agribusiness in Australia. Additionally, foreign investments in Australia are regulated by the Acquisitions and Takeovers Regulations 2015 (the 'A&T Regulations'), and

78 Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020.

79 The Hon Josh Frydenberg MP, Treasurer of Commonwealth of Australia, 'Changes To Foreign Investment Framework' (2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/changes-foreign-investment-framework> accessed 2 September 2020.

80 Australian Government, Foreign Investment Review Board, 'Q&A – Temporary Changes to Foreign Investment Framework' (2020) <https://firb.gov.au/qa-temporary-changes-foreign-investment-framework> accessed 2 September 2020.

81 Foreign Acquisitions and Takeovers 1975 (Act No 92 of 1974).

82 Foreign Acquisitions and Takeovers Act 1975, s 3.

supported by Australia's Foreign Investment Policy (the 'AFI Policy') and Guidance Notes on the specific application of the law.⁸³

For determining investments that require the prior approval of the Foreign Investment Review Board (FIRB), Australia has retained the dual test of: (1) shareholding percentage threshold; and (2) monetary threshold.⁸⁴

Shareholding percentage threshold

A relatively lower threshold in terms of percentage of shareholding has been prescribed under the A&T Regulations. The following investors do not need to apply for FIRB approval prior to investing:

- a foreign investor (other than foreign government investor⁸⁵) acquiring less than 20 per cent in an entity in a non-sensitive sector;
- a privately owned foreign investor acquiring a less than ten per cent interest in a land-rich entity (agribusiness); or
- a foreign government investor acquiring less than ten per cent in an Australian company.⁸⁶

Certain sectors, *inter alia*, media, transport and telecommunications are categorised as sensitive business⁸⁷ and have an even lower ownership threshold prescribed under the A&T Regulations.⁸⁸ These thresholds have not undergone any amendment pursuant to the Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 (the 'A&T Amendment Regulations'), and are still required to be complied *in toto*.

Monetary threshold

The biggest change brought about by the A&T Amendment Regulations has been the reduction in the monetary threshold for the screening of all foreign investments (subject to the FATA 1975) to nil, that is, AU\$0.⁸⁹ Prior to this amendment, the prescribed monetary threshold for screening ranged

83 Treasurer of Commonwealth of Australia, 'Australia's Foreign Investment Policy' (2020) <https://firb.gov.au/sites/firb.gov.au/files/inline-files/2020-FIP-cv.pdf> accessed 2 September 2020.

84 Foreign Acquisitions and Takeovers Act 1975, s 46.

85 Foreign Acquisitions and Takeover Regulations 2015, s 17.

86 Australian Government, Foreign Investment Review Board, 'Temporary Measures In Response to the Coronavirus [GN53]' (2020) <https://firb.gov.au/guidance-resources/guidance-notes/gn53> accessed 2 September 2020.

87 Foreign Acquisitions and Takeover Regulations 2015, s 22.

88 Foreign Acquisitions and Takeover Regulations 2015, s 55.

89 Foreign Acquisitions and Takeover Regulations 2015, sch 1, pt 4, introducing new Reg 49 of the Foreign Acquisitions and Takeover Regulations 2015.

from AU\$275m for foreign persons to AU\$1.192bn for certain countries recognised as ‘agreement country investors’.^{90, 91}

This amendment is significant, as it widely increases the categories of investment requiring the prior approval of the government authorities. The aggregate number of applications reviewed by the FIRB in 2018–2019 was 9,466.⁹² This number is likely to increase exponentially as the monetary threshold has effectively been removed by the authorities, displaying increased suspicions over foreign investments.

Extended deadline for processing of cases

In addition to the nil monetary screening thresholds for all investments, the FIRB has revised the timeframe for reviewing and screening applications (new as well as existing) to six months, from the earlier prescribed time period of 30 days.⁹³ Josh Frydenberg, the Treasurer of Australia, when announcing these changes, stated that the government will prioritise urgent applications for investments that support and protect Australian jobs and Australian businesses.⁹⁴ The lead factors being relied on during screening shall include the potential impact on the employment and community.⁹⁵ The clear implication of this decision, however, is the likely increased latency in the processing of applications for foreign investment.

