Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Investing In ... 2023

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

USA: Law & Practice
G J Ligelis Jr, Christopher K Fargo, Alyssa K Caples
and Margaret T Segall
Cravath, Swaine & Moore LLP

USA: Trends & Developments
G J Ligelis Jr
Cravath, Swaine & Moore LLP

practiceguides.chambers.com

Trends and Developments

Contributed by:
G J Ligelis Jr
Cravath, Swaine & Moore LLP **see p.27**

Overview

In 2021 and the first half of 2022, the United States was the leading recipient of inbound FDI as well as the largest investor in outbound FDI worldwide, according to the OECD. And the United States topped the list in Kearney's Foreign Direct Investment Confidence Index as the most attractive market for FDI – for the tenth year in a row. Perhaps this is just concomitant with the United States being the largest economy in the world. Perhaps it reflects the flight of FDI flows to a more stable and predictable jurisdiction in times of uncertainty in recent years. Perhaps it can be attributed to the simple good fortune of having access to abundant fossil fuels, being geographically removed from geopolitical strife and having early access to COVID-19 vaccines.

Amidst a complex and changing political, economic and social backdrop, the United States has faced a number of factors that have influenced its position as one of the top jurisdictions for FDI again in 2022, including as a result of legislative and executive action with direct implications for FDI.

CFIUS and National Security

While the Committee on Foreign Investment in the United States (CFIUS) has been around for many years, 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 enhanced the focus on transactions involving critical technologies, critical infrastructure and sensitive personal data. Using this broadened grant of authority, CFIUS reviewed 436 total filings made by transaction parties in 2021. It identified for consideration an additional 135 transactions that had not been notified by the transaction parties.

In September 2022, President Biden signed an Executive Order titled *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States* which for the first time provided specific presidential direction to CFIUS on the risks that it should consider in its reviews of inbound investment transactions by non-US persons. The Executive Order highlighted a number of areas, including US supply chain resilience, US technological leadership (including in sectors such as microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy and climate adaptation technologies), risks of aggregate industry investment trends, cybersecurity and cyber-enabled malicious activity, and US persons' sensitive personal data (including health, digital identity and biological data). While the identified areas of focus are not explicitly targeted at any individual foreign nation, they reflect a broader policy trend within the Biden administration of repositioning the United States for a period of strategic competition with China and using CFIUS in particular to ensure that advanced technologies developed in the United States are adequately protected from access that may enhance China's capabilities.

Overall, for deal practitioners, the CFIUS process is well established in the deal landscape for inbound M&A and other forms of investment. The CFIUS process has remained fairly consistent from the Trump administration to the Biden administration and, although CFIUS outcomes are never certain, the trend is toward greater predictability, particularly when compared to the aggressive and volatile nature of antitrust enforcement by the Department of Justice and the Federal Trade Commission under the Biden administration.

Federal Government Stimulus

After a slower start to implementing its legislative agenda, the Biden administration has succeeded in passing a number of significant pieces of legislation that have had a profound impact on the FDI landscape in the United States, drawing interest from companies around the world to invest and grow their US operations.

In November 2021, the US Congress passed the Infrastructure Investment and Jobs Act providing for USD550 billion in new investment in transportation infrastructure, clean energy and water and broadband internet access, including USD60 million for clean-energy-related projects. In August 2022, the US Congress passed the Inflation Reduction Act, which allocated USD369 billion to energy security and climate change. Also in August 2022, the US Congress passed the CHIPS and Science Act intended to boost innovation and national security with respect to semiconductors and other advanced technologies by allocating USD200 billion to scientific research and development, USD53 billion to semiconductor manufacturing and USD24 billion to tax credits for domestic chip production.

The combined effect of these acts, as well as numerous other governmental policies, has been to supercharge investment in the United States in the areas that the Biden administration views as critical to national security and to winning a strategic competition with China over advanced technologies and supply chains. In fact, according to the US Bureau of Economic Analysis, approximately USD2,111 billion or 42.4% of inbound FDI in the United States in 2021 was in the manufacturing sector, which has continued to gradually increase from USD1,606 billion or 39.9% of inbound FDI in 2017 and shows the effect of consistent financial and regulatory incentives provided over that period to grow domestic manufacturing capabilities. Whether through investments in background research that enables technological breakthroughs or the training of a talented workforce or the allocation of tax credits to support domestic manufacturing operations or the upgrading of infrastructure that is critical to transporting products within the United States and to export markets, these acts have stimulated an increase in inbound FDI to the United States on top of existing economic and geopolitical tailwinds.

