THE UNITED STATES' FOREIGN DIRECT INVESTMENT SCREENING REGIME IN A POST-COVID WORLD

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Abstract

The COVID-19 pandemic and countries' responsive containment measures brought shockwaves to the world, including worldwide supply and demand. This environment presented opportunistic buyers with the chance to acquire or invest in foreign companies that were weakened by the crisis. In an effort to protect critical and strategically important companies from foreign control, many countries tightened their foreign direct investment screening regimes. However, the United States' foreign direct investment screening regime remains unchanged since 2018. This paper assesses the motivations and concerns driving Australia, France, and Germany's screening upgrades and leverages the analysis to assess the strength of the United States' FDI screening regime as it stands.

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I. Introduction

The COVID-19 pandemic ("pandemic", "COVID-19") and countries' responsive containment measures brought shockwaves to the world, especially to worldwide supply and demand.[1] The pandemic disrupted global production networks, leaving many countries' economies in turmoil.[2] This environment presented opportunistic buyers with the chance to acquire or invest in foreign sectors and companies that were weakened by the pandemic.[3] In an effort to protect critical and strategically important companies and sectors from foreign control, many countries both temporarily and permanently revised their foreign direct investment ("FDI") screening regimes.[4] These measures generally surround certain strategic sectors like telecom, technology, infrastructure, and raw materials.[5] Shortages of personal protective equipment ("PPE") for healthcare workers and restrictions on exports of medical equipment prompted state actors to guard their pharmaceutical and medical

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[1] Susan Helper & Evan Soltas, *Why the Pandemic Has Disrupted Supply Chains*, WHITE HOUSE BLOG (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/why-the-pandemic-has-disrupted-supply-chains/ [**https://perma.cc/JZ68-V5PP**] ("The situation [brought on by Covid-19] has been especially difficult for businesses with complex supply chains, as their production is vulnerable to disruption due to shortages of inputs from other businesses. These shortages and supply-chain disruptions are significant and widespread . . . .").

[2] *Id.* (explaining that retail inventory fell by 10 days "caus[ing] cascading issues in industrial supply chains.").

[3] Joanna Kenner, *FDI in a post-covid-19 worlds: A threat to the European project?*, INST. MONTAIGNE, (May 11, 2020), https://www.institutmontaigne.org/en/blog/fdi-post-covid-19-world-threat-european-project **[**https://perma.cc/8W87-54XA] **("**FDI screening becomes critical when, as a result of a post-pandemic economic slowdown, European companies are systematically weakened, thus creating a one-off opportunity for foreign investors to acquire such assets at cheapened prices.").

[4] Simon J. Evenett, *What Caused the Resurgence in FDI Screening?,* SUERF, May 2021 ("While openness to FDI has not been rejected outright, in recent years a large number of governments have established or strengthened mechanisms to review foreign direct investment in their jurisdictions. . . . This change in the treatment of FDI has coincided with the COVID-19 pandemic . . . .").

[5] *Id.* (describing different FDI screening changes to various infrastructure for certain business sectors including telecommunication, digital technology, and raw material).

manufacturing sectors more closely.[6] Additionally, many countries' updated FDI screening laws subject any potential foreign acquisition to automatic review by the country's FDI regulatory body.[7]

The United States ("U.S.") openly welcomes foreign investments and generally imposes few restrictions on, or regulatory oversight of, FDI.[8] Unlike other countries with advanced economies, the United States has not enacted any new FDI legislation in response to COVID-19; the most recent FDI-related legislation passed was the Foreign Investment Risk Review and Modernization Act of 2018 ("FIRRMA"), which President Trump signed into law over a year before the first COVID-19 case was reported.[9] FIRRMA strengthens and modernizes the Committee on Foreign Investment in the United States ("CFIUS") and allows CFIUS to reach a broader

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[6] *See* Press Release, The Foreign Investment Review Board of the Australian Government, Changes to foreign investment framework (March 29, 2020), https://firb.gov.au/about-firb/news/changes-foreign-investment-framework-0 ("The Government will prioritise [sic] urgent applications for investments that directly protect and support Australian businesses and Australian jobs, taking account of any commercial deadlines related to those proposed investments."); *see also* Stephan Müller & Mareike Hessing, *17th Amendment of the Foreign Trade and Payments Ordinance: stricter investment screening in Germany,* OPPENHOFF FOREIGN TRADE NEWSL. (Apr. 29, 2021), https://www.oppenhoff.eu/en/news-detail/17th-amendment-of-the-foreign-trade-and-payments-ordinance-stricter-investment-screening-in-germany [https://perma.cc/RDP3-22G6] ("The trend is towards ever greater scrutiny of foreign investments . . . .").

[7] *See* Press Release, The Treasury of the Australian Government, Australia's Foreign Investment Policy (Jan. 1, 2019), https://cdn.tspace.gov.au/uploads/sites/82/2018/12/1-January-2019-Policy_.pdf [https://perma.cc/E2JJ-GAQ6].

[8] *See* Barack Obama, President, U.S., Keynote Address at the 2016 SelectUSA Investment Summit (June 20, 2016) (showing that President Barack Obama mentions that "no other country is home to more foreign direct investment than the United States of America.").

[9] Kent Bressie & Robert Friedman, *President Trump Signs into Law the Most Significant Changes to Foreign Investment Reviews in Over a Decade*, HARRIS, WILTSHIRE & GRANNIS LLP (Aug. 13, 2018), https://www.hwglaw.com/president-trump-signs-into-law-the-most-significant-changes-to-foreign-investment-reviews-in-over-a-decade/ (reporting that President Trump signed FIRRMA as part of the National Defense Authorization Act).

range of foreign investment transactions, including those that deal in critical technologies, and maintain or collect sensitive personal data.[10] On January 13, 2020, the Department of the Treasury released two final regulations to implement the changes that FIRRMA made to CFIUS's jurisdiction and processes.[11]

These three countries were chosen because they all have developed economies and received between $38 billion and $68 billion in net FDI inflows in 2019.[1212] In Section V, this paper leverages the analysis in Section IV to assess the strength of the United States' FDI screening regime. This paper does so by assessing whether the United States has similar concerns surrounding FDI that are not reflected in the country's laws as they currently stand. Finally, in Section VI, this paper recommends various updates that the United States can implement to its current FDI laws to properly assess concerns exposed by the pandemic that have yet to be properly addressed.

This paper utilizes a variety of sources including legislative documents, governmental press releases, and fact sheets. It also leverages interviews with government officials and commentaries from both working papers and law firm press releases. Because of its international scope and the author's linguistic limitations, the sources used were limited to those either already written in English or translated from a foreign language into English by a reputable translator. The author avoided translating foreign documents herself to preserve the integrity of this paper's research and analysis. In addition, while the Australian government releases abundant FDI screening data on an annual basis, the French and German governments do not do so. As a result, fewer inferences could be drawn by the author for those two countries.

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[10] 31 C.F.R. § 801.204 (2018) (defining "critical technologies" as including items related to national security, chemical and biological weapons, and nuclear equipment).

[11] Farhad Jalinous et. al, *CFIUS Finalizes New FIRRMA Regulations*, WHITE & CASE (Jan. 22, 2020), https://www.whitecase.com/publications/alert/cfius-finalizes-new-firrma-regulations (reporting that on February 13, 2020, CFIUS has released final FIRRMA implementing regulations).

[1212] *Foreign direct investment, net inflows (BoP, current US$),* WORLD BANK, https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2019&most_recent_value_desc=true&start=1970%20%20 (displaying the FDIs of countries across the world).

II. Pre-Pandemic FDI

FDI is a category of cross-border investment in which an investor in one economy establishes a lasting interest in a business enterprise in another economy. [13]

FDI investments typically involve a long-term commitment between the country and the foreign investor, as well as a significant degree of control by the foreign investor.[13] As trade flows and production methods have grown and become globalized, FDI has increasingly become a key element of international economic integration.[14] FDI can take a variety of forms but is typically done using multinational enterprises ("MNE"), which invest abroad either through "greenfield investments" (the setting-up of subsidiaries abroad) or through mergers and acquisitions.[15] Other types of FDI include the acquisition of an existing foreign company and the establishment of a joint venture with a foreign partner.[16] A direct investment is often considered one involving more than ten percent of the capital stock of a foreign enterprise.[17]

FDI is an integral part of an open and effective international economic system, as well as a major catalyst of development around

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[13] *Id.* (discussing the basics of foreign direct investment before analyzing "greenfield investments").

[14] *Foreign direct investment (FDI)*, OECD, https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en ("FDI is a key element in international economic integration because it creates stable and long-lasting links between economies.").

[15] Federico Carril-Caccia & Elena Pavlova, *Foreign direct investment and its drivers: a global and EU perspective,* EUROPEAN CENT. BANK (April 2018), https://www.ecb.europa.eu//pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html ("Between 2000 and 2016, FDI stocks grew from 22% of world GDP to 35%. FDI, which is defined as a situation where a firm owns at least 10% of a company located in a different country, is carried out by MNEs, which invest abroad either through greenfield investments (GIs), i.e. the setting-up of subsidiaries abroad, or through M&As.").

[16] Detlev Vagts et al., *Transnational Business Problems* 297 (6th ed. 2019).

[17] *Id.* (clarifying that direct investments are considered as involving more than ten percent in capital stock for statistical purposes while smaller investments are regarded as portfolio investment).

the world.[18] Studies show that FDI triggers technological spillovers, contributes greatly to international trade integration, and helps create a more competitive business environment that drives enterprise development.[19] Investors engage in FDI for a variety of reasons. Most countries impose import tariffs, making international trading costly and difficult.[20] As such, it can be advantageous for companies to acquire or establish manufacturing facilities in foreign countries as a way of avoiding tariff charges, thus reducing logistics and transportations costs.[21] By acquiring a controlling interest in foreign assets, corporations can also quickly acquire new products and technologies and greatly increase their market size.[22] According to statistics released by the Bureau of Economic Analysis, the United States' cumulative level of foreign investment was $5.91 trillion at the end of 2019.[23] In 2020, American investors spent $163,466 million on foreign investments in Australia, $162,387 million in Germany, and $91,153 million in France.[24]

FDI presents serious advantages for host countries as well. Generally speaking, FDI helps create jobs in foreign markets, even in

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[18] OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMIZING BENEFITS, MINIMIZING COSTS (2002) (analyzing the positive effects of FDI for development while also considering the potential drawbacks for the host economies).

[19] *Id.* at 5 (summarizing the findings from various studies that all show the listed benefits of FDI for the developing country economies).

[20] Justin Kuepper, *Foreign Direct Investment: What It Means for Investors*, BALANCE (June 28, 2021), https://www.thebalance.com/what-is-foreign-direct-investment-1979197 (exploring the positive and negative side effects of foreign direct investments, and their overall utility).

[21] *Id.* ("Most foreign direct investment is designed to create new businesses in the host country, which usually translates to job creation and higher wages.").

[22] *Id.* ("By acquiring a controlling interest in foreign assets, corporations can quickly acquire new products and technologies, as well as sell their existing products to new markets.").

[23] Ryan Smith & Jeannine Aversa, *Direct Investment by Country and Industry, 2020*, BUREAU ECON. ANALYSIS (July 22, 2021) ("The U.S. direct investment abroad position, or cumulative level of investment, increased $244.9 billion to $6.15 trillion at the end of 2020 from $5.91 trillion at the end of 2019, according to statistics released by the Bureau of Economic Analysis (BEA).").