Even though the authorities have stated that the changes introduced to the foreign investment regime are ‘temporary’ in nature, the exact duration has been left open-ended. Guidance note No 53 on Temporary measures in response to the coronavirus (‘GN53’) specifies that conditions imposed on foreign investment, which are required to be screened by the FIRB pursuant to the temporary changes, ‘will remain

90 Foreign Acquisitions and Takeover Regulations 2015, Reg 5 defines ‘agreement country or region’ as any of the following countries or regions: (a) the US; (b) New Zealand; (c) Chile; (d) Japan; (e) the Republic of Korea; (f) China; (fa) Peru; (g) Singapore; (h) a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force; and (i) the region of Hong Kong, China.

91 Australian Government, Foreign Investment Review Board, ‘Monetary screening thresholds [GN34]’ (2020) <https://firb.gov.au/guidance-resources/guidance-notes/gn34> accessed 2 September 2020.

92 Foreign Investment Review Board, ‘Annual Report 2018–19’ (2018) <https://firb.gov.au/sites/firb.gov.au/files/2020-05/FIRB-AR-2018-19.pdf> accessed 2 September 2020.

93 See n 86 above.

94 See n 79 above.

95 Australian Government, Foreign Investment Review Board, ‘David Irvine – Temporary changes to the foreign investment review framework’ (2020) <https://firb.gov.au/about-firb/news/media-release-david-irvine-temporary-changes-foreign-investment-review-framework> accessed 2 September 2020.

for as long as required to protect the national interest, and as such, may remain in place including after the expiry of the temporary measures'.⁹⁶ Given that the changes have already been legitimised by the amendment of the foreign investment law,⁹⁷ these changes appear to be the norm for the foreseeable future.

On 5 June 2020, the Treasurer of Australia announced the intention to introduce further changes to Australia's foreign investment regime, which are likely to be the most comprehensive changes since 1975, and such, overhaul is likely to come into effect from 2021.⁹⁸

NATIONAL INTEREST

The common sentiment in all the statements released by the relevant authorities is to safeguard the 'national interest'. These changes have been described as a bulwark to protect Australian entities and businesses. It has been claimed that without these protectionist measures, it is possible that numerous businesses in Australia would be sold to foreign interests without any government oversight, which would present a risk to the national interest.⁹⁹ Further, 'national interest' has also been described as the main determining factor when deciding the priority of applications being selected for screening.¹⁰⁰

The term 'national interest' has not been defined in the FATA or any of its regulations. The AFI Policy provides for broad parameters, which are to be evaluated by assessing what constitutes a national interest.¹⁰¹ The FIRB strives to compare the benefits of incoming investment against national sensitivities. Given that national sensitivities change with changing times, it is not always easy to gauge the approach that the FIRB may take or the weight it may apply to a particular factor while analysing whether a particular proposal is in the 'national interest'.

The following are the broad factors set out in the AFI Policy, which the FIRB usually considers for ascertaining 'national interest' while assessing and screening the application for foreign investment:

96 See n 86 above.

97 Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020.

98 Treasurer of Commonwealth of Australia, 'Major reforms to Australia's foreign investment framework' (2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/major-reforms-australias-foreign-investment-framework> accessed 2 September 2020.

99 See n 80 above.

100 *Ibid.*

101 See n 83 above.

- competition;
- national security;
- character of the investor;
- impact on the economy and the community; and
- other Australian Government policies.¹⁰²

The incumbent Prime Minister and erstwhile Treasurer of Australia, Scott Morrison, rejected an AU\$10bn bid in 2016 for 50.4 per cent of country's biggest energy grid, Ausgrid, from Cheung Kong Infrastructure Holdings Ltd (CKI) and State Grid Corp of China, citing national security concerns.¹⁰³ Similarly, in 2018, the FIRB rejected a proposed takeover bid of AU\$13bn by CKI for APA, a leading natural gas transmission company, citing protection of the national interest.¹⁰⁴

Recent trends suggest that Australia has been attracting more investment from the US and Canada as there is a decline in investment from China.¹⁰⁵ It appears that as the prevalent economic and health situation unravels, increased attention is being paid to potential strategic and security interests. While determining the suitability of an investment, increased focus is likely to be placed on the country of origin of the investor and the impact of such investments to the economic and political fabric of Australian society.