Focus on China

While one primary objective of the CHIPS and Science Act was to foster research and development and semiconductor manufacturing at home in the United States, another key objective was to hinder development of the Chinese semiconductor industry and its ability to develop its own advanced technologies. In fact, the White House announcement of the act overtly stated that the “CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China”. One requirement under the act for receipt of the financial incentives and tax credits is that the recipient not invest in expanding semiconductor manufacturing in China during the following ten years – effectively facilitating the investment in the United States semiconductor industry while simultaneously impeding the growth of China’s semiconductor industry. This is consistent with National Security Advisor Jake Sullivan's statement in September 2022 that it is no longer adequate for the United States to stay "only a couple of generations ahead" of its competitors in certain key technologies and his remarks in December 2022 that the United States "must maintain as large of a lead as possible."

The Biden administration went further in October 2022 when the US Department of Commerce's Bureau of Industry and Security adopted a series of updates to its export control regulations targeting both advanced computing and semiconductor manufacturing in China. Citing concerns about China's military, intelligence and security services, the new regulations expressly sought to keep technologies that are important to the development of artificial intelligence, automation and surveillance beyond the reach of Chinese companies or state actors. The new regulations – which are exceedingly complex – apply not just to US-based firms, but in some cases also to non-US companies that produce items using technology developed in the United States. The regulations also restrict the ability of US persons to support the development or production of semiconductors at certain Chinese facilities without a licence.

Chinese FDI into the United States had already been significantly hampered by aggressive CFIUS enforcement and the trade war policies enacted under the Trump administration. But the steps taken by the Biden administration in 2022 could mark the beginning of a new chapter for FDI between the United States and China, and the world as a whole. If the United States and China proceed down a path of "decoupling" in the coming years, then countries across the globe may be forced to choose sides between them and in essence participate in either a US-centric FDI ecosystem or a China-centric FDI ecosystem. While the politics of "near-shoring" and "friend-shoring" that arose from the supply chain disruptions during the worst of the COVID-19 pandemic began to nudge the world in this direction, further FDI and other restrictions from both the United States and China would only accelerate the separation of supply chains and investment and technological spheres.

Outbound FDI Regulation?

On the other side of the ledger, the United States was the leading investor in outbound FDI to other countries in 2021 and the first half of 2022. Large American multinational companies across industries from the technology sector to the automotive industry to the hospitality space have continued to invest heavily abroad, even during the past few challenging years. In 2022, the strength of the US dollar as compared to most other currencies has made those investments even more attractive. Given the rapid rebound from the COVID-19 pandemic in the United States, US multinational companies were in a prime position to take advantage of investment opportunities in countries that had a slower path to recovery.

However, on the regulatory front, there has been growing momentum in Washington, DC to focus on the potential national security risks of outbound FDI in addition to the more traditional scrutiny of inbound FDI through CFIUS. A draft bill titled the National Critical Capabilities Defense Act has been proposed several times in Congress in recent years and would create a new framework for national security screening of certain outbound FDI from the United States. Proponents of the bill argue that US companies investing in technology development overseas can increase the capabilities of US competitors and adversaries, thereby creating national security risks equivalent to those that may result from non-US companies acquiring US-based businesses. The bill would also provide the US government with stronger tools to monitor and influence the supply chains of US companies, including any links to countries like Russia, China and others.

Critics of the bill argue that it would harm the competitiveness of US companies investing abroad or even result in a raft of new similar legislation in countries around the world in response that could hamstring inbound FDI to the United States and the global economy at large. Just as CFIUS served as an influential model for inbound FDI review regimes adopted around the world in recent years, a US-led push to screen outbound FDI may be the next wave of regulation to buffet FDI flows globally.

Although the National Critical Capabilities Defense Act was not enacted in 2022, in December 2022 the US Congress encouraged the US Commerce and Treasury Departments each to consider the establishment of "a program to address the national security threats emanating from outbound investments from the United States in certain sectors that are critical for U.S. national security." With bipartisan support in the US Congress and the backing of senior officials within the Biden administration, the establishment of such a programme may just be a matter of time.

Conclusion

It is as challenging as ever to look into the crystal ball to predict whether the United States will retain its top spot for both inbound FDI flows and outbound FDI flows in 2023 and beyond. As with the domestic economy in the United States, there are numerous powerful headwinds that are set to continue to hinder growth, from stubbornly high inflation to increasing interest rates and difficulties in accessing the financing markets to significant stock market volatility, particularly in the lasting valuation reset for technology companies.

However, the US economy has once again proven its resilience in the face of global headwinds, with GDP growth of 2.6% on an annualised basis in the third quarter of 2022 and unemployment remaining at 3.7% through November 2022. The United States has benefited significantly from the ability to access abundant and inexpensive sources of energy domestically, as well as its geographic distance from the ongoing war in Ukraine.

Yet it is the constants in the United States market that are likely to provide the biggest boost to inbound FDI in the years to come – a skilled and innovative workforce, access to a large and affluent consumer market, stability and predictability of judicial outcomes, and favourable tax rates and regulatory regimes. As the political wheel in Washington, DC continues to spin at an ever-increasing rate, it would be prudent to recognise that it is these constants that have made the United States the world's pre-eminent jurisdiction for FDI and any changes that jeopardise them need to be approached with due caution.

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.

Author

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

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com