[24] *Id.* (presenting both domestic and foreign data regarding direct investments by countries and their respective industries).

places where unemployment rates are high.[25] On average, MNCs pay wages that are forty percent higher than local companies.[26] FDI in a host country often allows local companies to contribute to a foreign company's production chain, effectively strengthening native companies that existed before the foreign MNC established itself.[27]

Considering these microeconomic and macroeconomic advantages, it is unsurprising that countries were increasingly liberalizing their FDI regimes up until the pandemic.[28] Yet, it may come as a surprise that global FDI flows have been declining since 2015.[29] Global FDI flows in 2019 were lower than those from 2010 to 2017.[30] In 2019 alone, global FDI flows dropped by fifteen percent in the first half of the year before increasing by ten percent in the second half of the year, to $1,744 billion.[31] Economists and scholars generally agree that this decline was being caused in large part by a decrease in FDI rates of return.[32] In 2017, for example, the global average return on foreign investment was 6.7%, down from

[25] Joaquim Tres & Yannick Detchou, *Why do companies invest abroad and how does it impact development?*, INTER-AMERICAN DEV. BANK (May 10, 2018), https://blogs.iadb.org/integration-trade/en/why-do-companies-invest-abroad-and-how-does-it-impact-development/ ("Generally speaking, FDI create jobs, more jobs than those that are eventually lost due to the shrinking or closure of local firms that cannot compete with the newly arrived firms from abroad.").

[26] *Id.* ("Furthermore, MNCs pay wages that are 40 percent higher, on average, than those of local firms.").

[27] *Id.* ("However, FDI can increase demand for local inputs and lead to the growth of industrial clusters where synergies emerge between MNCs and local firms, creating jobs, as is the case in the Puebla-Tlazcala automotive cluster in Mexico, which grew around Volkswagen.").

[28] *See generally* MULTI-JURISDICTION GUIDE FOR SCREENING OF FOREIGN INVESTMENTS, DLA PIPER (August 2019) (discussing countries' use of protectionist measures to monitor foreign investments).

[29] OECD, *FDI In Figures* 1 (2020).

[30] *Id.* ("Compared to 2017, FDI flows decreased by 15%, continuing the downward trend observed since 2015.").

[31] *Id.* at 2 ("Looking at half-year values, FDI flows dropped by 15% in the first half of 2019 before increasing by 18% in the second half of the year.").

[32] *Global foreign investment flows fell sharply in 2017,* UNCTAD (June 6, 2018), https://unctad.org/news/global-foreign-direct-investment-flows-fell-sharply-2017 ("UNCTAD observed that the negative FDI trend is caused in large part by a decrease in rates of return.").

8.1% in 2012.[33] As a result of this investment downturn, economists remarked at the increasingly slow expansion of international production;[34] while sales of foreign affiliates continued to grow, productive assets and employees increased at a slower rate.[35] Despite FDI's advantages, foreign investment does not come without risk to the host

country.[36]

Increases in FDI have historically produced national security concerns, particularly in the areas of trade disputes and intellectual property transfers.[37] If an economy becomes too dependent on FDI, foreign countries can potentially use the threat of decreased foreign investment as bargaining leverage in international negotiations.[38] In addition, foreign ownership of domestic businesses can enable the theft of domestic technology through unauthorized transfer of intellectual property.[39]

III. The Pandemic Landscape

A. The Pandemic

[33] *Id.* ("The global average return on foreign investment is now at 6.7%, down from 8.1% in 2012.).
[34] *Id.* ("As a result of the investment downturn, the rate of expansion of international production is slowing down.").
[35] *Id.* ("Sales of foreign affiliates continue to grow (up 6 per cent in 2017) but productive assets and employees are increasing at a slower rate.").
[36] *See* Mary Ellen Stanley, *From China with Love: Espionage in the Age of Foreign Investment*, 40 BROOKLYN J. INTL. L. 1033, 1035 (2015) ("As globalization accelerates and the world's largest corporations conduct cross-border transactions with increasing frequency, businesses can be victims of espionage, or instead become vessels for espionage through FDI.").
[37] *Id.* (illustrating the FDI concerns surrounding the purchase of land adjacent to a U.S. Navy base by a Chinese owned corporation).
[38] *Id.* (describing the growing risks of becoming overly reliant on FDI).
[39] Matthew Crosston, *Soft Spying: Leveraging Globalization as Proxy Military Rivalry*, 28 INT'L J. INTEL. & COUNTERINTEL. 105, 109 (2014) (describing efforts made by both American and foreign nations to gain access to patents and other intellectual property through economic espionage).

In early 2020, the world was struck by a surprise attack from a coronavirus-related disease called Coronavirus Disease 2019.[40] The disease was first reported in Wuhan, China in February 2020.[41] Less than a month later, COVID-19 was declared a pandemic by the World Health Organization mainly due to the speed and scale of the transmission of the disease across 190 countries.[42] As of January 11, 2022, there have been over 310 million COVID-19 cases and over 5.4 million people have died from the virus.[43]

Unlike the exogenous shocks following the terrorist attacks on September 11, 2001 and the 2008 global financial crisis, the pandemic burdened the world economy by creating concurrent supply, demand, and policy shocks.[44]

Governments reacted quickly to invoke emergency laws and adopted measures like border controls, stay-at-home orders, and social distancing.[45] These measures created serious economic consequences; the United States' gross domestic product ("GDP") fell by 4.8% in the first quarter of 2020, the largest quarterly decline in GDP since the fourth quarter of 2008.[46] The Eurozone economy

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[40] Na Zhu et al., *A Novel Coronavirus from Patients with Pneumonia in China*, 382 NEW ENG. J. MED. 727 (2020) (reporting the early data collected on COVID-19).

[41] *Id.* (describing the initial outbreak of COVID-19 in Wuhan, China).

[42] Dr. Tedros Adhanom, Director-General, World Health Org., Opening Remarks at COVID-19 Mission Briefing (Mar. 12, 2020) (explaining the rationale for naming COVID-19 a global pandemic).

[43] Johns Hopkins University, *COVID-19 Dashboard*, CTR. SYS. SCI. & ENG'G. (Jan. 11, 2022, 10:21 AM), https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (reporting the global COVID-19 data as of January 11, 2022).

[44] Basu Sharma, *Covid-19 and recalibration of FDI regimes: convergence or divergence?*, 13 TRANSNAT'L CORP. REV. 62, 62 (2021) (describing how the COVID-19 pandemic differs from both 9/11 and the global financial crisis of 2008).

[45] Janice Lee, *Note on Covid-19 and the Police Powers Doctrine: Assessing the Allowable Scope of Regulatory Measures During a Pandemic*, 13 CONTEMP. ASIA ARB. J. 229 (2020) (explaining numerous regulatory measures to curtail spread of virus).

[46] Bureau of Econ. Analysis, *Gross Domestic Prod., First Quarter 2020* (Apr. 29, 2020), https://www.bea.gov/news/2020/gross-domestic-product-1st-quarter-2020-advance-estimate ("Real gross domestic product (GDP) decreased at an annual rate of 4.8 percent in the first quarter of 2020").

contracted by 3.8% at an annual rate, according to data from the first quarter of 2020.[47] This was the Eurozone's largest quarterly decline since 1995.[48] In addition, global FDI flows plunged by thirty-five percent in 2020, to roughly one trillion dollars.[49] By September 2020, the World Bank Group reported that over ninety percent of the eighty MNEs surveyed had reported experiencing adverse effects in the second quarter of 2020 and more than eighty percent of them saw their net income decline, by an average decline of thirty-seven percent.[50]

B. FDI Concerns

For many of the reasons outlined in Section II, FDI became an important factor to support economic recovery in the face of depleted internal resources.

Yet many governments also expressed increased concern that the pandemic was greatly weakening domestic businesses in sectors critical to national security and public order, exposing them to

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[47] Michael Stott, *Coronavirus Set to Push 29m Latin Americans Into Poverty*, FIN. TIMES, (Apr. 27, 2020), https://www.ft.com/content/3bf48b80-8fba-410c-9bb8-31e33fffc3b8 (highlighting how coronavirus has triggered economic collapse).

[48] Benjamin Hall, *Coronavirus Shutdown Poses Threat to 59m Jobs in Europe, Report Warns*, FIN. TIMES (Apr. 20, 2020), https://www.ft.com/content/36239c82-84ae-4cc9-89bc-8e71e53d6649 (emphasizing the threat of lasting damage to European labor markets and econ. growth).

[49] *Global Foreign Direct Investment Set to Partially Recover in 2021 but Uncertainty Remains,* UNCTAD (June 21, 2021), https://unctad.org/news/global-foreign-direct-investment-set-partially-recover-2021-uncertainty-remains ("FDI flows plunged globally by 35% in 2020, to $1 trillion from $1.5 trillion the previous year").

[50] Abhishek Saurav, *The Impact of COVID-19 on Foreign Investors: Evidence from the Second Round of a Global Pulse Survey,* WORLD BANK (Oct. 6, 2020), https://blogs.worldbank.org/psd/impact-covid-19-foreign-investors-evidence-second-round-global-pulse-survey ("Over 90 percent reported experiencing some adverse effects in the period . . . . More than 80 percent of MNEs saw their net income decline from what they would have expected without COVID-19").

unwanted foreign investment and control.[51] In March 2020, the President of the European Commission ("Commission") highlighted the risk of Europe losing strategic assets as a result of predatory acquisitions and encouraged member states to restrict foreign investment in critical assets.[52] Nine European Union ("EU") leaders signed a joint letter to the president of the Commission stating the need for member states to "make sure . . . no strategic assets fall prey of hostile takeovers during this phase of economic difficulties."[53] By the same token, when Australia announced forthcoming reforms to its FDI screening regime following the pandemic, the Australian government stated that enhanced national security review of sensitive acquisitors was necessary to ensure that foreign investments remained non-contrary to the country's national interest.[54]

IV. Responsive Measures

Since the beginning of 2020, at least thirty countries have introduced new FDI screening policies or strengthened their existing

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[51] Kenner, *supra* note 3 ("Concern over FDI is nothing new, but the Covid-19 pandemic has made the situation more urgent. FDI screening becomes critical when, as a result of a post-pandemic economic slowdown, European companies are systematically weakened, thus creating a one-off opportunity for foreign investors to acquire such assets at cheapened prices.").

[52] *Id.* ("In March this year [2020], concerned by how Covid-19 might impact the FDI landscape, Commission President Ursula Von der Leyen highlighted the risk of Europe losing strategic assets as a result of predatory acquisitions; she encouraged Member States both to use existing powers to restrict investment in critical assets and to adopt the implementation of the investment screening regulation ahead of its formal entry into force in October.").

[53] *Id.*

[54] Press Release, The Treasury of the Australian Government, Major reforms to Australia's foreign investment framework (June 5, 2020), https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/major-reforms-australias-foreign-investment-framework ("The comprehensive changes being announced today deal with [*inter alia*] national security risks, ... Importantly, these reforms preserve the underlying principles of our system: that Australia welcomes foreign investment for the significant benefits it provides but also ensures that investments are not contrary to the national interest.").

FDI screening policies.[55] Many of these measures surround certain sectors like telecom, technology, infrastructure, and raw materials, as these are considered critical to the proper protection and functioning of a country.[56] In addition, shortages of PPE for healthcare workers and restrictions on exports of medical equipment prompted state actors to add pharmaceutical and medical manufacturing sectors to the list of critical sectors.[57] Countries also lowered the monetary and acquisition percentages required to trigger screening of a particular investment.[58] The specific responsive measures enacted by Australia, the European Commission, France, and Germany are outlined in detail below.