China

For several years, foreign companies operating in China have had concerns over significant regulation, unilateralism and trade protectionism by the country. However, over the last decade, the Chinese Government has taken several measures to open up the Chinese economy to foreign investors. Correspondingly, the commencement of China's new Foreign Investment Law¹⁰⁶ (FIL) on 1 January 2020 has presented significant opportunities for foreign investors, including more flexibility on joint venture terms and streamlined entity establishment procedures. Despite the apprehensions over its policies, China was ranked the world's second-largest FDI recipient

102 See n 83 above.

103 James Massola, Philip Wen, Brian Robins and Sean Nicholls, 'Treasurer Scott Morrison Blocks Sale Of Ausgrid To Foreign Bidder' *Sydney Morning Herald* (Sydney 11 August 2016) www.smh.com.au/politics/federal/treasurer-scott-morrison-blocks-sale-of-ausgrid-to-foreign-bidders-20160811-gqq5te.html accessed 2 September 2020.

104 Cole Latimer, 'Government Blocks CKI's \$13B Pipeline Bid' *Sydney Morning Herald* (Sydney 20 November 2018) www.smh.com.au/business/the-economy/is-cki-s-13bn-takeover-of-apa-dead-in-the-water-20181120-p50h2i.html accessed 2 September 2020.

105 See n 92 above.

106 Foreign Investment Law of the People's Republic of China 2019.

after the US in 2019,¹⁰⁷ and was ranked 31st out of 190 countries in the World Bank's 2020 *Doing Business* report.¹⁰⁸ This was a major improvement from 2019, when it was ranked 46th.¹⁰⁹ This progress reflects improvement in a wide array of subcomponents, ranging from procedures for starting a business to the introduction of reform agendas that aim to improve the business regulatory environment in the country over the course of several years.

LEGAL FRAMEWORK

China implements a socialist market economy, whereby the government regulates the economy on a market basis.¹¹⁰ Moving away from the system of socialism propounded by its enigmatic leader Mao Zedong, the China of the 21st century combines a socialist system with a market economy, an amalgamation of the *visible hand* of the state and the *invisible hand* of market forces. The structure is founded on the idea of the predominance of public ownership and state-owned enterprises within a market economy,¹¹¹ where the government accepts and permits the use of free market forces for the growth of the economy, but still plays a crucial part in the economic development of the country through strong regulation and direct participation through state-owned corporations.

In line with this philosophy, FDI policies in China have developed alongside economic growth and strengthened institutional capacity. China has adopted a gradual and prudent approach in the process of liberalisation, revising its FDI regime at constant intervals to align itself with the prevailing economic environment at the international level by introducing various measures and policies. One such method is the issuance of a 'Negative List'

107 According to the 2019 World Investment Report published by UNCTAD, China was ranked the world's second-largest FDI recipient. UNCTAD, *World Investment Report* (UNCTAD 2019) https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf accessed 4 September 2020.

108 World Bank, *Doing Business 2020* (World Bank 2020) www.doingbusiness.org/content/dam/doingBusiness/country/c/china/CHN.pdf accessed 4 September 2020.

109 World Bank, *Doing Business 2019* (World Bank 2019) www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf accessed 4 September 2020.

110 In June 1992, Jiang Zemin explicitly put forward the concept of a 'socialist market economic system' for the first time on the basis of Deng Xiaoping's southern talk. The Communist Party of China clearly proclaimed the establishing of a socialist market economic system as the goal of its economic reform at its 14th conference. 'China's Socialist Market Economic Reform and its Strong Theoretical Consciousness and Confidence' (2012) <http://en.people.cn/100668/102793/7980397.html> accessed 5 September 2020.

