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Foreign Direct Investment Screening in the Arctic

Cornell Overfield, Anthony Miller, Eleanore Douglas, Kasey Stricklin, Mary Ellen Connell

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Abstract

This report is part of a series of reports that CNA produced at the request of the Office of the Secretary of Defense to fulfill requirements outlined in the FY 2020 National Defense Authorization Act (NDAA, Sec. 1260E). The FY 2020 NDAA mandates that a federally funded research and development center "complete an independent study of Chinese foreign direct investment [FDI] in countries of the Arctic region, with a focus on the effects of such foreign direct investment on United States national security and near-peer competition in the Arctic region." This paper examines the laws governing FDI screening in Arctic states, concluding that such policies (particularly in the US, Canada, Russia, Norway, and Iceland) offer effective tools to investigate and block foreign investments that raise national security concerns. Iceland, Greenland, Canada, Norway and Russia all have industrial policy and land-ownership laws that provide additional layers of protection.

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The lead author for this paper is Cornell Overfield (overfieldc@cna.org).

The project director for this study is Dr. Joshua Tallis (tallisj@cna.org).

Approved by: **January 2022**

Nilanthi Samaranayake

Nilanthi Samaranayake, Research Program Director
Strategy and Policy Analysis
Strategy, Policy, Plans, and Programs Division

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Executive Summary

This report is part of a series that CNA produced to fulfill requirements outlined in the fiscal year (FY) 2020 National Defense Authorization Act (NDAA), Sec. 1260E. The FY 2020 NDAA mandates that a federally funded research and development center "complete an independent study of Chinese foreign direct investment [FDI] in countries of the Arctic region, with a focus on the effects of such foreign direct investment on United States national security and near-peer competition in the Arctic region."[1] The Department of Defense selected CNA to execute this analysis, for which CNA produced four reports. In this report, we examine the legal conditions governing investments in the Arctic.[2]

Organization

That examination hinges on the two mechanisms that Arctic states can use to manage inbound investment: FDI screening systems and sectoral policies. On the one hand, FDI screening systems are only one means to evaluate inbound investments. On the other hand, sectoral policies can also functionally control and constrain FDI. These techniques can be understood as the differences between "nets" and "walls."

- **FDI screening systems operate like nets.** Investments are permitted, by default, but may be rejected if certain features of a project capture the attention of regulators. Because investments under this rubric often do not require explicit permission, some investments may pass through unnoticed.
- **Sectoral policies operate like walls.** Such policies cordon off certain industries from external investment and by default prohibit or limit foreign investment opportunities. Authorities can choose to waive these rules, but those actions would by definition follow from an initial awareness of the inbound investment.

Although the NDAA mentions only FDI screening, we assessed both mechanisms since both can be used to filter incoming investments for their harm to national security.

[1] *National Defense Authorization Act for Fiscal Year 2020*, 2019. § 1260E(b)(2).

[2] The three other CNA papers assess the scale of PRC-based Arctic investment, assess the strategic objectives of PRC-based Arctic economic activity, and provide recommendations for US policy-makers. All reports for this project can be found at www.cna.org/ArcticFDI. The summary report and recommendations document by Joshua Tallis, Mark Rosen, and Cornell Overfield is *Arctic Economic Security: Recommendations for Safeguarding Arctic Nations against China's Economic Statecraft*.

Key Findings

The NDAA laid out a series of report criteria related to the legal and regulatory environment for Arctic FDI in Canada, Greenland, Iceland, Norway, Russia, and the US, including the need to explore:

- The efficacy of mechanisms for screening FDI.
- The degree of transparency in FDI screening.
- The criteria used in FDI screening.
- The efficacy of monitoring methods.
- The exemption of People's Republic of China (PRC)-based investments from environmental and bankruptcy regulations.

Addressing these criteria, we reached the following conclusions:

- **Efficacy of mechanisms for screening FDI:** Canada, Iceland, Norway, Russia, and the US have FDI screening mechanisms. Although most jurisdictions have some combination of broad criteria and broad application requirements to incoming FDI, Norway and Iceland stand out as having some areas for improvement, including addressing decentralized processes, narrow definitions of control, and limited state capacity.
- **Degree of transparency in FDI screening:** Most Arctic states require transparency when proposed investments are blocked through FDI screening systems. For protected sectors in which ministers may authorize controlling investments, public explanation is often required.
- **Criteria used in FDI screening:** All FDI screening systems in the Arctic test investments against their threat to national security in a broad sense. Covered investments range from all investments with controlling stakes (Canada, the US, Iceland) to investments in only security sectors (Russia, Norway).
- **Efficacy of monitoring methods:** Of the five states with FDI screening mechanisms, four have laws permitting mitigation measures, and three have legislation explicitly authorizing monitoring. Monitoring is ad hoc and depends on mitigation agreements.
- **Exemption of PRC investments from environmental and bankruptcy laws:** PRC-based investors are not exempt from environmental or bankruptcy laws in the Arctic.

Implications

- **No "Arctic" FDI screening:** No state in the Arctic applies special rules to screening investments in its Arctic territory. Instead, states have national FDI screening regimes that apply equally and uniformly to Arctic and non-Arctic regions.
- **Greenland gap:** Greenland lacks a formal FDI screening system; Denmark's recently introduced screening regime does not apply to Greenland. Currently, investment can be scrutinized or blocked only through indirect means, such as refusing land or mining permits.
- **Limited capacity in some jurisdictions:** Iceland, and to some extent Norway, experiences capacity challenges in implementing its FDI screening protocols because of limited personnel capacity and decentralized processes. Greenland likely would also suffer from capacity shortcomings if it adopted a screening law.
- **Sectoral and industrial policy:** In all but one state that we examine (the US), sectoral and industrial policies play a supplementary role in protecting sensitive sectors from foreign control. These involve, variously, energy, aviation, and cultural affairs. Greenland, Iceland, Norway, and Russia also have restrictions on foreign land purchases.
- **No environmental or bankruptcy exemptions:** No state exempted foreign investments from local environmental or bankruptcy requirements.

Recommendations

Our broader recommendations on Arctic FDI, summarizing findings and implications from across all study reports, can be found in a separate capstone document.[3] Yet this analysis also produced the following three more specific recommendations for policy-makers to address the narrow gaps in the existing FDI regulatory regime for Arctic states.

Increased information sharing

Information sharing is the principal way the US can help guard against undesired FDI in the Arctic. To that end, the Chairperson of the Committee on Foreign Investment in the US (CFIUS) may authorize sharing information collected in the course of a CFIUS investigation with US allies and partners if doing so serves US national security. The 2020 Corporate Transparency

[3] Joshua Tallis, Mark Rosen, and Cornell Overfield, *Arctic Economic Security: Recommendations for Safeguarding Arctic Nations against China's Economic Statecraft*, 2021.

Act further charges the Treasury's Financial Crimes Enforcement Network (FINCEN) with maintaining a database of beneficial ownership, which may help screening authorities as they consider whether investments and investors are strategically motivated. FINCEN may share information in the database with ally and partner authorities.

Exempt investor state leverage

CFIUS may designate certain countries with sufficient FDI screening measures as exempt foreign states. Investors from such states do not need to report non-controlling investments in the infrastructure, technology, or data sectors or controlling real estate acquisitions. Currently, only Australia, Canada, and the United Kingdom[4] are designated as exempt foreign states. Iceland and Norway are interested in obtaining such status for themselves. US regulators should encourage Icelandic and Norwegian officials to adapt their screening regimes to meet the standards CFIUS has set out,[5] and provide assistance if requested.

Arctic investor information clearinghouse

Some investors may be active across similar industries in multiple Arctic countries (e.g., resource extraction or tourism). Arctic states could therefore benefit from greater capacity to collaborate on fact-finding and sharing information. A comprehensive information clearinghouse program could serve that function. The US Departments of Commerce, Treasury, or State may also lead a multilateral effort restricted to US allies and partners in the Arctic. Such collaboration would further help Arctic states meet the criteria for excepted foreign state status.[6]

[4] Excluding British overseas territories and crown dependences.

[5] *Factors for Determinations under § 800.1001(a) / § 802.1001(a)*, Committee on Foreign Investment, accessed 30 June 2021, https://home.treasury.gov/system/files/206/Excepted-Foreign-State-Factors-for-Determinations.pdf.

[6] Ibid.

Contents

1. Introduction **1**

1.1 Research statement 1
1.2 Methodology 2
1.2.1 FDI screening 2
1.2.2 Roadmap 3

2. Regulating FDI **4**

2.1 FDI screening 4
2.1.1 Control 4
2.1.2 Triggers for screening 5
2.1.3 Institutionalization and centralization 7
2.1.4 Criteria 8
2.1.5 Recourse 10
2.1.6 Post-approval monitoring 11
2.1.7 Transparency 11
2.2 Sectoral policy 12

3. Conclusion **16**

3.1 Findings 16
3.1 Implications 17
3.2 Recommendations 18
3.2.1 Increased information sharing 18
3.2.2 Excepted investor state leverage 18
3.2.3 Arctic investor information clearinghouse 19

Appendix: Country Profiles **21**

Canada 21
FDI screening 22
Sectoral walls 33
Sub-federal rules 35
Iceland 36
Company formation 37
FDI screening rules 38
Sector-specific walls 40
Country-specific rules 42
Investment transparency 43
United States 44
FDI screening 44
Country-specific rules 51
State-level considerations in the US Arctic 52
Norway 52

FDI screening 53
Sectoral walls 58
The case of Bergen Engines 61
Russia 64
FDI Screening 66
Greenland 74
Greenland and the World 75
Company formation 78
FDI screening 79
Figures **83**
Abbreviations **84**
References **85**

1. Introduction

The fiscal year (FY) 2020 National Defense Authorization Act (NDAA), Sec. 1260E, requires that a federally funded research and development center "complete an independent study of Chinese foreign direct investment [FDI] in countries of the Arctic region, with a focus on the effects of such foreign direct investment on United States national security and near-peer competition in the Arctic region."[7] Given prior CNA work examining People's Republic of China (PRC)-based investments around the world, including the 2017 report *Unconstrained Foreign Direct Investment: An Emerging Challenge to Arctic Security*, the Office of the Secretary of Defense asked CNA to execute the analysis described in the NDAA.

In response, CNA produced four reports, each tackling a different question:

1. What is the nature and scope of current PRC FDI in the Arctic?
2. What are the legal conditions that govern FDI in the Arctic countries?
3. How does Arctic FDI by PRC-based investors relate to the PRC's strategic regional objectives?
4. How can the US mitigate negative implications of PRC Arctic FDI?

This document answers question two by providing "an analysis of the legal environment in which PRC-based foreign direct investments are occurring" in the Arctic. Readers can visit www.cna.org/ArcticFDI to access the other three reports and their results.

1.1 Research statement

Although seven states and one autonomous territory extend into the Arctic, the NDAA called for this analysis to examine only Canada, Greenland, Iceland, Norway, Russia, and the US.[8] Substantially, the NDAA calls for assessments of the following:

- The efficacy of mechanisms for screening FDI.
- The degree of transparency in FDI screening.
- The criteria used in FDI screening.
- The efficacy of monitoring methods.

[7] *National Defense Authorization Act for Fiscal Year 2020,* 2019. § 1260E(b)(2).

[8] Ibid.§ 1260E(b)(2).

- The degree to which PRC-based investors are exempt from local environmental and bankruptcy regulations.

CNA addressed these NDAA requirements with the following research questions:

1. What are the mechanisms for FDI screening in the examined countries?
2. What criteria are applied in FDI screening processes?
3. How transparent is the screening process?
4. To what degree are investments monitored after approval for compliance?

Formal FDI screening systems are only one means to evaluate inbound investments. Sectoral policies can also functionally control and constrain FDI. These different techniques can be understood as the differences between "nets" and "walls." FDI screenings operate like nets: investments are permitted, by default, but may be rejected if certain features of a project capture the attention of regulators. Because investments under this rubric often do not require explicit permission, some investments may pass through unnoticed. Meanwhile, sectoral policies are more akin to walls: such policies cordon off certain industries from external investment and by default prohibit or limit foreign investment opportunities. Authorities can choose to waive these rules, but those actions would by definition follow from an initial awareness of the inbound investment. Although the NDAA mentions only FDI screening, this report includes an assessment of both mechanisms that can be used to filter incoming investments for their harm to national security.

1.2 Methodology

FDI screening takes place largely at the country level. Local authorities play a role in inducing investment, but generally are not decisive actors in FDI evaluation processes. As a result, CNA answered the above research questions primarily through qualitative research by country experts who assessed primary legal and regulatory sources in English, Russian, Danish, Norwegian, and Icelandic. Our analysis focused on national laws, but took local ordinances into account when appropriate. References lead to original laws whenever possible.

1.2.1 FDI screening

FDI is defined as investment controlled by foreign persons, whether natural or legal. Such definitions depend on how *control* is defined. States can assess control quantitatively, based on what percentage of a company is foreign owned. Alternatively, regulators can use an outcome approach, which assesses foreign control based on the objective capacity for foreign notables/entities to shape firm decisions and actions.

The UN Conference on Trade and Development (UNCTAD) identifies three core characteristics of FDI evaluation systems. Such mechanisms (1) target only foreign investment, (2) are general instruments introduced by statute, and (3) focus on national security or interest.[9] UNCTAD notes that screening tools have become both more common and broader in recent years as states grow more concerned about malign investment and protecting important high-tech industries. As of 2019, at least 28 states have such mechanisms, including all Arctic states under study in this report: Canada, Denmark, Iceland, Norway, Russia, and the US.[10]

Screening can lead generally to three outcomes: approval, mitigation, or rejection. Approval finds no concerns and permits the investment to proceed. Mitigation may result when screening identifies potential concerns in an investment; however, these concerns can be addressed with legal commitments by the investor. Rejection may result when risks are identified and either the investor or the screening authority is unwilling to accept mitigation.

1.2.2 Roadmap

This report describes the major findings of our analysis of Arctic nations' approaches to FDI surveillance. The first subsection considers net-like screening measures for foreign investment, looking across all relevant Arctic jurisdictions. The second subsection discusses the disparate sectoral policy "walls" that jurisdictions have erected to protect certain industries from foreign investment. The final element provides findings and related policy implications. Readers interested in detailed descriptions of each polity's laws should consult the appendix for profiles of Canada, Iceland, the US, Norway, Russia, and Greenland.