In Australia, the Foreign Acquisitions and Takeovers Act of 1975 ("FATA") allows the Treasurer of Australia's Foreign Investment Review Board ("FIRB") to review foreign investment proposals that meet certain criteria.[59] The Treasurer has the power to block foreign investment proposals or apply conditions to how the

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[55] Evenett, *supra* note 4 ("Since 2019 at least 30 governments have introduced or strengthened policies that screen foreign investments ostensibly on national security grounds.").

[56] *Id.* at 4 ("The measures were concentrated in a relatively few number of sectors. The [Organisation for Economic Co-operation and Development 1985 follow-up] report observes 'the majority of such measures are found in sectors such as defence products, maritime transportation, communications (broadcasting), and energy production.'").

[57] *See* Müller & Hessing, *supra* note 6 ("The threshold for a notification obligation and a screening right on the part of the [Federal Ministry for Economic Affairs and Energy] is being lowered to 20% of the voting rights (as opposed to 25%) for the newly controlled industries and the medical sector.").

[58] *See* Press Release, The Foreign Investment Review Board of the Australian Government, Changes to foreign investment framework (March 29, 2020), https://firb.gov.au/about-firb/news/changes-foreign-investment-framework-0 ("Following the Treasurer's announcement of Sunday, 29 March 2020, the threshold amounts which apply in determining whether particular foreign investments made on or after 10:30 pm (AEDT) Sunday, 29 March 2020 are subject to Australia's foreign investment framework are now $0."); *see also* Müller & Hessing, *supra* note 6 ("The following regulations have been substantially amended: . . . Reduction of the relevant thresholds for the notification obligation to 20% of the voting rights for certain cases . . . .").

[59] Press Release, The Treasury of the Australian Gov't, *supra* note 7, at 2 ("The [Foreign Acquisitions and Takeover] Act allows the Treasurer to review foreign investment proposals that meet certain criteria.").

way proposals are implemented to ensure that they are not contrary to Australia's "national interest."[60] Although the term "national interest" is not defined in FATA, FIRB considers the following factors in all sectors to determine whether an investment is contrary to the national interest: national security, competition, impact on government policies (including tax), impact on the Australian economy and community, and the character of the investor.[61]

Prior to March 2020, the Australian government made it clear that it openly welcomed FDI.[62] In a speech given during the 2019 Sino-Australian Investment and Financing Forum, the Chair of FIRB stated, "As a relatively small open economy, we rely on foreign investments to fill the gap between domestic savings and investment. . . . This injection of foreign capital provides additional investment in the Australian economy than would otherwise be possible."[63] Until the beginning of 2020, Australia imposed various acquisition thresholds that would trigger the need for foreign investors to obtain approval before acquiring a "substantial interest" in an Australian entity.[64] For investments in non-sensitive sectors, the review threshold was twenty percent or more of an Australian entity valued above $266 million, a relatively large stake compared to the traditional ten percent stake commonly considered to trigger a "direct investment."[65]

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[60] *See* Press Release, The Foreign Inv. Rev. Bd. Of the Australian Gov't, *supra* note 6 (clarifying the new threshold amounts and that application screening times could take up to six months); *see also* Müller & Hessing, *supra* note 6 (discussing Germany's review process for foreign investment screening).

[61] Press Release, The Treasury of the Australian Gov't, *supra* note 7, at 9–10 (highlighting each of these as subsection headings and briefly discussing these "[n]ational interest factors in all sectors.").

[62] David Irvine AO, Chair, Foreign Inv. Rev. Bd., Address to the Sino-Australian Investment and Financing Forum 2019 (Nov. 6, 2019), https://firb.gov.au/about-firb/news/address-mr-david-irvine-ao-firb-chair-sino-australian-investment-and-financing (listing facts that showcase the great value Australia places on foreign investments because it increases jobs).

[63] *Id.*

[64] Press Release, The Treasury of the Australian Gov't, *supra* note 7, at 3 (defining a "substantial interest" as at least twenty percent in some sectors and lower in other sensitive sectors and requiring review for any investments over these thresholds).

[65] *Id.* ("Foreign persons must get approval before acquiring a substantial interest (at least 20 per cent) in an Australian entity that is valued above $266 million.").

Before COVID-19, FIRB had already identified sensitive sectors triggering a heightened review. These included industries like media, telecommunications, and defense and military-related industries.[66] Automatic review of investments in these areas was generally triggered by a five to ten percent investment stake, with the value of the investment also reduced substantially.[67]

A. Following the Pandemic

On March 29, 2020, Australia enacted temporary changes to its FDI screening laws ("March Reforms").[68] These changes made any proposed foreign investment into Australia subject to approval by FIRB, regardless of the value of the foreign investment or the nature of the foreign investor.[69] This is a temporary change, remaining in place only for the duration of the pandemic.[70] In clarifying its reasoning for subjecting all foreign investments to FIRB approval, the government stated that the change was necessary because "transactions that would otherwise have required screening by FIRB (i.e. be ordinarily of a higher value but for the COVID-19 crisis) may no longer trigger FIRB assessment due to the artificially low values attributed to such transactions primarily as a result of the COVID-19 crisis."[71] In a letter to The Hon. Josh Frydenberg MP, former Treasurer of Australia, David Irvine, former Chair of FIRB,

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[66] *Id.* at 9 (identifying these sectors).
[67] *Id.* at 4 (requiring review after at least a five percent investment in media business and at least a ten percent investment in agribusinesses).
[68] Press Release, The Foreign Investment Review Board of the Australian Government, Changes to foreign investment framework (March 29, 2020), https://firb.gov.au/about-firb/news/changes-foreign-investment-framework-0 (FIRB advises the Australian Government and Treasurer on foreign investment policy).
[69] *Id.* (stating that the $0 threshold amount will apply to any foreign investment made on or after 10:30 pm (AEDT) on March 29, 2020).
[70] TREASURY AUSTL. GOV'T, FOREIGN INVESTMENT REFORMS (June 2020), https://treasury.gov.au/sites/default/files/2020-06/p2020-87595_0.pdf (outlining reforms to Australia's foreign investment review framework, particularly focusing on national security).
[71] John Tivey et. al., *Australian foreign investment approval measures in response to COVID-19 and other recent Australian foreign investment approval developments*, WHITE & CASE (May 21, 2020), https://www.whitecase.com/publications/alert/australian-foreign-investment-approval-measures-response-covid-19-and-other.

explained that the March Reforms were necessary in light of "concerns about the pressures facing Australian businesses and the potential for them to be sold to foreign interests without any government oversight, presenting risks to the national interest."[72]

On December 10, 2021, the Australian government announced permanent reforms that will enter into force once the economic effects of the pandemic have subsided and the March Reforms are lifted.[73] These reforms mark the most significant changes to FATA in more than twenty years.[74] First, foreign investors will be required to provide FIRB with notification of any investments in national security businesses and national security land, regardless of the value of the investments.[75]

The reforms give the Treasurer new power to "call-in" certain investments for review where national security risks emerge.[76] The Treasurer will also be given a new last-resort power to review investments on national security grounds that were not previously

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[72] FOREIGN INV. REV. BD., ANNUAL REPORT 2019–20 iv (2021), https://firb.gov.au/sites/firb.gov.au/files/2021-06/FIRB2019-20AnnualReport.pdf.

[73] TREASURY AUSTL. GOV'T, *supra* note 69 ("The government anticipates a smooth transition from the current temporary arrangements to the new system . . . .").

[74] Andrew Wheeler et al., *New Foreign Investment Laws in Place from 1 January 2021,* PWC AUSTRALIA (December 14, 2021), https://www.pwc.com.au/legal/publications/new-foreign-investment-laws.html (cautioning foreign investors to "carefully consider the scope of what constitutes a national security business and national security land under the new foreign investment laws . . . .").

[75] TREASURY AUSTL. GOV'T, *supra* note 69 (stating that the definition of a sensitive national security business will need to be narrowed for the purposes of the "new mandatory notification requirements that specifically deal with national security risks."); Wheeler, *supra* note 74 ("National security land broadly includes defence premises, land in which a national intelligence agency has an interest and land which the Treasurer declares to be national security land.").

[76] Andrew Wheeler et al., *Part 1 of exposure draft legislation released to give effect to key major reforms to Australia's foreign investment review framework,* PWC AUSTRALIA (Dec. 14, 2021), https://www.pwc.com.au/legal/publications/major-reforms-australian-foreign-investment-review-framework.html [https://perma.cc/U36D-XTH9] (naming three new national security test measures, among other measures).

notifiable under Australia's pre-COVID-19 FDI screening laws.[77] Finally, the reforms will provide the Australian government new and broad power to monitor, investigate, and enforce compliance with foreign investors.[78]

On June 21, 2021, FIRB released its 2019–2020 Annual Report detailing its FDI review from June 30, 2019 to June 30, 2020.[79] The Treasurer rejected three separate foreign investment applications during that time, out of 8,221 decisions made.[80] These rejections are notable, as it is rare for the Treasurer to reject an application and entirely prohibit an investment from proceeding;[81] from 2018–2019, only one application was rejected out of a total of 8,725 decisions made by FIRB.[82] Two of the three rejections in 2020 were investments into Australia's mining sector by Chinese steel and chemical producers, as they were deemed to be contrary to the national interest.[83]

Because one of the proposed investments was for a minority stake in an Australian company, its rejection possibly indicates a material change in FIRB's view "of what constitutes 'national interest' in instances where the Australian entity is a mere holding company." [84]These decisions may also be evidence of a more protectionist approach around regulating inbound foreign investment into critical sectors.[85] There is little doubt that in Australia, there is a

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[77] *Id.* (listing another measure in the exposure draft of the Foreign Investment Reform).
[78] *Id.* (describing key reforms such as "call-in" power, last resort power, notifiable national security actions, increased penalties, and registration of Foreign Ownership of Australian Assets).
[79] FOREIGN INV. REV. BD., *supra* note 72, at xi ("This Annual Report provides an insight into proposed foreign investment during an extraordinary year for Australia and the world.").
[80] *Id.* at 24 (reporting the number of applications in the chart by year).
[81] Tivey et al., *supra* note 70.
[82] *Id.* ("Firstly, it is rare for the Treasurer to reject an application, with the effect that an investment is prohibited from proceeding. In 2018-19, out of a total of 8,725 decisions made by FIRB, only one application was rejected (as the BGIA application was), with 670 applications withdrawn prior to a decision being made (as the Yibin Tianyi application was).").
[83] *Id.* ("The Treasurer has recently prohibited two proposed investments into Australian mining projects by foreign investors, both of Chinese origin.").
[84] *Id.*
[85] *Id.* ("The introduction of these new measures . . . indicate[s] a potential shift by the Australian Government to a more protectionist approach to foreign investment regulation . . .").

heightened degree of concern around the extent of Australia's reliance on foreign investment and the values at which critical domestic assets may be bought and sold during the pandemic and beyond.[86]

B. The European Union

1. *Prior to the Pandemic*

The Lisbon Treaty, entered into force in 2009, provides the EU with exclusive competence in the area of foreign direct investment as part of the EU's common commercial policy.[87] In March of 2019, the EU adopted Regulation 2019/452 ("2019/452"), "which established a framework for screening FDI into the EU from non-EU countries."[88] This regulation entered into force the following month.[89] Until that moment, the EU had maintained one of the world's most liberal regimes for FDI and had been one of its largest receivers of FDI.[90] The introduction of 2019/452 reflected a major shift in the Commission's view of FDI.[91] Jean-Claude Juncker, then

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[86] *Id.* ("There is no doubt that there is a heightened degree of community concern about foreign investment . . . and the values at which assets may be sold during the COVID-19 crisis . . .").
[87] Hallak Issam, *EU International Investment Policy: Looking Ahead,* EUR. PARL. (Feb. 28, 2020), https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729276 ("The Treaty of Lisbon entered into force on 1 December 2009, and . . . provides the legal basis for the EU's exclusive competence in the area of commercial policy . . . .").
[88] Federica Cristani, *HOW THE CORONAVIRUS CRISIS CHALLENGES INTERNATIONAL INVESTMENT (CUSTOMARY) LAW RULES: WHICH ROLE FOR THE NECESSITY DEFENSE?*, 53 CASE W. RSRV. J. INT'L L. 89, 95 (2021).
[89] JÜRGEN BENINCA & NICOLAS BRICE, SCREENING OF FOREIGN DIRECT INVESTMENTS IN THE EU UNDER THE NEW FDI REGULATION (2019), https://www.jonesday.com/en/insights/2019/04/screening-of-foreign-direct-investments ("The FDI Regulation will enter into force on 10 April 2019 . . .").
[90] Steffen Hindelang & Andreas Moberg, *THE ART OF CASTING POLITICAL DISSENT IN LAW: THE EU'S FRAMEWORK FOR THE SCREENING OF FOREIGN DIRECT INVESTMENT*, 57 COMMON MKT. L. REV. 1427, 1428 (2020) (describing the EU's FDI regime).
[91] *Id* at 1429 (characterizing use of FDI as increasingly political, as opposed to economic, strategy in EU).

