Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering comparative analysis from top-ranked lawyers

Investing In...

Introduction
G. J. Ligelis Jr
Cravath, Swaine & Moore LLP

practiceguides.chambers.com

2021

INTRODUCTION

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

Global Overview

The benefits of globalisation have been touted across both the developed and developing world 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.

However, the past decade has also shone a light on some of the costs of globalisation as well. Businesses that spread a web of suppliers across the globe have become exposed to the fickle effects of shifting tax regimes, trade wars and global health crises, notably the current COVID-19 pandemic.

Countries that have benefitted from offshoring large portions of their manufacturing base have been faced with the 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, consequently, found key assets uncomfortably in the hands of geopolitical rivals or businesses with unknown or opaque ties to foreign governments or state-owned enterprises.

Developing nations have had to learn 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.

As one of the most direct proxies for globalisation, foreign direct investment (FDI) has followed a similar up-and-down path as companies and businesses come to understand the full benefits and costs of investing abroad. According to the OECD, FDI flows in 2019 equalled USD1,426 billion, which was below the level recorded in each of the years from 2010 to 2017, albeit an increase of 12% from 2018, a year that saw diminished levels of FDI arising from tax reforms in the USA that led to significant repatriation of profits for US multinationals.

Even prior to the devastating impact of COVID-19 on FDI in 2020, outbound FDI flows in 2019 were only slightly more than half of what they were in the banner year of 2007. As the world continues to be drawn closer together through innovative technology, access to global news and the spread of social media, investors appear to be bringing their investments back closer to home and are being more selective about the longer-term consequences of their investments abroad.

Nonetheless, it is difficult to imagine a world where FDI does not resume its expansion following this difficult period. 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 increasingly complex and precarious environment for FDI, however, 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.

Introduction to the Guide

This is the first year of publication of this Chambers Global Practice Guide, *Investing In...,* so a brief introduction to the content is in order. The purpose of each of the country-specific chapters 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 a resident enterprise in one jurisdiction in an enterprise that is resident 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...*), this guide focuses on those types of investment transactions and not the establishment and operation of new "greenfield" businesses in the subject country.

Each chapter begins with a summary of the country's legal system, regulatory framework, common transaction structures, corporate governance, capital markets, recent developments and market trends. It then delves deeper into the relevant antitrust/competition, foreign investment, national security and other regulatory regimes that apply to FDI, before concluding with an overview of selected tax, employment/labour and intellectual property considerations.

INTRODUCTION

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

Key Developments

In recent years, flows of FDI have been buffeted by three key developments, each of which is summarised in more detail below: (i) escalation of global trade tensions, (ii) the COVID-19 pandemic, and (iii) increasingly stringent national security review regimes.

Global trade tensions

Following years of harsh rhetoric and posturing over unfair trade practices and intellectual property violations, the trade tensions between the USA and China escalated into a full-blown trade war in 2018, with tariffs being applied to tens of billions of dollars of goods in both directions.

The repercussions of the US-China trade war were felt around the world, both directly – as supply chains and economic dependencies were thrown into disarray – as well as indirectly by giving new life to proponents of isolationist, protectionist and anti-immigrant policies on the political stage. In addition, envisaging, structuring and executing FDI requires a meaningful degree of long-term planning, and the uncertainty created by escalating trade tensions and shifting government policies significantly hampered businesses' ability to implement FDI strategies.

However, US retrenchment from the global stage also created new opportunities for FDI. Multilateral trade deals such as the Trans-Pacific Partnership were reset without US involvement and proceeded successfully with the remaining participants. Businesses seeking to reduce exposure to China found other outlets for investment, such as in South-East Asia.

As the latest round of global trade tensions and geopolitical uncertainty begin to subside, countries will look to provide predictability and stability to businesses looking to invest abroad, as evidenced by the 30 December 2020 announcement of an agreement between the EU and China to facilitate FDI that was rolled out concurrently with finalising the UK's exit from the EU.

Impact of COVID-19

By far the development with the largest impact on FDI in 2020 was the rapid and unexpected spread of COVID-19 to every corner of the world, turning everyday life for billions of people on its head and forcing significant retrenchment for many businesses. Global FDI flows fell by 50% in the first half of 2020 from the prior half-year to a low of USD364 billion, according to the OECD. With businesses quickly turning their focus to shoring up their liquidity and adapting work practices to protect employees while maintaining productivity, there was minimal bandwidth or capital for investment abroad. Even factors as mundane as the inability to conduct in-person due diligence or negotiations hindered companies' ability to source and evaluate FDI opportunities.

Furthermore, as countries closed their borders and imposed previously unthinkable restrictions on their citizens, the world faced a harsh lesson in how closely intertwined the global economy had become and how exposed it was to disruption when everyday goods were no longer produced close to home. While the lasting effects of the pandemic on FDI remain to be seen, businesses as well as national governments will certainly view their international exposure and related risks in a new light. However, they will perhaps also find new opportunities in a post-pandemic world to make supply chains more resilient, workforces and physical locations more flexible and products and services more competitive on the global scale.

National security restrictions

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

In the USA, the passage of the Foreign Investment Risk Review Modernization Act in 2018 and its implementation since adoption 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 Bill was published by the government on 11 November 2020, which will implement a new regime for reviewing FDI in the post-Brexit world. Across Europe, new or revamped FDI review procedures have been recently implemented in Germany, Italy, Spain and France, and the EU's framework for screening FDI came into effect on 11 October 2020. In Asia, countries such as Australia, India and Japan have also revisited their foreign investment review programmes in 2020.

Much of this focus has been driven by fear of investment from China, whether in natural resources in Australia, technology companies in the USA or 5G networks in Europe. Accordingly, the impact on inbound Chinese investment around the world has been sudden and severe, with Chinese investment in the USA dropping to levels not seen since the 2008–09 financial crisis. Importantly, however, the net cast by these more expansive and proactive FDI review regimes is far broader than just China, and governments view them as a tool to not only 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 upfront and effectively navigate their review in order to successfully achieve their FDI objectives.

INTRODUCTION

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.

Contributing Editor

G. J. Ligelis Jr. is a partner in Cravath's corporate department, where he advises on public and private mergers and acquisitions, corporate governance and general corporate matters. His M&A practice has a particular focus on cross-border transactions. Mr Ligelis is a member of the International Bar Association.

Cravath, Swaine & Moore LLP

Worldwide Plaza
825 Eighth Avenue
New York
NY 10019-7475
USA

Tel: +1 212 474 1000
Fax: +1 212 474 3700
Email: newyork@cravath.com
Web: www.cravath.com

Cravath, Swaine & Moore LLP