111 Xiaojin Ding, 'The Socialist Market Economy: China and the World' (2009) 73(2) *Science & Society* 235 www.jstor.org/stable/40404550 accessed 5 September 2020.

and ‘Catalogue of Encouraged Industries’, which provides a framework containing restrictions on foreign investment and the ownership of Chinese companies, issued by the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM). On 30 June 2019, the Chinese Government announced the Special Administrative Measures (Negative List) for Foreign Investment Access (2019 Edition),¹¹² the Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2019 Edition)¹¹³ (collectively, the ‘Negative Lists’) and the Catalogue of Encouraged Industries for Foreign Investment (2019 Edition) (the ‘Catalogue of Encouraged Industries’).^{114,115}

Under the said regime, for the *prohibited* sectors specified in the Negative Lists, offshore investors are not allowed to invest in industries in such sectors.¹¹⁶ As for other industries in the Negative Lists, foreign investors may invest within the applicable regions after obtaining the requisite permission from the government. In those industries that are not included in the Negative Lists, offshore investors are subject to the same investment restrictions as Chinese domestic investors. With regard to industries in the Catalogue of Encouraged Industries, foreign investors can enjoy preferential treatment, such as taxation and land, according to law.

However, in addition to the above Negative Lists and Catalogue of Encouraged Industries at the central government level, many local governments have also issued their own investment guidelines covering certain industries (eg, the mining, automobile and integrated circuit sectors), which may prescribe further detailed requirements and constraints on foreign investment, and which may not necessarily be consistent with the above catalogues.

Historically, solely foreign-owned enterprises were not permitted unless, inter alia, they could prove themselves to be beneficial to the development of the Chinese national economy, and must have adopted advanced technology

112 The Special Administrative Measures (Negative List) for Foreign Investment Access (2019 Edition).

113 The Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2019 Edition).

114 The Catalogue of Encouraged Industries for Foreign Investment (2019 Edition).

115 All three lists came into effective on 30 July 2019.

116 The Special Administrative Measures (Negative List) for Foreign Investment Access (2019 Edition) is applicable to mainland China, except the pilot free trade zones. The Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2019 Edition) is applicable to China’s pilot free trade zones. Note, as of the date of this article, China has established 18 pilot free trade zones in Shanghai, Guangdong, Tianjin, Fujian, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shaanxi, Hainan, Jiangsu, Shandong, Hebei, Heilongjiang, Guanxi and Yunnan) www.china-briefing.com/news/china-free-trade-zones-six-provinces accessed 4 September 2020.

and equipment or exported a majority of their products.¹¹⁷ Such restrictions, being contrary to their World Trade Organization (WTO) commitments, were subsequently relaxed,¹¹⁸ and accordingly, China's FDI regime has been gradually liberalised.

In line with its aim to provide continual support to open its economy, China recently promulgated the FIL, which seeks to address the long-standing demands of foreign investors for a fairer, competitive market, where such foreign investors are treated on a par with their domestic counterparts in China. Before the FIL, there were three laws regulating three types of foreign enterprises: wholly foreign-owned enterprises,¹¹⁹ Sino-foreign contractual joint ventures¹²⁰ and Sino-foreign equity joint ventures.¹²¹ In contrast to the erstwhile law, the FIL now prescribes the basic principles of foreign investment in China, under which the foreign enterprises would be subject to the same domestic laws as Chinese companies, being the Company Law of the People's Republic of China (PRC) (and where applicable the Partnership Enterprise Law of the PRC).¹²² The FIL also unifies the governance of more forms of foreign investment, such as M&A and new project investment, rather than just the establishment of foreign invested enterprises (FIEs).