President of the Commission, presented the regulation as a "trade defence [sic] instrument" that would better protect member states against FDI that "de-regulated" and "distorted" the EU's market.[92]

Prior to 2019/452, there was no comprehensive EU-level framework for screening FDI.[93] At the time this regulation was first proposed in 2017, only twelve out of the twenty-eight member states had a mechanism for screening FDI.[94] Each of these differed widely in design.[95] In a letter to the then trade commissioner, the French, German, and Italian governments asked the Commission to implement EU-level screening measures as a way to remedy the problems caused by the lack of coherence amongst member states.[96] 2019/452 was the Commission's attempt to provide member states with a common framework for screening foreign investments on the grounds of security or public order.[97]

Although 2019/452 marked the first time that the screening of FDI was regulated at the EU level, the regulation did not create a mechanism capable of issuing binding decisions or even forcing member states without screening mechanisms in place to establish

[92] *Id.* (observing that Juncker described 2019/452 as "trade defence instrument" against those who "'dump, de-regulate or distort the market.'").

[93] Peter Alexiadis, *Revisiting the State's Role in the Private Sector: Reflections on the EU's System of Checks and Balances in the Age of Covid-19*, 22 BUS. L. INT'L 21, 25 (2021) ("Prior to the adoption of the FDI Regulation, there was no comprehensive legal framework at EU level for the screening of FDI . . . .").

[94] *Id.* ("When the Commission presented its draft proposal for the FDI Regulation in September 2017, only 12 out of 28 Member States had a national mechanism for screening of FDI in place at the time.").

[95] *Id.* ("These national FDI screening mechanisms were not aligned, differing widely in their scope and in their design.").

[96] Hindelang & Moberg, *supra* note 88, at 1434 ("In a letter to the then Trade Commissioner Malmström, sent in February 2017, the French, German, and Italian governments jointly asked the Commission to implement FDI screening measures at the EU level . . . . The EP initiative . . . called for the Commission to come forward with a legislative proposal in order to remedy the problems caused by the lack of coherence and cooperation amongst the Member States.").

[97] Regulation 2019/452, of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79) 1, 2 ("The framework for the screening of foreign direct investments and for cooperation should provide Member States and the Commission with the means to address risks to security or public order in a comprehensive manner . . . .").

them.[98] Instead, the regulation acknowledges that each member state's FDI screening needs are different.[99] As such, 2019/452 focuses more on coordination and cooperation between member states, establishing a mechanism through which member states and the Commission can exchange FDI screening information.[100]

It also allows the Commission to participate in national FDI investigations by issuing opinions.[101] For example, any member state who screens FDI under its national rules must provide detailed transaction information to the Commission and the other member states, including the ownership structure and business activities of the buyer and seller.[102] The Commission may then issue an opinion on

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[98] JONES DAY, SCREENING OF FOREIGN DIRECT INVESTMENTS IN THE EU UNDER THE NEW FDI REGULATION 1(2019), https://www.jonesday.com/-/media/files/publications/2019/04/screening-of-foreign-direct-investments/screening_of_foreign_direct_investmentsv2.pdf ("It is the first time that the screening of foreign direct investments ("FDI") is regulated at European Union ("EU") level. . . . The FDI Regulation does not impose a robust EU-wide FDI screening mechanism capable of issuing binding decisions.").

[99] Regulation 2019/452, *supra* note 96, at 2 ("The framework for the screening of foreign direct investments and for cooperation should provide Member States . . . the means . . . to adapt to changing circumstances, while maintaining the necessary flexibility for Member States to screen foreign direct investments on grounds of security and public order taking into account their individual situations and national specificities.").

[100] Cristani, *supra* note 86, at 95 ("Such a framework aims to establish a cooperation mechanism where member states and the Commission can exchange information regarding the screening of FDI on the grounds of security and public order.").

[101] Michael J. Ulmer & Mirko von Bieberstein, *Changes to the German Foreign Direct Investment Control Regime Take Shape Amid the COVID-19 Crisis*, CLEARY GOTTLIEB (June 4, 2020), https://www.clearytradewatch.com/2020/06/changes-to-the-german-foreign-direct-investment-control-regime-take-shape-amid-the-covid-19-crisis/ ("[FDI regulation] allows Member States as well as the European Commission to participate in national foreign direct investment investigations, *inter alia*, by requesting information and issuing opinions.").

[102] JONES DAY, *supra* note 97 (contending that nations that do FDI screening have certain reporting requirements to the European Commission, including "the ownership structure of the buyer and the target, the value of the transaction, the business activities of both buyer and target, the Member States in which the buyer and target are active, the funding of the transaction, and the date of the transaction's scheduled or completed closing").

the transaction if it believes that the investment is likely to affect security or public order in more than one member state.[103] The regulation establishes similar review mechanisms for FDI not currently undergoing screening and FDI that is likely to affect projects of EU interest.[104]

In addition to establishing information sharing rules, 2019/452 provides a non-exhaustive list of factors that member states can take into account in determining whether a particular investment is likely to affect security or public order.[105] These include the effects of the investment on a member state's critical infrastructure including energy, transport, communication, and land. Other factors include the investment's effects on critical technologies, like cybersecurity and energy storage, and inputs necessary for security and public order.[106] 2019/452 also urges member states to consider whether the foreign investor is controlled by another country's government or is pursuing state-led programs.[107] The broad application of these terms brought a large number of transactions into the scope of the EU's FDI filing requirements.

2. *Following the Pandemic*

In March of 2020, the Commission released guidance that "asked EU member states to reinforce their" FDI screening mechanisms to avoid the pandemic leading to "'a loss of critical assets and technology.'"[108] The Commission noted that because of the pandemic, there could be an increased risk in the EU of attempts to

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[103] *Id.*("[T]he Commission may issue an opinion on the transaction to the Screening Member State, in case it considers that the FDI is likely to affect security or public order in more than one Member State, or that it has relevant information in relation to that FDI.").

[104] *Id.* (outlining the requirements for various aspects of FDI screening).

[105] Regulation 2019/452, *supra* note 96 (Providing that 2019/452 establishes factors for impact on security and public order including critical infrastructure, critical technologies and dual-use items, the supply of critical inputs, access to sensitive information, and freedom and pluralism of the media among others).

[106] *Id.*

[107] *Id.*

[108] Victoria Régis, *COVID-19: Control of Foreign Direct Investments in France,* MORGAN LEWIS (May 7, 2020), https://www.morganlewis.com/pubs/2020/05/covid-19-control-of-foreign-direct-investments-in-france-cv19-lf [https://perma.cc/8XJN-3WVC].

acquire healthcare capacities or related industries via FDI.[109] The Commission urged EU member states to preserve and share these "precious capacities" within the EU's single market.[110] The guidance stressed that member states' FDI screening regimes needed to account for COVID-19's impact on the EU as a whole, with a view of ensuring continued capacities of critical industries well beyond the healthcare sector.[111]

C. France

1. Prior to the Pandemic

Similar to Australia, France's FDI screening regime was born from the general principle that financial operations between France and foreign countries are unrestricted, except in cases where a foreign company acquires operations in sensitive sectors or invests in activities that are likely to jeopardize public order, public safety, or national defense interests.[112] France aims to find a balance between

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[109] Eur. Comm'n*, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)*, C(2020) 1981 final (Mar. 25, 2020), https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf ("In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment.").

[110] *Id.* ("The COVID-19 outbreak has highlighted the need to preserve and enhance the sharing of such precious capacities within the single market, as well as with those who need them elsewhere in the world.").

[111] *Id.* ("In this context, acquisitions of healthcare-related assets would have an impact on the European Union as a whole.").

[112] *Foreign Direct Investment Screening in France,* MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES (April 30, 2020), https://www.tresor.economie.gouv.fr/Articles/5ed19b2a-8ff9-40bf-88a8-172679985561/files/fa02c7b0-bffd-4898-920a-05d30490000b [https://perma.cc/KU6R-6ZXZ] ("EXCEPTION: Some operations might be subject to prior authorization of the Minister in charge of Economy . . . when the company acquired operates in sensitive sectors [and] activities at stake are likely to jeopardise public order, public safety or national defence interests.").

ensuring fair competition and safeguarding the country's most vulnerable and critical sectors.[113] Article L. 151-3 of the French Monetary and Financial Code requires that certain foreign investments in France receive prior authorization.[114] Before COVID-19, all foreign investments were subject to authorization by the French Ministry of Economy and Finance (FMEF) if they involved activities in the exercise of public authority, that could be harmful to public order, public security, or the interests of national defense, or were activities related to research, production, or marketing of arms, ammunition, explosives, and biotechnology.[115] The FMEF would then "either approve, refuse, or conditionally approve" the investment under conditions designed to continue the line of business, protect public health, protect the integrity, security, and continuity of the supply chain, or honor contractual obligations of the target company.[116]

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[113] Press Release, Ministère De L'Économie et Des Finances, The French Government's Trade Policy (June 2019), https://www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/the-french-government-s-trade-policy/ [https://perma.cc/9GJP-2A67] ("Therefore France defends, alongside its partners, provisions ensuring fair competition and also encourages the introduction of safeguard clauses or adjustment mechanisms so as not to destabilize the most vulnerable sectors.").

[114] Dr. Peter Veranneman & Alberto Salvadè, *Foreign Direct Investment in Times of the COVID-19 Pandemic*, BIRD & BIRD (Aug. 2021), https://www.twobirds.com/en/news/articles/2020/global/foreign-direct-investment-in-times-of-the-covid-19-pandemic#France [https://perma.cc/X5Y8-HLQB] ("Restrictions apply to the sensitive sectors listed exhaustively by the French Monetary and Financial Code (art. L. 151-3 and R. 151-3) . . . . In principle, Foreign Investors are required to request an approval for an investment.").

[115] *Id.* ("Restrictions apply to the sensitive sectors listed exhaustively by the French Monetary and Financial Code (art. L. 151-3 and R. 151-3). This includes investments in activities (i) which may harm public order, public security or national defence interests, or (ii) are related to research, production or marketing of arms, ammunition, explosives and biotechnology.").