[9] UNCTAD, *National Security Related Screening Mechanisms for Foreign Investment*, UNCTAD, UNCTAD/DIAE/PCB/INF/2019/7, 2019, 2, https://unctad.org/webflyer/investment-policy-monitor-special-issue.

[10] Ibid.

2. Regulating FDI

Arctic states can regulate FDI through formal screening tools (akin to nets) as well as through sectoral policies (akin to walls) that functionally serve to constrain foreign investments in select industries or locations. This section describes how each of those tools function across all of the Arctic states in this analysis.

2.1 FDI screening

All Arctic polities but Greenland have FDI screening processes designed to catch investments that may be contrary to the national interest. All are run at the national level and are based in statutes. These processes have similarly broad definitions of *foreign control*, generally have voluntary reporting requirements (other than Canada, Norway, and Russia), and have screening that is centralized generally in a single body (except Norway). Most states screen FDI against broad national security criteria, although Canada has an additional process focused on economic benefit. In Canada, Russia, Norway, and the US, mitigation agreements may be used to address security concerns. Post-approval monitoring of specific investments by national governments is fairly unstructured across Arctic states. Only some states provide explicitly for post-approval monitoring, and only when mitigating agreements are used.

None of the Arctic states with FDI screening processes (Canada, Denmark, Iceland, Norway, Russia, or the US) have rules tailored specifically to the Arctic. The closest any state comes is the recent US provision exempting sales and leases of Alaska Native-owned real estate to foreigners. Instead of Arctic FDI screening, it is more accurate to speak of FDI screening by Arctic states.

2.1.1 Control

Iceland, Norway, Canada, and Russia define *foreign control* based on a mix of percentage of shares owned and effective control. The US employs a broad definition focused solely on outcomes or "control in fact."

- Iceland's FDI screening system defines *foreign control* as foreign ownership of more than 50 percent of a company's shares or effective control.[11]

[11] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Art. 2, https://www.althingi.is/lagas/nuna/1991034.html.

- Norway's FDI screening system considers *control* ("qualified ownership") as owning or having rights to own at least one-third of capital or votes, or having significant control over a firm's management.[12]
- Russia's FDI screening system mixes quantitative and qualitative standards for determining control. *Control* is ownership of more than 50 percent of a company's shares. However, Russian FDI screening laws also permit the Federal Anti-trust Service to consider an investment controlling when the investor can influence, directly or indirectly, a firm's choices.[13]
- Canada's Investment Canada Act (ICA) mixes a numeric and qualitative definition of *control*. For most investments, non-Canadians are presumed to have control when they hold one-third of voting interests. If an investment targets a cultural business or stems from a state-owned enterprise, the quantitative thresholds do not apply, and authorities test for "control in fact."
- The US Committee on Foreign Investments in the United States (CFIUS) process defines *control* as "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity."[14]

All Arctic states take a broad approach to determining control that considers the ability to shape firm behavior, not merely the percentage of shares owned.

2.1.2 Triggers for screening

FDI screening processes can trigger only when authorities are notified of a transaction. Reporting requirements vary widely and are generally expansive, but reporting is technically voluntary in states other than Russia and Canada.

- In the US, investments subject to review by CFIUS are "covered transactions"—which include all controlling investments in existing US firms. Since 2018, covered transactions also include real estate acquisitions near some military installations and in some ports, as well as most non-controlling investments in US firms in the infrastructure, advanced technology, or personal data sectors.

[12] *Act Relating to National Security*, LOVDATA, (Jan. 1, 2019), https://lovdata.no/dokument/NLE/lov/2018-06-01-24., §10(1).

[13] *Федеральный закон от 29 апреля 2008 г. N 57-ФЗ "О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства"*, (29 Apr. 2008)., §5.

[14] *Defense Production Act of 1950*, US Code, (8 Sept. 1950), §4565(a)(4563), accessed 10 May 2021, https://www.law.cornell.edu/uscode/text/50/4565.

- In most cases, the US FDI screening system does not require investors to notify CFIUS of covered transactions before completing an investment, but it does encourage such notification by issuing safe harbor letters to investments that notify and win CFIUS approval. A safe harbor letter is the notice from CFIUS that a review has been completed with no outstanding concerns for national security. If CFIUS is not notified of an investment, it may review and potentially order divestment at any subsequent time.[15]

- Iceland's FDI screening rules cover all majority foreign investments in Iceland. Since 2014, Iceland's FDI screening system requires notification of an investment prior to closing only if the investment targets protected sectors (i.e., fishing, airlines, and energy). Otherwise, notification is not mandatory. If the minister of Industry and Innovation is not notified of an investment before the investment is completed, the minister may presumably review the investment upon learning of it.[16]

- Russia's national security FDI screening process can trigger for any controlling investment in any industry, although Russian authorities may be focusing on strategic sectors.[17]
    - When a foreign investor targets a firm active in one of 46 strategic sectors, the investor must notify the Federal Anti-trust Service and obtain authorization. Foreign investors must report any stake larger than 5 percent of company equity in a strategic sector to the Federal Anti-trust Service.[18]

- Norway's national security screening process triggers when a foreign person makes a controlling investment in a firm that handles classified information or is involved in a fundamental national function, including the ability to defend Norwegian or allied territory, safe water, food and energy supplies, and maintenance of essential internet access.[19]

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[15] James Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, Congressional Research Service, RL33388, 2020, https://fas.org/sgp/crs/natsec/RL33388.pdf.

[16] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Art. 12.

[17] *Федеральный закон от 9 июля 1999 г. N 160-ФЗ "Об иностранных инвестициях в Российской Федерации" (с изменениями и дополнениями)*, (9 July 1999); Igor Ostapets and Ksenia Tyunik, "Amendments to the Foreign Investments Law: a means to tighten control?," White and Case, 2 Aug. 2017, accessed 24 June 2021, https://www.whitecase.com/publications/alert/amendments-foreign-investments-law-means-tighten-control.

[18] *FZ N. 57-2008*, 29 Apr. 2008., §7.

[19] *Security Act*, Jan. 1, 2019., §1(3). "Oversikt over Innmeldte Grunnleggende Nasjonale Funksjoner," Nasjonal Sikkerhetsmyndighet, 2021, https://nsm.no/regelverk-og-hjelp/rad-og-anbefalinger/grunnleggende-nasjonale-funksjoner-gnf/grunnleggende-nasjonale-funksjoner/oversikt-over-innmeldte-grunnleggende-nasjonale-funksjoner/.

    - All such investments must be reported to the minister overseeing the firm or the National Security Authority before closing.

- Canada's investment screening reviews trigger only when certain conditions are met. The net-benefit review triggers based on the investor's identity, the target firm's identity, and the investment or firm's value. The national security review can apply to any foreign investment (controlling, non-controlling, or greenfield) in Canada if the minister of Innovation, Science and Economic Development believes the investment is injurious to national security.[20]
    - If an investment crosses the threshold required to trigger the net-benefit review, it must be reported and reviewed before the investment closes. All other controlling investments must be reported to Canadian authorities either before or within 30 days of the investment's completion. Any notification may trigger a national security review.[21]

Arctic states have varying standards for transactions covered by their screening processes. Norway's screening regime applies the most narrowly—only to firms in certain sectors considered essential for national functions. Canada's net-benefit review has a highly formulaic trigger, but the national security review applies universally to all foreign investments. In the US, Iceland, and Russia, controlling investments in any national firm can trigger a review.

Notification requirements are also mixed. Only Russia and Canada have broad mandatory reporting requirements, while the US requires reporting in some narrow instances. Norway and Iceland operate on voluntary notification regimes, and the main CFIUS channel likewise does not require, but encourages, notification.

2.1.3 Institutionalization and centralization

The bureaucratic organization and structure of FDI screening further shapes the investment oversight process.

- Norwegian FDI screening is decentralized to the various Norwegian ministries, but supervision is centralized in the National Security Authority. The ministry responsible for a firm reviews a covered investment in that firm. The National Security Authority reviews any covered investments in any firm outside the purview of any ministry.[22]

[20] *Investment Canada Act (R.S.C., 1985, c. 28 (1st Supp.))*, (1 Apr. 2021), https://laws-lois.justice.gc.ca/eng/acts/I-21.8/index.html., §§14, 25.1.

[21] Ibid., §§12, 17.

[22] *Security Act*, Jan. 1, 2019., §10(1)-(2).

- Iceland's FDI screening is centralized in the Ministry of Innovation and Industries. The minister may consider inputs from other ministries, and obtain information from other authorities.[23]
- Russian FDI screening is centralized in the Federal Anti-trust Service and the Commission on Monitoring Foreign Investment in the Russian Federation.
- US FDI screening is centralized in the CFIUS. The US director of national intelligence may contribute intelligence assessments.
- Canada's FDI screening system is centralized in the Investment Review Division of Innovation, Science and Economic Development Canada (ISED), a government department, and managed by a director of investments.[24]

Limited centralization can prove an impediment to intragovernmental communication, which is necessary when screening across diverse industries. Norway provides an effective example of this dynamic. Each ministry is responsible for conducting its own review; this compounds the challenge of the screening process' relative newness (introduced in 2019) because ministries may be slow to respond or fail to appreciate national security concerns.

The case of Bergen Engines is illustrative. When a Russian firm proposed to buy this Norwegian Rolls-Royce subsidiary that produces, inter alia, engines used by the Norwegian military, the Norwegian Ministry of Justice and Public Security initially did not flag the sale as concerning. The Ministry for Industry and Trade learned of the proposed investment only a month later, from an external source, while news took another month to reach the prime minister, who learned of the concerns from a newspaper. The investment was eventually blocked through the screening process, but ministers from across the Norwegian government acknowledged that poor communication had hampered their response. The Norwegian parliament also proposed a study to identify vulnerabilities in the Security Law and to address how ministries were equipped to handle security concerns and cooperate.

2.1.4 Criteria

Although most states have broad criteria for screening and rejecting investments, criteria are still unclear in some states.

- In the US, CFIUS screens investments primarily against three criteria: CFIUS must conduct a "risk-based analysis" that assesses the "threat" posed by a foreign investor, the "vulnerabilities" exposed by the US business, and the consequences of combining

[23] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Art. 12.

[24] *Investment Canada Act*, 1 Apr. 2021., Part I.

threat and vulnerabilities.[25] Furthermore, CFIUS and the President may consider 18 additional factors.

- Norway's ministries and National Security Authority are charged with considering simply whether an investment poses a "not insignificant risk to national security."[26]
- Iceland's FDI process considers proposed investments against three criteria: whether an investment threatens national security or public order, security, or health; whether an investment exploits a temporary economic shock; and whether an investment poses systemic risk to the financial system.[27]
- Russia's FDI screening laws do not articulate the basis for conditioning or rejecting an investment, and the Commission on Monitoring Foreign Investments has complete discretion.
- Canada's net-benefit and national security reviews screen investments based on different criteria.
    - The net-benefit review tests investments against six criteria: (1) the investment's effect on Canada's economy; (2) the degree of Canadian participation; (3) the investment's effect on Canadian productivity; (4) the investment's effect on competition; (5) compatibility with national policies; and (6) contributions to Canadian competitiveness.[28]
    - The national security review simply considers whether the proposed investment would be "injurious to national security."[29]

Generally, national security criteria are vague and broad, leaving national authorities with significant leeway in deciding whether an investment may be of concern. Canada, Norway, and Russia have the broadest criteria for national security reviews. Icelandic and US reviews charge screeners with considering an investment against more specific issues, but these too include broad criteria.

[25] Farhad Jalinous et al., "CFIUS Finalizes New FIRRMA Regulations," White & Case, 22 Jan. 2020, 2020, accessed 5/21/2021, https://www.whitecase.com/publications/alert/cfius-finalizes-new-firrma-regulations.

[26] *Security Act*, Jan. 1, 2019., §10(3).

[27] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Art. 12.

[28] *Investment Canada Act*, 1 Apr. 2021., §20.

[29] Ibid., §25.2.

2.1.5 Recourse

Every Arctic state with an FDI screening system has recourse to blocking or divesting an investment. All but Iceland also can use legally binding mitigation agreements to address security concerns.

- When an investment meets the requisite risk criteria, the Norwegian King-in-Council may either block an investment or impose conditions on the investor to mitigate the risk.[30]
- Iceland's legislation speaks only of suspending or blocking investments, and mentions no power to enter into mitigating agreements. The minister of Industry and Innovation may be able to order divestment in cases in which they learn of and rule against an investment after the investment has been completed, but the law does not explicitly provide for this mechanism outside the fishing industry.[31]
- The Russian Federal Anti-trust Service may impose conditions on investments in strategic sectors. Mitigation may include transferring essential technology to local business, localizing production, and designating Russian nationals as managers. Russian authorities may also block proposed investments.[32]
- Both of Canada's FDI screening reviews permit legally binding mitigation measures to assuage concerns, whether about Canada's economic benefit or national security. If risks cannot be mitigated, Canadian authorities may block an investment, or order divestment if the investment has already occurred.[33]
- US law permits both mitigation and rejection if an investment poses national security risks. CFIUS may construct a mitigation agreement with the investor. Mitigation agreements can include restricting intellectual property transfers or access to certain technology, products, and services, ensuring that certain activities and products are located only in the US or creating security protocols or committees, which may include US government-approved members. If CFIUS and the investor fail to reach a mitigation agreement, the President may decide to block an investment.[34]

[30] *Security Act*, Jan. 1, 2019., §10(3).

[31] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Arts. 5, 12.

[32] *FZ N. 57-2008*, 29 Apr. 2008., §7.

[33] *Investment Canada Act*, 1 Apr. 2021., §20.

[34] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*; *Defense Production Act of 1950*, 8 Sept. 1950.

2.1.6 Post-approval monitoring

Post-approval monitoring is the most ad hoc aspect of net-like screening. Only two states—the US and Canada—specifically address post-approval monitoring in their enabling legislation.

