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A CONTROLLING INTEREST: CORPORATE GOVERNANCE AND NATIONAL SECURITY ACROSS GLOBAL FDI REGIMES

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ABSTRACT

In recent years, there has been an explosion of foreign direct investment (FDI) review and enforcement across the globe, often explicitly driven by national security concerns. Considerations of corporate governance are often critical to these regimes. The Committee on Foreign Investment in the United States is a prime example, which uses corporate governance measures, such as the right to appoint directors to a company's board, as a method of determining jurisdiction for FDI review. However, these FDI regimes vary greatly across different jurisdictions, both in purpose and in function. Despite the rapidly growing world of FDI review and this apparent reliance on corporate governance, there is a dearth of scholarship at this intersection.

This Article begins to map both the growth and taxonomy of these FDI regimes across eleven different jurisdictions. It highlights that, despite the varied nature of these regimes, corporate governance is fundamental to how these regimes operate—collateral to the project of national security but essential as a means. This Article ultimately underscores the novelty of these regimes as powerful corporate governance-fueled engines of control over large portions of the global economy. Notably, this method of control over corporate entities continues to fly well under the radar of many skeptics in contrast to more traditional modes of government control, such as golden shares and direct state ownership. Viewed through this lens of control, the rise of these regimes troubles an already troubled model of shareholder primacy and raises questions about the role of government interests in the boardroom and in the development of corporate law. It also signals a new trend of weaponized convergence in corporate governance, spawned by an FDI review arms race.

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I. INTRODUCTION

In the initial thirty-six years of the United States' national security-based foreign direct investment (FDI) regime, a transaction was blocked or unwound only once.[1] Yet since 2012, U.S. Presidents have intervened in nine more deals.[2] This more aggressive approach to

1. The earliest example is President George H.W. Bush's 1990 divestiture order of U.S. aerospace manufacturer MAMCO by the China National Aero-Technology Import and Export Corporation. George Bush, *Order on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated Online by Gerhard Peters and John T. Woolley*, THE AM. PRESIDENCY PROJECT (Feb. 1, 1990), https://www.presidency.ucsb.edu/node/263889; *see* John Schaus, *President Obama's Second Order on CFIUS*, CSIS (Dec. 5, 2016), https://www.csis.org/analysis/president-obamas-second-order-cfius.

2. In 2012, President Barack Obama ordered the divestiture of multiple wind farm companies from Chinese-national-owned Ralls Corporation. Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Oct. 3, 2012). In 2016, President Obama also banned the sale of U.S. semiconductor company AIXTRON, Inc. to Grand Chip Investment GMBH, a Germany company with a Chinese parent company. Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH, 81 Fed. Reg. 88607 (Dec. 7, 2016). President Trump and President Biden have each blocked or unwound additional deals, relating to Lattice Semiconductor in 2017, Qualcomm in 2018, Grindr Inc. in 2019, StayNTouch, Inc. in 2020, MineOne Cloud Computing Investment I L.P. in 2024, and United States Steel Corporation and Jupiter Systems, LLC in 2025. Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation

reviewing FDI is not unique to the United States or its Committee on Foreign Investment in the United States (CFIUS), the interagency committee charged with administering the regime. Countries around the world have strengthened or adopted their own national security FDI regimes in the last decade, changing the landscape for international business and investment.[3] As the Organization for Economic Cooperation and Development (OECD) noted in an April 2023 report, there has been a "historically unprecedented" shift in policy with respect to international investment.[4]

The impact of these regimes, however, is not restricted to blocked deals. The various FDI regimes around the world subject both proposed and even long-completed transactions to stringent national security reviews, which can impose various mitigation measures or conditions on deals to remediate national security concerns.[5] The scope of these reviews may very well continue to grow as some jurisdictions begin implementing outbound investment reviews.[6] Ultimately, although various stakeholders closely monitor the number of conducted reviews, the primary impact of investment screening regimes comes from the ever-looming *threat* of review and enforcement, rather than the actual reviews they conduct.

Limited, 82 Fed. Reg. 4,665 (Sep. 18, 2017); Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11631 (Mar. 15, 2018); Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co., Ltd., 85 Fed. Reg. 13719 (Mar. 10, 2020); Regarding the Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P., 89 Fed. Reg. 43301 (May 16, 2024); Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, 90 Fed. Reg. 2605 (Jan. 13, 2025); Regarding the Acquisition of Jupiter Systems, LLC by Suirui International Co., Limited, 90 Fed. Reg. 31,125 (July 8, 2025); *see* Paul Marquardt, John P. McGill, Jr. & Chinyelu Lee, *CFIUS Forces Kunlun to Unwind 2016 Acquisition of Grindr Over Concerns About the Protection of Sensitive Personal Data*, CLEARY GOTTLIEB (Apr. 5, 2019), https://www.clearymawatch.com/2019/04/cfius-forces-kunlun-to-unwind-2016-acquisition-of-grindr-over-concerns-about-the-protection-of-sensitive-personal-data.

3. *See infra* Part III. FDI has been defined as "a cross-border equity investment in which the foreign investor exerts corporate influence over the enterprise in the host country." Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95(2) IND. L. J. 533, 575 (2020). FDI can be accomplished through a variety of means, including M&A transactions and greenfield investments, in which a new venture is formed. *See id.* at 576. It can also include brownfield investments, in which a foreign investor leases or purchases existing facilities. CFI Team, *Brownfield Investment*, CFI, https://corporatefinanceinstitute.com/resources/management/brownfield-investment (last visited Dec. 11, 2024).

4. FREEDOM OF INV. ROUNDTABLE 36, INVESTMENT POLICY DEVELOPMENTS IN 61 ECONOMIES BETWEEN 16 OCTOBER 2021 AND 15 MARCH 2023 7 (2023) [hereinafter INVESTMENT POLICY DEVELOPMENTS].

5. *See infra* Parts IV.B, IV.C.

6. *See, e.g.*, Exec. Order No. 14,105, 3 C.F.R. 640 (2023).

Given the growing importance of national security-based FDI regimes, there is a significant need to more comprehensively study their impact. This Article contributes to that end by undertaking a comparative analysis of FDI regimes across eleven jurisdictions. These jurisdictions encompass major centers of economic power and foreign investment: Brazil, Canada, China, France, Germany, India, Italy, Japan, Singapore, the United Kingdom, and the United States. Each jurisdiction, except Brazil, has begun to experiment with significant national security-based FDI review. However, as the Article describes, their approaches to this issue vary through their adoption of distinct yet increasingly convergent statutory schemes—all with a focus on corporate governance.

Through this analysis, the Article grapples with the long-existing but only recently studied intersection between corporate governance and national security. It highlights how corporate governance is fundamental to the operation of these regimes: collateral to the project of national security but essential as a means. Governments, through these FDI regimes, co-opt corporate governance tools through mitigation measures and contractual conditions to entrench their own interests. Importantly, this Article argues that these remedial efforts in the FDI realm are only viewed as sufficient substitutes for domestic ownership because they create *control* through corporate governance requirements. Each of these regimes says as much. These FDI regimes are able to command the levers of corporate governance that their own statutes define as providing the ability to exert control.

Ultimately, this Article argues that these FDI regimes effectively serve as an aggressive new tool of government control over corporations within their jurisdictional purview, further troubling the dominant model of shareholder primacy, raising questions about the role of the government and its interests in the boardroom, and signaling a level of "weaponized" convergence in corporate governance. Notably, this method of control over corporate entities continues to fly well under the radar of many skeptics, in contrast to more traditional, if not flashier, modes of government control, such as golden shares.

Part II of this Article reviews existing literature on corporate law, governance, and national security. Part III traces the history of national security FDI regimes, including a detailed description of recent local and regional efforts to expand their numbers. Part IV conducts a comparative analysis in three stages. First, it provides an overview of the jurisdictions and their FDI regimes, describing the jurisdiction selection process and outlining a taxonomy based on each regime's jurisdictional trigger elements. It then describes how corporate governance measures have been viewed by these FDI regimes as both vulnerabilities and tools,

and thus serve as critical elements in how these regimes define the concept of control and remediate national security concerns.

Finally, in Part V, the Article argues that these regimes have created an effective new form of government control beyond golden shares or state-owned enterprises, troubling the idea of shareholder primacy, highlighting the influence of national security in the boardroom, and presenting new opportunities for convergence in an increasingly diverging world.

II. Corporate Law, Governance, and National Security

A small but growing body of scholarship has begun to analyze the interactions and intersections between national security, corporate law, and corporate governance. These efforts have approached the topic from various lenses and with various labels, including but not limited to "national security creep," "the grip of nationalism," and "national security corporate governance."[7] Broadly speaking, this scholarship has broached three topic areas: nationalism, corporate boards, and foreign direct investment regimes.

A. *Nationalism*

As Mariana Pargendler has argued, "nationalist influence on corporate law is old, widespread, and resilient, and has put sand in the gears of globalization."[8] Pargendler describes three factors that contribute to what she calls the "grip of nationalism" on corporate law: the political deficit of foreigners, the powerful alliance of domestic forces, and the use of corporate law as stealth protectionism.[9]

In particular, the influence of nationalism can be seen in the use of corporate law mechanisms to ensure domestic control of corporate entities, whether through voting mechanisms or state-owned enterprises.[10] Nationalism's influence on ownership structures and control rights is premised on the idea that domestic, as compared to foreign, control has positive welfare effects and economic and geopolitical

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7. *E.g.*, Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123(2) Colum. L. Rev. 549, 549 (2023); Pargendler, *supra* note 3, at 533; Andrew Verstein, *The Corporate Governance of National Security*, 95(4) Wash. U. L. Rev. 775, 775 (2018); *see also* Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domain and Beyond*, 97(4) Va. L. Rev. 801, 808-10, 897 (2011) (discussing CFIUS's fit within the administrative state).

8. Pargendler, *supra* note 3, at 534.

9. *Id.* at 535-36.

10. *Id.* at 534.

advantages for a jurisdiction.[11] A highly visible example, as Pargendler discusses, is France's *loi Florange* of 2014, which granted double voting rights to shares held for at least two years—in essence, a system of loyalty shares.[12] This law was a direct response to French steel company Arcelor's acquisition by Indian conglomerate Mittal.[13] Nationalism—or its counterpart, protectionism—has similarly played a significant role in the durability of controlling shareholders in other jurisdictions, such as Sweden.[14]

Ultimately, Pargendler highlights the important role nationalism has played in the development of corporate governance. "By focusing exclusively on agency costs, efficiency accounts [about the determinants of corporate governance] have neglected the other possible ways in which corporate law can affect social welfare, such as by influencing economic integration, national security, and local development."[15] Likewise, political accounts that focus on the role of special interests in shaping corporate governance often ignore the popular appeal of nationalist corporate policies.[16]

Lastly and most conspicuously, nationalism can also take the form of state-owned enterprises. While direct state ownership has often been viewed negatively, given its perceived lack of profit motive, inefficiencies, and distorted incentives, state-owned enterprises are on the rise, through both open and "stealth" nationalization.[17]

B. *The Battle for Corporate Boards*

National security finds another battlefield in the corporate boardroom and has been called the "new frontier of corporate responsibility."[18] Scholars like Joel Slawotsky have argued that, in the U.S. context, corporate directors should be required to consider national security

11. Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45(4) J. CORP. L. 953, 956 (2020).

12. *Id.* at 962; *see* Martin Gelter & Julia M. Puaschunder, *COVID-19 and Comparative Corporate Governance*, 46(3) J. CORP. L. 557, 603 (2021).

13. Pargendler, *supra* note 11, at 962.

14. *See id.* at 966-67.

15. Pargendler, *supra* note 3, at 536.

16. *Id.*

17. Gelter & Puaschunder, *supra* note 12, at 601-02.

18. *National Security Is The New Frontier of Corporate Responsibility*, FREEH, SPORKIN & SULLIVAN LLP, https://fsslaw.com/national-security-is-the-new-frontier-of-corporate-responsibility (last visited Dec. 2, 2024).

under the *Caremark* doctrine,[19] which determines the contours of director oversight liability.[20] Slawotsky points to three interrelated changes to justify this argument. First, the threat of federal enforcement for national security breaches has increased.[21] Second, there has been a reorientation towards stakeholderism—or as Slawotsky calls it, "enhanced-shareholder value governance"—which places value on long-term profitability as affected by broader stakeholder interests.[22] Third, it is now more common to view director oversight failures as violations of the duty of loyalty.[23]

National security has also become deeply relevant to cross-border mergers and acquisitions (M&A). In the United States, the CFIUS regime has been described as a "super poison pill," given CFIUS's ability to recommend blocking proposed transactions—a power that boards can strategically leverage as a defensive tactic.[24] One such example is the failed acquisition of Qualcomm, a U.S. corporation, by Singapore-based Broadcom.[25] The acquisition was ultimately blocked by President Trump after Qualcomm, whose board was highly resistant to the takeover attempt, unilaterally requested a CFIUS review.[26] Amy Deen Westbrook thus argues that boards can effectively lobby for CFIUS review as an anti-takeover tactic, entrenching themselves and engaging in what she labels "rent-seeking of a pure sort."[27] National security, then, can serve as a guise—sometimes real, sometimes inflated, and even sometimes imagined—to fend off foreign offers and protect poor management.[28]

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19. Joel Slawotsky, *U.S. Corporate Director Responsibilities to Oversee National Security Threats in an Era of Great Power Rivalry*, 49(4) J. CORP. L. 873, 873 (2024); *see also* Curtis J. Milhaupt, *Corporate Governance in an Era of Geoeconomics* 22-23 (ECGI Working Paper Series in Law, Paper No. 790/2024, 2024) ("Thus, the potential for *Caremark* liability plainly exists with respect to corporate losses incurred due to a board's or an officer's failure to monitor compliance with economic sanctions, export controls, and related national security regulations, since they constitute violations of positive law.").

20. *See* Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369-70 (Del. 2006).

21. Slawotsky, *supra* note 19, at 873.

22. *See id.*

23. *Id.*

24. Amy Deen Westbrook, *Securing the Nation or Entrenching the Board: The Evolution of CFIUS Review of Corporate Acquisitions*, 102(3) MARQ. L. REV. 643, 646 (2019).

25. *Id.* at 650-58. For further discussion on the deal and Broadcom's foreign status determination, see Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 (3) U. PENN. LAW. REV. 717, 763-64 (2021).

26. Westbrook, *supra* note 24, at 653-58.

27. *Id.* at 649-50.

28. *See id.* at 650.

A significant nuance here is that CFIUS, imbued with national security's historic exceptionalism, is largely insulated from judicial review, unlike other modern anti-takeover tools.[29] In general, corporate boards must determine whether offers are in the best interest of the corporation and shareholders.[30] Because the board's incentives may meaningfully differ from the shareholders' interests with regards to a takeover offer, courts have denied boards in this realm the significant deference that often accompanies board decisions (i.e., the business judgment rule).[31] Now, when a bid can plausibly trigger broadly construed national security concerns, corporate boards can leverage CFIUS review as a decisive, practically unreviewable anti-takeover tool.[32]

Beyond corporate responsibility and takeover bids, Andrew Verstein has argued that for companies in the defense contracting space, "corporate boardrooms have quietly become instruments of national defense," in which shareholders have been sidelined at the behest of national security interests.[33] Rather than boards using the flag of national security to entrench themselves, Verstein asserts that the U.S. federal government—through the Defense Security Service (DSS)[34] under the Department of Defense—has been able to entrench boards with individuals who, while perhaps lacking in business experience, have significant national security ties.[35]

Specifically, Verstein focuses on companies within the military-industrial complex and on defense contractors who receive foreign investment or are at risk of foreign influence.[36] In short, through the appointment of "outside directors" who act on behalf of the U.S. government and the relinquishment of voting rights to cleared U.S. citizen "proxy holders," boardrooms are transformed and insulated from shareholders.[37] He

29. *Id.* at 682, 690-91 (discussing CFIUS, judicial review, and anti-takeover tools); Eichensehr & Hwang, *supra* note 7, at 586-88 (discussing national security exceptionalism).