[116] Jones Day, *Foreign Investment Control Heats Up: A Global Survey of Existing Regimes and Potential Significant Changes on the Horizon*, JONES DAY (Jan. 2018), https://www.jonesday.com/files/upload/Foreign%20Investment%20Control%20Heats%20Up.pdf [https://perma.cc/QU8H-DJRA] (listing factors the FMEF would consider in approving any investment).

On December 31, 2019, following the EU's adoption of Regulation 2019/452, the French parliament tightened its FDI screening regime when it passed Decree No. 2019-1590. (the Decree).[117] Prior to the Decree, France's FDI screening regime ordinarily applied to non-EU investors in transactions giving the investor a 33.33% threshold or more of the voting rights in an entity governed by French law.[118] The Decree lowered that threshold to twenty five percent.[119] It simultaneously broadened the sectoral scope of its screening laws "by adding print and digital media, food safety, and critical technologies (e.g. cybersecurity, artificial intelligence, energy storage)" to the list of reviewed sectors.[120] Additionally, the Decree strengthened the French government's investigative powers and choices of sanctions in case of non-compliance with the foreign investment regulation.[121] How FMEF conducts its screening shifted, focusing "on ascertaining whether a foreign investor has links to a foreign government or public body" and obligating investors to provide information on any potential significant financial ties to a state or public body outside of the EU.[122] This pre-pandemic tightening of the country's FDI screening laws was largely driven by the adoption of 2019/452 and more general concerns that the EU's

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[117] UNCTAD INV. POL'Y HUB, *France Expands and clarifies its FDI screening regime,* UNCTAD (Dec. 31, 2019), https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3468/france-expands-and-clarifies-its-fdi-screening-regime#:~:text=The%20Decree%20No.,%2C33%25%20to%2025%25 [https://perma.cc/R47F-8HQS] ("The Decree No. 2019-1590 of 31 December 2019 expands and clarifies the foreign investment screening regime in France along with implementing a Ministerial Order. It enters into force on 1 April 2020.").
[118] *Id.* ("The new regulation lowers the thresholds triggering mandatory investment reviews, from 33,33% to 25%.").
[119] *Id.*
[120] *Id.* ("Furthermore, it broadens the sectoral scope of the mechanism by adding print and digital media, food safety, and critical technologies (e.g. cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies, and energy storage).").
[121] MULTI-JURISDICTION GUIDE FOR SCREENING OF FOREIGN INVESTMENTS, *supra* note 28, at 42 ("Finally, the adoption of the so-called PACTE law by the French Parliament in May 2019 has strengthened the French government's investigative powers and choices of sanctions in case of noncompliance with the foreign investment regulation.").
[122] UNCTAD, *supra* note 116.

collective security was "being jeopardized by the lack of a harmonized foreign investment control framework."[123]

2. *Following the Pandemic*

In response to the Commission's guidance, the FMEF announced two measures related to the control of FDI on April 29, 2020.[124] First, the French Minister of Economy, Bruno Lemaire, extended the FMEF's control of foreign investments in French companies engaged in strategic sectors and technologies by adding biotechnology, print and online press services for political and general information, food safety, energy storage, and quantum technology sectors to those subject to control.[125] In adding biotechnology to the list of "sensitive" sectors subject to authorization, the French government explained that "with regard to biotechnologies, the challenge of protecting public health is sometimes more distant and prospective."[126] Second, Lemaire temporarily lowered the non-EU investor threshold from twenty five percent to ten percent for certain publicly listed companies.[127] The French government explained that publicly listed companies

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[123] John Adebiyi et al., *Foreign Investment Control Reforms in Europe,* SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Jan. 17, 2019), https://www.skadden.com/insights/publications/2019/01/2019-insights/foreign-investment-control-reforms-in-europe [https://perma.cc/YZ3P-WK28].
[124] Régis, *supra* note 107 ("On April 29, 2020, Bruno Lemaire, the French Minister of the Economy, announced that the French government would be extending its control of foreign investments in French companies . . .[t]hese two amendments to the French FDI screening regime supplement a series of other changes . . . .").
[125] *Id*. (listing the areas in which control would be expanded to).
[126] Nicolas Brice & Dr. Jürgen Beninca, *France Ramps up Foreign Investment Regulation in the COVID-19 Era*, JONES DAY (May 2020), https://www.jonesday.com/en/insights/2020/05/france-ramps-up-foreign-investment-regulation-in-the-covid19-era [https://perma.cc/4N5F-T6WN].
[127] Régis, *supra* note 107 ("[The French government] lower[ed] temporarily the threshold which triggers the screening of investments in listed companies engaged in sensitive businesses or activities falling within the scope of the screening regime by investors from non-EU countries from 25% of the voting rights of the French company to 10%.").

sometimes reflect "dispersed ownership," and that "minority shareholdings can be destabilizing if unfriendly."[128]

"Reflecting heightened scrutiny over foreign acquisitions, France's first publicly announced refusal of FDI authorization" occurred in 2020.[129] On December 18, 2020, Lemaire officially vetoed the proposed acquisition of a French optronic technologies firm, Photonis, by the U.S. based Teledyne.[130] Notably, "Teledyne is an important business partner to France and employs 850 people in the country."[131] The parties had been negotiating for over a year.[132] Florence Parly, the French Minister for the Armed Forces, stated that "the decision to veto the proposed transaction was motivated by the necessity to protect and guarantee French economic and industrial sovereignty in the defense sector."[133] She further noted that the conditions for the proposed acquisition of Photonis did not adequately address those requirements.[134] The veto is unusual considering the historically close strategic defense relationship between France and the United States.[135] Usually, foreign investment blocks based on national strategic considerations are targeted at "acquirers from countries with which the FDI authorities are not strategically aligned."[136] This decision, like those in Australia, may

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[128] Brice & Beninca, *supra* note 125.
[129] *Id.*
[130] Pascal Bine & Ernst-Wesley Laine, *France Extends COVID-19 Interim Rules on Foreign Investments and Vetoes Teledyne's Acquisition of Photonis*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 23, 2020), https://www.skadden.com/insights/publications/2020/12/france-extends-covid19-interim-rules [https://perma.cc/5AF7-TM9T] ("On December 18, 2020, the French authorities officially vetoed the proposed acquisition of Photonis, a leading French optronic technologies firm, by the U.S. group Teledyne.").
[131] *Id.*
[132] *Id.* ("The decision came after more than a year of negotiations . . . .").
[133] *Id.*
[134] *Id.* ("[T]he conditions for the proposed acquisition of Photonis did not address these requirements.").
[135] Nicola Bonucci et. al., *French Authorities Block U.S. Acquisition of French Company*, PAUL HASTINGS (Jan. 13, 2021), https://www.paulhastings.com/insights/client-alerts/french-authorities-block-u-s-acquisition-of-french-company [https://perma.cc/5M98-235U] (discussing how unusual the French veto was).
[136] *Id.*

be evidence of a more protectionist approach around regulating inbound foreign investment into critical sectors.[137]

D. Germany

1. Prior to the Pandemic

German FDI regulation "is based on the fundamental principle of free trade, allowing all economic transactions with foreign firms" so long as they are not "explicitly forbidden" by the country's FDI screening regime.[138] Like Australia and France, the Federal Ministry of Economics and Energy (BMWi) reviews the acquisition of German shares or assets by foreign buyers on a case-by-case basis.[139] The Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance provides the legal basis for the review.[140]

Prior to COVID-19, investments where a foreign buyer acquired control of at least twenty five percent of the voting rights of a German company were automatically reviewed.[141] That threshold dropped to twenty percent if the German company was active in certain sectors like health, agriculture and food extraction, or critical raw materials.[142] In 2018, the German government adopted

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[137] *See id.* (explaining the implications of France's decision).

[138] MULTI-JURISDICTION GUIDE FOR SCREENING OF FOREIGN INVESTMENTS, *supra* note 28, at 48.

[139] Veranneman & Salvadè, *supra* note 113, at 11 (stating that the BMWi is responsible for the verification of FDI's).

[140] *Investment Screening*, BMWK https://www.bmwi.de/Redaktion/EN/Artikel/Foreign-Trade/investment-screening.html [https://perma.cc/G3E8-YR3R] ("In order to prevent security risks, the Federal Ministry for Economic Affairs and Climate Action may review the acquisition of German firms by foreign buyers on a case-by-case basis.").

[141] Veranneman & Salvadè, *supra* note 113, at 11 ("The general (cross-sector) restrictions apply to all transactions through which a buyer directly or indirectly acquires control of at least 25 percent of the voting rights of a domestic company. . . .").

[142] *Id.* ("[T]his threshold is reduced to (i) 20 percent if the domestic company is active in the sectors of health, emerging technologies (e.g. satellite technology, artificial intelligence, drones, robotics), information technology-products, airlines, quantum computing or communications, smart-meter-gateways, agriculture and food or extraction of critical raw materials. . . .").

amendments to its screening regime that further lowered thresholds to ten percent if the German company was active in sectors like telecommunications, media, and security.[143] BMWi review would consider whether the investment posed a threat to the "essential security interests" of Germany.[144] In determining whether to approve a foreign investment, BMWi considers whether the investment will have a likely effect on German public order or security.[145] The twenty-seven factors considered include whether the German company operates critical infrastructure, develops critical components, contributes to the formation of public opinion through media, or extracts, processes, or refines raw materials.[146]

2. Following the Pandemic

Like France, Germany amended its FDI screening regime in May of 2020 to align it with the Commission's guidance.[147] The

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[143] *Id.* ("T]his threshold is reduced to . . . (ii) 10 percent if the domestic company is active in particularly sensitive sectors (e.g. operators of critical infrastructures like energy, water, food, telecommunications, cloud computing, telematics, media, security related communication infrastructure or other particularly security-relevant services).").

[144] *Investment Screening*, *supra* note 138 ("Any acquisition of a company by foreign investors whereby these acquire ownership of at least 10% of the voting rights of a company resident in Germany can be subjected to such review. The review considers whether the respective acquisition poses a threat to essential security interests of the Federal Republic of Germany.").

[145] Außenwirtschaftsverordnung [AWV] [Foreign Trade and Payments Ordinance], Aug. 2, 2013, Federal Law Gazette I at 28 (Ger.) ("The Federal Ministry for Economic Affairs and Energy can assess whether there will be a likely effect on the public order or security of the Federal Republic of Germany . . . establishing a framework for the screening of foreign direct investments . . . if a non-EU resident directly or indirectly acquires a domestic company or directly or indirectly acquires a stake within the meaning of Section 56 in a domestic company.").

[146] *Id.* at 29 (listing the above factors among several other factors that are considered in determining the effect on public order or security).

[147] Ulmer & von Bieberstein, *supra* note 100 ("The amendment of the FDI Regime is primarily envisaged to align it with the new EU Investment Screening Regulation (Regulation), which came into force on April 11, 2019 and will take full effect as of October 11, 2020."); Dr. Maria Brakalova, *Covid-19 speeds up tightening of the German foreign direct investment rules,* DENTONS, https://www.dentons.com/en/insights/articles/2020/may/5/covid-19-speeds-

amendments added five new sensitive sectors.[148] As a result, prior BMWi authorization is required for foreign acquisitions of at least ten percent stock in German companies developing or manufacturing personal protective equipment, medications pursuant to Section 2(1) German Medicinal Products Act, medical goods for life-threatening and highly contagious infectious diseases, or in-vitro diagnostics for life-threatening and highly contagious infectious diseases.[149] The amendments also add the provision of services for the operation of governmental communication infrastructure as a sensitive sector.[150]

In addition to expanding the scope of its review, the amendments increase BMWi's power to investigate the foreign investor involved in the potential acquisition.[151] BMWi now assesses "whether the investor is directly or indirectly controlled by a foreign government or institution," "whether the investor was involved in activities that may have had a detrimental effect on Germany's public order or security," and whether the investor has been involved in activities that constitute criminal conduct.[152] As a result, BMWi can

up-tightening-of-the-german-foreign-direct-investment-rules [https://perma.cc/E83D-QQ2T] (The respective draft amending the AMW was published by the Federal Ministry of Economics and Energy on April 28, 2020, adopted by the German Government on May 20, 2020 and it came into force on June 3, 2020.").