The FIL provides national treatment to FIEs,¹²³ and sets out a number of general principles related to investment facilitation and protection. It also abolishes the case-by-case review and approval system on market access for foreign investment, and standardises the regulatory regimes for foreign investment by including the negative list management system,¹²⁴ a foreign investment information reporting system¹²⁵ and a foreign investment security review system¹²⁶ all under one document. Supplementing this, the FIL further seeks to address common complaints from foreign business and government, such as explicitly banning forced technology transfers,¹²⁷ promising better

117 Detailed Rules for the Implementation of the Law on Wholly Foreign-Owned Enterprises 1990.

118 Detailed Rules for the Implementation of the Law on Wholly Foreign-Owned Enterprises 2003.

119 Law of the People's Republic of China on Wholly Foreign-owned Enterprises 1986.

120 Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures 1988.

121 Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures 1979.

122 Foreign Investment Law of the People's Republic of China 2019, Art 31.

123 *Ibid*, Art 4.

124 *Ibid*, Art 28.

125 *Ibid*, Art 34.

126 *Ibid*, Art 35.

127 *Ibid*, Art 22.

intellectual property rights protection¹²⁸ and ensuring equal treatment for foreign firms in government procurement.¹²⁹

In addition, the new law could help to create a law-based environment to protect a foreign investor's legitimate rights and interests, which is closer to international practices.

However, the FIL just lays down the basic principles for foreign investment. The law and its implementing regulation still lack implementation details on how to protect the legitimate rights and interests of foreign investors.

Additionally, to ease financing controls on cross-border trade and investment activities, and create a better business environment for domestic enterprises and overseas investors, China's State Administration of Foreign Exchange issued a Notice on Further Facilitating Cross-border Trade and Investment¹³⁰ in October 2019. This introduced 12 measures to further relax the foreign exchange restrictions on foreign investment enterprises and boost cross-border trade and investments.

RESPONSE TO THE OUTBREAK OF COVID-19

To cushion the economic hit caused by the Covid-19 outbreak, China's central and local governments have been rolling out a series of supporting policies to shore up the confidence of businesses and ease some of their compliance burdens.¹³¹ China is placing importance on restoring the confidence of the foreign business community through the roll-out of policies addressing the concerns of FIEs, to help them withstand the economic impacts. With this objective, the MOFCOM has released a series of circulars,¹³² which delineate a variety of tasks for local governments in support of the FIEs. Beyond helping businesses to return to normality, the circular instructs local governments to provide special assistance to major investment projects and firms involved in the production of medical equipment. They contain ways in which local governments can spur foreign trade and investment in the face of the pandemic, including a variety of tasks ranging from strengthening legal services, to developing street-level

128 *Ibid.*

129 *Ibid.*, Art 16.

130 Circular of the State Administration of Foreign Exchange on Further Promoting Facilitation of Cross-border Trade and Investment, Huifa (2019) No 28 dated 23 October 2019.

131 Notice of the National Development and Reform Commission on Further Deepening the Reform regarding Foreign Investment Projects to Respond to Epidemic Situations 2020.

132 Circular on Strengthening Services to Foreign Enterprises and Attracting Investments During the Coronavirus Epidemic issued on 10 February 2020; and Circular on Stabilising Foreign Trade and Investment and Stimulating Consumption in Response to the Novel Coronavirus Pneumonia issued on 18 February 2020.

stores and markets, close communication with foreign investors, and accelerating their approvals for import and export licensing.

With another circular¹³³ on 1 April 2020, the MOFCOM put forward measures to address the prominent problems faced by FIEs in the current Covid-19 situation, for the purpose of helping FIEs to resume work and production. The circular also aims to stabilise the number of FIEs, expand the use of foreign investment and promote the increase of foreign investment, and proposes a series of measures to strengthen foreign investment services, facilitate administration and optimise foreign investment environment.

These circulars reflect China's ongoing commitment to providing support and assistance for foreign investment in China as enterprises resume operations following this difficult period and plan for the future.

In spite of their remarkable contribution in the early phases of China's reform to open up to the global community, the erstwhile FIE mechanism required updating and streamlining. The circulars, together with the FIL, have been an attempt to overhaul the 40-year-old FIE regime.

Furthermore, against the backdrop of US–China trade negotiations, the FIL sought to address some of the key concerns raised by the US, such as the national treatment of foreign investment (subject to the Negative List), the protection of foreign intellectual property rights and trade secrets and the equal treatment of domestic and foreign companies in government approval procedures.