- In the US, CFIUS may require reporting to verify compliance with any mitigating agreement. The lead department for a case manages reporting and monitoring after approval. Violation of a mitigating agreement can be grounds for reopening a case, even after the investment receives a safe harbor letter. CFIUS may also periodically review mitigation agreements to add, modify, or phase out mitigation measures.[35]
- If Canadian authorities permit an investment on conditions, they may also require periodic reporting to ensure compliance with the mitigation agreement.[36]
- Norway's screening process does not include any specific provisions on post-approval monitoring. Monitoring requirements may be incorporated into any mitigation measures the King-in-Council imposes as a condition for approving an investment.
- Russian law does not explicitly provide for post-approval monitoring.
- Icelandic law does not explicitly provide for post-approval monitoring.

2.1.7 Transparency

Some states require annual summaries for FDI screening outcomes and explanations for blocked investments. General information about the total number of cases reviewed and approved may be available, but specific mitigation measures are generally confidential or classified.

- Norway's National Security Act does not explicitly require Norwegian authorities to explain their decision to reject or approve a covered investment. However, explanations were provided in the one major case since screening began in 2019.
- Russian authorities are not required to explain why investments were rejected. However, screening review results typically appear on Russian government websites.
- Canadian screening authorities are required to provide a public explanation when rejecting an investment. They also may, but need not necessarily, provide public explanations for approvals.[37]

[35] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*.

[36] *Investment Canada Act*, 1 Apr. 2021., §25.5

[37] Ibid.

- In the US, presidential determinations to block an investment are public. Approved investments and any mitigating measures are generally confidential or classified. CFIUS is required to publish annual reports summarizing screening activities. Furthermore, the CFIUS chairperson may share collected information with US allies and partners if necessary for national security purposes.[38]
- Iceland's foreign investment screening legislation does not explicitly require the responsible minister to publicize screened or rejected investments. The law does require the minister to submit annual reports to the Icelandic Althingi on FDI screening decisions, but if these are produced, they are not public.[39]

2.2 Sectoral policy

Canada, Iceland, Norway, and Russia have sectoral policies that protect firms in specific industries from takeover by foreign investors. Governments can issue case-by-case exemptions, but these policies provide a higher degree of protection from foreign control than the FDI screening systems above. In such protected industries, foreign control is by default prohibited, but may be allowed on an ad hoc basis. These policies generally focus on natural resource or energy industries.

Iceland has erected sectoral walls around several industries:

- Only Icelandic citizens or Icelandic legal persons controlled by Icelandic legal persons are permitted to own or run fishing enterprises within Iceland's fishing jurisdiction. When a legal person is controlled by other legal persons, foreign persons must control no more than 25 or 33 percent of any individual parent company. The law does not provide for exemptions.[40]
- Iceland relies heavily on geothermal energy and restricts the ownership rights of foreigners from outside the European Economic Area (EEA) in this industry. Only Icelandic and EEA persons may own rights or firms exploiting geothermal or hydropower energy commercially.[41]

[38] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*.

[39] *Lög um breytingu á lögum um fjárfestingu erlendra aðila í atvinnurekstri, nr. 34/1991, með síðari breytingum*, (2014), https://www.stjornartidindi.is/Advert.aspx?RecordID=ca66a5c9-486f-4610-b3d6-786d850f2be4.

[40] Ibid.

[41] Ibid.

- Iceland caps foreign ownership in the airline sector for non-EEA persons at 49 percent.[42]
- Iceland prohibits majority foreign control of firms that export controlled or dual-use defense items, including items that may be used for internal repression. The minister may issue exemptions.[43]

Norway has restrictions on investment and control in certain sectors. Some apply only to foreigners; others apply to both foreign and domestic investors.

- Norway protects its financial sector. Foreign acquisitions of more than 10 percent of a financial institution's equity require a suitability assessment. Non-EEA banks are required to set up a subsidiary or branch in Norway, and Norwegian or EEA nationals or residents must make up at least half of the bank's board and corporate assembly.[44]
- To obtain licenses to fish commercially or register in the Ordinary Ship Register, legal persons must be controlled by Norwegian citizens, who must hold 60 percent of capital and shares.[45]
- All applications for licenses to mine or exploit waterfalls for energy generation require ministerial licensing, including full disclosure of ownership structure.[46]
- Finally, the Norwegian Competition Authority can monitor and review any acquisitions, particularly if the combined company's revenue exceeds 1 billion Norwegian Kroner (NOK) per year.[47]

Canada has erected walls around several industries:

- Canadian law severely caps foreign ownership of the largest firms in the telecommunications sector. For any firm that generates more than 10 percent of

[42] Ibid.

[43] *Act No. 58/2010, Act on Control of Services and Items that have Strategic Significance*, (14 June 2010), https://www.government.is/library/04-Legislation/Act%20on%20Control%20of%20Services%20and%20Items%20that%20may%20have%20Strategic%20Significance.pdf.

[44] *Trade Policy Review, Report by the Secretariat, Norway*, World Trade Organization, 2018, 33, https://www.wto.org/english/tratop_e/tpr_e/s373_e.pdf.

[45] *Lov om retten til å delta i fiske og fangst LOV-1999-03-26-15*, Lovdata, (26 Mar. 1999), https://lovdata.no/dokument/NL/lov/1999-03-26-15?q=deltakerloven.

[46] *Lov om konsesjon for rettigheter til vannfall mv. LOV-1917-12-14-16*, Lovdata, (14 Dec. 1917), https://lovdata.no/dokument/NL/lov/1917-12-14-16?q=Konsesjonsloven#KAPITTEL_2; *Lov om erverv og utvinning av mineralressurser LOV-2009-06-19-101*, Lovdata, (19 June 2009), https://lovdata.no/dokument/NL/lov/2009-06-19-101?q=om%20erverv%20av%20mineral.

[47] *Trade Policy Review, Report by the Secretariat, Norway*, 33.

telecommunications revenue, 80 percent of the board must be Canadian persons, 80 percent of voting interests must be held by Canadians, and no foreign person may control the firm. Similar conditions apply in the broadcast sector.[48]

- Canadian law generally requires all domestic flights, which dominate in the Canadian Arctic, to be conducted by Canadian-owned airlines. To qualify as Canadian-owned, an airline must be majority-owned by Canadian persons, and no single foreign person can control more than 24 percent of voting interests. The competent minister may issue exemptions.[49]
- Federal Canadian policy requires all uranium mining to be conducted by firms with at least 51 percent Canadian ownership. The federal government may waive this requirement on a case-by-case basis.[50]
- Although Canadian fishing law permits the government to issue fishing licenses to foreign commercial fishing vessels, policies in some geographical areas mandate licenses only for majority-Canadian firms.[51]

Russia prohibits or restricts FDI into its closed cities, often those related to military or research installations, including in Murmansk Oblast in the Russian Arctic. Foreigners may not invest in such cities unless they obtain special government permission.

Additionally, four Arctic jurisdictions have significant restrictions on foreign ownership of land:

- In Norway, acquisitions and leases longer than 10 years and ownership of certain land require concessions.

[48] *Telecommunications Act; S.C. 1993, c. 38*, (23 June 1993), https://laws-lois.justice.gc.ca/eng/acts/t-3.4/FullText.html.

[49] *Canada Transportation Act; S.C. 1996, c. 10*, (29 May 1996), https://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html.

[50] Natural Resources Canada, "Canada's Non-Resident Ownership Policy in the Uranium Mining Sector," Government of Canada, 22 June 2015, accessed 17 June 2021, https://www.canada.ca/en/news/archive/2015/06/canada-non-resident-ownership-policy-uranium-mining-sector.html.

[51] *Coastal Fisheries Protection Regulations (C.R.C., c. 413)*, (17 June 2019), accessed 6/17/2021, https://laws-lois.justice.gc.ca/eng/regulations/C.R.C.%2C_c._413/index.html; Roy G. Argand et al., "Canada: Transfers And Non-Canadian Ownership Of Atlantic Canadian Fishing Licences," Mondaq, 14 May 2020, accessed 6/17/2021, https://www.mondaq.com/canada/contracts-and-commercial-law/933682/transfers-and-non-canadian-ownership-of-atlantic-canadian-fishing-licences.

- In Greenland, land is publicly owned. Any use or change in use must be proposed to and approved by the local *Kommune* or comparable authorities. No user enjoys permanent ownership rights.
- Iceland generally grants untrammeled land ownership rights only to Icelandic citizens, residents, or firms with boards entirely composed of Icelandic citizens. Residents or firms from the EEA are exempt only if they plan to relocate or operate in Iceland, and must have a "real and permanent connection" with the EEA country in which they are registered. The minister may make limited exemptions, but these may not be issued to foreign states, government authorities, state-owned enterprises, or similar bodies.[52]
- Russia's Land Code bars foreign nationals from owning land in all border municipal districts, including those along the Russian Arctic coast. Foreigners also may not own agricultural land.[53]

[52] *Nr. 34/1991*, 2014.

[53] *Land Code of the Russian Federation (Земельный кодекс Российской Федерации)*, (25 Oct. 2001), base.garant.ru/12124624.

3. Conclusion

Our examination of Arctic FDI regulations hinges on two mechanisms that Arctic states can use to manage inbound investment: screenings and sectoral policies. **FDI screenings operate like nets,** permitting investments by default but with the authority to reject FDI if certain features capture the attention of regulators. Meanwhile, **sectoral policies operate like walls,** cordoning off certain industries from external investment and by default prohibiting or limiting foreign investment opportunities.

3.1 Findings

These two mechanisms combine to address the NDAA criteria to investigate Arctic FDI regulations. Based on our review of FDI processes in Arctic nations, we can see the following that are related to Congress' stated interests:

- **Efficacy of mechanisms for screening FDI:** Five of the six jurisdictions examined here—Canada, Iceland, Norway, Russia, and the US—have FDI screening mechanisms.
- **Degree of transparency in FDI screening:** Most Arctic states require transparency when proposed investments are blocked through FDI screening systems. For protected sectors for which ministers may authorize controlling investments, public explanation is often required for exemptions.
- **Criteria used in FDI screening:** Most FDI screening systems in the Arctic test investments based on their potential threat to national security. Covered investments range from all investments (Canada) to all controlling investments, (the US, Iceland), to investments only in security sectors (Russia, Norway).
- **Efficacy of monitoring methods:** Of the five states with FDI screening mechanisms, four have laws permitting mitigation measures, and three have legislation explicitly authorizing monitoring. Monitoring is ad hoc and depends on mitigation agreements.
- **Exemption of PRC investment from local environmental and bankruptcy laws:** PRC-based investors are not exempt from environmental or bankruptcy laws in the Arctic.

3.1 Implications

This review leads to a broader set of implications related to understanding FDI as a policy issue and understanding where policy-makers should focus their attention.

- **No "Arctic" FDI screening:** No state in the Arctic applies special rules to screening investments in their Arctic territory. Instead, states have national FDI screening regimes that apply equally and uniformly to Arctic and non-Arctic regions.
- **Greenland gap:** Greenland currently lacks a formal FDI screening system. Denmark's recently introduced screening regime does not apply to Greenland. At present, investment can only be scrutinized or blocked through indirect means, such as refusing land or mining permits.
- **Broad application and criteria:** In Iceland, Canada, Russia, and the US, FDI screening rules apply broadly, to either all controlling investments (the US, Russia, and Iceland) or all investments (the US in some cases, Canada). Furthermore, each state's process is guided by broad criteria for rejecting or modifying an investment, typically simply referring to broad national security concerns.
- **Limited capacity in some jurisdictions:** Iceland, and to some extent Norway, experience capacity challenges in implementing their FDI screening protocols. Greenland would likely also suffer from capacity shortcomings if it adopted a screening law. Iceland appears to have limited personnel capacity to investigate and screen controlling investments, and must make decisions within eight weeks of learning of the investment. Norway diffuses screening responsibilities throughout its ministries, complicating reviews and intergovernmental coordination. These challenges can make it more likely that objectionable investments will be completed.
- **Sectoral and industrial policy:** In all but one jurisdiction examined here (the US), sectoral and industrial policies play a supplementary role in protecting sensitive sectors from foreign control. These variously involve energy, aviation, and cultural affairs. Three polities (Iceland, Norway, and Russia) and Greenland also have restrictions on foreign land purchases.
- **No environmental or bankruptcy exemptions:** No state exempted foreign investments from local environmental or bankruptcy requirements.

3.2 Recommendations

Our broader recommendations on Arctic FDI, summarizing findings and implications from across all study reports, can be found in a separate capstone document.[54] Yet some specific recommendations from this regulatory analysis are important to consider separately. This final subsection offers the three action areas immediately available to policy-makers to address the narrow gaps in the existing FDI regulatory regime for Arctic states.

3.2.1 Increased information sharing

- Information sharing is the principal way the US can help guard against predatory foreign investment in the Arctic. Six of the other seven Arctic polities are US allies and partners—the only exception being Russia. The Foreign Investment Risk Review Modernization Act's (FIRMMA) Sense of Congress notes that "the President should conduct a more robust international outreach effort" with allies and partners to bolster their capability to screen FDI for national security risks.[55]
    - The chairperson of CFIUS may authorize sharing information collected in the course of a CFIUS investigation with US allies and partners if this serves US national security.
    - The 2020 Corporate Transparency Act charges the Treasury's Financial Crimes Enforcement Network (FINCEN) with maintaining a database of beneficial ownership. This information may help screening authorities as they consider whether investments and investors are strategically motivated. FINCEN may share information in the database with ally and partner authorities.

3.2.2 Excepted investor state leverage

- FIRMMA permits CFIUS to designate certain countries with sufficiently advanced FDI screening measures as excepted foreign states. Investors from such states do not need to report non-controlling investments in the infrastructure, technology, or data sectors nor controlling real estate acquisitions. Currently, only Australia, Canada, and the

[54] Joshua Tallis, Mark Rosen, and Cornell Overfield, *Arctic Economic Security: Recommendations for Safeguarding Arctic Nations against China's Economic Statecraft*, 2021.

[55] *H.R.5515 - John S. McCain National Defense Authorization Act for Fiscal Year 2019*, (13 Aug. 2018), §1702(b), https://www.congress.gov/bill/115th-congress/house-bill/5515.

United Kingdom[56] are designated as excepted foreign states. Iceland and Norway are interested in obtaining such status for themselves.