[148] Ulmer & von Bieberstein, *supra* note 100.

[149] *Id.* ("The Revised AWV defines five new sensitive sectors. As a result, the acquisition by a non-EU/non EFTA investor of at least 10% of the voting rights in a German entity that carries out any of the respective activities must be notified to the BMWi. As a direct reaction to the COVID-19 pandemic, the following activities in the medicinal industry will be addressed: Development or manufacture of personal protective equipment . . . . Development, manufacture or distribution of pharmaceutical . . . . Development or manufacture of medicinal products for the diagnosis, prevention, monitoring, prognosis or treatment of life-threatening and highly infectious diseases. Development or manufacture of medical devices for in-vitro diagnostics used to detect or monitor therapeutic measures in life-threatening or infectious diseases.").

[150] *Id.* ("In addition to these, and unrelated to the COVID-19 pandemic, the Revised AWV adds the provision of services for the operation of governmental communication infrastructure (including maintenance, repair, installation and facility management) as a sensitive sector.").

[151] *Id.* ("The broader scope of decision-relevant factors and a lowered review standard will allow the BMWi to investigate and intervene in foreign direct investments more easily and more discretionary.").

[152] *Id.*

now investigate and intervene in foreign direct investments more easily and with more discretion.[153] Foreign investment prohibitions by BMWi are extremely rare;[154] it prefers to work with foreign acquirers to reformulate their proposals so they may be approved by BMWi.[155] Although BMWi prohibitions are normally kept confidential, its decision in December, 2020 to prohibit the acquisition of communications technology company IMST GmbH by Chinese investor Addsino Co. Ltd. was accidentally leaked.[156] IMST is active in the research and production of radio systems and antennas, and has experience in communications technology relevant for military applications.[157] According to the leaked prohibition document, BMWi's main concern was that the acquisition endangered the supply of satellite and radar communications equipment to German Armed Forces.[158] BMWi also worried about supplying China, a non-allied country, with important military equipment.[159] Because public funding made up forty percent of IMST's revenue, BMWi concluded that IMST's activities related "too closely to Germany's 'technological sovereignty'" to be sold.[160]

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[153] *Id.* (explaining BMWi's expanded powers).
[154] Sebastian Faust et. al., *This Time's for Real: German Government Prohibits Acquisition of a Tech Company by a Chinese Acquirer*, JD SUPRA (Dec. 4, 2020), https://www.jdsupra.com/legalnews/this-time-s-for-real-german-government-94391/ [https://perma.cc/JJE7-6AEC] (discussing how a prohibition decision under German FDI is not only rare but confidential and not published).
[155] *Id.* (discussing how prohibition approaches have been rarely used because mitigation agreements are very common in German FDI procedures and are allowed to address a variety of concerns in previous transactions).
[156] *Id.* (explaining how the entire draft prohibition decision which prohibited a planned acquisition by Chinese investors has been leaked).
[157] *Id.* ("IMST is active in research and production the area of radio systems . . . [and] antennas . . . . It also has key know-how in the fields of satellite/radar communication and 5G technology that is also relevant for military applications.").
[158] *Id.* ("IMST . . . . has key know-how in the fields of satellite/radar communication . . . that is also relevant for military applications. Hence, the BMWi's main concern was that the acquisition endangered the supply to the German Armed Forces.").
[159] *Id.* ("The flipside of this concern was the supply of armament to China as a non-allied country.").
[160] *Id.*

V. The United States – An Outlier

A. Prior to the Pandemic: CFIUS and FIRRMA

At the end of 2019, inflows of FDI to the United States stood at roughly $4.5 trillion.[161] This made the United States the largest single recipient of FDI in the world.[162] U.S. inbound FDI stock almost doubled between 2010 and 2019, suggesting that foreign companies were increasingly eager to establish and expand operations within the United States.[163] This eagerness was driven in large part by the fact that, besides being the largest economy in the world, the United States remained an innovative and stable market.[164]

Further, the United States government had made it clear that it openly welcomed foreign investments. In a keynote address at the 2016 SelectUSA Investment Summit, President Barack Obama stated, "nowhere in the world and never in history has there ever been a better place [than the United States] to grow your business . . . never before have we had such high-standard free-trade agreements that level the playing field."[165] The United States generally imposes

[161] Amin Mohseni-Cheraghlou, *Foreign Direct Investment: A new strategy for the United States*, ATL. COUNCIL (Aug. 5, 2021), https://www.atlanticcouncil.org/blogs/foreign-direct-investment-a-new-strategy-for-the-united-states/ [https://perma.cc/J7WK-WU6T] ("As of 2019… foreign FDI inside the United States… stood at $4.5 trillion.").
[162] *Id.* ("[M]aking the United States the largest recipient of FDI in the world.").
[163] *Id.* ("[T]he US inbound FDI stock almost doubled between 2010 and 2019.").
[164] *Id.* ("[F]oreign companies have been relatively more eager in establishing and expanding operations inside the United States than US companies have been in investing abroad. This is because besides being the largest economy in the world, the United States has continued to remain an innovative and stable market with a favorable business climate for foreign entities to operate in.").
[165] Barack Obama, U.S. President, Remarks by the President at the 2016 SelectUSA Investment Summit (June 20, 2016).

few restrictions on, or regulatory oversight of, FDI.[166] In 2020, the Organisation for Economic Co-operation and Development (OECD) "ranked the United States slightly above the OECD average on its Foreign Direct Investment Regulatory Restrictiveness Index."[167] This index measures, among other things, a country's foreign equity restrictions and other restrictions on the operation of foreign enterprises.[168]

FDI screening in the United States is handled by CFIUS, the interagency committee authorized to review certain transactions involving foreign investment in the United States.[169] CFIUS operates under Section 721 of the Defense Production Act of 1950.[170] Following World War II and the oil shock of the early 1970s, fears that wealthy Organization of the Petroleum Exporting Countries (OPEC) countries would use petrodollars to buy strategic U.S. assets led President Ford to issue an Executive order creating CFIUS in

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[166] Aimen Mir et. al., *The Foreign Investment Regulation Review: USA*, L. REVS. (Oct. 17, 2021), https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/usa#footnote-058 [https://perma.cc/F5LW-49VG] ("The United States has long favoured foreign investment and, historically, the US government has imposed few restrictions on foreign investment inflows.").

[167] *Id.*; *see also OECD Foreign Direct Investment Regulatory Restrictiveness Index,* OECD (2020), https://goingdigital.oecd.org/en/indicator/74 (depicting a chart showing OECD ranking).

[168] Aimen Mir et. al., *supra* note 165 ("The index measures four types of statutory restrictions on foreign direct investment: (1) foreign equity restrictions . . . and (4) other restrictions on the operation of foreign enterprises."); *OECD Foreign Direct Investment Regulatory Restrictiveness Index*, *supra* note 166.

[169] *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius [https://perma.cc/H6HL-K9TF] ("CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.").

[170] *Id.* ("CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended (section 721), and as implemented by Executive Order 11858, as amended, and the regulations at chapter VIII of title 31 of the Code of Federal Regulations."); Defense Production Act of 1950 § 721, 50 U.S.C. § 4565 (as amended).

1975.[171] The Executive order tasked CFIUS with supporting international investments and ensuring they were consistent with the protection of national security.[172] Since then, CFIUS's has remained focused on investigating and reviewing foreign transactions that the Committee believes threaten to impair the national security of the United States.[173] To exercise authority under CFIUS, the President must "conclude that other U.S. laws are inadequate or inappropriate to protect national security" and have "'credible evidence' that the foreign interest exercising control might take action that threatens to impair the United States' national security."[174]

In contrast to the many countries who have passed FDI legislation in response to COVID-19, the United States "has not announced additional restrictions on the acquisitions of U.S. businesses."[175] The United States' most recent FDI-related legislation is FIRRMA, which President Donald Trump signed into law on August 13, 2018.[176] FIRRMA is the most significant change to CFIUS's foreign investment review process in over a decade.[177] Generally speaking, FIRRMA strengthens CFIUS in an effort to allow it to address national security concerns more effectively and contains tools that allow CFIUS to more effectively target emerging

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[171] Thomas Feddo, Assistant Sec'y, U.S. Dep't of the Treasury, Keynote Address at the American Conference Institute's Sixth National Conference on CFIUS (July 15, 2020) ("The oil shock that made OPEC countries wealthy led to fears that petrodollars might be used to buy strategic U.S. assets.").

[172] Exec. Order No. 11858, 40 Fed. Reg. 20,263 (May 7, 1975) at 20,263 ("The Committee shall . . . review investments in the United States national interests.").

[173] U.S. DEP'T TREASURY, *supra* note 168 ("[determining] the effect of [foreign] transactions on the national security of the United States.").

[174] JAMES K. JACKSON & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF10952, CFIUS REFORM UNDER FIRRMA (2020).

[175] *COVID-19: Impact on Governmental Foreign Investment Screening*, BAKER MCKENZIE (Mar. 31, 2020), https://insightplus.bakermckenzie.com/bm/mergers-acquisitions_5/international-covid-19-impact-on-governmental-foreign-investment-screening_1 [https://perma.cc/8J5M-SMM].

[176] Bressie & Friedman, *supra* note 9, at 1 ("On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act ("FIRRMA") . . . . ").

[177] *Id.* ("FIRRMA represents the most significant change to the foreign investment review process of the interagency Committee on Foreign Investment in the United States ("CFIUS") in over a decade.").

national security threats from foreign investors.[178] In justifying the modernization of CFIUS, the Treasury Department points out that both the nature of foreign investments in the United States and the national security landscape have shifted significantly since CFIUS was last updated more than a decade ago.[179] In a statement released after FIRRMA was passed into law, then U.S. Treasury Secretary Steven T. Mnuchin stated, "[F]IRRMA delivers much-needed reforms that will ensure CFIUS has the tools necessary to identify, examine, and address national security concerns arising from foreign investment. America is a vibrant place to invest, and better protecting critical U.S. technology and infrastructure will ensure it stays that way."[180]

Most significantly, FIRRMA expands CFIUS's jurisdiction to cover certain non-controlling, yet non-passive, investments made by foreign people.[181] FIRRMA gives CFIUS and the President power to review and take action against non-controlling acquisitions made by foreign persons in "TID U.S. businesses," defined as businesses operating in one of three "TID" sectors: Critical Technology, Critical Infrastructure, or Sensitive Personal Data.[182]

A TID U.S. business is a "U.S. business that produces, designs, tests, manufactures, fabricates, or develops . . . 'critical technologies.'"[183] Critical technologies include defense articles and

