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Investing In... 2024

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Introduction

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Contributed by: G J Ligelis Jr, **Cravath, Swaine & Moore LLP**

Cravath, Swaine & Moore LLP has been known as one of the premier US law firms for two centuries. The firm advises companies in their most critical needs, including across the full spectrum of corporate transactions, encompassing mergers, acquisitions, divestitures, spin-offs and joint ventures, as well as securities offerings in the global debt and equity markets, bank financings, and restructuring and bankruptcy matters and shareholder activism defence. Both US and international clients rely on the firm's leadership and expertise in their most transformative corporate matters and high-stakes litigation, many of which involve multiple jurisdictions across diverse industries. Cravath's hallmark is its ability to bring together expertise across disciplines, delivering an integrated and collaborative approach to clients on their most significant matters.

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Global Overview

The benefits of globalisation have been touted for decades now. For the developed world, globalisation can bring access to new markets, solutions for optimising supply chains, connection with a global talent pool and diversification of revenues. For the developing world, globalisation can provide critical capital investment, importation of cutting-edge technology and expertise, and boosts to local employment and the economy at large.

The past decade has also shone a light on some of the costs of globalisation. Businesses with a web of suppliers across the globe have become exposed to the fickle effects of shifting tax regimes, unpredictable supply chains, trade and actual wars, and global health crises.

Countries that have benefited from offshoring large portions of their manufacturing base have been faced with divisive social consequences at home, arising from disempowered and unemployed segments of the population. Governments that have provided open access to foreign investment in critical industries have found key assets in the hands of geopolitical rivals or businesses with unknown or opaque ties to foreign governments or state-owned enterprises.

Developing nations have learned the hard way that the tap of foreign investment can be shut off as quickly as it is turned on – with dire consequences for currencies, capital accounts and economies.

Nonetheless, while businesses may ensure more local supply redundancies and governments may erect barriers to entry for geopolitical foes, capital is likely to continue to follow its inexorable path to profitable investment. Navigating this complex and precarious environment for foreign direct investment (FDI) will only increase the demand for sound legal, financial, tax and operational advice for businesses that choose to look abroad for expansion, ideas and talent.

As one of the most direct proxies for globalisation, FDI has followed a similar rocky path. In 2022, global FDI flows decreased to USD1,286 billion – down 24% from 2021, according to the OECD. This decline was more pronounced in cross-border M&A than in greenfield investments, though the number of projects still remained below pre-pandemic levels. However, FDI announcements – which reflect future investment plans – rose in 2022, mainly in technologically and politically strategic sectors, most notably the renewable energy sector.

Global FDI flows rebounded in the first half of 2023, reaching USD727 billion, but remained 30% below the levels recorded in the first half of 2022. Persistent inflation, elevated interest rates and constant geopolitical crises continued to negatively impact global FDI flows in countries around the world.

Across 2022 and the first half of 2023, the US was both the largest source of outbound FDI flows and the largest destination for inbound FDI flows. While the US is still affected by stock market volatility, high interest rates and stubborn inflation, signs are beginning to emerge that it is turning a corner in the fight against inflation, albeit by significantly increasing the risk of a recession in the near to medium term.

Introduction to the Guide

As a brief introduction to the content of this Chambers Global Practice Guide, Investing In... 2024, the purpose of each country-specific chapter is to provide the reader with an understanding of the key legal issues that arise from investing in the subject country and to serve as a reference point for the key factors and considerations that should be evaluated prior to making a foreign investment in that country.

The Guide generally adopts the OECD definition of FDI for the types of investments that are addressed, which is an investment that reflects the objective of establishing a lasting interest (ie, long-term relationship with significant degree of influence on management) by an enterprise residing in one jurisdiction with an enterprise that resides in another jurisdiction. This includes transactions such as mergers and acquisitions, formation of partnerships and joint ventures and significant minority investments.

Since other resources effectively cover the key considerations for owning or operating a business in various countries (see the **Chambers Global Practice Guide**, Doing Business In... 2023), this guide focuses on those types of investment transactions and not the establishment and operation of new "greenfield" businesses in the subject country.

Key Developments

Over the past year, flows of FDI have been buffeted by three key developments:

- geopolitical tensions;
- return of industrial policy and protectionism; and
- continued expansion of national security review regimes and other national interest-driven policies.

Geopolitical tensions

In the wake of the severe disruption caused by the COVID-19 pandemic that affected every corner of the world, a seemingly endless cascade of geopolitical crises in 2022 and 2023 have continued to buffet and shape the flows of trade and investment. As decades of globalisation worked to gradually knit economies in vastly different geographies and stages of economic development together, the shocks of these crises continue to tear at those bonds as countries and companies alike seek to align themselves with more secure and familiar trading partners.