30. Westbrook, *supra* note 24, at 691.

31. *Id.* The business judgment rule refers to the presumption that directors of a corporation make decisions in good faith and on an informed basis. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995).

32. Westbrook, *supra* note 24, at 694.

33. *See* Verstein, *supra* note 7, at 775, 777. Verstein also briefly discusses the connections between what he refers to as national security corporate governance and the CFIUS process. *See id.* at 795.

34. The DSS was reorganized as the Defense Counterintelligence and Security Agency in 2019. *See* Transferring Responsibility for Background Investigations to the Department of Defense, 84 Fed. Reg. 18125 (Apr. 24, 2019).

35. Verstein, *supra* note 7, at 777.

36. *Id.* at 793.

37. *See id.* at 798-803.

asserts that "[a]mong the almost 400 contractors subject to national security governance, government representatives dominate the board about [ninety] percent of the time. And in almost a quarter of those cases, the shareholder elects none of the board members."[38]

This "national security corporate governance," Verstein asserts, can be a double-edged sword. It may indeed reduce the risk that comes with foreign ownership, control, and influence.[39] However, it also conflicts with the agency model of corporate governance that much of U.S. corporate law is built around, providing enhanced leverage to management at the expense of shareholders.[40] Similar to the troubles of using CFIUS as an anti-takeover tool, Verstein argues that this board entrenchment creates opportunities for shareholder exploitation and even a revolving door system for government officials that may create perverse incentives.[41]

C. *Foreign Direct Investment Regimes*

FDI regimes have received considerable attention in legal scholarship in recent years and are arguably underpinned by nationalist concerns, regardless of whether any given regime specifically has a national security focus.[42] These regimes, at least in theory, operate under the premise that domestically controlled companies are more likely to act in ways that benefit local communities (given greater nonpecuniary private benefits of control), share local values, and work in a symbiotic manner with national and local governments.[43]

As detailed in Part III, FDI regimes across the globe have increasingly incorporated national security as a significant determinant of the approval process. Eichensehr and Hwang describe this "recent expansion of national security-related review and regulation of cross-border investments to allow government intervention in more transactions than ever before" as "national security creep."[44]

National security FDI reviews have become increasingly relevant to foreign investors as FDI regimes have multiplied and become more

38. *Id.* at 803.
39. *See id.* at 833.
40. *Id.* at 805, 810.
41. *See id.* at 833.
42. *See, e.g.*, Eichensehr & Hwang, *supra* note 7, at 553-54, 603.
43. *See* Pargendler, *supra* note 3, at 577.
44. Eichensehr & Hwang, *supra* note 7, at 551.

established.[45] Over the last few years, they have also shown a greater willingness to force substantive changes in deals or even block them wholesale.[46] Their scope has increased as well. For example, CFIUS's jurisdiction has grown dramatically since its founding, in part fueled by the "indeterminacy" of the concept of national security.[47] In particular, the growth of these national security FDI regimes over the last few decades has paralleled the merging of the concepts of national security and economic security.[48]

The recent global focus on critical raw materials highlights the merging of these concepts. For instance, in late 2025, the United States took a more interventionist approach in the U.S. rare earth metals industry in response to new Chinese restrictions on the minerals.[49] Treasury Secretary Scott Bessent justified this move under a framework of both economic security and national security.[50] As he stated, "[w]hen we get an announcement like this week with China on the rare earths, you realize we have to be self-sufficient, *or we have to be sufficient with our allies*."[51] President Trump's America First Investment Policy says it more plainly: "Economic security is national security."[52]

Beyond this issue-based jurisdictional growth, CFIUS's temporal jurisdiction has also grown. Starting in 2006 with the use of National Security Agreements (NSAs), CFIUS has been able to reopen and even overturn reviews based on continued compliance requirements.[53]

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45. *See infra* Part III. In contrast, foreign investors have not always viewed regimes like CFIUS as primary concerns. *See* Ji Li, *Investing near the National Security Black Hole*, 14(1) BERKELEY BUS. L. J. 1, 1 (2017).

46. Eichensehr & Hwang, *supra* note 7, at 551.

47. *Id.* at 553, 557.

48. *See id.* at 557-59*; see, e.g.*, *Updated Guidelines on the National Security Review of Investments*, MINISTRY OF INNOVATION, SCI., ECON. DEV. CAN. (Mar. 5, 2025), https://ised-isde.canada.ca/site/investment-canada-act/en/updated-guidelines-national-security-review-investments ("In an increasingly geopolitically fractured world, Canada is facing more frequent threats to its national security through economic means.").

49. Alan Rappeport & Ana Swanson, *U.S. to Take Control of More Companies to Counter China*, N.Y. TIMES (Oct. 15, 2025), https://www.nytimes.com/2025/10/15/us/politics/us-government-companies-china.html.

50. *See id.*

51. *Id.* (emphasis added).

52. *America First Investment Policy*, WHITE HOUSE (Feb. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy.

53. *E.g.*, Eichensehr & Hwang, *supra* note 7, at 566; *see, e.g.*, Regarding the Proposed Merger of Alcatel and Lucnet Technologies, Inc., 71 Fed. Reg. 67429 (Nov. 22, 2006). The United States has also used NSAs in combination with "Special Security Agreements" within the CFIUS process. *See Statement on CFIUS Recommendation Regarding Proposed Merger of Lucent Technologies, Inc., and Alcatel*, WHITE HOUSE (Nov. 17, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061117-13.html.

All in all, national security FDI regimes create troublesome beasts. Eichensehr and Hwang highlight how the CFIUS process differs from the traditional involvement of regulators in corporate deals, such as in the antitrust review process.[54] Compared to CFIUS, the antitrust process is "relatively self-contained and easy to calculate."[55] Transaction parties generally understand the filing requirements and process, so they are able to plan for the costs that may arise from a given proposed deal.[56] In addition, after a successful antitrust review, transaction parties are able to move forward unburdened by the risk of any future review for that deal.[57] With CFIUS, this is not the case. Much of the CFIUS review process is cloaked in secrecy and shielded from the public eye, including the internal deliberations and negotiations that might lead to recommendations of divestment or unwinding, leaving future parties unaware "about potential regulatory landmines."[58] Thus, national security reviews of transactions have long been a "black box" of the regulatory world, with some even referring to the process as a "regulatory bazooka" and "the most disruptive" of the security-related regulatory regimes.[59]

Unsurprisingly, geopolitics often play a central role in not just the creation of national security FDI regimes but also their operation.[60] For

54. Eichensehr & Hwang, *supra* note 7, at 598. Within the United States, CFIUS has long been notable for how it fits—or rather, doesn't fit—into the traditional regulatory regime. Its "architecture departed from conventional understandings and expectations" of models of executive power within the administrative state, as it was greatly empowered to investigate potential investments within its jurisdiction—to the arguable reduction of power maintained by the President. *See* Michaels, *supra* note 7, at 808-10, 897; David Zaring, *CFIUS as a Congressional Notification Service*, 83(1) S. CAL. L. REV. 81, 83 (2009) (arguing that Congress has created a role for itself within foreign policy and national security through CFIUS, which while seemingly a tool of the executive branch, functions more as a congressional notification service).

55. Eichensehr & Hwang, *supra* note 7, at 598.

56. *Id.*

57. *Id.*

58. *Id.* at 600-01.

59. *Id.* at 552-53, 561.

60. *See* Zaring, *supra* note 54, at 131 ("And although it is undoubtedly related to protectionist sentiments, Congress appears to believe, perhaps more so than does the executive, that national security requires the domestic sourcing of some industrial goods and the domestic ownership of some natural resource extractors. Defense contractors, raw materials providers, and high-technology industries are all particularly likely to be included in this encompassing view of what national security means in economic terms."); *see also* Norman P. Ho, *Asian-American Jurisprudence and Corporate Law: Politicization, Racialization, Foreignness, and the U.S. CFIUS Foreign Direct Investment Review Mechanism*, 4(1) WIDENER J. L. ECON. & RACE 1, 3 (2012) (arguing that the outcomes of CFIUS reviews of Chinese and Japanese company-related transactions were to some extent influenced "by Asian-American jurisprudential themes of racialization, foreignness, and politicization").

example, the CFIUS regime overhauled by the Foreign Investment Risk Review Modernization Act (FIRRMA) authorizes the creation of CFIUS "excepted foreign states" which receive preferential treatment in the CFIUS review process.[61] To date, the excepted foreign states are Australia, Canada, New Zealand, and the United Kingdom, each a member of the anglosphere Five Eyes intelligence alliance.[62]

In another example, Canada announced in 2022 an enhanced review policy for foreign investments in the critical minerals sector, with a specific focus on investments made by state-owned enterprises and private investors connected to "non-like-minded governments."[63] The rationale of this move was "inherent economic risk" and the risk to national security that foreign investments within the critical minerals sector may pose.[64] Within days of the policy announcement, the Canadian government ordered the divestiture of three investments made by Chinese investors.[65]

Eichensehr and Hwang have argued that the proliferation of these national security FDI regimes may in turn lead to a nationalistic backlash that might negatively affect investors from countries that invest abroad.[66] In fact, CFIUS is both an example of and a blueprint for these regimes, and has long generated reactions from the international community. In response to CFIUS's work, countries like China and India considered or began to develop their own national security FDI review regimes.[67]

III. The Rise of National Security FDI Regimes

In the last decade, countries across the globe have introduced new or strengthened existing FDI regimes at a "historically unprecedented" pace.[68] These regimes have become more formalized, more expansive in jurisdiction, and more equipped to enforce their mandates.

Yet, despite the recent creation or overhaul of many of these regimes, both general FDI restrictions and national security reviews of FDI have a longer history. For example, France's FDI regime was formally implemented in 1966.[69] France's early FDI regime made clear that its

61. 31 C.F.R. § 800.218 (2020).

62. Eichensehr & Hwang, *supra* note 7, at 569, 603.

63. Oliver Borders & Erin Keogh, *Foreign direct investment reviews 2024: Canada*, White & Case, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-canada (last visited Dec. 12, 2024).

64. *Id.*

65. *Id.*

66. Eichensehr & Hwang, *supra* note 7, at 603.

67. Zaring, *supra* note 54, at 86.

68. *See* Investment Policy Developments, *supra* note 4, at 7.

69. Loi 66-1008 du 28 décembre 1966 relative aux relations financières avec l'étranger [Law 66-1008 of December 28, 1966 on Relating to Financial Relations with Foreign Countries],

purpose was to "ensure the defense of national interests."[70] Further, the United States' FDI review regime, administered by CFIUS, had an early focus on national security.[71] CFIUS was first established through executive order in 1975 and was given a statutory basis in 1988 through the Exon-Florio Amendment (Section 721) to the Defense Production Act of 1950.[72] Even in its early years, CFIUS was positioned to respond to national security threats, with a portion of its 1980's reviews instigated by the Department of Defense.[73]

Nevertheless, national security gained a stronger foothold in FDI regimes after the turn of the century. Canada provides a clear example through its Investment Canada Act (ICA) regime. The ICA was originally passed in 1985,[74] but only in the last few decades has the ICA taken on a more restrictive FDI posture, with the first formal rejection of an investment occurring in 2008.[75] National security-related provisions were first introduced in 2009, with the Act's purpose shifting from ensuring Canada sees the benefits of FDI to "recognizing the importance of protecting national security" and "[providing] for the review of investments in Canada by non-Canadians that could be injurious to national security."[76]

Within the last half a decade, many jurisdictions have undergone a similar transformation, increasingly focusing their FDI review regimes on national security.[77] Some of the impetus for this has been credited to geopolitical tensions.[78] Other contributing factors to the dramatic uptick are highlighted, to varying levels, by the OECD, including COVID-19 and the Russian invasion of Ukraine.[79]

JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 28, 1966; *see Foreign direct investment in France*, PINSENT MASONS (Mar. 1, 2022, at 3:18 PM ET), https://www.pinsentmasons.com/out-law/guides/frances-foreign-investment-regime.

70. Loi 66-1008, *supra* note 69, art. 3.

71. *See* Westbrook, *supra* note 24, at 662.

72. LATHAM & WATKINS LLP, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: KEY QUESTIONS ANSWERED 2 (2023), https://www.lw.com/admin/upload/SiteAttachments/CFIUS-QA-2023.pdf.

73. Westbrook, *supra* note 24, at 662.

74. Investment Canada Act, R.S.C. 1985, c. 28.

75. Huy A. Do, Andrew House & Robin Spillette, *Investment Canada Act governs increasingly controversial foreign investment regime*, GLOB. COMPETITION REV. (Aug. 12, 2024), https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2025/article/investment-canada-act-governs-increasingly-controversial-foreign-investment-regime.

76. *See* Investment Canada Act, R.S.C. 1985, c. 28 (versions 2008-05-19 to 2009-03-11; 2009-03-12 to 2012-06-28; 2024-09-03 to 2024-11-26).

77. *See infra* Part IV.A.

78. Recent changes to Canada's regime have specifically been credited to "increasing geopolitical competition" globally. INNOVATION, SCI. & ECON. DEV. CAN., ANNUAL REPORT: INVESTMENT CANADA ACT 2023-2024 15 (2024).

79. INVESTMENT POLICY DEVELOPMENTS, *supra* note 4, at 7-8.

Beyond these events, some credit can be given to local and regional policies that affirmatively push the development of national security FDI regimes. For example, in recent years, the United States has undertaken efforts to encourage the development of CFIUS-like FDI regimes in other jurisdictions.[80] Both the Trump and Biden administrations have highlighted as a top priority the fact that other allied countries adopted national security FDI regimes.[81] Furthermore, in passing FIRRMA in 2018, Congress "expressed its sense that 'the President should conduct a more robust international outreach effort to urge and help allies and partners of the United States to establish processes that are similar to [CFIUS] to screen foreign investments for national security risks and to facilitate coordination.'"[82] Beyond U.S. allies, other jurisdictions have looked to the CFIUS regime as a potential model for their own, including China.[83]

In addition, the European Union (EU) has encouraged the development of FDI regimes in its member states. In 2019, the EU adopted the Foreign Direct Investment Regulation (Regulation), creating its own FDI framework which encouraged the creation of FDI regimes in member states and established a cooperation mechanism through which member states can engage collaboratively on certain screening processes.[84] In 2017, prior to the Regulation's adoption, eleven member states had a national FDI screening mechanism.[85] By October 2020, fifteen member states had FDI regimes; by June 2021, eighteen member states had FDI regimes;[86] and by February 2025, twenty-four member states had regimes in place.[87]

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80. Eichensehr & Hwang, *supra* note 7, at 571 n.107.

81. *Id.*

82. *Id.* at 571 n.107, n.108 (quoting from the John S. McCain National Defense Authorization Acts for Fiscal Year 2019, Pub. L. No. 115-232, § 1702(b)(6), 132 Stat. 1653, 2176 (2018)).

83. An initial version of the review process was outlined in a 2015 draft of the Foreign Investment Law and was ostensibly modeled off the U.S. CFIUS regime; however, the draft process was removed from the final version of the law, to be filled in by regulations after its passage. *See China overhauls its Foreign Investment Regulatory Regime*, NORTON ROSE FULBRIGHT (Mar. 2019), https://www.nortonrosefulbright.com/de-de/wissen/publications/a885f4c3/china-overhauls-its-foreign-investment-regulatory-regime.

84. Eichensehr & Hwang, *supra* note 7, at 571-72.

85. COMM'N TO THE EUR. PARLIAMENT AND THE COUNC., FIRST ANNUAL REPORT ON THE SCREENING OF FOREIGN DIRECT INVESTMENTS INTO THE UNION 6 (2021).