Evidently, China has been opening more industries to foreign investment. For instance, in 2019, the State Council issued a guiding opinion to boost private investment in the healthcare sector. This order stipulated that the quantity and scale of public hospitals would be controlled in a way so as to have space for private investment in funding medical institutions, and public medical institutions were encouraged to liaise with privately owned medical institutions. Given the promotion of privately owned medical institutions by the government, it is anticipated that joint ventures, M&A and other forms of investment activity in medical institutions will increase in the near term.¹³⁴

133 Circular on Further Expanding Reform and Opening up to Stabilise Foreign Investment in response to the Covid-19 outbreak issued on 1 April 2020.

134 'Investing in China's Healthtech Industry' (2019) www.china-briefing.com/news/investing-chinas-healthtech-industry accessed 5 September 2020.

Further, China signed a ‘Phase One’ trade agreement¹³⁵ with the US,¹³⁶ by which it pledged to open the doors of its US\$21tn capital markets to foreign financial institutions, and in the process, served an invitation to financial giants such as Goldman Sachs, Morgan Stanley and JPMorgan Chase to potentially set up their wholly owned subsidiaries and compete on an equal footing with local companies.¹³⁷

Despite concerns over the vague wording and potential selective implementations, the new FIL is in many ways a step to the right direction – a unified and standardised FIL to address long-existing issues in foreign investment. Further, over the last several years, the Negative Lists have also been greatly reduced.¹³⁸ Holistically, however, there are several complexities that still exist in the Chinese foreign investment regime despite several reforms, making the system as a whole difficult for a foreign investor to understand.

Analysing the changing trends

Economies across the globe, irrespective of their foundational economic ideologies, are constantly recalibrating in an attempt to achieve equilibrium, that is, ensuring a constant flow of capital from other countries to sustain and rejuvenate the economy, while not handing over control of key industries to entities or countries that may jeopardise their national security interest.

Australia, China, India and the US are leaders in key geographies and their actions often contribute to policies being implemented by their allies. By analysing the routes taken by the select countries mentioned above, the authors will highlight the commonality of reason, if any, underpinning the actions taken by respective governments. Trends being established by these few leading economies are meant to reflect the direction the global economy is taking as a whole. Accordingly, the authors would like to highlight the rise

135 ‘Economic and Trade Agreement Between the Government of the United States Of America and the Government of the People’s Republic Of China’ (2020) https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf accessed 5 September 2020.

136 On 15 January 2020, President Trump and China’s Vice Premier Liu He signed a ‘Phase One’ trade agreement. It forms part of an effort to resolve trade tensions that have been ongoing since March 2018.

137 ‘Beijing speeds up opening of market to investment bank giants’ *The Business Times* (Beijing, 17 January 2020) www.businesstimes.com.sg/banking-finance/beijing-speeds-up-opening-of-market-to-investment-bank-giants accessed 5 September 2020.

138 The number of items in the Special Administrative Measures on Access to Foreign Investment List fell from 180 in 2011 to 40 in 2019 and items on the Free Trade Zone Special Administrative Measures on Access to Foreign Investment List fell from 190 in 2013 to 37 in 2019.

of protectionist measures and its possible impact on the struggling global economy by providing an outlook on cross-border investment in the near future.

Against this background, this section of the article aims to provide a better understanding of the interaction between the investment policies that are used differently across various economies, given their growing role as both recipients and sources of cross-border investment. While investment policies have been recognised by countries as one of the most influential vectors integrating the economies of the world, it can be seen that there has been a rise in investment protectionism. Some countries have been moving towards restricting investment through regulation and statutory provisions. Such a step away from the principle of FDI liberalisation raises pertinent questions about whether the increasing rate of growth that led to the era of globalisation can be maintained.