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[178] *See id.* at 1–2 (examining FIRRMA's key provisions and how they affect CFIUS and its control/powers).
[179] *FIRRMA FAQs,* U.S. DEP'T TREASURY, https://home.treasury.gov/system/files/206/FIRRMA-FAQs.pdf [https://perma.cc/S4U8-6R38] (explaining the necessity of updating and modernizing CFIUS through FIRRMA since the last change in 1950).
[180] *See* Press Release, Steven T. Mnuchin, Secretary, Dep't Treasury, Treasury Secretary Mnuchin Statement on Signing of FIRRMA to Strengthen CFIUS (Aug. 13, 2018), https://home.treasury.gov/news/press-releases/sm457 [https://perma.cc/ZM3R-J64L].
[181] DAVID MORTLOCK ET AL., EXPANDED CFIUS JURISDICTION UNDER FIRRMA REGULATIONS: AN OVERVIEW, WILLKIE FARR & GALLAGHER LLP (2020) ("CFIUS's authority expands to include non-controlling investments made by foreign persons . . . .").
[182] *See id*. at 1.
[183] Ann M. Nagele et. al., *FIRRMA Regulations Finalized*, PERKINS COIE (Feb. 12, 2020), https://www.perkinscoie.com/en/news-insights/firrma-regulations-finalized.html [https://perma.cc/S2RW-WHAP].

services as set forth in the International Traffic in Arms Regulations, certain nuclear-related items, certain biological agents capable of causing consequences like death and disease, and technologies essential to the national security of the United States.[184] To fall under review, the foreign investor's governance rights must be related to the use, development, acquisition, safekeeping, or release of critical technologies.[185] Critical infrastructure is defined as infrastructure that is so vital to the U.S. that its incapacity would have a debilitating impact on national security.[186] This includes, but is not limited to, certain telecommunications networks, certain systems for the generation of power, fiber optic cables that directly serve certain U.S. military installations, and all airports and maritime ports.[187] In addition, non-controlling foreign acquisitions of U.S. business involved, directly or indirectly, in the maintenance or collection of sensitive data that can be used to distinguish or trace an individual's identity are subject to review by CFIUS.[188] FIRRMA also allows CFIUS to review transactions where a foreign government has a

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[184] 31 C.F.R. § 801.204 (2018) (defining critical technologies under International Traffic in Arms Regulations to include defense articles or services under § 801.204(a), nuclear-related items mentioned under §801.204(b)(1), specially designed and prepared nuclear equipment under §801.204(c), nuclear facilities, equipment, and material covered by 10 CFR part 110 under §801.204(d), chemical and biological weapons under §801.204(b)(1), and "reasons relating to national security" under §801.204(b)(1)).

[185] *See* MORTLOCK ET AL., *supra* note 180, at 4 ("The foreign investor governance rights would need to pertain to the "use, development, acquisition, safekeeping, or release" of critical technologies.").

[186] *Id.* at 5 ("Critical infrastructure is defined as systems or assets that are so vital to the United States that the 'incapacity or destruction of such systems or assets would have a debilitating impact on national security.'").

[187] *See* JALINOUS ET AL., *supra* note 12 ("The regulations define [critical infrastructure] with precise bright lines – but with many such lines – in a detailed appendix that identifies *28 types* of infrastructure. These include: telecoms . . . power . . . defense industrial base . . . ports.").

[188] *See* MORTLOCK ET AL., *supra* note 180, at 14. ("FIRRMA added the following six factors, . . . [including] (5) the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of United States citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security.").

substantial interest in a U.S. company.[189] Finally, FIRRMA's final regulations give CFIUS jurisdiction over transactions involving the purchase or lease of real estate that is either located within or in close proximity to an air or maritime port, "or that provides the foreign person the ability to collect intelligence on or surveil national security activities at sensitive US government facilities."[190]

In addition to an expanded jurisdictional reach, CFIUS's final regulations also expand CFIUS's mandatory filing requirements.[191] Foreign parties investing in a TID U.S. business that produces, designs, tests, or develops critical technologies are required to file an abbreviated notification with CFIUS, who then has thirty days to review the declaration before deciding whether a national security review or investigation is necessary.[192] The same requirement holds for investments by foreign parties with a substantial foreign government ownership in a TID U.S. business.[193] "For all other transactions within CFIUS's jurisdiction, submission to CFIUS is voluntary."[194] That being said, CFIUS can "independently initiate a review, or ask foreign parties to submit a voluntary submission" for any transaction under its jurisdiction.[195]

While these changes generally apply to all foreign parties, certain states and investors are exempted. CFIUS does not provide criteria for how it selects excepted countries, but the regulations state that CFIUS must have identified the country as "eligible" and made a determination that the country has established and is effectively utilizing a robust process to analyze national security risks in foreign investment and facilitate coordination with the U.S. on matters

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[189] *See id*. at 9 ("The final regulations expand the mandatory filing requirement in the Pilot Program to include investments or acquisitions giving a foreign government a "substantial interest" in a TID U.S. business.").
[190] *See* JALINOUS ET AL., *supra* note 12.
[191] Mortlock et. al., *supra* note 180, at 9. ("[F]inal regulations expand the mandatory filing requirement . . . .").
[192] Jackson & Cimino-Isaacs, *supra* note 173 ("Most firms can file a short-form declaration to CFIUS and receive an expedited review process . . . .").
[193] Mortlock et. al., *supra* note 180, at 9. ("[including] investments or acquisitions giving a foreign government a 'substantial interest' in a TID U.S. business.").
[194] Nagele et. al., *supra* note 182.
[195] *Id.*

relating to investment security.[196] To date, CFIUS has only identified Australia, Canada, and the United Kingdom as excepted.[197] Additionally, the commentary accompanying the regulations notes that these countries were chosen because of their "robust intelligence-sharing and defense industrial base integration mechanisms with the United States."[198]

The process for determining whether an investor is excepted is more complex and highly technical. In general, the foreign investor must be one of the following for the three years following the transaction's completion: a national of only excepted foreign states, a foreign government of an excepted foreign state, or "a foreign entity that is organized under the laws of an excepted foreign state or in the United States, has its principal place of business in an excepted foreign state or in the United States, and meets minimum thresholds for directors and observers, major stakeholders, and overall stakeholders."[199]

B. Following the Pandemic – Is FIRRMA Enough?

FIRRMA was passed long before the pandemic began, at a time where the possibility of experiencing a global pandemic, and the accompanying economic and societal shocks, were far from the minds of lawmakers. FIRRMA, embodies both fears of the U.S. military's dependence on critical technologies developed in the private sector and worries over international "economic espionage" as politically-motivated investments in the U.S. continue to grow.[200]

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[196] *Id.* ("[F]or a country to remain on the lists [of 'excepted foreign states'], CFIUS must determine that the country has a robust process to analyze national security risks posed by foreign investment and facilitate coordination with the United States on investment security.").

[197] Jalinous et. al, *supra* note 12 ("CFIUS identified Australia, Canada, and the United Kingdom as 'excepted foreign states.'").

[198] *See* Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed Reg. 3112, 3116 (Jan. 17, 2020) (to be codified at 31 C.F.R. pts 800, 801).

[199] Nagele et. al., *supra* note 182 (detailing criteria for determining whether a foreign investor is an "excepted investor").

[200] Jayden R. Barrington*, CFIUS Reform: Fear and FIRRMA, An Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 TRANSACTIONS: TENN. J. BUS. L. 77, 101–03 (2019) ("FIRRMA is the embodiment of frustrations felt by . . . the military's dependence on private sector developed critical technology . . . the initial worries over suspect

Congressional Reports address both the rise of foreign investment by state-owned enterprises and the fear that these enterprises are increasingly investing to meet strategic political objectives rather than for economic gain.[201] As such, FIRRMA and the final regulations released by CFIUS remain narrowly tailored to FDI that implicates issues of U.S. national security. "FIRRMA does not change CFIUS's core analysis of each transaction reviewed, which assesses the 'threat' posed by the foreign investor, the 'vulnerability' of the U.S. business or industry in question, and the national security consequences of combining that threat and vulnerability."[202]

Further, the term "national security" itself is narrowly defined. The Defense Production Act of 1950 instructs CFIUS and the President to consider the following factors, among others, when taking into account the requirements of national security: domestic production needed for projected national defense requirements, the control of domestic industries by foreign citizens as it affects the United States' ability to meet the requirements of national security, the transaction's effects on the sale of military goods to countries which pose a potential military threat to the United States' interests, and the United States' long-term need for energy and other critical resources.[203]

While it is clear that the Treasury believes FIRRMA has great potential to protect national security by vastly increasing CFIUS's foreign investment oversight, the pandemic and its economic effects have highlighted important yet vulnerable U.S. sectors that remain unprotected by CFIUS. Despite greatly expanding CFIUS's jurisdiction, FIRRMA and CFIUS's final regulations fail to

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OPEC investment have been replaced by skepticism over Chinese and Russian 'economic espionage' as politically motivated investment and trade secret theft in the United States continues to grow.").

[201] *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (2019) at 1, 8 ("Some Members questions CFIUS's performance and the way the Committee reviews cases involving foreign governments, particularly with the emergency of state-owned enterprises . . . respond to concerns of some that much of OPEC investments were being driven by political, rather than by economic, motives.").

[202] Jalinous et. al, *supra* note 12.

[203] Defense Production Act of 1950, 50 U.S.C. App. § 2170 (1950) (current version at 50 U.S.C. § 4565 (2018)) (listing the factors the President should take into account).

protect U.S. companies that develop and manufacture PPE, medications, medical goods, and in-vitro diagnostics for highly contagious diseases. The pandemic has exacerbated shortages of medical drugs and devices to a critical level in the United States. A recent report revealed that 99% of hospitals in the U.S. are facing challenges in obtaining the supplies they need to treat not only COVID-19, but many other diseases as well.[204] On top of domestic manufacturing shortages, labor shortages and international shipping disruptions resulting from the pandemic have only made it harder for patients to receive the medical goods they need.[205]

The need to protect domestic development and manufacturing of medical supplies through FDI screening is further supported by China's increased control of U.S. pharmaceutical supplies. Since the beginning of the pandemic, China has threatened to withhold key medical ingredients from dependent U.S. drug companies.[206] These ongoing shortages will only grow if foreign parties are able to acquire U.S. medical manufacturing companies as a way to supplement their own domestic shortages of medical supplies. Meanwhile, despite receiving significantly less FDI inflows

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[204] Dennis Thompson, *Supply Chain Issues Bring Shortages of Drugs, Devices to U.S. Hospitals*, U.S. NEWS & WORLD REP. (Nov. 4, 2021), https://www.usnews.com/news/health-news/articles/2021-11-04/supply-chain-issues-bring-shortages-of-drugs-devices-to-us-hospitals [https://perma.cc/U7F6-MQQD] ("Virtually all U.S. hospitals and health care systems (99%) have reported challenges in procuring needed supplies . . .").

[205] Kristen Hwang, *Supply Chain Woes Trigger Shortages of Critical Medical Devices,* CAL MATTERS (Nov. 22, 2021), https://calmatters.org/health/2021/11/medical-supplies-shortage-california/ [https://perma.cc/2UJ4-8SYB]. ("[M]any Californians are grappling with shortages of lifesaving medical supplies . . . California hospitals say medical supplies are more difficult to acquire now or are taking much longer to be delivered . . . . Increased purchasing of all consumer goods coupled with labor shortages, outdated port infrastructure, and prior distributions to shipping and manufacturing early in the pandemic have culminated in the offshore traffic jam.").