  - The greatest discrepancy between Icelandic FDI screening law and CFIUS' standard for excepted state status is the lack of explicit legal authority to conclude mitigating agreements or order divestments when investments have already concluded.
  - Discrepancies between Norwegian FDI screening practice and CFIUS' standard for excepted state status include the lack of explicit authority to order divestments, a decentralized review system that may raise concerns about information security, and a narrow sectoral scope.
  - US officials and diplomats should encourage Icelandic and Norwegian officials to adapt their screening laws and regimes to meet the standards CFIUS has set out.[57] If these governments request assistance, US diplomats working in economic sections should be prepared to assist and advise on adapting proven FDI screening models to local needs and concerns.

3.2.3 Arctic investor information clearinghouse

- Because certain industries are common across the Arctic (e.g., resource extraction and tourism), investors may be active across Arctic countries. Thus, Arctic states could benefit from greater capacity to collaboratively fact-find and share such information.
  - This initiative could occur at the Arctic Council. A comprehensive program could run afoul of that body's reluctance to touch national security matters given the national security focus of most FDI screening measures. However, other issues within the Arctic Council's core agenda, such as environmental standards and economic development, provide opportunities for some degree of coordination to set common standards that prevent FDI from exploiting local populations or destroying fragile ecosystems.
  - The US Departments of Commerce, Treasury, or State may lead a multilateral effort restricted to US allies and partners in the Arctic. Such collaboration would also help Arctic states meet the criteria for excepted foreign state

[56] Excluding British overseas territories and crown dependences.

[57] *Factors for Determinations under § 800.1001(a) / § 802.1001(a)*.

status.[58] Such an initiative is likely to be feasible given success to date in multilateral collaboration in other security fields among US allies.

[58] Ibid.

Appendix: Country Profiles

This appendix includes the detailed profiles on which the chapters in the main portion of this study rest. Profiles are included for Canada, the US, Iceland, Norway, Russia, and Greenland.

Canada

Canadian FDI is screened formally at the federal level through legislation and regulations as implemented by Canadian ministries. However, other forms of Canadian law provide additional screening of foreign investments. Provincial, territorial, and Indigenous authorities all play a vital role in overseeing natural resource permits and licensing, for example, as well as corporate law and commercial business regulations.[59] Finally, some elements of FDI screening are affected by international agreements, including a 2014 Bilateral Investment Treaty (BIT) with China.

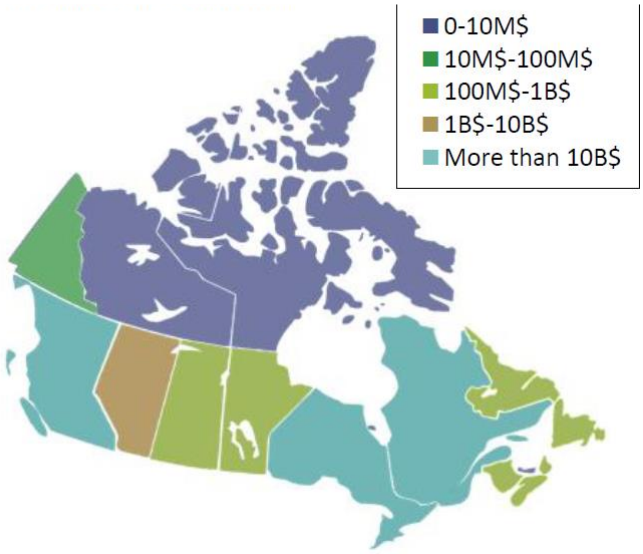
Canada's Arctic territories are Nunavut, Yukon, and the Northwest Territories. Although these territories comprise 40 percent of Canada's total land area, they contain less than 1 percent of the total population and draw very little FDI, as shown in Figure 1.

(For more on CNA's findings on PRC investment and economic activity in the Canadian economy, visit www.cna.org/ArcticFDI for the relevant companion report.)[60]

[59] Some suggest that federal and provincial legislatures could make changes in corporation law, restricting the acquisition of voting shares or the ability of a foreign investor to direct a firm's operation through staggering the terms of directorship; see Sherry Romanado, *The Investment Canada Act: Responding to the Covid-19 Pandemic and Facilitating Canada's Recovery*, Standing Committee on Industry, Science and Technology, Parliament of Canada, 2021, https://www.ourcommons.ca/Content/Committee/432/INDU/Reports/RP11176192/indurp05/indurp05-e.pdf.

[60] Wolfson et al., *Arctic Prospecting: Measuring China's Arctic Economic Footprint*, CNA, Aug. 2021.

Figure 1. Value of investments by principal province of destination 2018–2019



Source: Government of Canada. Innovation, Science and Economic Development. *Investment Canada Act: Annual Report 2018–2019*, 13.

FDI screening

Formal FDI screening in Canada is managed almost entirely at the national point of entry through the ICA. The ICA is intended to make Canada a more welcoming destination for foreign investment through "narrowing both the range of foreign acquisitions that are reviewable and the scope of the 'benefit to Canada' test to which these transactions must be submitted in order to receive approval from the federal government."[61] The act is administered by ISED, except for cultural investments.

Notification requirements

Notification before or shortly after an investment is required for all investments. A notification is required for all investment transactions, while a review is necessary only for investments that acquire equity or debt worth more than 10 percent of a company's value. Under the ICA, non-Canadian investments to acquire control of a Canadian business or to establish a new business must notify the federal government "at any time prior to the implementation of the

[61] Evan Oddleifson and Tom Alton, *Foreign Investment Review in Canada: Assessing Chinese Investment Amid a Re-Evaluation of the Investment Canada Act*, China Institute at the University of Alberta, 2020, 5.

investment or within thirty days thereafter."[62] Notification must happen before the investment, however, if the investment is subject to net-benefit review.[63]

A notification must include information on the investor, including their legal name, persons that control more than 10 percent of the investor's equity, and the legal name, address, and country of origin of any ultimate controller. The notification must also disclose any direct or indirect foreign state ownership interest, including by state-owned enterprises, in the ownership chain to the ultimate owner.[64] If states are present in the ownership chain, the investor must disclose the scale of their stake and whether the state has a veto or other special power over board appointments or strategic decisions.[65]

The ICA, as amended in 2009, authorizes two review processes: one devoted to an economic evaluation of proposed investments above a triggering threshold (the net-benefit review), and one devoted to a national security review of investments of any size (the national security review).

Net-benefit review

The "net-benefit" review is the relevant review process for most proposed FDI investments. It aims to protect the Canadian economy, and particularly scrutinizes whether proposed investments undervalue Canadian firms or exploit temporary market shocks. The result can be approval, approval with conditions, or rejection. Figure 2 summarizes the net-benefit review screening process.

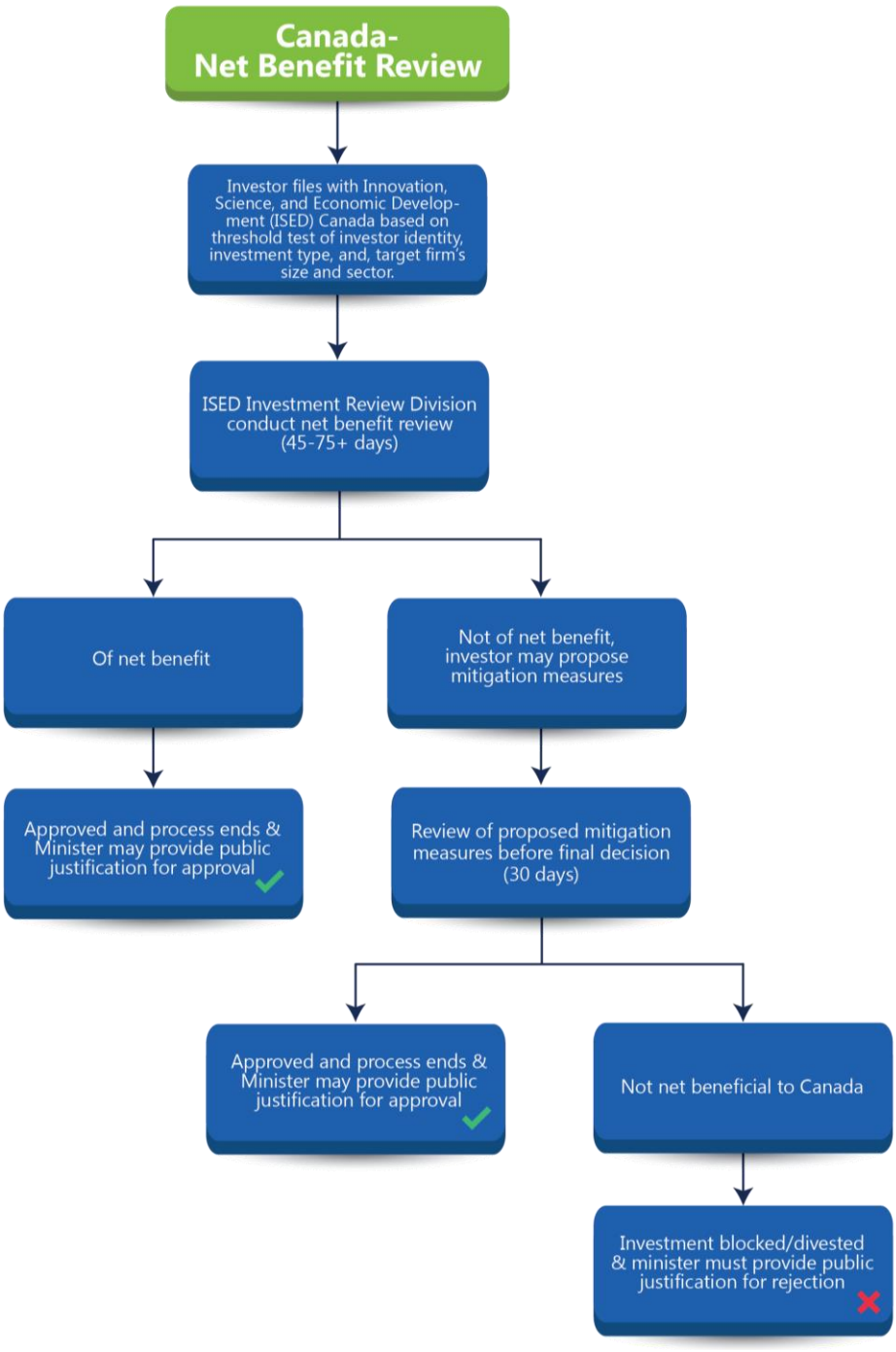
[62] *Investment Canada Act*, 1 Apr. 2021., § 12.

[63] Ibid., § 17.

[64] *SOR/85-611 "Investment Canada Regulations"*, (1 July 2020)., Schedule I-II.

[65] Ibid., Schedule I (9) and II (9).

Figure 2. Canada's net-benefit FDI screening review



Source: CNA.

A net-benefit review is triggered when an investment meets certain criteria regarding the investor's nationality, the investor's identity, and the investment or the target firm's value.

Investments are tested against different thresholds based on the investor's ultimate nationality and nature. For example, if an investment is made by a subsidiary, Canadian authorities will consider the nationality and nature of the ultimate parent company, not of any subsidiary. The nationality-nature categories, with descending thresholds, are as follows: private investors from select countries with which Canada has a free trade deal,[66] private investors from World Trade Organization (WTO) member states, state-owned investors from WTO states, indirect investors from non-WTO states, and direct investors from WTO states.[67] Some critics believe this system over-emphasizes state-owned enterprises and does not sufficiently guard against the risk of illegal technology transfer by private actors.[68]

These nationality-nature combinations determine what investment or enterprise value must be exceeded to trigger a net-benefit review. Most threshold values are adjusted annually by the minister of Innovation, Science and Industry and published in the Canada Gazette. The threshold is adjusted by dividing the current year's nominal gross domestic product (GDP) by the previous year's nominal GDP, then multiplying the quotient by the previous year's threshold value.[69] This means that if the Canadian GDP increases, the review threshold will increase, while a shrinking economy will reduce the threshold. In 2021, the review thresholds decreased, as summarized in Table 1.[70] The Canadian Bar Association noted that, because of rising review thresholds, the proportion of foreign investments reviewed under the "net-benefit" review process has dropped from 10 percent to 1 percent.[71]

[66] These countries are the United Kingdom, the US, Mexico, Chile, Peru, Colombia, Panama, Honduras, Korea, and members of the Trans-Pacific Partnership and the European Union.

[67] "Thresholds for Review," Government of Canada, 30 Mar. 2021, accessed 17 June 2021, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html.

[68] Evan Oddleifson and Alton, *Foreign Investment Review in Canada*, 21.

[69] *Investment Canada Act*, 1 Apr. 2021., §14.1(2)

[70] Baker McKenzie, "Investment Canada Act – Financial thresholds for "net benefit" review to decrease in 2021," Foreign Investment and National Security Blog, 2 Feb. 2021, accessed 17 June 2021, https://foreigninvestment.bakermckenzie.com/2021/02/02/investment-canada-act-financial-thresholds-for-net-benefit-review-to-decrease-in-2021/; "Thresholds for Review."

[71] Huy Anh Doh, Investment Canada Act Study – COVID-19 Implications, Subject, 16 June 2020.

Table 1. Net-benefit review thresholds, 2020 and 2021

Category of Investment	2020 Thresholds	2021 Thresholds
Private sector trade agreement investors (variable)	CAD1.613 billion (enterprise value)	CAD1.565 billion (enterprise value)
Private WTO investors (variable)	CAD1.075 billion (enterprise value)	CAD1.043 billion (enterprise value)
SOE WTO investors (variable)	CAD428 million (investment value)	CAD415 million (investment value)
Indirect investments by non-WTO investors (fixed)	CAD50 million (investment value)	CAD50 million (investment value)
Direct investments by non-WTO investors (fixed)	CAD5 million (investment value)	CAD5 million (investment value)
All cultural sector investments (fixed)	CAD5 million (investment value)	CAD5 million (investment value)

Source: Baker McKenzie, "Investment Canada Act – Financial thresholds for "net-benefit" review to decrease in 2021," Foreign Investment and National Security Blog, 2 Feb. 2021, accessed 17 June 2021, https://foreigninvestment.bakermckenzie.com/2021/02/02/investment-canada-act-financial-thresholds-for-net-benefit-review-to-decrease-in-2021/

Because China is a WTO state, investments in 2021 ultimately controlled by PRC-based investors will trigger a net-benefit review if (a) the investor is private and the target firm has an enterprise value of over CAD 1.075 billion, or (b) the investor is backed by the state and the investment is valued over CAD 428 million.