86. Eichensehr & Hwang, *supra* note 7, at 572-73.

87. Petr Bartoš et al., *Updates on Foreign Direct Investments: the European Commission Publishes Its Fourth Annual Report on the Screening of Foreign Direct Investments in the European Union and Plans to Revise the EU FDI Screening Regulation*, K&L GATES (Oct. 29, 2024), https://www.klgates.com/Updates-on-Foreign-Direct-Investments-The-European-Commission-Publishes-Its-Fourth-Annual-Report-on-the-Screening-of-Foreign-Direct-Investments-in-the-European-Union-and-Plans-to-Revise-the-EU-FDI-Screening-Regulation-10-29-2024.

IV. National Security FDI Regimes: A Comparative Analysis

This Article seeks to better understand, in aggregate, how the FDI review landscape has changed in recent years. To that end, it examines eleven jurisdictions: Brazil, Canada, China, France, Germany, India, Italy, Japan, Singapore, the United Kingdom, and the United States. As shown in Figure 1, these countries represent the top ten global economies, with the additional inclusion of Singapore.

Country	2023 GDP (US millions)	2023 Rank
United States	27,292,171	1
China	18,270,357	2
Germany	4,562,208	3
Japan	4,213,167	4
India	3,638,489	5
United Kingdom	3,420,797	6
France	3,056,251	7
Italy	2,316,728	8
Brazil	2,191,132	9
Canada	2,173,340	10
Singapore	505,440	30

Figure 1[88]

These eleven jurisdictions also make up a significant portion of the top ten destinations for foreign direct investment, seen in Figure 2. Of note, the United Kingdom has net outflows of FDI, unlike the other jurisdictions in this group.

Country	2023 FDI Inflows (US millions)	2023 Rank
United States	310,947	1
China	163,235.5	2
Singapore	159,669.6	3
Brazil	65,897.2	5
Canada	50,324.1	6
France	42,031.6	7
Germany	36,697.7	9
India	28,163.3	16
Japan	21,433.4	21
Italy	18,219.4	25
United Kingdom	-89,247.4	-

Figure 2[89]

88. *See GDP (Current US$)*, WBG, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Dec. 12, 2024).

89. *See FDI Data Explorer: By Region and Economy, 1990-2023*, *in World Investment Report*, UN Trade and Dev., https://unctad.org/publication/world-investment-report-2024 (last visited Dec. 12, 2024).

In total, the selected jurisdictions provide a detailed look at major centers of economic strength and FDI. Additionally, the selected jurisdictions provide insight into not only Western jurisdictions, but also jurisdictions in Asia, South America, and the Global South more broadly.[90] Nevertheless, these jurisdictions represent only a subset of potential national security FDI regimes, and the overall landscape is changing rapidly. For example, Belgium,[91] Ireland,[92] Luxembourg,[93] the Netherlands,[94] and Sweden[95] each initiated their FDI regimes in 2023. Switzerland is in the process of developing an FDI regime as well,[96] and Germany, one of the selected jurisdictions, is planning an overhaul of its regime.[97]

Lastly, the interaction between each jurisdiction's legal system and its FDI regime likely warrants further study. After all, scholars have argued that the civil and common law divide has had meaningful impacts on the development of corporate law and economics in general.[98] In this

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90. While often ignored, Global South jurisdictions can be seen as "relevant site[s] of innovation and experimentation in corporate law and governance." Mariana Pargendler, *The Global South in Comparative Corporate Governance* 2 (EUR. CORP. GOVERNANCE INST., Working Paper No. 751, 2024).

91. *Belgium Introduces screening regime for non-EU FDI that may affect national security and public order*, UN TRADE & DEV. INV. POL'Y HUB (July 1, 2023), https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4343/belgium-introduces-screening-regime-for-non-eu-fdi-that-may-affect-national-security-and-public-order.

92. *Ireland's New FDI Act*, KPMG L. (Sep. 20, 2024), https://kpmglaw.ie/insight-irelands-new-fdi-act.html.

93. *Luxembourg Introduces new FDI screening regime*, UN TRADE & DEV. INV. POL'Y HUB (Sep. 1, 2023), https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4381/luxembourg-introduces-new-fdi-screening-regime.

94. Robbert Snelders et al., *Dutch Foreign Direct Investment Screening Regime Enters Into Force*, CLEARY GOTTLIEB (July 4, 2023), https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-foreign-direct-investment-screening-regime-enters-into-force.

95. Mattias Hedwall & Seher Budak, *Sweden: The new Foreign Direct Investment Review Act*, BAKER MCKENZIE (Oct. 10, 2023), https://insightplus.bakermckenzie.com/bm/international-commercial-trade/sweden-the-new-foreign-direct-investment-review-act_1.

96. Raphaël Schindelholz, Marie Flegbo-Berney & Stéphane Lagonico, *Foreign direct investment reviews 2024: Switzerland*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-switzerland (last visited Dec. 12, 2024); Roger Thomi, Philippe Reich & Boris Wenger, *Switzerland: Draft Investment Screening Act*, GLOB. COMPLIANCE NEWS (Apr. 25, 2024), https://www.globalcompliancenews.com/2024/04/25/https-insightplus-bakermckenzie-com-bm-financial-institutions_1-switzerland-draft-investment-screening-act_04192024.

97. *See* Tammy Tietze, *Germany expected to tighten grip on FDI*, BIRD & BIRD (Oct. 15, 2024), https://www.twobirds.com/en/insights/2024/germany/germany-expected-to-tighten-grip-on-fdi.

98. *See* Rafael La Porta, Florencio Lopez-di-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46(2) J. ECON. LIT. 285, 286-87 ("In our conception, legal origins are central to understanding the varieties of capitalism."). *But see* Holger Spamann, *Civil V. Common Law: The*

sample, five countries (Canada, India, Singapore, the United States, and the United Kingdom) hail from the common law system. In contrast, six countries (Brazil, China, France, Germany, Italy, and Japan) maintain civil law systems. Nevertheless, this Article underscores that, in many respects, these regimes employ similar techniques, converging how jurisdictions treat matters of corporate governance in connection to national security.

A. *Trigger Mechanisms and the Scope of Review*

Throughout this period of significant transformation, which will likely continue in the short term,[99] jurisdictions have approached national security FDI review in varied ways, both in how their respective regimes operate and in their overall levels of restrictiveness. For example, the OECD maintains a periodic FDI restrictiveness index, which gauges restrictiveness through four measures: foreign equity restrictions, discriminatory screening or approval mechanisms, restrictions on key foreign personnel, and operational restrictions.[100] In its 2023 rankings, Australia was the most restrictive, with Canada placing third and the United States placing thirteenth.[101]

One fundamental way in which these regimes vary is their jurisdiction or scope, often determined in part by trigger mechanisms that serve to activate the review process.[102] Within the selected jurisdictions, there are at least four different types of trigger mechanisms at work, as this Article will define.

Some jurisdictions have implemented what can be thought of as a *dragnet* approach, in which almost all transactions fall into the scope of the regime, regardless of the line of business of the targeted entity. The *dragnet* approach depends on broadly viewed conceptions of control. Canada, the United States, and the United Kingdom arguably fall into this category—aligning with the stringent reputation of each country's FDI regime.[103]

Emperor Has No Clothes 1, 1 (Harvard Pub. L. Working Paper, Paper No. 24-11, 2025) (arguing that few rules or institutions are systematically different between civil and common law jurisdictions).

99. *See* Tietze, *supra* note 97.

100. *FDI restrictiveness*, OECD, https://oecd.org/en/data/indicators/fdi-restrictiveness.html (last visited Dec. 12, 2024).

101. *See id.*

102. *See infra* Parts IV.A.1-5. Trigger mechanisms are just one determinant of any given regime's jurisdiction. Many variables can influence what scope a regime has, including, for example, how a regime defines terms like "foreign investor" or "transaction." *See id.*

103. *See infra* Part IV.A.1. For their reputations, see Glafkos Tomobolis, *The UK national security regime a year on – what have we learned?*, DELOITTE (Jan. 25, 2023), https://www.deloitte.com/global/

Other jurisdictions maintain *sector-trigger* regimes, in which transactions that are made within certain industries or lines of business can be subject to review—often defense, technology, and critical materials industries. China, France, Germany, Italy, and Japan have adopted these types of regimes.

While the *dragnet* and *sector-trigger* regimes appear to be the most common, other countries have crafted additional varieties of review that fit their specific contexts, e.g., developmental or geopolitical goals. As relevant here, Singapore's regime has created an *entity-trigger* system, in which certain corporate entities are designated as important to national security, leading to FDI restrictions for transactions with those entities. In addition, the most restrictive portion of India's regime operates as a *regional-trigger* system, in which geography, rather than industry, determines the level of review.

It's important to note that these regimes are often sweeping, multifaceted, and not cleanly categorizable. For example, in some senses, the U.S. CFIUS regime can be seen as a *sector-trigger* regime, given that the only mandatory filings in the regime deal with what are known as "TID US businesses"—or businesses dealing with critical technology, infrastructure, or sensitive data.[104] However, CFIUS review remains a primarily voluntary process formally unmoored from specific sectors, leading to its *dragnet* categorization.[105] As another example, India's general FDI regime operates as a relatively lax *sector-trigger* regime, but as mentioned, its most restrictive elements focus on geography.[106]

Finally, even after years of increasing FDI protectionism, not all jurisdictions have adopted national security FDI regimes. Within this jurisdictional subset, Brazil remains the only country without a formal FDI

en/services/legal/blogs/the-uk-national-security-regime-a-year-on-what-have-we-learned.html (noting that "it is clear that NSIA has real teeth, and the UK government is willing and able to block deals entirely or clear them subject to detailed and potentially restrictive conditions"); Rujuta Patel, Chris Hersh & Erin Brown, *Buyer beware: Major changes to Canada's foreign investment review regime passed*, NORTON ROSE FULBRIGHT (Apr. 3, 2024), https://www.nortonrosefulbright.com/en-gb/knowledge/publications/bb30178a/buyer-beware-major-changes-to-canadas-foreign-investment-review-regime-passed (noting that Canada "is likely to take a more interventionist approach" after recent amendments to its FDI regime); Michael E. Leiter et al., *CFIUS Goes Global: New FDI Review Processes Proliferate, Old Ones Expand*, SKADDEN (Jan. 19, 2022), https://www.skadden.com/insights/publications/2022/01/2022-insights/regulation-enforcement-and-investigations/cfius-goes-global (noting that the U.S. CFIUS process "often remains the stiffest hurdle" for transactions).

104. *See* LATHAM & WATKINS LLP, *supra* note 72, at 3-4.

105. *See* Farhad Jalinous, Karalyn Mildorf & Ryan Brady, *Foreign direct investment reviews 2024: United States*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-united-states (last visited Dec. 12, 2024).

106. *See infra* Part IV.A.4.

regime.[107] Nevertheless, it is clear that the landscape for international business has changed dramatically within the last decade. If a foreign investor seeks to do business in a majority of the ten largest economies in the world, or in many of the global hotspots for international investment, they must navigate these FDI regimes and deal with newly prominent stakeholders—governments.

1. Dragnet Regimes

The FDI regimes in *dragnet* jurisdictions are generally broad, strict, and in some ways amorphous. Each regime considered here—the United States, Canada, and the United Kingdom—has taken an aggressive approach to FDI review, unsurprising given that both the Canadian and U.K. regimes were in many ways influenced by the U.S. regime,[108] though they have their distinctions. Ultimately, *dragnet* regimes achieve their potency through their broad scope.

The United States: The FDI review process in the United States is administered by CFIUS.[109] CFIUS has the authority to review any transaction that could result in control—broadly defined—of a U.S. business by a foreign person.[110] In 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) significantly expanded CFIUS's jurisdiction to include certain real estate transactions and non-passive, non-controlling investments in certain businesses that deal with sensitive technology, infrastructure, and data.[111] CFIUS also maintains

107. *See infra* Part IV.A.5.

108. *See* Libby Bloxom & Mackenzie A. Zales, *U.K.'s National Security and Investment Act Takes Effect*, HOLLAND & KNIGHT (Jan. 19, 2022), https://www.hklaw.com/en/insights/publications/2022/01/uks-national-security-and-investment-act-takes-effect ("Each of the NSI Act's updates corresponds to the U.S. foreign direct investment regime. . . ."); Josh Zelikovitz, *New Canadian National Security Rules will Impact M&A Deal Timing and Risk Allocation*, GOODMANS LLP (Sep. 20, 2023), https://www.goodmans.ca/insights/article/new-canadian-national-security-rules-will-impact-m-a-deal-timing-and-risk-allocation (stating that the Canadian regime "resemble[d] CFIUS reviews" and that C-34's changes "resemble[d] US rules expanded under FIRRMA").

109. *See* 31 C.F.R. § 800 (2020). CFIUS is an inter-agency committee, chaired by the Department of Treasury and includes individuals from the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy as representatives in addition to representatives from the Office of the U.S. Trade Representative and the Office of Science & Technology Policy. *CFIUS Overview*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview (last visited Dec. 12, 2024). After being formed by executive order in 1975, the Foreign Investment and National Security Act codified CFIUS practice in 2007. LATHAM & WATKINS LLP, *supra* note 72, at 2.

110. *CFIUS Overview*, COOLEY, https://www.cooley.com/services/practice/cfius/cfius-overview (last visited Dec. 12, 2024).

111. LATHAM & WATKINS LLP, *supra* note 72, at 2; Westbrook, *supra* note 24, at 678.

jurisdiction to review a deal years after it has closed if the deal was not filed with CFIUS pre-closure.[112] The reach of CFIUS is so broad that some law firm FAQs include the question: are there "certain transactions beyond the reach of CFIUS?"[113]

Canada: Canada's FDI regime has begun to rival CFIUS in scope. The Foreign Investment Review and Economic Security (FIRES) Branch of the Ministry of Innovation, Science, and Economic Development Canada (ISED) implements the Investment Canada Act (ICA), Canada's "increasingly controversial" FDI regime.[114] The ICA applies to any acquisition of control of a Canadian business by a foreign investor, with an acquisition of control defined to be an acquisition of over fifty percent of equity or voting interests.[115] In some cases, the acquisition of over one-third of equity or voting interests suffices to *presume* control.[116] Over these thresholds, a pre-merger application process applies, labeled a "net benefit review."[117] When approval is not required, parties need only file an administrative notification.[118]

Generally, the Canadian government has forty-five days after receipt of an application or notification to order a national security review, but it may also subject even unnotified, non-controlling minority investments to national security review.[119] The scope of this national security review process is broad, given it applies when there are "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security," undefined by statute.[120] The ICA regime

112. *See* Stephen R. Heifetz, Joshua F. Gruenspecht & Nimit Dhir, *CFIUS Rules: A Crash Course in Assessing and Navigating Risk*, LEXISNEXIS PRAC. GUIDANCE, https://www.wsgr.com/a/web/eEJgAmdZD9DCDVeDwQoD1P/cfius-rules-0322.pdf (last visited Dec. 12, 2024).

113. *E.g.*, LATHAM & WATKINS LLP, *supra* note 72, at 3. The answer to this question is, of course, yes. Transactions outside the jurisdiction of CFIUS include, e.g., greenfield investments and passive investments with less than 10% voting interest. *Id.* at 3-4.