In February 2022, Russia commenced its war in Ukraine, which dramatically affected global energy, impacting oil, gas and electricity prices around the world. European countries and economies accustomed over many years to inexpensive oil and gas supplied by Russia were faced with inadequate supply and skyrocketing prices for fossil fuels, which was quickly followed by the rapid decoupling of many Western nations' economies from Russia due to sanctions and pressure to walk away from investments in the country. In October 2023, Hamas's terrorist attack on Israel and the ensuing war in Gaza has turned the world's attention to the humanitarian, security and geopolitical crises that continue to unfold. In addition to the tragic human costs, the crisis will have far-reaching economic repercussions across the already volatile region and the world, especially given the risks of an expanded conflict in the region. And in 2023, tensions between the US and China continued unabated, as the two global powers settle into a high-stakes relationship of strategic competition on a global scale. The risk of a military confrontation in the South China Sea, the East China Sea or elsewhere makes headlines on a regular basis, forcing businesses around the world to consider whether it is even possible to disentangle supply chains, consumer markets and investments in the region should a full-blown crisis erupt.

Against the backdrop of multiple international crises and rising geopolitical tensions, firms and policymakers have been responding with strategies to make supply chains less vulnerable to geopolitical tensions by moving production to trusted countries. According to the IMF, over the past decade, FDI flows have been increasingly concentrated in geopolitically aligned countries, especially in strategic sectors, such as semiconductors, in an effort to make supply chains less vulnerable to geopolitical tensions. If such tensions continue to intensify and countries further diverge along geopolitical fault lines, FDI flows may become even more concentrated within blocs of aligned countries centred around the US and China. It remains to be seen how FDI fragmentation between US-centred and China-centred geopolitical blocs will impact economies that remain unaligned with either camp, particularly in emerging and developing economies such as India and Latin America.

The return of industrial policy and protectionism

In 2022 and 2023, a global resurgence of industrial policy was highlighted by several high-profile pieces of legislation and rulemaking in the US and the EU. The impact on FDI is palpable as supporters of industrial policy or even outright protectionism regain influence in developed economies and chart the course of advancement in developing economies.

In 2022, the US passed the CHIPs and Science Act, the Infrastructure Investment and Jobs Act and the Inflation Reduction Act. While each of these laws utilise industrial policy to accomplish a range of stated goals such as the reduction of greenhouse gas emissions or diversifying the economy and its supply chains, they all rely on trade restrictions, government subsidies and targeted regulation to strengthen existing manufacturing in the US and "reshore" or "friend-shore" production elsewhere. These pieces of US legislation are in part a direct response to similar industrial policies around the world, such as China's "Made in China 2025" strategy or India's "Make in India" strategy. The EU also has responded in kind, ranging from adoption of proposals for a European Green Deal, to the European Council's approval of the European Chips Act to bolster semiconductor production in direct response to the US act of the same name, to a push for a "Made in Europe" industrial strategy.

These recent developments demonstrate that industrial policy is here to stay in the current market environment and will become an increasingly important factor in country and industry-specific FDI.

National security restrictions

Against the backdrop of these crises, governments around the world have been re-evaluating their regimes for reviewing and approving inbound FDI, which have become more proactive, broadly applicable and widespread in recent years.

In the US, the passage of the Foreign Investment Risk Review Modernization Act in 2018 and its implementation expanded the scope of transactions subject to review, required certain mandatory filings for the first time and shifted the focus to transactions involving critical technologies, critical infrastructure and sensitive personal data.

In the UK, the National Security and Investment Act became law on 29 April 2021, and came into effect at the start of 2022. The Act implements a new regime for reviewing FDI in the post-Brexit world. Across Europe, new or revamped FDI review procedures were recently implemented in the Netherlands, Belgium, Denmark, Luxembourg, Slovakia and Estonia, with additional regimes expected to come into force in the near term in Sweden and Ireland. On top of FDI regimes, the European Commission's Foreign Subsidies Regulation came into effect in July 2023 under which transactions involving parties that have received "distortive foreign subsidies" from their home countries are subject to screening and review.

Much of this focus has been driven by fear of investment from China. Accordingly, the impact on inbound Chinese investment around the world has been sudden and severe, with Chinese investment in the US dropping to levels not seen since the 2008–09 financial crisis. Importantly, the net cast by these more expansive and proactive FDI review regimes reaches beyond just China, and governments view them as a tool not only to protect national security but to further national interests and the well-being of their citizens. Going forward, businesses around the world will need to proactively evaluate the applicability of these regimes and legislation upfront and effectively navigate their review in order to successfully achieve their FDI objectives.

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