A net-benefit review takes six criteria into account: (1) the investment's effect on Canada's economy, (2) the degree of Canadian participation, (3) the investment's effect on Canadian productivity, (4) the investment's effect on competition, (5) compatibility with national policies, and (6) contributions to Canadian competitiveness.[72] Canadian authorities have made clear that these criteria can be shaped by sector. For example, since 2012, the minister of ISED Canada "will find the acquisition or control of a Canadian oil sands business by a foreign State-Owned Enterprise to be of net benefit to Canada on an exceptional basis only."[73]

The net-benefit review process begins formally when the foreign investor files an application with the ISED's Investment Review Division. Investments that trigger the above thresholds generally cannot be executed before a net-benefit review.[74] The minister has 45 days to

[72] *Investment Canada Act*, 1 Apr. 2021., §20

[73] *"World Trade Organization Secretariat", Trade Policy Review: Canada, World Trade Organization, WT/TPR/S/389, 2019, 40-41, https://www.wto.org/english/tratop_e/tpr_e/tp489_e.htm.*

[74] Exceptions exist in only narrow instances for the net-benefit review. *Investment Canada Act*, 1 Apr. 2021., §16

conduct the net-benefit review, although this can be extended 30 days. The notification must include the name and nationality of the investor's ultimate controller, the means of control, and whether a foreign state has an ownership stake.[75] The director may require additional information from the foreign investor."[76]

The notification must provide information to the government on the investor, the nature of the investment, as well as the Canadian business that will be acquired or established. The ICA and its implementing regulations thus require foreign investors "to provide information that would reveal a foreign state's influence over the goals and activities of the foreign investor's ultimate controller."[77]

If the minister is not satisfied that the foreign acquisition will be of net benefit, they will notify the applicant who has an opportunity to offer legally binding mitigation measures, after which the minister will make a final decision.[78] If the minister authorizes an investment with mitigation measures, Canadian authorities may also require regular reports that demonstrate compliance with any mitigation measures.[79] If the minister remains unsatisfied, the investment will be prohibited. If the investment has already taken place, the stake must be divested.[80]

The ICA requires the minister to provide public justifications for rejected applications. The minister may provide explanations for approvals, but it is not mandatory.[81]

Critiques of the net-benefit review system focus on threshold triggers and intellectual property. Some view the current review thresholds as being too high or too blunt to address investment strategies that exploit investments by multiple firms below thresholds that collectively would trigger a review.[82] Critics also worry that the law's sequencing is ill suited to protecting intangible assets. Because an investment can, in edge-cases, be completed before the review is completed, foreign investors could raid intellectual property between the investment completing and Canadian authorities rejecting the investment and ordering divestment.[83]

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[75] *Investment Canada Regulations*, 1 July 2020., Schedules I-III.

[76] Romanado, *Responding to the Covid-19 Pandemic and Facilitating Canada's Recovery*.

[77] Ibid., 18.

[78] *Investment Canada Act*, 1 Apr. 2021., §23(1)-(2).

[79] Ibid., §25.

[80] Ibid., §24(1).

[81] Ibid., §23.1

[82] Romanado, *Responding to the Covid-19 Pandemic and Facilitating Canada's Recovery*, 23.

[83] See description of the testimony of Mr. Jim Balsillie and Mr. Omar Wakil, *INDU Committee Meeting* Standing Committee on Industry, Science and Technology, 15 June 2020, 2020, accessed 24 June 2021. https://www.ourcommons.ca/DocumentViewer/en/43-1/INDU/meeting-24/evidence#Int-10882486.

National security review

The national security review of FDI in Canadian firms dates to 2009 and focuses on investments "injurious to national security."

Since the national security review process was established in 2009, the minister has issued only 28 notices subjecting an investment to the review and 22 instances were confirmed by the Governor in Council (GiC). Of those 22 national security reviews, 15 originated from China. Two were approved unconditionally, four were approved with conditions, and nine were either blocked, divested, or withdrawn.[84]

National security reviews may trigger when a non-Canadian (1) establishes a new business in Canada, (2) acquires control over a Canadian business, or (3) acquires in whole or part any entity operating in Canada.[85] None of these criteria are limited to specific sectors. Practically, this means that all foreign investments are potentially subject to review, whether they provide control or not.

Investments may not be completed while in the national security review process. Only once the Canadian government concludes that the investment is not a threat to national security can the investment be completed.[86] However, because reporting is not mandatory, an investor could complete the investment before the minister flags and reviews the investment.

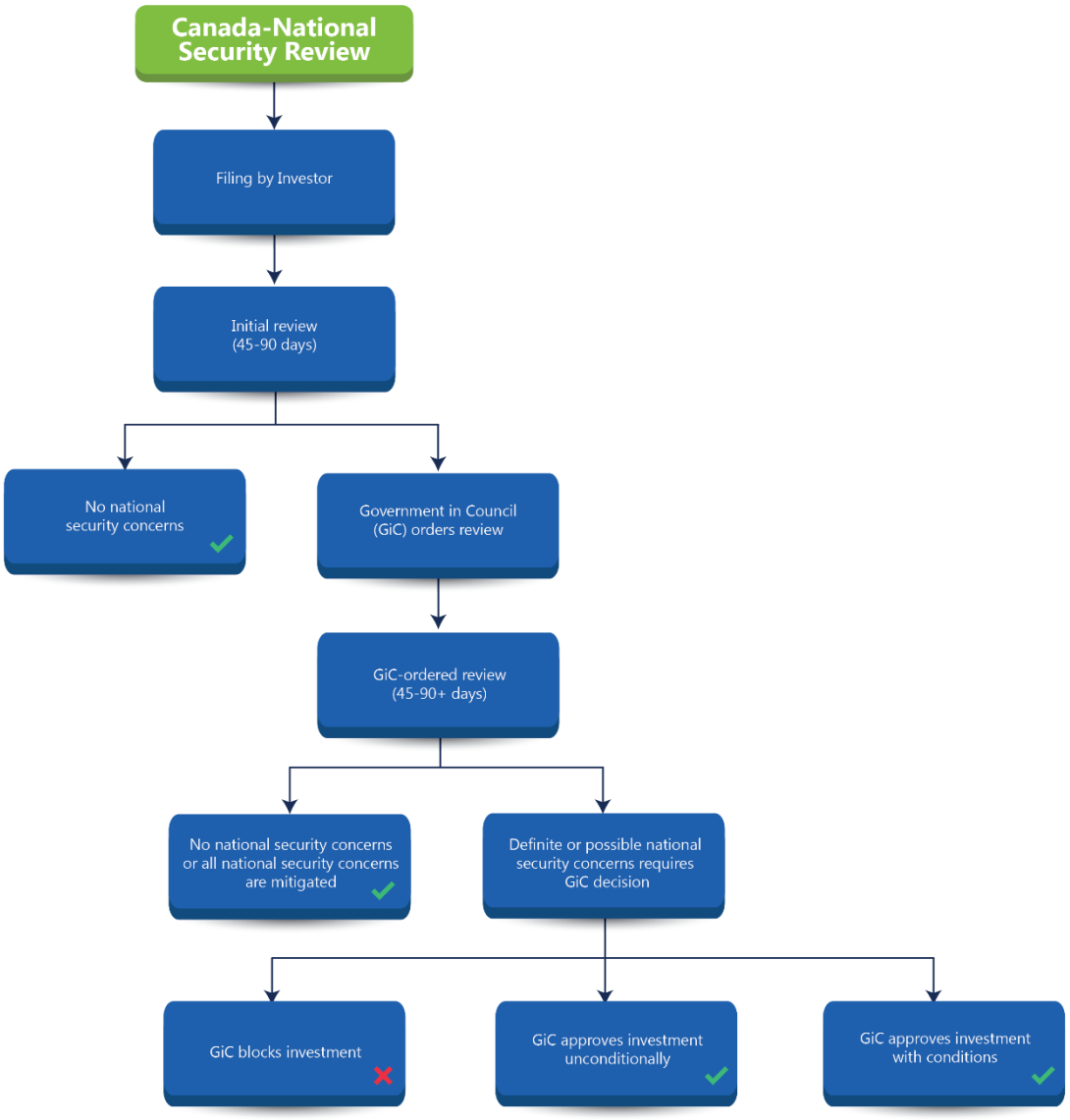
The minister considers whether the proposed investment would be "injurious to national security." The national security review process consists of two reviews culminating in a final decision. This process is depicted in Figure 3.

[84] *Investment Canada Report: Annual Report, 2018-2019*, Innovation, Science and Economic Development Canada, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81126.html., 16.

[85] *Investment Canada Act*, 1 Apr. 2021., §25.1.

[86] Ibid., §§25.2(2), 25.3(2)-(3)

Figure 3. Canada's national security review process



Source: CNA.

When the investment is filed under the ICA, the minister of Innovation, Science and Economic Development begins a 45-day initial review (which may be extended another 45 days) to determine whether the investment may be injurious to national security. At this stage, the minister is directed to coordinate with the minister for Public Safety and Emergency

Preparedness. If the investment does not raise national security concerns, the review ends and the investment may proceed.[87]

If the investment raises concerns, the GiC may order a full 45-day review, which may be extended 45 days or longer with investor consent. The minister of Innovation, Science, and Economic Development remains in charge of the review and may request further information from the investor. During the second review, the investor may also offer mitigating measures to assuage Canadian concerns. The second review can end either with the minister informing the investor that the investment is cleared, or the minister filing a report of findings and recommendations with the GiC. If the minister is uncertain about injury to national security, the GiC makes a final decision.[88]

If the two reviews find that the investment will or might cause injury to Canadian national security, the GiC may take one of three actions. First, the GiC may order the investor not to complete the investment. Second, the GiC can permit the investment subject to certain legally binding mitigating conditions. Third, the GiC can order divestment if the investment was completed before the review process began.[89]

When the GiC imposes or accepts conditions to approve the investment, the director of investments may require periodic disclosures to ensure that the investor is complying with any mitigation agreement.[90]

The national security review process is supported from the initial receipt of notification by Canadian public safety, national security, and intelligence agencies.[91] In this inter-agency process, the Canadian Secret Intelligence Service focuses on "acquisitions by shell companies, SOEs, or ones directly linked to intelligence services or foreign governments."[92]

Since the establishment of the national security review process, only 22 investments have been subject to a full GiC-ordered review. The record of these reviews is detailed in Table 2.

[87] Ibid., §25.2.

[88] Ibid., §25.3.

[89] Ibid., §25.4(1).

[90] Ibid., §25.5.

[91] Canadian House of Commons, Standing Committee on Industry, Science and Technology, *The Investment Canada Act: Responding to the COVID-19 Pandemic and Facilitating Canada's Recovery*, 43rd Parliament, 2nd Session, Mar. 2021, 29.

[92] Ibid.

Table 2. Investments subject to full national security reviews

Year	Origin	Industry Sector	Outcome
2018–2019	China	Urban Transit Systems	Divestiture
2018–2019	China	Commercial and Service Industry Machinery Manufacturing	Withdrawal
2018–2019	Singapore	Hardware Manufacturing	Withdrawal
2018–2019	Switzerland	Engine, Turbine & Power Transmission Equipment	Divestiture
2018–2019	China	Activities Related to Credit Intermediation	No Further Action
2018–2019	China	Electronic Shopping and Mail-Order Houses	No Further Action
2018–2019	Switzerland	Other General-Purpose Manufacturing	No Further Action
2017–2018	China	Pharmaceutical and Medicine Manufacturing	Withdrawal
2017–2018	China	Other Heavy and Civil Engineering Construction	Block
2016–2017	China	Manufacturing Industries – Telecommunication Equipment Industry	Conditions Imposed
2016–2017	China	Other Telecommunications	Divestiture
2016–2017	China	Ship and Boat Building	Divestiture
2016–2017	China	Other Electrical Equipment and Component Manufacturing	Conditions Imposed
2016–2017	Cyprus	Rail Transportation	Divestiture
2014–2015	China	Manufacturing Industries – Telecommunication Equipment Industry	Divestiture
2014–2015	China	Manufacturing Industries – Other Communication and Electronic Equipment	Conditions Imposed
2014–2015	China	Business Service Industries – Computer and Related Services	Conditions Imposed
2014–2015	Russia	Mining & Quarrying & Oil Well Industries – Crude Petroleum and Natural Gas Industries	Block
2014–2015	United Kingdom	Business Service Industries – Computer and Related Services	Divestiture
2014–2015	Egypt	Business Service Industries – Computer and Related Services	Block
2012–2013	China	Business Service Industries – Computer and Related Services	Block
2012–2013	Russia	Communication & Other Utility Industries – Telecommunications Carriers Industry	Withdrawal

Source: Government of Canada. Innovation, Science and Economic Development. *Investment Canada Act: Annual Report 2018–2019*, 17-18.

The national security review covers all investments in the Canadian economy and provides an open-ended criterion for modifying or blocking a proposed investment. Still, critics point to two potential gaps. First, transactions that do not involve whole entities, such as the purchase of some intellectual property assets, are subject to neither a net-benefit nor a national security review.[93] Second, the ICA may not apply to downstream investments or actions, such as when an investment is approved but then the investor's stake is subsequently seized by a foreign government.[94]

Investment transparency

ISED must treat all information obtained as privileged, including details about the foreign investor or the Canadian business being acquired or established. The net-benefit and national security reviews oblige the minister to disclose some information about reasons for their decision, particularly if the investment is rejected, but in all cases, the minister "must refrain from divulging financial, commercial, scientific or technical information if doing so would prejudice the person who provided the information."[95]

Reformers frequently advocate for increased transparency for both greater efficiency in ICA application and greater accountability. However, some caution that "'investors take great comfort in the fact that' the ICA treats 'their sensitive business information…confidentially in the context of the review.'"[96]

Recent and emerging developments

The Canadian government has provided new details on the review process in response to the COVID-19 crisis. Although the Canadian Bar Association warned that the national security review already provided "tremendous power,"[97] the Canadian government released updated guidelines for the national security review process in March 2021. The guidelines instruct national security reviews to consider whether an investment could (a) affect supply of critical goods and services to Canadians or the government, (b) affect supply of critical minerals and their supply chains, or (c) provide access to sensitive personal data.[98] The guidelines also

[93] See, for example, Wakil, *INDU Committee Meeting*

[94] An illustrative example was the ICA-approved acquisition of Canadian hotels and long-term care homes by the Beijing-based firm Anbang, which was subsequently seized by the PRC government. See Romanado, *Responding to the Covid-19 Pandemic and Facilitating Canada's Recovery*, 35-36.