114. Do, House & Spillette, *supra* note 75; *see* Investment Canada Act, R.S.C. 1985, c. 28.

115. Borders & Keogh, *supra* note 63. Note that the indirect acquisition of a Canadian business through the acquisition of a foreign parent does not fall into the scope of ICA net benefit reviews. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* For investments that did not require a notification and do not generate a voluntary notification, the government has five years of jurisdiction to review the action. *Id.*

120. *Id.*; Investment Canada Act, R.S.C. 1985, c. 28 § 25.2. This threshold determination has recently been expanded to include threats to economic security, which many commentators have explicitly linked to the second Trump administration's hostile approach to U.S.-Canadian trade relations. *See Updated Guidelines on the National Security Review of Investments*, MINISTRY OF INNOVATION, SCI., & ECON. DEV. CAN. (Mar. 5, 2025), https://ised-isde.canada.ca/site/investment-canada-act/en/updated-guidelines-national-security-review-investments; Subrata Bhattacharjee et al., *Navigating*

received its latest major update in early 2024, through Bill C-34, *An Act to Amend the Investment Canada Act*, which has been described as more "interventionist."[121] The new changes increased the scope of the ICA regime to apply to investments by state-owned enterprises if they acquire any assets of a Canadian business.[122]

The United Kingdom: The United Kingdom's relatively nascent FDI regime has followed the trajectory of both the United States and Canada. The U.K.'s FDI regime arises from the National Security and Investment Act of 2021 (NSIA).[123] NSIA is administered by the Investment Security Unit within the Cabinet Office.[124] Notably, the NSIA applies equally to U.K. and foreign investors.[125] Prior to the NSIA, the United Kingdom had another national security regime through the Enterprise Act 2002, which conducted only twenty reviews in its history, a quarter of which were post-2021.[126] Beyond the Enterprise Act, merger transactions subject to antitrust review by the Competition and Markets Authority Act could be reviewed for national security reasons in certain cases.[127]

The NSIA has dramatically increased the scope of transactions that are reviewable, has created a mandatory filing requirement for certain transactions, and has a retroactive feature for transactions completed after November 2020.[128] The NSIA's mandatory notification requirement applies to seventeen sensitive sectors, but all transactions are potentially subject to the regime.[129] The mandatory notification requirement for the specified sectors is triggered with a twenty-five, fifty, and seventy-five percent equity or voting interest acquisition.[130] Voluntary

changes to Canada's competition & foreign investment laws amid economic uncertainty, BLG (Mar. 31, 2025), https://www.blg.com/en/insights/2025/03/navigating-changes-to-canadas-competition-and-foreign-investment-laws-amid-economic-uncertainty.

121. Patel, Hersh & Brown, *supra* note 103. The number of extended national security reviews initiated in recent years has tripled compared to pre-2020 numbers. INNOVATION, SCI. & ECON. DEV. CAN., *supra* note 78, at 8.

122. An Act to Amend the Investment Canada Act, S.C. 2024, Bill C-34 (Can.); Patel, Hersh & Brown, *supra* note 103.

123. Marc Israel & Kate Kelliher, *Foreign direct investment reviews 2024: United Kingdom*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-united-kingdom (last visited Dec. 12, 2024).

124. *Id.*

125. *Id.*

126. Ian Giles et al., *Global Rules on Foreign Direct Investment: UK*, NORTON ROSE FULBRIGHT (Feb. 2023), https://www.nortonrosefulbright.com/en/knowledge/publications/c582517b/uk.

127. *Id.*

128. *See id.*

129. Israel & Kelliher, *supra* note 123.

130. Giles et al., *supra* note 126.

notification may also be provided if there is an acquisition of material influence over a qualifying entity, among other trigger events.[131] Non-notified transactions subject to the voluntary notification regime can be "called-in" for review regardless of sector.[132]

What these three regimes have in terms of a broad scope, they equal in remedial measures. As part of the remedial process for addressing identified national security risks, CFIUS negotiates with transaction parties to create mitigation agreements, which can include requirements such as restrictions on intellectual property sharing, access to technology, and locations of technology; or even corporate governance measures like the establishment of "Corporate Security Committees" to ensure compliance.[133] If CFIUS deems mitigation measures unsatisfactory to remediate the national security concerns, it can recommend the president to block the transaction wholesale.[134] The United States has continued to enhance CFIUS's remedial measures, including by increasing monetary penalties and expanding the scope of CFIUS's investigative powers.[135] Similarly, the Canadian government can wholesale deny the investment, ask for mitigation conditions, or even require post-closure divestment.[136] The ICA regime also authorizes the imposition of interim conditions while national security reviews are taking place and various penalties for noncompliance.[137] After a national security review in the U.K.'s NSIA, final orders may impose conditions on the flagged transactions or prohibit them.[138] As a sign of the U.K.'s shifting posture to align itself with the United States' and Canada's aggressive stances, since NSIA's enactment, the review process has already resulted in six prohibitions as of early 2025, and while technically agnostic to the origin country, five out of six were connected to China.[139]

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131. *Id.*

132. *Id.*

133. Eichensehr & Hwang, *supra* note 7, at 563.

134. *CFIUS Overview*, *supra* note 110.

135. Anne Salladin et al., *U.S. Treasury expands the scope of CFIUS investigative authority and updates civil monetary penalties*, HOGAN LOVELLS (Nov. 7, 2024), https://www.hoganlovells.com/en/publications/us-treasury-expands-the-scope-of-cfius-investigative-authority-and-updates-civil-monetary-penalties.

136. Borders & Keogh, *supra* note 63.

137. Patel, Hersh & Brown, *supra* note 103.

138. Marc Israel & Kate Kelliher, *UK FDI Update: Key takeaways from the latest NSIA Annual Report*, WHITE & CASE (Sep. 18, 2024), https://www.whitecase.com/insight-alert/uk-fdi-update-key-takeaways-latest-nsia-annual-report.

139. *See* Christopher Peacock & Alicia S. Taulli, *China and the UK National Security and Investment Act – Implications for Business and Investors in 2025*, HOGAN LOVELLS (Feb. 19, 2025), https://www.

2. Sector-Trigger Regimes

The *sector-trigger* label includes a diverse group of jurisdictions and FDI regimes, which vary considerably in history, form, and function. However, a clear trendline in this subgroup is that these FDI regimes reflect—and center—a focus on the inputs and outputs of industry as national security risks. Accordingly, these regimes focus on specific sectors in their respective economies. Still, because of their variability, it is worth considering each regime on its own.

China: China's FDI regime is governed by multiple statutes and regulations and has been transformed in the last few years.[140] The Foreign Investment Law (FIL), enacted in 2020,[141] established a general equality principle between domestic and foreign investment; however it also applied limits to foreign investment in certain industries (known as the "Negative List") and established a Security Review System for reviewing FDI based on national security concerns.[142] The FIL was at least partially a response to U.S. measures restricting Chinese FDI.[143] The National Development & Reform Commission (NDRC) oversees the review process, but transactions are first registered with the State Administration for Market Regulation (SAMR) and the Ministry of Commerce (MOFCOM).[144] In 2021, the Measures for Security Review of Foreign Investments Regulations (2021 Security Review Measures) further defined the review system.[145]

Foreign investors first must look to the Negative Lists to determine if there are any FDI restrictions based on industry.[146] Over the last few

hoganlovells.com/en/publications/china-and-the-uk-national-security-and-investment-act-implications-for-business-and-investors.

140. These include the National Security Laws, as revised in 2015. Vivian Desmonts, *Foreign Direct Investment Regimes China 2025*, ICLG (Nov. 15, 2024), https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/china. In addition, China maintains a competition review regime through its Anti-Monopoly Law. *See PRC: Global rules on foreign direct investment*, NORTON ROSE FULBRIGHT (Aug. 2024), https://www.nortonrosefulbright.com/en/knowledge/publications/933e78b6/prc.

141. Prior to the 2020 and 2021 updates, reviews based on national security were generally limited to M&A transactions and acquisitions of SOEs. Vivian Desmonts, *Foreign Direct Investment Regimes China*, ICLG (Nov. 15, 2024), https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/china.

142. *Id.* Of note, the Foreign Investment Law more generally provided greater flexibility in terms of acceptable forms of corporate governance for foreign investors and their investments in China. *China overhauls its Foreign Investment Regulatory Regime*, *supra* note 83.

143. Desmonts, *supra* note 141.

144. *Id.*

145. *See id.*

146. *See id.*

decades, the Negative Lists have considerably shortened as part of a broader liberalization aimed at attracting foreign investment.[147] Beyond these industry-based restrictions, the National Security Review system reviews FDI which may have an impact on the country's national security.[148] A filing is required where "actual control" is gained over entities in industries designated as important.[149] The review process can end with approval, conditional approval with mitigation measures, or denial.[150]

France: France's FDI regime is administered through the Bureau Multicom 4 of the Ministry of Economy's Treasury Department.[151] The country's original regime, established in 1966, began its overhaul starting in 2000 and then experienced a major overhaul within the last few years.[152] In the recent overhaul, the country expanded the scope of its national security review system through Decree n. 2018-1057 in 2018.[153] France then strengthened the regime's sanctions and enforcement powers in 2019/2020 through the PACTE Law, n. 2019-486.[154] Finally, Decree n. 2019-1590 significantly expanded and formalized its regime, akin to FIRRMA in the United States.[155] France most recently expanded the scope of its FDI rules in December 2023, through Decree n. 2023-1293, which among other expansions,

147. *See e.g.*, *PRC: Global rules on foreign direct investment*, *supra* note 140. This has not changed as of early 2025. *See* Edwin Northover et al., *China's Foreign Investment Law - A Look Back and Ahead*, DEBEVOISE & PLIMPTON (Mar. 3, 2025), https://www.debevoise.com/insights/publications/2025/03/chinas-foreign-investment-law-a-look-back-and.

148. *See PRC: Global rules on foreign direct investment*, *supra* note 140; Desmonts, *supra* note 141.

149. Desmonts, *supra* note 141.

150. *Id.*

151. Orion Berg, *Foreign direct investment reviews 2024: France*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-france (last visited Dec. 12, 2024).

152. Loi 66-1008, *supra* note 69; Pascal Bine et al., *France Completes Major Foreign Investment Reform*, SKADDEN (Mar. 30, 2020), https://www.skadden.com/insights/publications/2020/03/france-completes-major-foreign-investment-reform.

153. Orion Berg & Nathalie Nègre-Eveillard, *Foreign Investments in France: new legislation expands and strengthens the national security review mechanism*, JD SUPRA (July 22, 2019), https://www.jdsupra.com/legalnews/foreign-investments-in-france-new-10724.

154. Orion Berg & Louis Roussier, *Update on French FDI Screening Trends: Continuity and Stability*, WHITE & CASE (June 25, 2024), https://www.whitecase.com/insight-alert/update-french-fdi-screening-trends-continuity-and-stability; Tanguy Bardet et al., *PACTE law: the latest step in the strengthening of the French State's control over foreign investment in strategic sectors*, FRESHFIELDS (May 29, 2019), https://www.lexology.com/library/detail.aspx?g=14c0b962-396b-40ef-b2c5-426be860f7d3.

155. Bine et al., *supra* note 152.

enlarged the scope of covered activities to include critical raw materials.[156]

The French FDI regime covers transactions in which a foreign investor acquires a direct or indirect controlling interest in a French entity or one of its branches.[157] The regime also covers transactions by non-EU investors that acquire more than twenty-five percent of the voting rights of a French company, or ten percent for French listed companies.[158] Review, however, is triggered only when the target company conducts sensitive activities, to include defense and security, critical infrastructure, and technology R&D, among others.[159] Reviews can conclude with approval, conditions, or divestment of the sensitive activities; transactions that close without authorization are considered null and void.[160]

Germany: Germany's FDI regime, like that of many other jurisdictions, has been in flux over the last few years as the country has tightened those aspects relating to national security. For example, amendments in 2020 lowered the threshold for intervention from FDI posing *actual* threats to public order or safety to FDI to only *likely* impairing public order or security.[161] The regime is run by the German Federal Ministry for Economic Affairs and Climate Action (BMWK)[162] and is governed by the Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Regulation (AWV).[163] Germany plans to amend its FDI regime to some degree in the near future.[164]

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156. Pascal Bine & Wesley Lainé, *France Strengthens Foreign Investment Controls, Expands Jurisdiction to 'Commercial Establishments' Registered in France*, SKADDEN (Jan. 16, 2024), https://www.skadden.com/insights/publications/2024/01/france-strengthens-foreign-investment-control. As of early 2025, there have been no major updates. Orion Berg, *Foreign direct investment reviews 2025: France*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2025-france (last visited Apr. 16, 2025).

157. Berg, *supra* note 151.

158. *Id.*

159. *Id.*

160. *See id.*

161. Marius Boewe, *Germany: trends emerging from established national FDI regime*, GLOB. COMPETITION REV. (Nov. 25, 2024), https://globalcompetitionreview.com/hub/fdi-regulation-hub/fourth-edition/article/germany-trends-emerging-established-national-fdi-regime.

162. Thilo-Maximilian Wienke & Sabine Kueper, *Foreign direct investment reviews 2024: Germany*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-germany (last visited Dec. 12, 2024).

163. Martin Buntscheck et al., *Foreign Direct Investment Regimes Germany 2025*, ICLF (Nov. 15, 2024), https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/germany.

164. *Id.*; Thilo-Maximilian Wienke, *Foreign direct investment reviews 2025: Germany*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2025-

The German regime covers both direct and indirect acquisitions by foreign investors and can review all types of transactions.[165] Transactions that acquire ten percent of voting rights of companies in sensitive sectors are subject to a mandatory filing and "sector-specific review."[166] For other transactions, "cross-sectoral" reviews are based on additional voting rights thresholds and the target company's industry and activities.[167] Finally, the regime has a catch-all provision for acquisitions that don't reach the normal voting rights thresholds; these transactions may be called-in for review based on government concerns in cases of "atypical" control.[168] BMWK is able to prohibit transactions or impose mitigation measures.[169] Clearance provides safe harbor to transactions; if no filing is submitted for a transaction, BMWK retains jurisdiction over the deal for five years and has the power to unwind a deal.[170]

Italy: Italy controls foreign direct investment through its Golden Power regime, enacted in 2012, which gets its name from giving the government special "golden powers" to approve and veto transactions.[171] The government may also impose conditions on transactions.[172] The regime covers all transactions relating to domestic companies carrying out strategic activities or holding assets with strategic relevance in certain sectors, and the regime has expanded in scope in the last few years.[173] For example, since August 2023, even intragroup transactions involving non-EU investors and certain strategic sectors are subject to FDI review, when historically they were only subject to a notification requirement.[174]

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germany (last visited Apr. 16, 2025). While the direction of any future change is not yet clear, Germany's regime has gotten stricter over the years. *See id.*

165. Wienke & Kueper, *supra* note 162.

166. *Id.*

167. *Id.*

168. *Id.*; Buntscheck et al., *supra* note 163.

169. BMWK conditions can be challenged in court, and there have been some recent successes on the part of companies challenging BMWK decisions. Wienke & Kueper, *supra* note 162.

170. *Id.*

171. Leonardo Graffi & Sara Scapin, *Foreign direct investment reviews 2024: Italy*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-italy (last visited Apr. 16, 2024).

172. *See* Francesco Liberatore, Daniela Sabelli & Sara Belotti, *Italian National Security and Investment Control Regime: Golden Powers Guide*, SQUIRE PATTON BOGGS (Jan. 2023), https://www.squirepattonboggs.com/insights/publications/italian-national-security-and-investment-control-regime-golden-powers-guide.

173. Graffi & Scapin, *supra* note 171.

174. *Id.*

Clearance is mandatory for any strategic company transaction in the defense and national security sectors by *any* investor beyond Italian state or public entities; relevant transactions include changes in ownership, control, or availability of assets, transfers of subsidiaries, changes to business purpose, dissolution, and modification of charters.[175] Strategic company transactions made by EU investors in certain sectors must be cleared, and strategic company transactions made by non-EU investors into any strategic sectors must also be cleared.[176] With respect to acquisitions of various levels of equity interest, clearance is required for any investor, beyond Italian state or public entities, in the defense and national security sector.[177] The regime contains further clearance requirements based on sector and investor as well.[178] As detailed, the Golden Power regime may at times apply to EU persons and Italian persons based on business sectors and type of transaction.[179] Because of uncertainty around the broad scope of the regime, the number of filings has dramatically increased, from eighty-three in 2019, to 342 in 2020.[180] The regime reviewed 727 transactions in 2023.[181]

Japan: Japan's FDI regime is conducted under the Foreign Exchange and Foreign Trade Act (FEFTA), first enacted in 1949.[182] It was amended to incorporate national security review measures in 2019.[183] The Economic Security Promotion Act, passed in 2022, further identifies certain Specific Critical Products and their associated "core" sectors, in which acquisitions require prior approval.[184]

Depending on the business sector of the target entity and characteristics of the foreign investor, including nationality, the FEFTA regime requires prior notification filings for two types of transactions.[185] The

175. *Id.*; *see* Liberatore, Sabelli & Belotti, *supra* note 172.