[206] Guy Taylor, *'Wake-Up Call': Chinese Control of U.S. Pharmaceutical Supplies Sparks Growing Concern*, WASH. TIMES (Mar. 17, 2020), https://www.washingtontimes.com/news/2020/mar/17/china-threatens-restrict-critical-drug-exports-us/ [https://perma.cc/83X8-S43T] ("As the war of words between China and the U.S. heats up, Chinese state media have raised the specter of using Beijing's pharmaceutical leverage to block critical components and supplies for dependent U.S. drug companies.").

than the Unites States, both France and Germany reacted quickly to enhance governmental control and oversight over FDI in domestic medical manufacturing companies.[207]

Similar issues have occurred with respect to domestic shortages of raw material. A recent Institute for Supply Management survey found that U.S. companies and their suppliers continue to struggle to meet increasing levels of demand, blaming wide-scale shortages of basic materials, rising prices, and difficulties transporting products.[208] These domestic shortages could lead many U.S. businesses to look internationally for basic supplies, only increasing the United States' dependency on countries like China for basic raw materials, electronic components, and fabricated metal products.

C. Recommendations

In light of the economic effects of the pandemic, it is clear that FIRRMA does not adequately protect the United States' critical sectors from foreign control. It is important for legislators to expand and strengthen CFIUS' FDI screening regulations by either working within FIRRMA's framework, amending the Defense Production Act of 1950, or passing new legislation.

First, CFIUS could theoretically prevent foreign acquisitions of U.S. medical development and manufacturing companies by characterizing the company as a TID U.S. business. This would most plausibly be done under CFIUS's jurisdiction over U.S. businesses

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[207] *See* Régis, *supra* note 107 ("Evidence is growing of a hardening of French public policy regarding the need for political control of acquisitions of French companies and other foreign direct investment (FDI) transactions."); Ulmer & von Bieberstein, *supra* note 100 (discussing Germany's new industrial policy, and the amendment of Germany's FDI Regime in particular).

[208] Lucia Mutikani, *U.S. Manufacturing Gains Steam; Raw Material, Labor Shortages Mounting,* REUTERS (June 1, 2021), https://www.reuters.com/world/us/us-manufacturing-sector-picks-up-may-work-backlogs-rising-ism-2021-06-01/ [https://perma.cc/HBC9-L5FR] ("The Institute for Supply Management (ISM) survey on Tuesday found companies and their suppliers 'continue to struggle to meet increasing levels of demand,' noting that 'record-long lead time, wide-scale shortages of critical base materials, rising commodities prices and difficulties in transporting products are continuing to affect all segments' of manufacturing.").

that design and manufacture critical technologies.[209] FIRRMA does not limit critical technologies to only those that are currently utilized by the military.[210] Congress tactfully avoided defining what technologies are considered critical, instead opting to outline a compilation of regularly-updated lists.[211] This was Congress' way of acknowledging the rapid pace of innovation and the shortfalls of a strict bright-line list that would quickly expire.[212] FIRRMA leaves additional room for those lists to expand by allowing CFIUS' chairperson to recommend additional technologies to add to one of the lists the legislation includes.[213] CFIUS could attempt to characterize the development and manufacturing of PPE, medical goods for highly contagious infectious diseases, and in-vitro diagnostics for highly contagious infectious diseases as critical technologies, effectively forcing foreign acquisitions of these products to be reviewed.

That being said, CFIUS's narrow focus on national security would make fitting these businesses within a stated list extremely challenging. For example, while the United States Munitions List references biological agents, it does so in reference to chemical agents deployed in warfare such as mustard gas and nerve agents.[214] It is hard to imagine how CFIUS would reasonably include products like PPE or medications and medical goods for highly contagious diseases within FIRRMA as it currently stands. The classification of raw materials as critical technologies would be nearly impossible. Even if CFIUS agreed internally that it was in the United States' best interest to add these types of products to a referenced list, this would require consensus from eleven government agencies who all harbor

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[209] Barrington, *supra* note 199, at 107, 118 (explaining that "FIRMA expands CFIUS covered transactions to include all 'critical technologies'" and the Department of Defense will outline the specifics in practice, but only as a starting point).
[210] *See* 50 U.S.C. § 4565(a)(6)(A)) (2019) (defining "critical technologies").
[211] Barrington, *supra* note 199, at 118 ("[Congress] avoid[ed] creating a list by outlining a compilation of lists determined by other government entities that are updated regularly" instead of adopting a "bright-line list").
[212] *Id.*
[213] *Id.* (enumerating five instances when a president used CFIUS to block a foreign transaction).
[214] 22 C.F.R. § 121.1 (2022) (starting the list of chemical agents with nerve agents, soon followed by mustard gas).

their own interests and perspectives.[215] Plus, the President maintains control over the final contents of the list CFIUS can amend.[216] The President could legally remove any addition relating to the pandemic and is not obligated to present a rationale for doing so.[217]

Given these concerns, it might be more effective for legislators to expand CFIUS's jurisdiction beyond the issue of national security. To do so, legislators would have to amend Section 731 of the Defense Production Act of 1950. Borrowing from Australia's FDI screening regulation, the Section 731's language could be amended to allow CFIUS to review investments affecting the "national interests" of the United States.[218] This broad language would allow CFIUS to review investments affecting not just the United States' national security, but also the country's economy, community, and ability to remain competitive.[219]

Alternatively, lawmakers could pass legislation imposing a moratorium on foreign acquisitions of U.S. companies engaged in activities critical to the government's ability to respond to national emergencies.[220] Framing a bill in this way would effectively give CFIUS the power to review foreign acquisitions in important sectors weakened by the pandemic, such as biotechnology, print and online

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[215] Barrington, *supra* note 199, at 93–95 (explaining that CFIUS is made up of members from ten or eleven different government agencies).

[216] *Id.* at 119 ("Note further, that the President of the United States again maintains control of the final contents of the list the CFIUS Committee can amend.").

[217] *Id.* ("[T]he President is not obligated to present a rationale for accepting or ignoring the Committee's proposal.").

[218] *See generally Media release – David Irvine – Temporary changes to the foreign investment review framework*, FIRB (March 29, 2020), https://firb.gov.au/about-firb/news/media-release-david-irvine-temporary-changes-foreign-investment-review-framework ("The FIRB will continue to assess foreign investment applications against the national interest (including support for employment) on a case by case basis.").

[219] *See id.* ("The FIRB will continue to assess foreign investment applications against the national interest (including support for employment) on a case by case basis.").

[220] *See* John Tivey et al., *supra* note 71 ("The introduction of these new measures and the subsequent blocked investments indicate a potential shift by the Australian Government to a more protectionist approach to foreign investment regulation, at least in the short term and until the COVID-19 crisis eases.").

press services, and food production and safety.[221] To limit the burden that this type of legislation would have on CFIUS, it could stipulate that review would only be required for a controlling interest in a U.S. business covered under the bill.[222] The bill could also apply to U.S. businesses of a certain size or nature, like those with more than $100 million in revenue or those with an exclusive patent that impacts the crisis, like patents concerning PPE.[223]

VI. Conclusion

The pandemic has created unprecedented and lasting economic turmoil, weakening entire industries and making them ripe for foreign control.[224] Many developed countries responded by enacting measures that strengthened the ability of their FDI screening bodies to review foreign investments that implicated critical sectors.[225] Surprisingly, the United States was one of the few

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[221] *See id.* ("The Federal Government has explained that the reasoning behind the new measures is to protect the 'national interest' by preventing foreign investment into distressed assets in critical sectors, which may pose a threat to the security and viability of such sectors in the Australian economy, without any government oversight.").

[222] Jalinous, *supra* note 12 ("As we previously reported in July and August 2018, FIRRMA provided the general contours for CFIUS reform—including new jurisdiction over certain non-controlling investments and real estate transactions; limitation of such expanded jurisdiction to certain categories of foreign investors; a new short-form filing and review process; and mandatory filing requirements for certain transactions involving foreign government interest or critical technologies—but largely deferred to CFIUS itself to define the precise extent of such reforms.").

[223] *See* Joanna Kenner, *FDI in a Post-Covid-19 World: A Threat to the European Project?*, INST. MONTAIGNE (May 11, 2020), https://www.institutmontaigne.org/en/blog/fdi-post-covid-19-world-threat-european-project [https://perma.cc/Z3KB-ZECY] ("Furthermore, while FDI screening is generally treated through the lens of investment in strategic sectors, Covid-19 has shown the concept of what is a strategic sector or asset needs updating, specifically in relation to medical equipment, pharmaceuticals and research.").

[224] *See id.* ("FDI screening becomes critical when, as a result of a post-pandemic economic slowdown, European companies are systematically weakened, thus creating a one-off opportunity for foreign investors to acquire such assets at cheapened prices.").

[225] *See* Stephan Müller & Mareike Heesing, *17th Amendment of the Foreign Trade and Payments Ordinance: stricter investment screening in Germany,*

developed nations that did not enact any such legislation.[226] Instead, the U.S. relied on its existing FDI screening framework that only allows for the review of foreign investments implicating the country's national security, a narrowly-defined term.[227]Given how COVID-19 has fundamentally changed the world economy, the United States' FDI screening regime remains unequipped to protect critical U.S. sectors, weakened by the pandemic, from foreign control.[228] Many U.S. businesses continue to play a critical role in the country's response to COVID-19, such as those developing novel medicines to fight highly contagious diseases, manufacturing PPE to protect critical healthcare workers, and extracting critical raw materials.[229] Yet, many such businesses remain open to foreign control under the United States' FDI screening regime.[230] Foreign control of these sectors could exacerbate domestic shortages of these critical goods, weakening the country's ability to continue fighting COVID-19.[231] In addition, the President retains unfettered control over the lists CFIUS uses to determine whether certain technologies are considered critical for FDI screening purposes.[232] This ability

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OPPENHOFF FOREIGN TRADE NEWSL. (Apr. 29, 2021), https://www.oppenhoff.eu/en/news-detail/17th-amendment-of-the-foreign-trade-and-payments-ordinance-stricter-investment-screening-in-germany [https://perma.cc/8D6L-AZK7] ("The trend is towards ever greater scrutiny of foreign investments—also outside of Germany or the EU.").

[226] *Cf. id.*

[227] *See* Bressie & Friedman, *supra* note 9, at 1 ("FIRRMA expands transactions subject to CFIUS jurisdiction to include: (1) any non-passive investment by a foreign person in any unaffiliated U.S. business involved in critical technology, critical infrastructure, or that maintains sensitive personal data that, if exploited, could threaten national security . . . .").

[228] *See* Barrington, *supra* note 199, at 84 ("Further, FIRRMA falls short by not addressing threats from . . . cumulative passive foreign ownership. FIRRMA's failures to adequately address these issues are important because CFIUS serves a critical role in . . . preserving national security. . . .").

[229] *See* Hwang, *supra* note 204 ("In September [2021], the FDA announced nationwide shortages of ventilators. Specimen collection tubes also have been in short supply since the summer.").

[230] *See* Taylor, *supra* note 205 ("China is among the top providers of active pharmaceutical ingredients (APIs)—the basic components for antibiotics and other prescription drugs consumed by Americans.").

[231] *See id.* (discussing the impact that relying on China for manufacturing of certain drugs could have in the pandemic).

[232] *See* Barrington, *supra* note 199, at 99 ("The resulting discretion granted to the President is 'not be subject to judicial review.'").

debases CFIUS' power to control the types of investments that it considers important enough to review.[233] It allows the United States' review of FDI to be leveraged for political purposes, when it is in the best interest to allow CFIUS complete power over FDI screening in the United States.[234]

Given these consequences, U.S. lawmakers must strengthen CFIUS' ability to review attempts by foreign investors to control these critical sectors.[235] This reinforcement can best be achieved if lawmakers either make changes within FIRRMA's existing framework, amend the Defense Production Act of 1950, or pass entirely new legislation.[236]

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[233] *See generally supra* part V(A).
[234] *See generally supra* part V(A).
[235] *See generally supra* part V (C).
[236] *See generally supra* part V (C).