[95] The Investment Canada Act: Responding to the COVID-19 Pandemic and Facilitating Canada's Recovery, 38-39.

[96] Ibid.

[97] Doh, Investment Canada Act Study – COVID-19 Implications, 16 June 2020.

[98] "Guidelines on the National Security Review of Investments," Government of Canada, 24 Mar. 2021, accessed 1 June 2021, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html.

flagged 15 high-tech sectors in which national security reviews were likely.[99] These are not statutory changes, however.

The House of Commons Standing Committee on Industry, Science and Technology conducted a review of the ICA beginning in June 2020. In March 2021, they released a report summarizing their review of the act and presented nine recommendations. Four recommendations suggest specific amendments to the ICA:

- Reducing valuation thresholds for state-owned or state-controlled enterprise investments.
- Requiring an annual review process for existing thresholds.
- Mandating coordination and consultation between the ministry and Canadian security, policing, and intelligence establishments in the national security review process.
- Authorizing the review and intervention in secondary or downstream transfers of ICA-approved acquisitions.[100]

Sectoral walls

In terms of openness to foreign investment, the WTO has consistently ranked Canada in a low position because of restrictions on foreign investments in such sectors as uranium mining, air transportation, telecommunications, broadcasting, and financial services. These restrictions are generally stricter than those of other countries, surpassed only by New Zealand, Mexico, China, and Russia.[101]

Under the 1987 Non-Resident Ownership Policy in the Uranium Mining Sector, uranium mines in commercial production must have at least 51 percent ownership by Canadian residents.[102] The federal government may waive this requirement if no Canadian investor can be found.[103]

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[99] Advanced Materials and Manufacturing; Advanced Ocean Technologies; Advanced Sensing and Surveillance; Advanced Weapons; Aerospace; Artificial Intelligence (AI); Biotechnology; Energy Generation, Storage and Transmission; Medical Technology; Neurotechnology and Human-Machine Integration; Next Generation Computing and Digital Infrastructure; Position, Navigation and Timing (PNT); Quantum Science; Robotics and Autonomous Systems; Space Technology

[100] The Investment Canada Act: Responding to the COVID-19 Pandemic and Facilitating Canada's Recovery.

[101] *Foreign Direct Investment in Canada – the Case for Further Openness and Transparency*, C.D. Howe, 2018, 5-7, https://www.cdhowe.org/public-policy-research/foreign-direct-investment-canada-%E2%80%93-case-further-openness-and-transparency.

[102] "Canada's Non-Resident Ownership Policy in the Uranium Mining Sector."

[103] Natural Resources Canada, "Minister Rickford Announces Approval of Majority Ownership of Proposed Uranium Mine in Newfoundland and Labrador," Government of Canada, 22 June 2015, accessed 6/17/2021, https://www.canada.ca/en/news/archive/2015/06/minister-rickford-announces-approval-majority-ownership-proposed-uranium-mine-newfoundland-labrador.html.

Total foreign ownership of any Canadian airline is limited to 49 percent of equity, and no single non-Canadian person can control more than 24 percent of voting interests. No more than 25 percent can be owned by one or more non-Canadians authorized to provide air services in any location.[104] Domestic flights, which dominate access to the Canadian Arctic, must be conducted by Canadian airlines or persons (including firms in which foreign ownership is below the above thresholds). The minister of transportation may make exemptions to this restriction when "advisable in the public interest," but must publicize such exemptions.[105]

The Telecommunications Act restricts foreign investment in firms that own or operate telecommunications facilities. To be eligible to operate in Canada, a firm must either (a) earn less than 10 percent of the total revenues generated by the Canadian telecommunications services, or (b) be organized in Canada and owned and controlled by Canadians.[106] Canadian ownership requires that 80 percent of the board be Canadian citizens, Canadians own at least 80 percent of voting interests, and no foreign person otherwise controls the entity.[107] This policy means that the largest Canadian telecommunications firms legally must be controlled by Canadians. These nationality restrictions do not apply to international submarine cables, Earth stations for satellite communications, or satellites.[108] Furthermore, implementing regulations in the broadcast sector requires the Canadian Radio-television and Telecommunications Commission to grant only Canadian persons broadcast licenses. For corporations, this requires that the chief executive officer and 80 percent of the directors be Canadians, and that Canadians own at least 80 percent of share capital. Subsidiaries are also eligible for licenses when Canadians own two-thirds of voting shares and the parent corporation does "not control or influence any programming decisions of the broadcasting undertaking."[109]

Canada also walls off some parts of the fisheries industry from foreign investment. The Coastal Fisheries Protection Act and Regulations both permit foreign fishing vessels to obtain licenses to engage in commercial fishing.[110] However, in the Maritimes region of Eastern Canada,

[104] *Canada Transportation Act*, 29 May 1996., § 55(1); "World Trade Organization Secretariat", *Trade Policy Review: Canada*, 40-41; *Canada Transportation Act*, 29 May 1996.

[105] *Canada Transportation Act*, 29 May 1996., §§61 and 62(1) and (3).

[106] *Telecommunications Act*, 23 June 1993., §16(2).

[107] Ibid., §16(3).

[108] "World Trade Organization Secretariat", *Trade Policy Review: Canada*, 40-41; *Telecommunications Act*, 23 June 1993.

[109] *Direction to the CRTC (Ineligibility of Non-Canadians)*, (1997), https://laws-lois.justice.gc.ca/eng/regulations/SOR-97-192/page-1.html.

[110] *Coastal Fisheries Protection Regulations* 17 June 2019; *Coastal Fisheries Protection Act (R.S.C., 1985, c. C-33)*, (16 June 2019), https://laws-lois.justice.gc.ca/eng/acts/C-33/.

policies (which are less binding than laws or regulations) require offshore fishing licenses to be issued only to Canadian individuals or firms with at least 51 percent Canadian ownership.[111]

Sub-federal rules

As a federal state with significant First Nations populations, Canada's FDI regime includes important rules at the sub-federal level.

Territorial governance

Laws and regulations at the provincial and territorial level can play a role in filtering FDI, particularly in the natural resource sector. These include laws and regulations on licenses, exploration permits, and environmental reviews.[112] In Canada, natural resources (aside from uranium) are treated as public heritage and managed on behalf of the public by provincial and territorial governments, although the federal government manages such rights in Nunavut.[113] Resources cannot be exported without the provincial or territorial government's oversight and agreement.[114] An important further annotation is that the lease of mineral rights is fully transferable without government intervention or review.[115]

Indigenous and local communities

Companies operating in natural resource exploration and development in Canada, particularly in the Northwest Territories, have a duty to consult with the relevant First Nations and local communities. Furthermore, though most subsurface rights are managed by the provincial governments (or federal government in Nunavut), surface rights such as access permissions and land use licenses are managed by Regional Inuit Associations (Kitkmeot, Kivalliq, and Qikiqtani). Nunavut Tunngavik Incorporated (NTI) still holds some subsurface rights.[116] In combination, these rights and duties can spur developers to negotiate contractual Impact and Benefits Agreements with First Nations groups.[117]

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[111] "Canada: Transfers And Non-Canadian Ownership Of Atlantic Canadian Fishing Licences."

[112] A. E. Safarian, "Simplifying the Rule Book: a Proposal to Reform and Clarify Canada's Policy on Inward Foreign Direct Investment," *C.D. Howe Institute Commentary*, no. 425 (2015): 1.

[113] "Canada's Positive Investment Climate for Mineral Capital," Natural Resources Canada, 26 July 2017, accessed 17 June 2021, https://www.nrcan.gc.ca/science-data/science-research/earth-sciences/earth-sciences-resources/earth-sciences-federal-programs/canadas-positive-investment-climate-mineral-capital/8782.

[114] Wendy Dobson, *China's State-Owned Enterprises and Canada's FDI Policy*, University of Calgary School of Public Policy, 2014, 18.

[115] "Canada's Positive Investment Climate for Mineral Capital."

[116] *Overview 2020: Nunavut – Mining, Mineral Exploration, and Geoscience*, Government of Nunavut, Canada-Nunavut Geosicence Office, and Nunavut Tunngavik Incorporated, 2020.

[117] "Canada's Positive Investment Climate for Mineral Capital."

The power of First Nations groups to shape investment is illustrated by the TMAC Hope Bay gold-mining project. TMAC, a Canadian company, was interested in taking over an existing mine lease and expanding the gold-mining and port facilities at Hope Bay. To that end, TMAC negotiated a 20-year agreement with the Kitikmeot Inuit Association (KIA) and NTI. This agreement provided socio-economic investments for the Inuit communities in the region, royalties on mine production, and a water and wildlife compensation agreement in addition to making KIA a shareholder in TMAC. The transfer of these agreements and their desired implementation as part of a productive investment in local infrastructure was bound up with the government's review of China's Shandong Gold Group's bid to purchase TMAC.[118]

Given the lack of infrastructure in the Northwest Territories and the difficulties in getting investment into these regions, many local communities view FDI as an opportunity "for Indigenous people in the North to gain more control over their economic futures." Stanley Anablak, president of the KIA, observed that "the Kitikmeot regions compete with many other international mining districts for this investment. We are open to receiving investment whether it is from Canadian or foreign companies" but that "being open does not mean being naïve or soft."[119] Anablak emphasized that Canadian and Nunavut laws applied in full to foreign investors. Others are wary of giving foreigners too much leverage in the local economy. A member of the legislative assembly for Yellowknife noted, "I don't want to have to pass laws thinking, 'Is this going to anger the Chinese government?'"[120] These statements indicate that at least some Indigenous leaders are aware of the risks associated with PRC-backed investments.

Iceland

With a relatively small economy, Iceland has in recent years promoted FDI inflows. The public investment promotion entity Invest in Iceland notes that "Foreign Direct Investment is paramount to the continued growth of Iceland's economy." Iceland's regulatory framework is uneven, combining clear and broad screening criteria with limited investment notification rules and limited transparency.

Iceland's GDP was $20.3 billion in 2018.[121] The United Nations cited its inward FDI as valued at -$241 million in 2019, meaning divestments were greater than investments by that amount.

[118] "TMAC Resources, KIA and NTI Sign Landmark Land Tenure Agreements for the Hope Bay Belt, Nunavut," Nation Talk, 1 Apr. 2015, accessed 30 June 2021, https://nationtalk.ca/story/tmac-resources-kia-and-nti-sign-landmark-land-tenure-agreements-for-the-hope-bay-belt-nunavut.

[119] Gloria Dickie, "China Wants to Invest in the Arctic. Why Doesn't Canada?," *The Walrus*, 29 Jan. 2021, accessed 1 June 2021, https://thewalrus.ca/china-wants-to-invest-in-the-arctic-why-doesnt-canada/.

[120] Ibid.

[121] UN Data, "GDP, PPP (current international $)," UN Data, 5 Feb. 2021, accessed 10 Mar. 2021, http://data.un.org/Data.aspx?q=GDP&d=WDI&f=Indicator_Code%3aNY.GDP.MKTP.PP.CD.

Iceland last recorded a positive inflow of FDI in 2015.[122] As of 2019, the total FDI stock in Iceland was valued at $8.507 billion.[123] (For more on CNA's findings on PRC investment and economic activity in the Icelandic economy, visit www.cna.org/ArcticFDI for the relevant companion report.)[124]

Company formation

Icelandic law requires a significant degree of reporting to the government regarding the identity of investors establishing a commercial entity in Iceland.

In the establishment of a private limited liability company (LLC), the notice of incorporation must include "names, identity numbers, and addresses of company founders," among other important individuals. The act regulating such formations notes that *founders* means beneficiaries.[125] This information presumably is stored in the register of Icelandic private LLCs. The act empowers the minister of finance to decide whether and how information from the register is made available to the public.[126]

The Icelandic citizen requirement is subject to significant exceptions. Citizens and residents of the European Free Trade Area (EFTA) and European Union (EU) states enjoy national treatment for the purposes of corporation formation.[127] Likewise, the ministry of industry and commerce has issued a general exemption on corporation formation rules for citizens of Organization for Economic Cooperation and Development (OECD) states residing in an OECD state. These individuals enjoy the same national treatment as EU and EFTA citizens and residents.[128]

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[122] *World Investment Report 2020: International Production Beyond the Pandemic*, United Nations Conference on Trade and Development, UNCTAD/WIR/2020, 238, https://unctad.org/system/files/official-document/wir2020_en.pdf.

[123] Ibid., 242.

[124] Wolfson et al., *Arctic Prospecting: Measuring China's Arctic Economic Footprint*, CNA, Aug. 2021.

[125] *Act No. 138/1994 respecting Private Limited Companies, as amended up to 1 May 2011*, (1 May 2011), https://www.government.is/publications/legislation/lex/2018/02/06/Act-No.-138-1994-respecting-Private-Limited-Companies-as-amended-up-to-1-May-2011-amendments-as-from-Act-43-2008-indicated/.

[126] Ibid.