176. Graffi & Scapin, *supra* note 171.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* Liberatore, Sabelli & Belotti, *supra* note 172.

181. *Foreign Direct Investment in Italy: What the 2023 Annual Activity Report Tells Business About the Government's 'golden power'*, OSBORNE CLARKE (Oct. 1, 2024), https://www.osborneclarke.com/insights/foreign-direct-investment-italy-what-2023-annual-activity-report-tells-business-about.

182. *See* Hiroaki Takahashi & Koji Kawamura, *Foreign Direct Investment Regimes Japan 2025*, ICLG (Nov. 15, 2024), https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/japan.

183. *See id.*

184. Jun Usami et al., *Foreign direct investment reviews 2024: Japan*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-japan (last visited Dec. 12, 2024).

185. Foreign investors include entities in which foreign investors hold 50 percent or more of voting rights and those in which the majority of directors are non-residents. *See id.*

first type of reviewable transaction is a designated acquisition, in which a foreign investor acquires any amount of shares of a non-listed company from another foreign investor.[186] The second type of reviewable transaction is an inward direct investment, which can include: a foreign investor acquiring a one percent stake or higher in a listed target's shares or voting rights; transactions in which a foreign investor consents to a change in business purpose of a target company; transactions which enable the foreign investor to nominate themselves or related parties to the board; and transactions in which the foreign investor gains proxy voting rights.[187] If a transaction is found to pose national security concerns, the government can first recommend, then order upon refusal of the recommendation, changes to the transaction or a discontinuance of the transaction.[188]

While each of these *sector-trigger* jurisdictions vary a great deal, they are representative of the dominant approach to FDI review in recent years, including an increasing focus on a broader sense of national security that implicitly includes the idea of economic security.[189] Accordingly, not only are deals in the defense and military industries subject to review but so are industries as far ranging as critical minerals to technology to pharmaceuticals.[190] In addition, despite many of the new entrants into the FDI review field being a product of the EU member state push, variability remains high as different jurisdictions target a miscellany of features, including even internal restructurings.[191]

3. Entity-Trigger Regimes: Singapore

The sole *entity-trigger* jurisdiction in this analysis takes a forensic approach to FDI review. Singapore's general FDI regime is made up of a few industry-based legislative restrictions, industry-based license programs, and antitrust reviews of M&A transactions through its

186. *Id.*

187. *Id.*

188. *Id.*

189. *See* Eichensehr & Hwang, *supra* note 7, at 557–59. Consider also, for example, Japan's Economic Security Promotion Act. Usami et al., *supra* note 184.

190. *See* HERBERT SMITH FREEHILLS KRAMER, NAVIGATING FDI REGULATION: CRITICAL MINERALS 3 (2024), https://www.hsfkramer.com/dam/jcr:e9eda5cd-ec3a-4716-946c-84968a81776a/FDI%20Critical%20Minerals.pdf; HERBERT SMITH FREEHILLS KRAMER, NAVIGATING FDI REGULATION: PHARMACEUTICALS 3 (2020), https://www.hsfkramer.com/dam/jcr:18974031-573b-4c1a-adb1-f1d09072402c/Navigating%20FDI%20regulation%20-%20Pharmaceuticals.pdf.

191. *See* Brooks E. Allen et al., *Does Your Company's Reorganization or Spin-Off Require FDI Approval?*, SKADDEN (Apr. 2024), https://www.skadden.com/-/media/files/publications/2024/04/does_your_companys_reorganization_or_spin_off_require_fdi_approval.pdf?rev=0ca19a64a0724048b585786e31bade4d.

Competition Act.[192] However, its first national security FDI regime only went into force in January 2024: the Significant Investments Review Bill (SIRB).[193] Under the SIRB, Singapore has identified "Designated Entities" which are critical to its national security interests.[194] To qualify, the entity must (1) be incorporated, formed, or established in Singapore; (2) carry out activity in Singapore; or (3) provide goods or services to any person in Singapore.[195] If one of these criteria is satisfied, and the Minister of Trade and Industry believes the designation to be in the interests of national security, then the entity receives the label.[196]

The SIRB's scope is large in some respects, as it covers both local and foreign investments into Designated Entities,[197] though it is not retroactive.[198] And as noted by the Singaporean Trade and Industry Minister Gan Kim Yong in January 2024, national security in the SIRB regime is broadly conceived to cover economic security, resilience, and essential services.[199] The first round of Designated Entities included local subsidiaries of multinational companies (ExxonMobil Asia Pacific and Shell Singapore) as well as other energy and technology companies, including Singapore Refining Company and four units of Singapore-based ST Engineering.[200]

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192. *Proposed Statutory Developments in Singapore's Foreign Direct Investment Regime – Significant Investments Review Bill*, NORTON ROSE FULBRIGHT (Feb. 2024) [hereinafter *Singapore's Proposed Statutory Developments*], https://www.nortonrosefulbright.com/en/knowledge/publications/bc19a16c/proposed-statutory-developments-in-singapore-foreign-direct-investment-regime.

193. *Id.*; Significant Investments Review Act 2023, No. 38/2023 (Sing.).

194. *Singapore's Proposed Statutory Developments*, *supra* note 192. Singapore also introduced a Transport Sector (Critical Firms) Bill which would create a similar designated entity system specifically for the transportation sector; designation in the Transport Sector Bill does not lead to designation in the Significant Investments Review Bill. *Redefining the Contours of Inbound Foreign Investment – Singapore's Significant Investments Review A*, LINKLATERS (Apr. 22, 2024), https://www.linklaters.com/en-us/knowledge/publications/alerts-newsletters-and-guides/2024/april/24/redefining-the-contours-of-inbound-foreign-investment--singapores-significant-investments-review-a.

195. *Singapore's Proposed Statutory Developments*, *supra* note 192.

196. *See id.*

197. *Id.*

198. Farhana Sharmeen, Marcus Lee & Sharon Lau, *Singapore's New Significant Investments Regime Comes Into Law*, LATHAM & WATKINS LLP (Jan. 16, 2024), https://www.lw.com/admin/upload/SiteAttachments/Singapores-New-Significant-Investments-Regime-Comes-Into-Law.pdf.

199. *Singapore's Proposed Statutory Developments*, *supra* note 192.

200. *See* Tessa Oh, *ExxonMobil, Shell, ST Engineering units among 9 entities designated under Singapore's Significant Investments Review Act*, THE BUS. TIMES (May 31, 2024), https://www.businesstimes.com.sg/singapore/exxonmobil-shell-st-engineering-units-among-9-entities-designated-under-singapores-significant.

Once dealing with a Designated Entity, a bevy of additional regulations applies. For prospective investors, notification to the Minister is required after becoming a five percent controller, and approval is required before becoming a twelve percent, twenty-five percent, or fifty percent controller or indirect controller.[201] In addition, existing investors must also obtain approval before dropping below a fifty or seventy-five percent control mark.[202]

Transactions that do not follow approval requirements are rendered void, though remedial measures exist.[203] For non-designated entities, the SIRB allows the Minister to review ownership or control transactions for two years post-transaction date when dealing with entities that have acted against the country's national security.[204] The Minister has the power to direct and create restrictions on equity and voting interests in these cases.[205]

4. Regional-Trigger Regimes: India

India has a much more limited FDI screening regime compared to the other analyzed jurisdictions. It is primarily governed by the Foreign Exchange Management Act of 1999 and the Consolidated Foreign Direct Investment Policy, 2020, issued by the Department of Promotion of Industry and International Trade (DPIIT).[206] DPIIT may engage with other relevant government stakeholders depending on the deal.[207] In addition, some sectors, including broadcasting, telecommunication, defense, and civil aviation, also require security clearance from the Ministry of Home Affairs.[208]

The regime has two major available pathways for FDI, which depend on the sector of investment and the quantum of investment.[209] Under the automatic route, foreign direct investors need not obtain any prior

201. *Singapore's Proposed Statutory Developments*, *supra* note 192.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Radhika Gaggar et al., *India: streamlined treatment of FDI aims to promote opportunities for investors*, GLOB. COMPETITION REV. (Nov. 25, 2024), https://globalcompetitionreview.com/hub/fdi-regulation-hub/fourth-edition/article/india-streamlined-treatment-of-fdi-aims-promote-opportunities-investors.

207. *See* James Hsiao & Royston C. Tan, *Foreign direct investment reviews 2024: India*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-india (last visited Dec. 12, 2024).

208. *Id.*

209. *Id.*

clearance from the government.[210] The automatic route is available to the following sectors: manufacturing, telecom, and financial services.[211] Other sectors, however, require some government approvals based on the quantum of investment, including the multi-brand retail trading sector and the brownfield pharmaceutical sector. Approval triggers for these sectors often depend on acquisition thresholds, e.g., above fifty percent.[212]

Other sectors prohibit FDI, either entirely or absent government approval.[213] While FDI in the defense sector is fully permitted up to 100%, government approval is required after reaching the seventy-four percent threshold,[214] and the government may consider national security concerns in its discretion.[215] The target company must also be structured to be self-reliant in product design and development.[216]

In contrast to most other jurisdictions analyzed, India, in recent years, has further liberalized its FDI regime, for example, by raising the automatic threshold for the defense sector from forty-nine to seventy-four percent.[217] One notable exception to this liberalization deals with regional restrictions. As of 2020, India's FDI regime requires government approvals when the investment is coming from a border country or an entity connected to one of these countries.[218] It is in this arena that FDI has been heavily restricted, with only eighty out of 388 proposals granted approval from 2020 to July 2022.[219] The Finance Minister, Nirmala Sitharaman, spoke to this dual-pronged approach in October 2024: "We want business, we want investment, but we need

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. Gaggar et al., *supra* note 206.

215. Hsiao & Tan, *supra* note 207.

216. *See* Gaggar et al., *supra* note 206.

217. *74% FDI In Defence Via Automatic Route*, GOV'T OF INDIA MINISTRY OF EXTERNAL AFFS. ECON. DIPL. DIV. (Sep. 19, 2020), https://globalcompetitionreview.com/hub/fdi-regulation-hub/fourth-edition/article/india-streamlined-treatment-of-fdi-aims-promote-opportunities-investors; *see also* James Hsiao, Royston C. Tan & Savi Hebbur, *Foreign direct investment reviews 2025: India*, WHITE & CASE, https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2025-india (last visited Apr. 16, 2025) ("In February 2025, India has proposed new regulations allowing up to 100 percent foreign direct investment into its insurance sector.").

218. Hsiao & Tan, *supra* note 207.

219. Kosturi Ghosh & Aditya Prasad, *Foreign direct investment in India*, PINSENT MASONS (June 7, 2023), https://www.pinsentmasons.com/out-law/guides/foreign-direct-investment-india.

some safeguards because India is located in a neighborhood which is very, very sensitive."[220]

5. No Regime: Brazil

Brazil's FDI landscape is quite open, especially given the Brazilian Constitution forbids discrimination between foreign and domestic investors.[221] However, Brazilian lawmakers have begun to cut this broad protection back in some instances, and some sectors have restrictions on foreign investments.[222] Specifically, the nuclear energy, aerospace, and postal sectors allow no foreign investment.[223] In addition, the journalism and broadcasting sectors, as well as some real estate sectors, maintain some restrictions.[224] Nevertheless, in the last few years, the government has removed other restrictions on foreign investment, including for financial technology and aviation in 2018 and financial institutions in 2019.[225]

At this point in time, Brazil has no national security-based FDI regime. Foreign investments need to be registered with the Brazilian Central Bank electronic system, but this is only a declaratory registry.[226] Notably, however, this lack of official FDI review has not left Brazil wholly without power to exercise control over transactions when facing national security concerns. The Brazilian government still maintains so-called "golden shares" in a few companies that were once state-owned but have since been privatized, and this golden share provides the government powerful rights, including potentially veto rights on a change in ownership.[227]

For example, when United States-based Boeing began talks to acquire Brazilian airplane manufacturer Embraer in 2015, various Brazilian officials raised national security concerns over the acquisition

220. *India will maintain investment curbs, can't invite FDI blindly: FM Nirmala Sitharaman*, NEW INDIAN EXPRESS (Oct. 23, 2024), https://www.newindianexpress.com/business/2024/Oct/24/india-will-maintain-investment-curbs-cant-invite-fdi-blindly-fm-nirmala-sitharaman.

221. Fernando Alves Meria & Gustavo Paiva Cercilli Crêdo, *Brazil*, *in* FOREIGN DIRECT INVESTMENT REGIMES 2024 35, 35 (5th ed. 2024), https://www.pinheironeto.com.br/Documents//storage/files/artigos-qa/iclg-chapter-brazil-fifth-edition_en.pdf; Constituição Federal [C.F.] [Constitution] art. 170 (Braz.).

222. Meria & Crêdo, *supra* note 221, at 35.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

given Embraer's close collaboration with the Brazilian Air Force.[228] Embraer, originally founded by the Brazilian government, has in its charter a golden share for the government, which provides veto power for changes to the company's name, purpose, logo, controlling interests, and engagement with Brazilian military programs.[229] Given the controversy and the leverage of this golden share, the potential deal was eventually abandoned.[230]

B. *Control: Defined, Expanded, and at Times Left Behind*

Despite the varied nature of these FDI regimes, corporate governance remains an essential consideration for each of them, especially when it comes to the idea of "control." Indeed, defining control is fundamental to the operation of these regimes. At what point is a domestic company under the control of a foreign investor? Through what means can a foreign investor exert control? Practitioner insight is particularly helpful in understanding the contours of control in these regimes, as many of these regimes are new in operation and relatively covert in function due to their national security focus.

In its most basic sense, control often refers to the acquisition of equity shares or voting power.[231] However, in many jurisdictions, control has been given an expanded definition[232] to reflect the various ways in which foreign actors may seek to influence domestic corporate entities.[233] These definitions often invoke corporate governance tools.

This expanded concept of control has come to be called by various names, including indirect control, atypical control, control in fact, and actual control,[234] to name a few. Singapore, for example, speaks of

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228. *See id.*; *Brazil defense ministry opposes giving up Embraer control to Boeing*, REUTERS (Dec. 28, 2017), https://www.reuters.com/article/us-embraer-m-a-boeing/brazil-defense-ministry-opposes-giving-up-embraer-control-to-boeing-idUSKBN1EM1ET/.

229. *See By-Laws of EMBRAER – EMPRESA BRASILEIRA DE AERONÁUTICA S.A.*, SEC, https://www.sec.gov/Archives/edgar/data/1355444/000119312511101384/dex11.htm (last visited Dec. 12, 2024).

230. Meria & Crêdo, *supra* note 221, at 35.

231. *See, e.g.*, *Singapore's Proposed Statutory Developments*, *supra* note 192.

232. Tracking this expansion to better understand the evolution of the term would be valuable but is beyond the scope of this Article. For now, it is clear that the term has grown more expansive.

233. Alternatively, India has demarcated the concept of control from the concept of ownership. Entities that are not owned or controlled by resident Indian citizens fall under the FDI regime, where ownership is defined as holding more than 50% of the equity of a company while control is defined as the right to appoint the majority of board members or control the company's management and policy decisions. *E.g.*, Ghosh & Prasad, *supra* note 219.