The US, the epitome of a true capitalist economy, has traditionally let the 'invisible hand' guide the economy and propounded Darwin's theory of the survival of the fittest. However, in the face of the realisation that they might no longer be the undisputed leaders of the free world, they decided to take a step back and have begun the search for the Trojan horse that threatens to bring the proverbial Troy down. More than ever before, the authorities (CFIUS and/or the President) have started screening and raising red flags over investments in certain strategic sectors (eg, infrastructure, technology and data) by companies owned by residents of certain countries. With the political environment becoming polarised, prospective investors are no longer sure if their investment would be welcomed, as before.

India, the ever-emerging superpower, in light of the unprecedented circumstances induced by Covid-19, has made a brave but questionable decision with regard to compulsory screening of FDI from its neighbouring countries. With the economies expecting a contraction of gross domestic product (GDP) in 2020–2021¹³⁹ and a widening fiscal deficit, questions have been raised over whether India can afford to refuse any prospective investment. Rather than identifying and limiting investment in certain sectors that might be of strategic importance, a blanket change to the screening process represents India's ever-increasing suspicions of its neighbours. These economic changes are likely to exacerbate the growing geopolitical tensions between India and some of its neighbours in light of increasing border-related issues, challenging its territorial integrity.

139 World Bank, 'COVID-19 To Plunge Global Economy Into Worst Recession Since World War II' (World Bank 2020) www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii accessed 3 September 2020.

Australia has retained restrictive provisions and has traditionally maintained a relatively low threshold for screening the foreign investment flowing into all sectors (sensitive as well as non-sensitive sectors). This has led to certain proposed investment in sectors such as power, ports and cattle ranching being rejected by the Australian Government, citing protection of the 'national interest'. These measures have been further strengthened by the removal of the monetary threshold for screening investment. Australia is looking to improve its political and economic alliances with countries such as Canada, India and the US, as the fear of political manipulation has forced Australia to reconsider some of its existing economic relationships.

The common thread running through the economies taking a relatively conservative approach (Australia, India and the US) is their focus on screening investment through the lens of the 'national interest'. The examples mentioned above of certain investment being refused due to it being deemed to be against the national interest of the host country were almost exclusively investment from one country – China. Similarly, India's policy regarding its neighbouring countries will also primarily affect investment from China. For these reasons, it is interesting to note the approach being taken by China in light of such protectionist measures being implemented by its key trading partners.

China, with the introduction of the FIL, is on the other end of the spectrum and is promising to remove certain pertinent restrictions, especially the much-maligned technology transfer provisions, and is promoting ease of investment to provide increased access to the market. China's cheap workforce to produce and the sprawling middle class to consume have been the key reasons behind the huge temptation for companies all across the globe to invest in the East Asian giant. Ever since becoming a member of the WTO in 2001, China's economy has grown exponentially. This has led to China becoming the leading provider of capital (equity as well as debt) to various countries, both developing and developed. China's reluctance in providing a level playing field to companies wanting to invest in its domestic markets has led to a long line of discontented partners. While other countries are in the process of putting up barriers, China appears to be pulling down walls, one brick at a time.

Nationalism is the antithesis of globalisation. The question remains, though, whether the emerging landscape is the precursor to full-scale conversion to protectionist regimes, or a collection of strategic moves by countries due to the changing geopolitical situation and rising influence of China.

The Covid-19 crisis has accelerated the shift towards protectionism and nationalism, with increased protection being afforded to sectors

such as healthcare, medical engineering and key technologies, as a direct consequence. However, the increased monitoring and control of foreign investment goes beyond that. Governments have been struggling to shield undervalued businesses from being the target of opportunistic foreign takeovers as financial markets have plummeted to an all-time low. Such changes are expected to have a far-reaching impact on transactions, even after the pandemic.