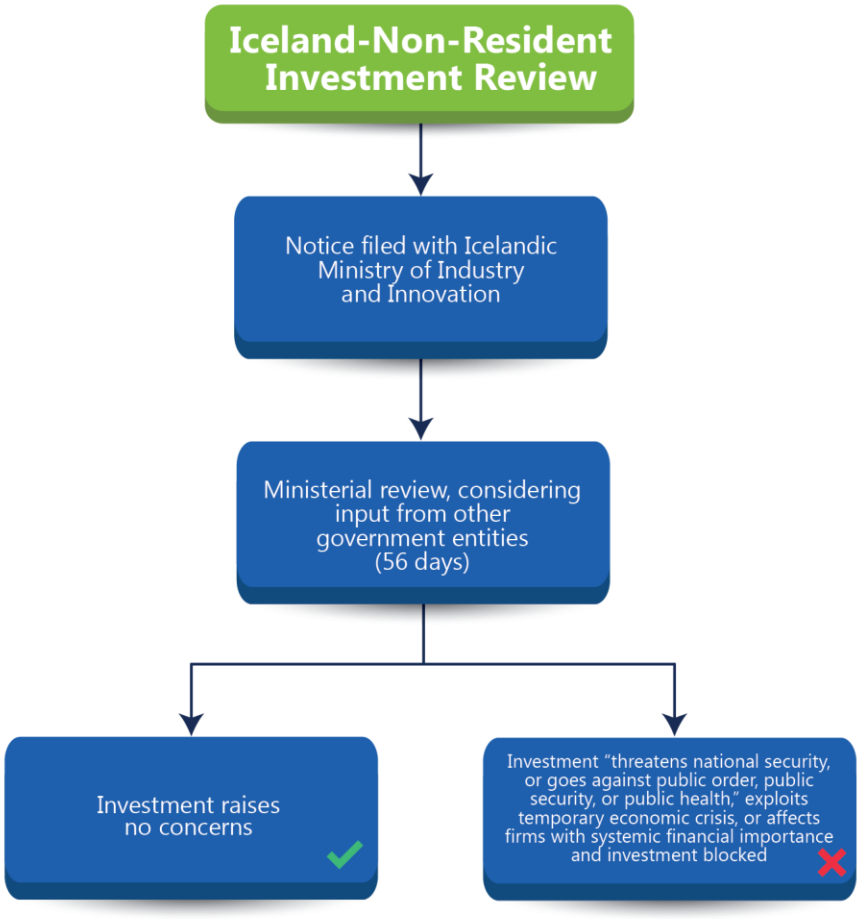
[127] *Act respecting Public Limited Companies No. 2/1995, as amended up to 1 May 2011* (1 May 2011), https://www.government.is/library/04-Legislation/Act%20No%202-1995.pdf; *Act No. 138/1994*, 1 May 2011.

[128] *Announcement No. 848/2013 respecting General Exemption from the Conditions of Residence of the Limited Liability Companies' Legislation*, (6 Sep. 2013), https://www.government.is/publications/legislation/lex/2018/02/06/Announcement-No.-848-2013-respecting-General-Exemption-from-the-Conditions-of-Residence-of-the-Limited-Liability-Companies-Legislation/.

FDI screening rules

The basis for Iceland's general FDI screening regime is a 1991 act that has been amended on several occasions. Although it sets out explicit bans or caps on foreign investment in some sectors, the general screening mechanism has some uncertainties and gaps. The current Icelandic system is summarized in Figure 4.

Figure 4. Icelandic FDI screening process



Source: CNA.

The act defines *non-residents* as "an individual residing abroad irrespective of nationality," "a company…or other legal person domiciled abroad," or a business enterprise "under foreign control." The act defines a *foreign controlled enterprise* as an Icelandic business containing "majority holdings either in shares or initial capital, or [that holds] a majority of votes, or in any other way [has] effective control over the enterprise in question." Further, the act defines *foreign investment* as investment in Icelandic enterprises "by a non-resident irrespective of whether this involves new equity capital or reinvestment of dividends."[129]

The 1991 act takes a firm line on investment by foreign states. Foreign investment by "foreign states, local authorities, or other foreign authority involved in enterprises is prohibited except with a special permission from the Minister of Commerce."[130]

The 1991 act requires immediate notification to the minister of Industry and Innovation whenever an initial or additional foreign investment is made in an industry subject to restrictions (fisheries, energy, and aviation).[131] Investments by EEA persons are essentially exempt from reporting requirements. The reporting burden is on the Icelandic business in most cases, unless the business is to be in a non-resident's name, in which case the notification obligation falls to the non-resident.[132]

Since 2014, the power to scrutinize and reject foreign investment has been concentrated in the Ministry of Industry and Innovation. The act as initially written instituted a five-person Committee on Foreign Investment empowered to monitor the enforcement of restrictions on investment by non-residents and offer recommendations to the minister of Industry and Innovation on the granting of licenses and exceptions.[133] This committee, however, was abolished in the 2014 amendment.[134]

The 1991 act permits case-by-case bans of foreign investment based on three criteria. First, the minister may suspend specific investments if they believe the investment "threatens national security, or goes against public order, public security, or public health." Second, the minister may suspend investments in industries beset by temporary but persistent economic, socio-economic, or environmental difficulties. Finally, since 2014, the minister may block investments in systemically important companies when a systemic risk to the financial system

[129] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Art. 2.

[130] Ibid., Art. 4(4).

[131] Prior to 2014, reporting requirements covered all transactions, but Iceland revised its laws after the EFTA Surveillance Authority found this to contravene Iceland's commitment to the EEA.

[132] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*, Art. 7.

[133] Ibid., Art. 2.

[134] Ibid., Art. 4.

is present—a clear response to Iceland's disastrous experience during the 2008 financial crisis.[135] The legislation speaks only of suspending investments and mentions no power to enter into mitigating agreements to assuage concerns.

From the date of notification, the minister has eight weeks to determine that an investment meets the criteria for a ban.[136] Although the initial legislation required the minister to consult the Committee on Foreign Investment, since 2014, the minister need not consult any external body. Other ministries with competency for the investment's sector may provide input or recommend a suspension. The minister is empowered to collect information to conduct the review and may delegate this collection to a government agency.[137]

Since the end of the universal reporting requirement in 2014, it is not clear how the minister is informed of investments in non-restricted sectors. However, current legislation provides a safe harbor for investments only when eight weeks elapse after a notification. Thus, investments not reported initially may be subject to scrutiny as the law permits the minister to order divestment. Furthermore, approval granted in cases in which investors misrepresent their identities or the investment's purpose will likely enjoy neither the safe harbor of Icelandic law nor any relevant protections under Iceland's investment treaties.[138]

Sector-specific walls

Iceland notably has special rules restricting foreign acquisitions in several sectors.

The right to own property is generally limited to Icelandic entities, although exceptions are possible. If the owner is an individual, natural person, they must be an Icelandic citizen or resident.[139] For an LLC, the company must be domiciled and located in Iceland, with a board composed entirely of Icelandic citizens.[140] The relevant minister may make exemptions for property ownership, but these are capped at 25 hectares. Exemptions may not be issued to foreign states, government authorities, state-run enterprises, or other foreign public bodies.[141]

[135] Ibid., Art. 12.

[136] Ibid.

[137] Ibid., Art. 7.

[138] Ursula Kriebaum, "Investment Arbitration – Illegal Investments," in *Austrian Arbitration Yearbook 2010*, ed. Peter Klein Christian Klausegger, et al. (CH Beck, Stämpfli, & Manz 2010).

[139] *Act on the Right of Ownership and Use of Real Property, No. 19*, (6 Apr 1966), Art. 1.1.1, https://www.government.is/Publications/Legislation/Lex/?newsid=353f66b8-f153-11e7-9421-005056bc4d74.

[140] Ibid., Art. 1.1.4.

[141] Ibid., Art. 1, paragraphs 2 & 3.

When violations do occur, they must be resolved (presumably with a sale) in between six months and three years.[142]

Iceland's memberships in the EEA and EFTA carry some exceptions to the above restrictions on real estate acquisitions. EEA citizens intending to relocate to or conduct business in Iceland may acquire property. Likewise, companies and legal persons may acquire property to conduct business (whether through a branch, through an agency, or as a service). However, companies enjoying the latter exemption "shall either have their headquarters or principal activity in an EEA- or EFTA-state or be domiciled there according to their statutes. In the case of domicile according to statutes, the legal person's activity shall have a real and permanent connection with the economy of the member state."[143]

The 1991 act on investments by non-residents significantly limits such investments in the fisheries industry. Only Icelandic citizens or Icelandic legal persons controlled by Icelandic persons are permitted to own or run fishing enterprises within Iceland's fishing jurisdiction (i.e., the Icelandic territorial sea, exclusive economic zone, and continental shelf). If a fishing enterprise is owned by one or several Icelandic legal persons, all legal persons must be no more than 25 percent owned by foreign residents of Iceland, unless the legal person controls less than 5 percent of the fishing enterprise, in which case the foreign resident's ownership of the owning legal person may be up to 33 percent. The act makes no exception for EEA members.[144]

Commercial geothermal energy is another important sector of the Icelandic economy subject to explicit foreign ownership controls under the 1991 act. Per that act, only Icelandic citizens or persons may own the rights to geothermal and waterfall energy sources or companies generating or distributing power. Individuals and legal persons domiciled in the EEA also enjoy these rights.[145]

Finally, foreign investment in Iceland's airline industry is also subject to a foreign-ownership cap. The combined ownership share of non-Icelandic persons also not resident in the EEA can never exceed 49 percent.[146]

Icelandic law also includes a foreign control cap on firms that export controlled defense-related or dual-use items. Controlled items include those that "may be intended, in their entirety or in

[142] Ibid., Art. 1, paragraph 5.

[143] *Regulation on the rights of aliens who come under the Agreement on the European Economic Area or the Convention establishing the European Free Trade Association to acquire the right to own or use real property*, Althingi, 602/2002, 2002, https://www.government.is/Publications/Legislation/Lex/?newsid=1b86afe4-f154-11e7-9421-005056bc4d74.

[144] *Lög um fjárfestingu erlendra aðila í atvinnurekstri*., Art. 4(1).

[145] Ibid., Art. 4(2).

[146] Ibid., Art. 4(3).

part, for military use…or for the purpose of internal repression." For such firms, the combined share of foreign control over an Icelandic firm may not exceed 49 percent. The relevant minister may issue an exemption, and international agreements may also override this restriction.[147]

Country-specific rules

Iceland is a member of the EFTA and thus has privileged economic relations with members of the EU and the three other members of EFTA.[148]

In addition, Iceland currently has bilateral investment treaties with six states: Egypt, Chile, China, Lebanon, Mexico, and Vietnam.[149]

The Iceland-China Bilateral Investment Treaty (BIT) is a standard 1990s BIT. Article 2 includes standard language on "fair and equitable treatment and shall enjoy full protection and security" without prejudice to existing laws and regulations.[150] This means that Iceland's laws and regulations restricting investments in certain sectors or by certain actors apply to PRC-based investors, as long as they are applied in a non-discriminatory fashion.

The core reciprocal provisions lie in Article 3, which grants most-favored nation status and national treatment to the other's investors.[151] However, two important caveats apply to these expansive permissions:

- First, the national treatment clause includes "in accordance with the stipulations of its laws and regulations"—language that permits Iceland to apply its restrictions on foreign investment in and ownership of certain sectors to PRC-based investors.[152] Additionally, it means that the minister of commerce should be able to review and reject proposed investments.
- Second, Article 3.4 notes explicitly that most-favored nation and national treatment provisions and their exceptions are not and will not be affected by customs unions or

[147] *Act on Control of Services and Items that have Strategic Significance*, 14 June 2010.

[148] Norway, Switzerland, and Lichtenstein.

[149] UNCTAD, "Iceland," International Investment Agreements Navigator, accessed 30 June 2021, https://investmentpolicy.unctad.org/international-investment-agreements/countries/95/iceland.

[150] *Agreement between the Goverment of the People's Republic of China and the Goverment of the Republic Iceland concerning the promotion and reciprocal protection of investments*, (1994), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/911/china---iceland-bit-1994-.

[151] Ibid.

[152] Ibid.

free trade areas.[153] This means that Icelandic exceptions on investment rules for EFTA or EEA entities do not apply to PRC-based investors.

In April 2013, China and Iceland signed a comprehensive free trade agreement (FTA) that liberalized trade in goods and services between the two countries. The FTA neither amends nor supplements the 1994 BIT but does cover some aspects of investment.

Investment transparency

Transparency regulations vary by industry and style of FDI in Iceland.

The 1991 act, as revised, does not explicitly require the responsible minister to publicize FDI cases or blocked investments. However, the legislation does require the minister to present to the Althingi an annual report covering overall FDI, FDI by sector, any screening decisions, and any actions taken under Article 5 of Act 34/1991 regarding foreign divestment of fishing industry interests. It is unclear, from the outside, whether these reports are in fact produced, but our research suggests they are at least not public.

Iceland offers a range of incentives for FDI that are clear and well regulated. Incentives are the most valuable for direct start-up grants to small and medium enterprises, film and television production, and research and development.[154] Iceland's incentives are constrained by EU rules on state aid. Furthermore, incentives are subject to legislative authorization and also must be approved by the EFTA Surveillance Authority (ESA).[155] The ESA is an independent body charged with monitoring EFTA states' compliance with EU regulations and empowered to bring violations to a special court.[156]

In Iceland's important tourism industry, a company planning to operate must obtain a license before commencing operations. Licensed firms must submit annual audited reports to the Icelandic Tourism Board before April 30 each year. License applications require either the person or their representative to reside within the EEA or EFTA. Failure to submit annual audited reports or the loss of financial autonomy can be cause for revocation of a license.[157]

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[153] Ibid.

[154] "Incentives and Support," Invest in Iceland, accessed 30 Apr 2021, https://www.invest.is/doing-business/incentives-and-support.

[155] Ibid.

[156] "Mission and Values," EFTA Surveillance Authority, 2020, accessed 4 Apr 2021, https://www.eftasurv.int/esa-at-a-glance/mission-values.

[157] *Act No. 96/2018 on the Icelandic Tourist Board*, (26 June 2018), https://www.government.is/library/04-Legislation/Act%20on%20the%20Icelandic%20Tourst%20Board%2096%202018.pdf; *Act no. 73 24 May 2005 on Tourism Administration*, (24 May 2005), https://www.government.is/Publications/Legislation/Lex/?newsid=2cfbbe20-0cde-11e8-9427-005056bc530c.

These regular reporting requirements suggest that the Icelandic Tourism Board should have fairly robust insight into the firms establishing tourism operations in Iceland. A list of licensed firms can be found on the Tourism Ministry's website.