234. *See supra* Part IV.A (discussing the regimes in Canada, Germany, France, and China).

control in terms of direct and indirect control. In Singapore, indirect control is defined as having directive power over directors, officers, or the policy of an entity, with or without having the markers of traditional control—equity or voting interests.[235] In France, control has been defined to include not just a direct or indirect holding of a majority of voting rights, but also *de facto* control through the ability to control decisions through even a minority of voting rights and the power to appoint or remove a majority of management or board members.[236]

The concept of "influence" has also taken a more central role in determining the jurisdiction of these regimes. France further updated its definition of control in its n. 2019-1590 Decree to add the concept of "significant influence," which takes into account the factual and legal context, including contract rights, which might give decisional-control to an entity.[237] Similarly, China's 2021 Security Review Measures defined actual control to include a foreign investor holding over fifty percent of shares; a foreign investor's voting rights significantly influencing the board and shareholder resolutions; and other means of exercising significant influence—which may include contractual control and proxy holdings, among other tools.[238]

These expansive definitions of control and influence highlight a few important features of these regimes. First, a hallmark of these regimes is that they are broad, imprecise creatures. Their jurisdictions often hinge on ill-defined or vague terms that enable them to cast their nets broadly.[239]

Second, corporate governance tools specifically have been used to expand the jurisdiction of these regimes. While equity and voting interests remain primary considerations for determining control, many of these jurisdictions have incorporated board appointment rights, proxy voting, information rights, and contractual agreements as well, to

235. *Singapore's Proposed Statutory Developments*, *supra* note 192.

236. Bine et al., *supra* note 152.

237. *Id.* The French National Assembly in May 2025 has taken a step further to recommend the French regime bring investments conferring "decisive influence" under its scope. *See French FDI regime: one step towards a new (extensive) reform?*, LINKLATERS (June 2, 2025), https://www.linklaters.com/insights/blogs/foreigninvestmentlinks/2025/june/french-fdi-regime.

238. *See* Desmonts, *supra* note 141.

239. The new U.K. regime has been particularly opaque in terms of its notification and call-in process. *See* Israel & Kelliher, *supra* note 123. Board seats, special voting rights, or other means to influence decision-making likely factor into determining risk of control. *See* Tenisha Cramer & Anthony Rosen, *FDI – Latest developments and refinements to the UK's NSIA regime*, BIRD & BIRD (Oct. 15, 2024), https://www.twobirds.com/en/insights/2024/fdi-%E2%80%93-latest-developments-and-refinements-to-the-uk%E2%80%99s-nsia-regime.

varying degrees. For example, the German regime has adopted the concept of "atypical control"—a vague term that encompasses influence beyond voting rights power, to include board rights, veto rights, or access to information.[240] This additional focus on governance rights was added in changes made to the regime in 2021.[241]

The United States' CFIUS regime has done all this and more. In general terms, CFIUS has jurisdiction in covered transactions in which a foreign person acquires *control* of a U.S. business. Relevant here, control is defined broadly, not requiring a majority equity interest and including minority interests that confer influence on important matters.[242] Examples of control include investor vetoes with respect to certain corporate decisions, board rights, or a voting stake as low as ten percent.[243] This broad conception is particularly visible in how the term is defined in regulations:

> the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity.[244]

Beyond control, FIRRMA has also explicitly brought into CFIUS's jurisdiction non-passive, *non-controlling* investments in certain types of U.S. companies that deal with sensitive technologies, infrastructure, or data within CFIUS's jurisdiction.[245] The investments must provide access to material nonpublic technical information, board membership, appointment, or observer rights, or other involvement in the decision making of the company.[246] Clearly, corporate governance is relevant beyond just the traditional parameters of control: the FIRRMA amendments are "a concession to the reality that measuring the extent of

240. Wienke & Kueper, *supra* note 162.

241. Anna Schwander & Thomas S. Wilson, *Germany Significantly Expands Its Foreign Investment Control Regime*, KIRKLAND & ELLIS (May 5, 2021), https://www.kirkland.com/publications/kirkland-alert/2021/04/germany-expands-foreign-investment-control-regime.

242. LATHAM & WATKINS LLP, *supra* note 72, at 2; Westbrook, *supra* note 24, at 668-69.

243. Heifetz, Gruenspecht & Dhir, *supra* note 112, at 2.

244. 31 C.F.R. § 800.208 (2025).

245. *See* Heifetz, Gruenspecht & Dhir, *supra* note 112, at 2-4.

246. *Id.*

corporate control by equity ownership or board representation alone is . . . highly imprecise."[247]

Canada, in particular, has enmeshed corporate governance principles throughout its FDI review process. In practice, factors that contribute to "control in fact" determinations under the Investment Canada Act (ICA) include the ability to make strategic decisions about the business, management of day-to-day operations, the exercise of special voting rights, and board appointment or veto rights.[248] The Canadian government has expressed disfavor at these types of investments which give control over shares or significant board representation.[249]

Recent amendments to the ICA also create a mandatory pre-closing notification regime for foreign investments in yet-to-be prescribed sectors, when the investment would give (1) access to material, non-public technical information or material assets or (2) the power to appoint or nominate any person who has the capacity to direct the business and affairs of the entity, such as a member of the board of directors or of senior management.[250]

Notably, when conducting a net benefit review of a potential state-owned enterprise (SOE) acquisition of a Canadian business, the government will even consider, among other things, if the SOE adheres to Canadian *standards* of corporate governance, "including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees, and equitable treatment of shareholders."[251]

By leveraging corporate governance tools, these regimes have expanded what it means to control an entity, enabling their reach to broaden. As the Canadian regime has shown in particular, considerations of corporate governance are not siloed to control determinations; they can implicate normative determinations as well.[252]

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247. Curtis J. Milhaupt, *The (Geo)Politics of Controlling Shareholders* 15 (ECGI Working Paper Series in Law, Working Paper No. 696/2023, 2023).

248. Alethea Au, Evan Marcus & Trevor Rowles, *Ten Key Considerations for Growth Equity Investments in Canada: Part 2*, STIKEMAN ELLIOT (Nov. 8, 2022), https://www.stikeman.com/en-ca/kh/canadian-ma-law/ten-key-considerations-for-growth-equity-investments-in-canada-part-2.

249. *See* Kevin West & Andrea Hill, *The Investment Canada Act: Gateway to the Canadian Business Frontier*, CHAMBERS & PARTNERS (Apr. 15, 2024), https://chambers.com/legal-trends/canada-investment-review-ica-foreign-investment (with respect to Russian transactions or those into the critical minerals sector).

250. An Act to amend the Investment Canada Act, S.C. 2024, Bill C-34 § 2 (Can.).

251. *All Guidelines: Industry Canada Investment Canada Act*, GOV'T OF CAN., https://ised-isde.canada.ca/site/investment-canada-act/en/investment-canada-act/guidelines/all-guidelines#p2 (last visited Dec. 12, 2024); Do, House & Spillette, *supra* note 75.

252. *See All Guidelines: Industry Canada Investment Canada Act*, *supra* note 251.

C. *The Remedial Powers of FDI Regimes*

As described in Part IV-B, corporate governance is at the core of how these FDI regimes operate. The "inputs" to these regimes—the factors that determine their scope and jurisdiction—have increasingly encompassed corporate governance tools. Many regimes are even sensitive to more abstract features like corporate purpose. Italy, Japan, and Brazil each impose restrictions on changes to the corporate purpose of an entity.[253]

The "outputs" or remedies of the regimes rely on corporate governance as well. Governments, sensitive to the power of corporate governance levers in operationalizing undue influence on domestic corporations, co-opt corporate governance tools through mitigation measures and conditions to entrench their own interests. In Singapore, with respect to its Designated Entities, the remedial powers of the minister include approval power for the appointment of key officers and directors; the minister also has the power to remove such individuals if they are appointed without approval, are noncompliant with conditions attached to the approval, or if their removal would be in the interest of national security.[254] The minister can also pass an administrative order to transfer management of a corporate entity to a minister-appointed individual if in the interest of broadly-conceived national security.[255] The U.K.'s NSIA regime has similarly relied on pre-approval of board members and key personnel as mitigation measures.[256]

In the United States, mitigation measures have included the adoption of Corporate Security Committees; voting trusts; and the appointment of U.S. government approved security officers, board members, and board observers.[257] These measures do not just apply to transactions that get the green light. In its 2023 annual report, CFIUS noted that it imposed mitigation measures in forty-three transactions, or in eighteen percent of 2023 notices.[258] Notably, conditions were still imposed in at least seven cases after the parties voluntarily withdrew and abandoned their transaction.[259]

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253. *See supra* Part IV.A.

254. *Singapore's Proposed Statutory Developments*, *supra* note 192.

255. *Id.*

256. Israel & Kelliher, *supra* note 123.

257. Dep't of Treasury, Committee on Foreign Investment in the United States: Annual Report to Congress Report Period CY 2023 31 (2024), https://home.treasury.gov/system/files/206/2023CFIUSAnnualReport.pdf.

258. *Id.* at 30.

259. *Id.* In these cases, conditions could include the divestiture of all U.S. assets and may not be part of an actual mitigation agreement. *See id.* at 14, 29, 31 n.21.

These remedial powers—mitigation measures and conditions imposed through contracts—have an impact on both the ex ante and ex post behavior of firms. Firms, cognizant of the regulatory hurdles these regimes create, will modify their behavior and business plans concerning foreign direct investment in advance. And when actually engaging in FDI, many firms will be pressured to or contractually required to modify their behavior. These national security FDI regimes "require[] firms to depart from the governance systems they would otherwise adopt."[260] For many companies, even beyond those in the defense and military sectors, national security now has—in a very literal sense—a seat in the boardroom.

V. Implications: Shareholder Primacy, Controlling Interests, and Weaponized Convergence

An analysis of eleven different jurisdictions reveals that as geopolitical tensions rise and FDI regimes become more important, so too does corporate governance. These regimes have increasingly viewed broader aspects of corporate governance as both potential vulnerabilities and potential tools for national security. Despite the varied nature of these regimes, corporate governance is fundamental to how these regimes operate and expand their reach. Corporate governance is also a large part of the solution, allowing governments to entrench their interests in domestic corporations. Corporate governance is thus collateral to the project of national security but essential as a means.

This reality is deeply relevant beyond just foreign direct investment, touching upon broader debates in corporate governance. These FDI regimes represent an expansive new model of government control over corporations, conceptually distinct from the more limited golden share or the integrality of the state-owned enterprise. Here, based on an asserted interest in the amorphous concept of national security, the cost of doing business now entails intimate regulatory oversight and control over a company's corporate governance toolkit. The implications of this new model of control are immense.

A. *Shareholder Primacy*

Since 2018, FDI review regimes have taken on new significance in corporate law. In fact, in the United States context, CFIUS has been said to act "near the heart of corporation law."[261] These regulatory

260. *See* Verstein, *supra* note 7, at 780.

261. Westbrook, *supra* note 24, at 698 (noting in particular the Committee's influence in the context of hostile takeovers).

regimes add new flavors to the ongoing debate about the purpose of corporate law, which—in the United States context—is a push and pull between theories of shareholderism and stakeholderism.[262]

As Pargendler has noted, "[t]he prevailing view among economists and corporate law scholars (at least in the United States) has been that the exclusive goal of corporate law should be the mitigation of agency costs and the protection of shareholders."[263] The FDI regimes reviewed in this Article pose issues for both these goals.

With respect to agency costs, these regimes alter the balance of power between the owners of a corporation—the shareholders—and the controllers of a corporation. For some of the largest decisions a corporation can make—in relation to its purpose, its sale, its data, its technology, and its management—control now rests with the government, which can be seen as both supplanting and insulating management from shareholders.

In addition, these FDI review regimes can serve as anti-takeover tools, throwing a wrench in the M&A "market for corporate control."[264] This market relies on the assumption that poorly managed corporations will generate lower share prices, thus leading to acquisitions by parties that will then have the incentive to better the corporations and increase their value.[265] The restrictions on mergers, acquisitions, and takeovers created by FDI regimes can thus be said to lead to potential inefficiencies within this market model.

Second, these FDI regimes also trouble the idea of shareholder primacy. In the dominant shareholder primacy model of corporate governance, shareholders are regarded as the sole owners to whom management and directors owe duties.[266] This is because shareholders need protections as residual claimants, for which contracts do not adequately provide.[267] Shareholder capital is also "locked in," meaning that they cannot easily sell their shares and withdraw their capital without limitations nor can they often receive a payout without board approval.[268]

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262. Stakeholderism embodies the theory that "groups in addition to shareholders have claims on a corporation's assets and earnings because those groups contribute to a corporation's capital." Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9(3) RICH. J. GLOBAL L. & BUS. 249, 257-58 (2010) (quoting Robert S. Karmel, *Implications of the Stakeholder Model*, 61(4) GEO. WASH. L. REV. 1156, 1171 (1993)).

263. Pargendler, *supra* note 11, at 969.

264. Westbrook, *supra* note 24, at 664, 686-88.

265. *Id.*

266. Verstein, *supra* note 7, at 811.

267. Pargendler, *supra* note 11, at 969.

268. Richard Squire, *Why the Corporation Locks in Financial Capital but the Partnership Does Not*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 8, 2022), https://corpgov.law.harvard.edu/2022/02/08/why-the-corporation-locks-in-financial-capital-but-the-partnership-does-not.

Corporate law theory thus frowns upon incorporating stakeholder interests into decision-making. In addition to diverting focus away from shareholder needs, stakeholderism is said to be "unworkable and inefficient, effectively permitting executives to pursue their own interests instead of social welfare at large."[269] Notably, social welfare within the shareholder primacy model is determined by the proxy of shareholder welfare.[270] Stakeholder interests, it is assumed, will be more efficiently protected by other dedicated areas of law, justifying the law-and-economics, *ceteris paribus* modularity trap in which corporate law theory is able to insularly grapple with narrow issues.[271]

Despite its influence, the shareholder primacy theory of corporate law has come under increasing scrutiny.[272] There has been a "creeping abandonment" of shareholder primacy models since the early 2010's, whereas in the decades leading up to the 2008/2009 financial crisis, shareholder primacy models were on the rise.[273]

As Pargendler notes, "mainstream economists and legal scholars are increasingly opening to the idea that firms may at times be able to address some social problems at lower cost than governments, and that corporate law may properly embrace broader objectives."[274] Indeed, the Business Roundtable's "Statement on the Purpose of a Corporation" in 2019 committed to both generating long term value for shareholders and to delivering value to all stakeholders, "for the future success of our companies, our communities and our country."[275] It reaffirmed this vision of corporate purpose in 2024 as

269. Pargendler, *supra* note 11, at 969.

270. *See id.* (noting that under the prevailing view, focusing on non-shareholder interests would allow executives to "pursue their own interest instead of social welfare at large").

271. *See id.* at 969-71. It is important to note that "attention to stakeholder interests has long been salient in corporate law and governance in the Global South." Pargendler, *supra* note 90, at 12.

272. Pargendler, *supra* note 11, at 970.

273. Gelter & Puaschunder, *supra* note 12, at 607. Nationalism has infected this debate as well. Scholars have argued that the COVID-19 pandemic will contribute to various trends in corporate governance, including the growth of nationalist politics in corporate law and a broader reorientation towards stakeholder interests. *See id.* at 558, 559–61. But many of these analyses attribute a large part of the shift towards stakeholderism to the power of institutional investors, such as mutual funds, hedge funds, and index funds. *E.g.*, *id.* at 614.