Struggles on the horizon

Covid-19 has triggered an unprecedented global crisis – a global health crisis that, in addition to an enormous human toll, is leading to the deepest global recession since the Second World War.¹⁴⁰ The pandemic is likely to cause lasting damage to the fundamental determinants of long-term growth prospects. Several measures being undertaken to slow the spread of the virus have slackened economic activity precipitously in many economies. The outbreak has struck a crippling blow to an already delicate global economy, with countries struggling to tackle the catastrophic economic and social effects of the pandemic. It is now, more than ever before, that investment policies have become an important tool and are likely to have a lasting effect, extending well beyond the confines of the impact of Covid-19.¹⁴¹

Several countries worldwide have adopted various measures to protect critical domestic industries in the crisis, while also supporting investment. In order to protect industries in sectors considered essential to deal with the crisis, such as the health or pharmaceutical sector, numerous countries have tightened foreign investment screening mechanisms, introduced new regulations and imposed export bans on medical equipment, and others are in the process of formulating such steps.

In line with various countries (Australia, India and the US) following an increasingly conservative approach, certain European countries such as France, Italy and Spain have similarly reacted by introducing amendments to their foreign investment laws to tackle these issues. These include reduced thresholds for review for certain/all foreign investors and/or expanded list of sectors that would be subject to review.

The countries evaluated in this article (under the heading ‘Country-wise study’) illustrate how different economies are reacting to this rapidly changing legal landscape, where countries are struggling to find a balance

140 World Bank, ‘Global Economic Prospects’ (World Bank 2020) www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii accessed 3 September 2020.

141 *Ibid.*

between protecting industries critical to the host country and attracting investment in other sectors as their economies are grappling to recover from financial distress and disrupted supply chains. Each of these countries has seen its FDI regime evolve, each constantly adapting to changes as per its economic health and economic environment, and they have continued to act accordingly in the face of a global pandemic. It has been observed that the outbreak of Covid-19 has already massively affected the flow of foreign investment. The Global Investment Trends Monitor of the United Nations Conference on Trade and Development (UNCTAD) has predicted a drastic drop in global FDI flows – up to 40 per cent – during 2020–2021, reaching the lowest level of the past two decades.¹⁴² On cue, various multinational enterprises have issued earnings revisions that confirm the rapid deterioration of global prospects, and have now seen downward revisions of 30 per cent on average for 2020 earnings estimates, warning of the global demand shock's impact on sales.¹⁴³ The sectors worst affected by Covid-19 are the energy and basic materials industries (-208 per cent for energy, with the additional shock caused by the recent drop in oil prices), airlines (-116 per cent) and the automotive industry (-47 per cent).¹⁴⁴ Downward revisions of earnings estimates are impacting developed as much as developing nations, irrespective of geographical location. Economic activity among advanced economies is anticipated to shrink by seven per cent in 2020 as domestic demand and supply, trade and finance have been severely disrupted, and emerging market and developing economies are expected to shrink by 2.5 per cent – their first contraction as a group in at least 60 years.¹⁴⁵

All economies, closely integrated by global value chains, are facing the ripple effects of mitigation efforts and lockdowns in other nations, with the demand shock pushing down overall investment. This has impacted nations more where there has been a greater domestic outbreak and where economies are heavily reliant on global trade, tourism, commodity exports and external financing. Although the scale of disruption varies from region to region, all emerging economies have vulnerabilities that have been magnified by external shocks. Consequently, what would further determine the impact on investment would be the manner in which different nations absorb such shocks and the extent of such absorption, which would lay the path to recovery. However, all governments would face the common

142 UNCTAD, 'Impact of COVID-19 Pandemic On Global FDI's And GVCs' (UNCTAD 2020) https://unctad.org/en/PublicationsLibrary/diaeiainf2020d3_en.pdf accessed 3 September 2020.

143 *Ibid.*

144 See n 142 above.

145 See n 139 above.

challenge of how to make the best use of investment policies in bringing their economies back onto a sustainable development path. This may be achieved primarily through the adoption of synergy-inducing policies, including global cooperation, to mitigate its consequences, safeguard vulnerable populations and strengthen nations' capacities to prevent and deal with similar events in the future. However, while creating an attractive investment climate, they would have to be wary of opportunistic deals because emerging markets and developing economies are particularly vulnerable. For this reason, limiting the flow of foreign investment across boundaries in the name of nationalistic fervour might have more to do with realpolitik, than economic principles.