274. Pargendler, *supra* note 11, at 971.

275. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (2019), https://opportunity.businessroundtable.org/opportunity-commitment. *See Five Years On: Corporate Purpose and Profit*, BUS. ROUNDTABLE (Aug. 16, 2024), https://www.businessroundtable.org/five-years-on-corporate-purpose-and-profit (stating in 2024 that it was five years since Business Roundtable issued their previous statement).

well.[276] No longer is it universally accepted that, as Milton Friedman once wrote, "there is one and only one social responsibility of business"—to increase its profits.[277]

While there has undoubtedly been a shift toward stakeholderism among some commentators and corporations, it remains a hotly contested topic, visible through continued heated debates on environmental, social, and governance (ESG) principles. The anti-ESG movement has been so vocal, and ESG principles so politicized, that executives and companies have de-emphasized their sustainability efforts, a tactic known as "greenhushing."[278]

National security FDI regimes, on the other hand, represent a growing, highly visible, and largely accepted move away from shareholderism. In fact, this shift is seen as a national security imperative, with the traditional levers of government regulation seen as too defuse and the traditional deference to shareholder primacy as too vulnerable.

In a related context, Andrew Verstein argues that government influence on the boards of defense contractors in the United States through the appointment of outside directors and proxy holders also can be viewed through the stakeholder model as "an actual instance of low-accountability, multiple-mandate boards that few imagined exist."[279] As Verstein notes, the practice is a "striking departure from corporate law's empowerment of shareholders."[280] Verstein suggests that the debates about the proper role of stakeholder interests within a corporation's mandate are incomplete without accounting for the reality of how national security stakeholder interests influence an entire sector of the economy.[281]

National security FDI regimes accomplish similar ends but to a significantly greater scope than the practice Verstein details.[282] Indeed, these FDI regimes accomplish these goals as a matter of broad government

276. *Five Years On: Corporate Purpose and Profit*, *supra* note 275.

277. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962); *see also* BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997) ("The paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders.").

278. Andrew Winston, *ESG is Under Attack. How Should Your Company Respond?*, HARV. BUS. REV. (Dec. 22, 2023), https://hbr.org/2023/12/esg-is-under-attack-how-should-your-company-respond.

279. Verstein, *supra* note 7, at 779.

280. *Id.* at 804.

281. *See id.* at 829.

282. While the capture of corporate boards by government-connected individuals has been described to be extensive in the defense contractor sector, *see id.* at 803-05, it appears that the number of independent directors with experience in the government or military for U.S. companies in general is small and even decreasing. *See* Curtis J. Milhaupt, *Corporate Governance in*

regulation rather than through the specific mechanism of government contracting. As scholars have noted, "corporations well outside the proverbial 'military-industrial complex' find themselves in a role to which they are unaccustomed: indispensable partners of government in the quest for geostrategic advantage."[283]

The government in these regimes enters transactions as a contractual stranger, nevertheless requiring compliance and often substantive changes to deals and corporate governance structures, all the while remaining unaccountable to any shareholder.[284] As described, beyond the wide breadth of companies that these regimes threaten to apply to, companies actually subject to FDI reviews often leave with continuing commitments and monitoring relating to a swath of their decision-making abilities, including with respect to facility locations, hiring, and corporate purpose, to name a few. Ultimately, especially when it comes to corporate governance, companies cannot independently choose how to operate within parameters set out by regulations; rather, much of their decision-making becomes explicitly dictated by government actors. These companies then become reliant on the continued blessing of the government to persist—or else risk unwinding.

In this sense, that the corporation must act always with the government's specific national security interest in mind is a notable change. FDI regimes are an increasingly important and broad way through which governments—willingly or unwillingly—recruit corporations and co-opt corporate governance regimes in the name of national security. Within these jurisdictions, these regimes put a notch in the belt of the stakeholder model.

B. *The Government's Controlling Interest*

A corollary to the troubling of shareholder primacy is the *extent* of this inclusion—or rather, intrusion—of a certain stakeholder interest into corporate governance. Beyond encouraging corporations to more broadly incorporate stakeholder interests into their decision-making, national security-based FDI regimes arguably go much further. Indeed, the government in these FDI regimes can be conceptualized as more than just a broad, overarching regulatory force—but rather as a direct

an Era of Geoeconomics 20 (ECGI Working Paper Series in Law, Working Paper No. 790/2024, 2025), http://dx.doi.org/10.2139/ssrn.4888623.

283. Milhaupt, *supra* note 282, at 16.

284. *See, e.g.*, DEP'T OF TREASURY, *supra* note 257 (discussing how CFIUS may impose conditions on deals).

stakeholder[285] with a (metaphorically) *controlling interest*. Like golden shares or national ownership of corporations, these newer FDI regimes do more than regulate. Driven by specific and variable geopolitical notions of national security, the government in many respects acts with a controlling interest, without any actual ownership interest, representing a new form of government intervention and control.

As Curtis Milhaupt describes, "the power of corporate control is a product of basic corporate law and governance principles," able to extend the power of the state in the corporate form.[286] The FDI regimes described here operate in much the same way, through molding the corporate governance of subject companies to establish control. It has been argued that, within the FDI realm, contracts substitute for ownership in the sense that post-closing contractual commitments implemented through mitigation measures are meant to make up for the perceived lack of loyalty connected to foreign ownership.[287] This comparative analysis suggests that contracts in the FDI realm are viewed as sufficient substitutes for ownership because they create *control* through their corporate governance requirements. To be clear, each of these regimes says as much.[288] FDI regimes are able to command the levers of corporate governance that their own statutes define as providing the ability to exert control.[289]

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285. Relevant but not necessary to this conclusion is the conception of the government acting as a stakeholder to a new extent. To be sure, the view of the government as a stakeholder is not novel, but the government actor in these regimes fits into the many diverging and varying conceptions of stakeholders to an extent not often seen. *See* Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9(3) RICH. J. GLOBAL L. & BUS. 249, 259-60 (2010) (identifying governments as secondary stakeholders). As a starting point, defining the "stakeholder" for a corporation is a difficult task. In a broad sense, various scholars have argued that stakeholders essentially include those "able to affect or be affected by the corporation." *See, e.g.*, *id.* at 256. The resulting group includes customers, suppliers, financiers, creditors, shareholders, employees, local communities, the environment, and local and national governments. *Id.* at 257, 260. The government qualifying under this umbrella is routine. The government generally drops out of the more stringent definitions of stakeholders, however. These include the "primary" stakeholder group, or those "who have a formal, official, or contractual relationship with the corporation, and without whom the corporation could not function." *See id.* at 259-60, 274. In contrast, the government is usually considered a "secondary" stakeholder, "those who have not negotiated with the corporation, but who can have influence and can affect the corporation." *Id.* at 259. Under these FDI review regimes, the government has arguably upgraded from a secondary to a primary stakeholder.

286. Milhaupt, *supra* note 247, at 4.

287. Pargendler, *supra* note 3, at 580.

288. *E.g.*, 31 C.F.R. § 800.208 (2025).

289. *Id.*

Accordingly, the move to what can be described as a controlling stakeholder model is in part a recognition of a concern that a controlling stakeholder is already at work in "adversarial" jurisdictions. For example, the European Commission's first annual report on FDI screening noted that "the past years have seen a clear change in investor profiles and investment patterns, i.e. increasingly non-OECD investors, occasionally with government backing or direction, whose motivation for a particular investment might not always be exclusively commercial."[290] The second Trump Administration has been even more explicit, as detailed in its "America First Investment Policy":

> Certain foreign adversaries, including the People's Republic of China (PRC), systematically direct and facilitate investment in United States companies and assets to obtain cutting-edge technologies, intellectual property, and leverage in strategic industries. The PRC pursues these strategies in diverse ways, both visible and concealed, and often through partner companies or investment funds in third countries.[291]

There is a concern that foreign investors, whether state-owned or not, are effectively controlled by their respective nation's government.[292]

Nationalism can take many forms in corporate law. It may entail full government ownership of corporations (i.e., state owned enterprises), or it may remain residual through golden shares, as seen in Brazil.[293] The controlling stakeholder formation of these FDI regimes straddles these two poles.[294] With the control levers of corporate governance in hand, corporations become tools of power for the state. As Milhaupt has noted, "[i]n important respects, the current era harkens back to a much earlier period in which corporations were formed explicitly to partner with government in the production of public goods, the implementation of government policy, and the projection of state power."[295]

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290. *Report from the Commission to the European Parliament and the Council: First Annual Report on the Screening of Foreign Direct Investments into the Union*, at 1, COM (2021) 714 final (Nov. 23, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0714.

291. *America First Investment Policy*, WHITE HOUSE (Feb. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy.

292. *See* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103(3) GEO. L. J. 665, 668 (2015).

293. *See* Gelter & Puaschunder, *supra* note 12, at 561; *supra* Part IV.A.5.

294. *See generally* Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2925-57 (2012) (analyzing state ownership in various jurisdictions).

295. Milhaupt, *supra* note 282, at 17.

Today, the government need not labor to form these corporate agents; they can convert existing ones as desired.

To be sure, there are clearly "overlapping and conflicting" interests between governments and the shareholders and management of corporate entities subject to their influence through these FDI regimes.[296] Corporations subject to these regimes must operate in restricted ways. Nevertheless, the national security stake that corporations must now contend with is in many respects impervious to competing interests. Like in other realms, national security dominates other competing considerations—the law is in many senses "unequivocal about its importance."[297]

The Qualcomm case study underscores this point. Given the contentious nature of Singapore-based Broadcom's failed effort to acquire U.S.-based Qualcomm, scholars like Westbrook have analyzed the events and outcome thoroughly.[298] The following overview is drawn from Westbrook's account of the events. In 2017, Broadcom made an offer for Qualcomm that was well above the company's publicly traded price, but Qualcomm's board of directors unanimously rejected the offer, finding that the offer undervalued the company.[299] In response, Broadcom undertook two efforts: (1) it launched a proxy contest, aiming to change a majority of the directors; and (2) it began to re-domicile in Delaware.[300] Qualcomm then filed a unilateral notice with CFIUS and put the transaction on the Committee's radar.[301] CFIUS in turn ordered Qualcomm to delay its stockholder meeting and its board election.[302] Broadcom described the move as "a blatant, desperate act by Qualcomm to entrench its incumbent board of directors and prevent its own stockholders from voting" and asserted that "[i]t should be clear to everyone that this is part of an unprecedented effort by Qualcomm to disenfranchise its own stockholders."[303] Nevertheless, President Trump soon after blocked the proposed takeover.[304] But President Trump went even further: the executive order also disqualified

296. *See id.* at 18.

297. Verstein, *supra* note 7, at 822, 830 ("Without constant vigilance, national security concerns have a tendency to supplant other values, such as civil liberties, representative government, and transparency.").

298. Westbrook, *supra* note 24, at 650-59.

299. *Id.* at 651-52.

300. *Id.* at 652.

301. *Id.* at 653.

302. *Id.* at 654.

303. *Id.* at 657.

304. *Id.* at 658.

all potential candidates that were listed on Broadcom's proxy card from standing for election as directors of Qualcomm.[305]

The government's intervention in the proposed Qualcomm acquisition shows just how dominant national security considerations are when infused into a deal. Yes, the government blocked the deal, but it also dictated the parameters of the fall out. Broadcom's candidates were blacklisted; the incumbents were re-elected in an uncontested election.[306] The ability of Qualcomm's stockholders to voice their preferences was not just diluted to make room for the government's interest. Rather, it was sidelined.

When considered in isolation, the fact that these national security FDI regimes operate to give governments such a controlling interest in corporations is striking enough. However, when considered in the broader context of the changing landscape of state intervention in corporate matters—at least in the American context—these regimes take on even greater significance.

First, it is worth reiterating that these national security FDI regimes are cut from the same cloth as other more traditional methods of government control in corporate law—namely, state ownership and golden shares.[307] To be sure, these methods differ in many ways: appearance, operation, formalization, transparency, and reception.[308] But they all provide an avenue for direct government control.

In some ways, in the U.S. context, the variable reception to these methods of government control is their most notable difference. The second Trump administration has surprised many by initiating relatively unprecedented interventions in U.S. companies and U.S. industrial policy. For example, the government has used tariffs to push companies like Apple to invest more in the United States.[309] It has made deals with companies like Nvidia and Advanced Micro Devices (AMD), granting export licenses in return for some of their profits.[310]

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305. *Id.*

306. *See id.* at 658-59.

307. *See* Pargendler, *supra* note 294, at 2918 ("state ownership of listed companies is pervasive"), 2960 (noting golden shares are common in common law countries).

308. *See generally id.* (describing various types of state-owned enterprises); *see id.* at 2967 (describing golden shares); *supra* Part IV.A (describing FDI regimes).

309. *See* Andrea Shalal, Nandita Bose & Arsheeya Bajwa, *Trump announces $100 billion new investment pledge from Apple*, REUTERS (Aug. 6, 2025), https://www.reuters.com/business/retail-consumer/trump-announces-100-billion-new-investment-pledge-apple-2025-08-06.

310. *US will get a 15% cut of Nvidia and AMD chip sales to China under a new, unusual agreement*, ASSOCIATED PRESS (Aug. 11, 2025), https://apnews.com/article/nvidia-amd-15-revenue-share-deal-c06e20d9c3418f1d0b1292891c4610c6.

It has acquired a golden share in U.S. Steel as a prerequisite to approving its acquisition by Japan-based Nippon Steel.[311] And it has even purchased direct stakes in numerous companies: MP Materials, Trilogy Metals, Lithium Americas, and Intel.[312]

Analysts have reacted with a marked sense of alarm towards these interventions. Some analysts have discussed "America's quiet turn towards state capitalism," [313] for example, with abundant discussion on whether the United States has truly begun to nationalize companies.[314] Of course, much of the worried reception stems from the novelty of these interventions.

Yet, the true extent of this novelty is not exactly clear. The specific framing or "rhetorical flourish"[315] of some of these interventions may be relatively new, but the effect—government control—is by no means

311. *Nippon Steel Corporation and U. S. Steel Finalize Historic Partnership*, NIPPON STEEL CORP. & U.S. STEEL CORP. (June 18, 2025), https://www.nipponsteel.com/common/secure/en/news/20250618_100.pdf.

312. Cory Pforzheimer & Sophie Metzger, *Intel and Trump Administration Reach Historic Agreement to Accelerate American Technology and Manufacturing Leadership*, INTEL (Aug. 22, 2025), https://www.intc.com/news-events/press-releases/detail/1748/intel-and-trump-administration-reach-historic-agreement-to?utm_medium=email&utm_source=substack; *MP Materials Announces Transformational Public-Private Partnership with the Department of Defense to Accelerate U.S. Rare Earth Magnet Independence*, MP MATERIALS (July 10, 2025), https://mpmaterials.com/news/mp-materials-announces-transformational-public-private-partnership-with-the-department-of-defense-to-accelerate-u-s-rare-earth-magnet-independence; Tony Giardini & Elaine Sanders, *Trilogy Metals Announces Strategic Investment by US Federal Government*, TRILOGY METALS INC (Oct. 6, 2025), https://trilogymetals.com/news-and-media/news/trilogy-metals-announces-strategic-investment-by-us-federal-government; Ernest Scheyder, *US government takes 5% stakes in Lithium Americas and joint venture with GM*, REUTERS (Oct. 1, 2025), https://www.reuters.com/business/autos-transportation/us-government-take-5-stake-lithium-americas-joint-venture-with-general-motors-2025-09-30.

313. Maria Shagina, *America's quiet turn towards state capitalism*, IISS (Sep. 15, 2025), https://www.iiss.org/online-analysis/online-analysis/2025/09/americas-quiet-turn-towards-state-capitalism/; *see also* Curtis K. Milhaupt & Angela Huyue Zhang, *Trump's special deals with NVIDIA, AMD, Intel and others send investors a troubling message*, MKT. WATCH (Sep. 20, 2025), https://www.marketwatch.com/story/trumps-special-deals-with-nvidia-amd-intel-and-others-send-investors-a-troubling-message-2f8bfb64?gaa_at=eafs&gaa_n=ASW%E2%80%A6 (referring to "America's new state capitalism").

314. *See, e.g.*, Sarah Bauerle Danzman, *Did Trump effectively nationalize US Steel with his 'golden share'?*, ATL. COUNCIL (June 16, 2025), https://www.atlanticcouncil.org/blogs/new-atlanticist/did-trump-effectively-nationalize-us-steel-with-his-golden-share; Michael R. Strain, *Is Trump a State Capitalist?*, AEI (Sep. 12, 2025), https://www.aei.org/op-eds/is-trump-a-state-capitalist; Michael Chapman, *Trump's "State Capitalism . . . a Hybrid Between Socialism and Capitalism" Won't Make America Great Again*, CATO INST. BLOG (Aug. 28, 2025), https://www.cato.org/blog/trumps-state-capitalism-hybrid-between-socialism-capitalism-wont-make-america-great-again.

315. Stephen Heifetz, *The Nippon-U. S. Steel Deal, a Golden Share, and Magic Beans*, COUNCIL ON FOREIGN RELS. (July 16, 2025), https://www.cfr.org/article/nippon-u-s-steel-deal-golden-share-and-magic-beans.

unfamiliar. National security-based FDI regimes, like CFIUS, have already been exerting similar levels of control for years. To borrow a medical term, there is an undiagnosed comorbidity in this conversation.

The recent U.S. Steel case study provides an apt example, precisely because it merges both CFIUS review and the golden-share method of control. In August 2023, U.S. Steel announced that it received multiple unsolicited bids, including from other American companies.[316] In December 2023, Japan-based Nippon Steel bid on U.S. Steel with an offer that was significantly higher than prior bids.[317] By mid-December, Nippon Steel and U.S. Steel had reached an agreement.[318] Notably, Nippon pledged to keep U.S. Steel's name, its U.S. production base, and its Pittsburgh headquarters,[319] reflecting the political anxieties at play in the deal.

In March 2024, President Biden weighed in, stating that U.S. Steel should not fall into foreign hands.[320] However, in an April 2024 Special Meeting of stockholders, an overwhelming majority (ninety-eight percent) of U.S. Steel shares that were voted in the meeting, representing seventy-one percent of the company's issued and outstanding common stock shares, voted in favor of the acquisition.[321] Nevertheless, in August 2024, CFIUS informed both companies that the transaction posed a national security risk; both parties responded, attempting to rebut the concerns.[322]

Ultimately, in December 2024, CFIUS informed the White House that it had failed to reach a conclusion after finishing its review, leaving the decision about the U.S. Steel acquisition to the president without a recommendation.[323] Shortly after, in January 2025, President Biden blocked the deal.[324] Critics of the move saw it as a politicization of what should be an apolitical CFIUS review process—national security, its boundaries morphing, used as a political instrument.[325]

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316. *Timeline of Nippon Steel Acquiring U.S. Steel*, 3(2) USALI E.-W. STUD., July 2025, https://usali.org/nippon-steel/timeline.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*; *U. S. Steel Stockholders Approve Transaction with Nippon Steel Corporation (NSC)*, U.S. STEEL (Apr. 12, 2024), https://www.ussteel.com/perspective-detail/-/blogs/u-s-steel-stockholders-approve-transaction-with-nippon-steel-corporation-nsc-.

322. *Timeline of Nippon Steel Acquiring U.S. Steel*, *supra* note 316.

323. *Id.*

324. *Id.*

325. *See* Editorial Board, *U.S. Steel and the Corruption of Cfius*, WALL ST. J. (Jan. 3, 2025, at 17:53 ET), https://www.wsj.com/opinion/biden-blocks-nippon-u-s-steel-deal-cfius-united-steelworkers-cleveland-cliffs-japan-fa301474.

Historically, that would be the end of the story.[326] In this case, however, newly-elected President Trump ordered CFIUS to conduct a *de novo* review of the national security implications of the transaction in April 2025.[327] Finally, in June 2025, President Trump issued an executive order announcing that the deal, while still presenting a national security risk, would be able to move forward.[328] Nippon would be required to enter into a National Security Agreement (NSA), which detailed certain mitigation measures that would address the national security concerns.[329]

Per a joint statement by the two companies, U.S. Steel would also issue a "Golden Share" to the U.S. government.[330] This golden share would provide the government with rights, including: (1) the right to appoint one independent director, and (2) "consent rights" of the president or his designee on specific matters.[331] These matters include any potential reductions in the committed capital investments under the NSA, the changing of U.S. Steel's name and headquarters, the redomiciling of U.S. Steel outside of the United States, any transfers of production or jobs outside of the United States, any material acquisitions of competing businesses in the United States, and certain decisions on closure or idling of U.S. Steel's existing U.S. manufacturing facilities, trade, labor, and sourcing outside of the United States.[332] The actual scope of this golden share is not clear-cut with President Trump stating, as early as May 2025, that U.S. Steel would be "controlled by the United States"[333] and Nippon Steel's President noting, shortly after the executive order, that there was a "minor difference in views" regarding the authority of the golden share.[334]

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326. It should be noted however that both Nippon Steel and U.S. Steel sued to contest the decision. Fatima Hussein, *Nippon, US Steel file suit against Biden administration, union, and rival after $15B deal scuttled*, ASSOCIATED PRESS (Jan. 6, 2025), https://apnews.com/article/nippon-us-steel-biden-pennsylvania-eacf51a38e26280080f49fb280cb70a6. This response, while not unprecedented, is uncommon. *See* Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296 (D.C. Cir. 2014); James Brower & Nicholas Weigel, *Are CFIUS Decisions Legally Vulnerable?*, LAWFARE (Jan. 16, 2025), https://www.lawfaremedia.org/article/are-cfius-decisions-legally-vulnerable (noting beyond a TikTok challenge, *Ralls* was the "only meaningful litigation" related to CFIUS's power).

327. *Timeline of Nippon Steel Acquiring U.S. Steel*, *supra* note 316.

328. *Id.*

329. *Id.*

330. *Nippon Steel Corporation and U. S. Steel Finalize Historic Partnership*, *supra* note 311.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Nippon Steel sees small gap with Washington over US Steel's golden share authority*, REUTERS (Sep. 25, 2025), https://www.reuters.com/business/nippon-steel-sees-small-gap-with-washington-over-us-steels-golden-share-2025-09-25.

The U.S. Steel case study is easily defined by the novelty of the remedial measure employed—the golden share. But more central to this story is the re-affirmation of the CFIUS process as a powerful tool of government control, which has taken second stage in the narrative.[335] The CFIUS process enabled the government intervention and provided a framework for the introduction of the golden share. In many respects, this was just another iteration of the CFIUS review process. The U.S. Steel case study thus underscores the power of these existing national security FDI regimes, which provide governments a controlling interest.

Accordingly, these regimes can be seen as just another manifestation of the broader shift in U.S. corporate law towards greater government intervention.[336] The U.S. Steel case study, however, also arguably points to another lesson: the CFIUS regime might better be viewed less as another manifestation of this shift towards government intervention and more as a contributing factor. At minimum, the existence of the CFIUS regime paved the path to where we are today. Through the infusion of broadly construed national security considerations into the corporate realm, more invasive government control was and is made palatable. In the U.S. Steel case, the CFIUS process, a hallmark of the United States' national security regulatory apparatus, provided legitimacy to the intervention. It also provided an avenue to introduce the golden share. Future interventions that go even further may benefit from the same process. The CFIUS process might then serve as a conduit for innovation in the U.S. corporate law environment—or as a conduit for even greater government control. National security—enlarged, pervasive, and mythologized—holds the reins of corporate governance.

C. *Weaponized Convergence*

Lastly, scholars have speculated that rising nationalism in corporate law may lead to increasing divergence in corporate governance.[337] As the theory goes, when markets become more closed, international competition generates less evolutionary pressures that will translate to less international convergence.[338] Indeed, in recent years, the market for

335. *See, e.g.*, Fred Ashton, *The Push Toward State-directed Capitalism Undermines Market Competition*, AM. ACTION F. (Sep. 22, 2025), https://www.americanactionforum.org/insight/the-push-toward-state-directed-capitalism-undermines-market-competition (flagging only the more recent use of CFIUS in the U.S. Steel deal as pushing toward state-directed capitalism).

336. With respect to the broader shift, see Shagina, *supra* note 313.

337. Gelter & Puaschunder, *supra* note 12, at 626-28.

338. *Id.* at 628.

international investment has undergone significant change, with greater restrictions and scrutiny across the board through the implementation of these FDI regimes.[339] Yet, the rise of these FDI regimes may offer a case study to the contrary: convergence may yet persist.

The idea of "convergence" in corporate governance originated when countries in Europe and Asia began to move towards the shareholder model of corporate governance (otherwise known as the Anglo-Saxon model) in the 1990s and 2000s.[340] Supported by international institutions like the World Bank, the International Monetary Fund, and the OECD, and "relative political tranquility," countries at the time increasingly adopted pro-shareholder and pro-investor laws and regulations.[341] This trend has withstood a variety of shocks, including the 2008/2009 global financial crisis for the most part.[342] Scholars, however, have questioned the lasting power of this "convergence" in the face of the world's more recent turn towards nationalism.[343]

To be sure, the "ascendancy of pro-shareholder structures" may be in decline,[344] clearly visible though the widespread adoption of these national security-based FDI review regimes as just one example. However, these regimes do not necessarily show a *divergence* in corporate governance as much as they show a *shift* in corporate governance—newly directional yet still convergent. The weaponized interdependence that these regimes leverage[345] has instead led to a "weaponized convergence" in corporate governance—that is, the increasing similarity of corporate governance practices in different countries as a result of the co-option of corporate governance tools by national security regulatory apparatuses.

This convergence is visible in two respects: the implicit shift away from theories of shareholder primacy that underlaid the convergence of corporate governance in the 1990s and 2000s and the use of corporate governance tools as methods of state control.[346] As to the first, and as described in this Article, the pressures that have led to the adoption of these FDI regimes have coalesced around a model of corporate

339. *Supra* Part III.

340. Gelter & Puaschunder, *supra* note 12, at 559, 575.

341. *Id.* at 575, 577.

342. *Id.* at 576.

343. *Id.* at 563-64, 577-78, 627-28.

344. *Id.* at 577-78.

345. *See generally* Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44(1) INT'L SEC. 42 (2019) (describing how states leverage network structures as a coercive tool).

346. For the topic of convergence, see Gelter & Puaschunder, *supra* note 12, at 574-75.

governance that is decidedly more stakeholder-centric.[347] In matters of national security, broadly construed, shareholder interests take a backseat to those of the government.

Second, the rising nationalism fueled by increasing geopolitical and technological competition has generated similarities in how jurisdictions view corporate governance within the realm of international investment—as a vulnerability and a tool.[348] Accordingly, these regimes often factor in corporate governance in similar ways to determine jurisdiction, and they further put in place strictures on corporate governance features in deals that might grant effective control or influence. In a remarkably short time, countries around the world are all now newly-equipped to co-opt corporate governance to retain or gain control over corporate entities as they see necessary. Thus, despite the varied nature of these regimes, they are a clear indicator of a weaponized convergence in corporate governance.

This weaponized convergence portends continued scrutiny and restrictions on FDI in the future. As more and more governments seize the levers of corporate governance that they themselves define as having the ability to exert control, it seems unlikely that other countries will not respond in kind. Indeed, many already have, and the political and regulatory complexity of international investment and global M&A have correspondingly increased.[349]

Importantly, this figurative "arms race" of corporate governance creates opportunities beyond reactive protectionism. It could lead to broader conversations about models of corporate governance and the role of the corporation in society. For example, Westbrook notes that CFIUS review may open up the possibility for a more "national approach" to the role of the corporation—and in effect, corporate law.[350] She notes that the CFIUS process can allow normative considerations to enter in a way that state corporation law or federal securities law have not: what deals should occur, and how they should occur.[351]

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347. *See supra* Part V.A.

348. *See supra* Part IV.B and IV.C.

349. Andrzej O'Leary et al., *Regulatory roadblocks to private M&A transactions: navigating competition, foreign direct investment and foreign subsidies controls*, LEXOLOGY (Sep. 2, 2025), https://www.lexology.com/library/detail.aspx?g=66cc3420-75f7-4bdd-9c57-9004a7968bf9 ("Identifying regulatory obstacles to cross-border transactions and designing strategies to secure clearances is becoming an ever more challenging task for transacting parties. There are now more than 130 jurisdictions worldwide with active merger-control regimes, with some major jurisdictions, such as Australia, also moving from voluntary to mandatory notification systems.").

350. *See* Westbrook, *supra* note 24, at 697-98.

351. *See id.*

It could also lead to new forms of regional cooperation, as jurisdictions look to their peers for models of reform. In a similar vein, scholars have increasingly looked to international economic agreements that incorporate principles of corporate governance, like the European Union-Japan Economic Partnership Agreement, as potential means of encouraging convergence in corporate governance.[352] Perhaps counterintuitively, this decentralized, weaponized convergence may create the opportunity for centralized convergence efforts that have been increasingly studied in the emerging field of international corporate governance.[353]

VI. Conclusion

In the realm of international investment, national security is now center stage. With the expansion of these FDI regimes, so too is corporate governance. As this Article highlights, national security-based FDI regimes have grown in number, scope, and influence—powerful players in all but one analyzed jurisdiction. Fundamental to their power is a converging focus on corporate governance, operationalized from vulnerability to asset.

Yet, this relationship between national security and corporate governance is not necessarily a balanced one. Rather, national security operates in these FDI regimes to co-opt corporate governance as a newly powerful tool of control, implicating corporations as extensions of the state—as this Article argued, providing governments with, in some respects, *a controlling interest*. The ability of governments to leverage these FDI regimes to exert this potentially unbounded influence reveals a broader flaw in national security-based systems of review. Without the proper guardrails, politicization can run rampant,[354] making the FDI review process transactional and divorced from a broader principled inquiry.[355] The indeterminacy of the concept of national

352. Ram Sachs, *The International Law of Corporate Governance*, 32(1) Pace Int'l L. Rev. 57, 59 (2019).

353. *See* Pargendler, *supra* note 11, at 973.

354. Some, for example, have questioned why certain transactions *escape* review, pointing to political connections. Vinita R. Singh, *The CFIUS Review That Will Never Be*, Lawfare (Oct. 3, 2025), https://www.lawfaremedia.org/article/the-cfius-review-that-will-never-be.

355. The law firm Covington LLP described the second Trump administration's and CFIUS's developing transactional approach to investment as potentially leading "to solutions that shift from core national security interests closer to a 'net benefit' or public interest framework." *See Reflections on CFIUS and U.S. National Security and Foreign Investment Regulation in the First Four Months of the Trump Administration*, Covington (June 4, 2025), https://www.cov.com/en/news-and-insights/insights/2025/

security further aggravates this issue. While this politicization is not new,[356] its prominence seems likely to grow.

The implications of this increasingly prominent form of government control go beyond national security discussions, though further interrogation into how the project of national security interacts with corporate law and governance is greatly warranted. Equally important is a consideration of why this shift away from shareholderism towards a stakeholder model seemingly meets little resistance while other stakeholder discussions in corporate governance—namely revolving around ESG—have ignited controversy. Can a national security exception to the shareholder model be justified in a principled manner? Are the stakes of national security so vastly different than other existential risks implicit in ESG discussions, like the climate crisis? While there are distinguishing variables between different stakeholder concerns, the stakeholder nature of FDI regimes require at the minimum continued interrogation of the theory of shareholder primacy so as to ensure models of corporate governance can work to benefit social welfare, broadly construed.

06/reflections-on-cfius-and-us-national-security-and-foreign-investment-regulation-in-the-first-four-months-of-the-trump-administration.

356. Several politicians, on both sides of the political aisle, intervened in the proposed Broadcom acquisition of Qualcomm, expressing concerns over the deal. Westbrook, *supra* note 24, at 653.