United States

The total US GDP in 2018 was $20.5 trillion.[158] In 2019, the net FDI inflow was $246.2 billion, with cumulative FDI stock valued at $9.465 trillion. These data are not broken out by US state, but the US trade representative notes that FDI was responsible for 17,200 Alaskan jobs in 2015 (against a total non-farm workforce of 339,100)—or 5 percent of Alaskan non-farm employment.[159] (For more on CNA's findings on PRC investment and economic activity in the Alaskan economy, visit www.cna.org/ArcticFDI.)

FDI screening

US FDI screening takes place on the national level and is highly formal and structured. The subsections below describe the general screening rules, procedures specific to the Committee on Foreign Investment in the United States (CFIUS), and sector-specific regulations.

General screening rules

The principal investment screening process in the US is CFIUS. CFIUS consists principally of nine cabinet members: the secretaries of State, Treasury, Defense, Homeland Security, Commerce, and Energy; the attorney general; the US trade representative; and the director of the Office of Science and Technology Policy.[160]

CFIUS screens investments primarily against three criteria, although additional factors may be considered. CFIUS must conduct a "risk-based analysis" that provides assessments of the "threat" posed by a foreign investor, the "vulnerabilities" exposed by the US business, and the consequences of combining threat and vulnerabilities.[161] Furthermore, in deciding whether a transaction should be mitigated or prohibited, CFIUS and the President may consider 18 additional factors, including needs for national defense or national security, long-term energy

[158] "GDP, PPP (current international $)."

[159] "Alaska," United States Trade Representative, accessed 10 May 2021, https://ustr.gov/map/state-benefits/ak; "Monthly Employment Statistics," Department of Labor and Workforce Development, accessed 10 May 2021, https://live.laborstats.alaska.gov//ces/index.cfm.

[160] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, 22.

[161] "CFIUS Finalizes New FIRRMA Regulations."

needs, whether the transaction is directed by a foreign government, and the investor's nationality.[162]

CFIUS aims to strike a balance between national security and economic openness through mitigation agreements. Mitigation addresses risks identified by CFIUS during an informal or formal review in exchange for a green light for a proposed investment. An investor violating or failing to comply with a mitigation agreement is one of the only grounds for CFIUS to re-evaluate a case after the case reaches safe harbor of an initial approval.[163]

The Defense Production Act (DPA) defines *control* as "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity."[164] The Act establishes that covered transactions include "any merger, acquisition, or takeover" that "could result in foreign control of any United States business." This includes both initial investments and any subsequent change in rights enjoyed by a foreign person that could result in foreign control.[165]

CFIUS procedures

The CFIUS FDI screening procedure described in this section is summarized in Figure 5.

[162] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, 30-31.

[163] *Defense Production Act of 1950*, 8 Sept. 1950., §4565(b)(1)(D)(ii).

[164] Ibid., §4565(a)(3).

[165] Ibid., §4565(a)(4)(B)(iv).

Figure 5. CFIUS FDI screening process

Source: CNA.

CFIUS employs two types of review: an informal review and a formal review. The informal review is a flexible process that offers advantages to both CFIUS and would-be investors. The review does not have a fixed timeline, which gives CFIUS members greater time to consider the potential risks and mitigation measures necessary for a proposed investment. The firms involved in a transaction derive two apparent benefits. First, they can iron out possible

concerns in advance with specific CFIUS members. Second, they can avoid negative publicity associated with a negative finding in a formal CFIUS review.[166]

The formal review process entails three steps upon receiving a declaration or written notice of a covered intended investment. The process is depicted in Figure 5. A declaration requires less information and allows a more expedited process. A written notice is required for some types of investment or foreign government-controlled investors, and CFIUS can require an investor to convert a declaration to a written notice.[167] Declarations and written notices are mandatory for investments only if "US Government export control authorization would be required to export, re-export, transfer, or re-transfer the US business' critical technology to transaction parties or their owners."[168]

Although declarations and notices are in most cases voluntary, parties to a covered transaction are incentivized to notify CFIUS of a transaction to obtain a safe harbor letter. A safe harbor letter is the notice from CFIUS that a review has been completed with no outstanding concerns for national security.[169] Once in safe harbor, the covered transaction can be reexamined only if CFIUS discovers "false or misleading material" in a submission, or the foreign person breaches a mitigation agreement or condition.[170] If a transaction is not reported, CFIUS indefinitely retains the authority to review the transaction and potentially take action, and may request that the parties file a notice for CFIUS to review.

The initial step is a basic review. Within 30 days of receipt, CFIUS must (a) request additional information, (b) rule that the transaction is not covered, (c) certify that no unmitigated risks to national security exist, or (d) flag the transaction for a unilateral review if a risk does exist. Option (c) ends the review.[171]

If flagged for a unilateral review, CFIUS conducts a national security review to "determine the effects of the transaction on the national security of the United States" as well as other factors, including the health of the defense industrial base, technological leadership, critical infrastructure, energy and resource independence, and foreign government control.[172] The lead agency is decided based on the proposed investment's sector. The review is also

[166] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, 12.

[167] Ibid., 16.

[168] *Fact Sheet: CFIUS Final Regulations Revising Declaration Requirement for Certain Critical Technology Transactions*, US Department of Treasury, 2020, https://home.treasury.gov/system/files/206/Fact-Sheet-Final-Rule-Revising-Mandatory-Crit-Tech-Declarations.pdf.

[169] *Defense Production Act of 1950*, 8 Sept. 1950., §4565(b)(1)(C)(v)(III)(aa)(DD).

[170] Ibid., §4565(b)(1)(E-D).

[171] Ibid., §4565(b)(1)(C).

[172] Ibid., §4565(b)(1)(A) and (f).

accompanied by a 30-day threat analysis by the director of national intelligence, drawing on information from the intelligence community.[173] The review must be completed within 45 days from the acceptance of a notice or declaration.[174] If unmitigated risks still exist at the end of the national security review, the process moves to a National Security Investigation.

A National Security Investigation is triggered if the investment threatens an unmitigated risk to US national security, the transaction would produce control by a foreign government, or the investment would give control of US critical infrastructure to a foreign person and threatens an unmitigated risk.[175] The investigation must be completed within 45 days, although extraordinary extensions of 15 days are possible. At this stage, CFIUS is charged with resolving outstanding issues with a mitigation agreement or conditions. If an agreement is necessary, it may include agreed timelines and processes for monitoring compliance. If at the end of a National Security Investigation concerns are still outstanding, CFIUS sends the investment for a presidential determination along with a recommendation from CFIUS.

Presidential action is the final possible stage of the screening process. If a covered transaction "threatens to impair" US national security, the President may "suspend or prohibit" the transaction. To exercise these powers, the President must believe "there is credible evidence…that a foreign person that would acquire an interest in a United States business…might take action that threatens to impair the national security" and that no other legal recourse exists.[176] Presidential decisions are generally not subject to judicial review.[177] To date, this power has been exercised on only five occasions.[178]

Information collected from and about parties to an investment is, in general, confidential. However, disclosure is permitted, inter alia, to (a) Congress and (b) "any foreign governmental entity of a United States ally or partner." Disclosure of information to allies and partners must be authorized by the CFIUS chairperson, and must be necessary for "national security purposes" (an undefined term).[179]

[173] Ibid., §4565(b)(4).

[174] Ibid., §4565(b)(1)(F).

[175] Ibid., §4565(b)(1)(B) and (b)(2)(B).

[176] Ibid., §4565(d)(4).

[177] Ibid., §4565(f).

[178] Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*.

[179] *Defense Production Act of 1950*, 8 Sept. 1950., §4565(c)(1)-(2).

Sector-specific rules

The 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) amendment to the DPA established formal sector-specific screening requirements in real estate, infrastructure, technology, and data.

Real estate

Title 50, Section 4565(a)(4)(B)(ii) of the US Code extends covered transactions to include US real estate transactions that involve a sale, lease, or concession to a foreign person of two categories of property. Covered real estate transactions could include real estate "located within or [that] will function as part of an air or maritime port." FIRRMA also covers real estate that is in "close proximity" to sensitive US government installations, could "reasonably" enable intelligence collection against those installations, or "could otherwise expose national security activities…to the risk of foreign surveillance."[180] Treasury regulations defined *close proximity* as within one mile of specified US military installations.[181]

Reporting of covered real estate transactions functions much the same way as a standard CFIUS review. In theory, declarations require a high degree of transparency about the foreign person involved in the real estate transaction, including "the name of the ultimate parent of the foreign person," the ultimate owner of a private company that is the ultimate owner of the buyer, and "information regarding all foreign government ownership."[182]

As in general reviews, CFIUS is charged with employing risk-based analysis of proposed real estate investments informed by threat, vulnerability, and consequences to national security.[183]

Covered real estate exists in the US Arctic. Fourteen of the military installations flagged by the Department of Treasury are in Alaska.[184] Covered ports in Alaska include the Ted Stevens Anchorage International Airport, the Port of Alaska in Anchorage, the Port of Ketchikan, and

[180] Ibid.

[181] *Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States*, United States Federal Register, Vol. 85, No. 12, (17 Jan. 2020), §802.203.

[182] Ibid., §802.402(c).

[183] Ibid., §802.102.

[184] Ibid., Appendix A, Part 1-3. The sites are Cape Newenham Long Range Radar Site, Clear Air Force Station, Eareckson Air Force Station, Eielson Air Force Base, Fort Yukon Long Range Radar Site, Joint Base Elmendorf-Richardson, King Salmon Air Station, Kodiak Tracking Stations, Ollktok Long Range Radar Site, Point Barrow Long Range Radar Site, Southeast Alaska Acoustic Measurement Facility, Tin City Long Range Radar Site, Fort Greely, and Fort Wainwright.

the Port of Valdez.[185] More facilities may be added as they meet criteria established in the Treasury's implementing regulations.

Treasury regulations carve out several exemptions to "covered status" for real estate, including one of special importance for the US Arctic:

- Otherwise covered transactions are exempt to CFIUS scrutiny if they involve a single "housing unit."
- Real estate in urbanized areas is not covered unless it involves a port or is in proximity to certain military installations.[186]
- Loans, mortgages, and similar financing by a foreign person to another person to purchase, lease, or obtain a concession to otherwise covered real estate is not by itself covered. However, the arrangement becomes a covered transaction only when the real estate is security-related and the property is due to pass to the foreign creditor because of an imminent or actual default.[187]
- Foreign persons from excepted foreign states (as of 2021, Australia, Canada, and the United Kingdom) are also exempt from reporting otherwise covered transactions, unless the person or the person's legal parents have recently been involved in various issues including materially misleading CFIUS submissions, presidential action under section 721(d), or sanctions and arms control violations.[188]
- With special significance to the Arctic, otherwise covered transactions are exempt if the covered real estate is "owned by an Alaska 'Native village,' 'Native group,' or 'Native Corporation.'"[189]

Infrastructure, technology, and data

The 2018 FIRRMA also introduced sector-specific measures that lower the threshold for review to any foreign investment into US business that (a) "owns, operates, manufactures,

[185] "National Port Readiness Network (NPRN)," US Department of Transportation Maritime Administration, 8 Dec. 2020, accessed 29 June 2021, https://www.maritime.dot.gov/ports/strong-ports/national-port-readiness-network-nprn; "List of Top 25 Tonnage, Container, and Dry Bulk Ports," Bureau of Transportation Statistics, accessed 29 June 2021, https://www.bts.gov/content/list-top-25-tonnage-container-and-dry-bulk-ports; "Passenger Boarding (Enplanement) and All-Cargo Data for US Airports Airports," Federal Aviation Administration, 8 June 2021, accessed 29 June 2021, https://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/.

[186] CFIUS and the Secretary of Defense may carve out exceptions to the urban area exceptions through regulations.

[187] *31 CFR Part 802*, 17 Jan. 2020, §802.303(a).

[188] Ibid., §802.215(c).

[189] Ibid., §820.216 (g).

supplies, or services critical infrastructure;" (b) "produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies;" or (c) "maintains or collects sensitive personal data of United States citizens that may be exploited in a manner that threatens national security."[190]

CFIUS requires the same information in notices and declarations that it requires for covered real estate transactions, including all parent companies and their ultimate owners.[191]

Country-specific rules

FIRMMA introduced scope for FDI screening that discriminates among the nationality of foreign persons involved in a covered transaction. FIRRMA includes the concept of an excepted foreign state, which CFIUS can designate according to §800.1001 or §802.1001. Under this provision, CFIUS may at any time designate a foreign state as excepted if it has effective national security-based screening processes and coordination with the US.[192] As of 2021, only Australia, Canada, and the United Kingdom (not including British overseas territories or crown dependencies) have been designated excepted foreign states.[193]

CFIUS published non-binding guidance on how it will consider whether a state's FDI screening system meets the criteria for excepted foreign state status. CFIUS' criteria include whether the foreign state has the legal authority to:

- Review investments across diverse sectors, including the defense industrial base, advanced technology, dual-use goods, and critical infrastructure.
- Mitigate, block, or divest proposed or completed investments.
- Obtain necessary information to screen an investment, including ultimate beneficial owners, key parties to the transaction, and potential national security risks.
- Share information on proposed foreign investments with the US government.

CFIUS will further consider the extent to which the country:

[190] *Defense Production Act of 1950*, 8 Sept. 1950., §4565(a)(4)(iii). §4565 (a) (4) (iii).

[191] *Provisions Pertaining to Certain Investments in the United States by Foreign Persons*, Federal Register, (Jan. 17 2020). §800.404, §800.502

[192] *31 CFR Part 802*, 17 Jan. 2020, §802.1001(a).

[193] UK overseas territories include, among others, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos, while the crown dependencies are Jersey, Guernsey, and the Isle of Man. "CFIUS Excepted Foreign States," US Department of the Treasury, accessed 30 June 2021, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states.

- Keeps confidential information collected during review.
- Monitors firms' compliance with mitigation agreements after approval.
- Identifies completed investments that were not reported but that pose security risks.

Investors from excepted foreign states are exempt only from certain elements of the CFIUS regime. They need not report transactions involving real estate or non-controlling investments in the critical infrastructure, critical technology, or personal data sectors. They still, however, must report any controlling investment in a US business, including shifts from non-controlling to controlling investments.

State-level considerations in the US Arctic

Alaska does not provide any major additional corporate-level restrictions on FDI, but it does have disclosure requirements for firms that have alien affiliates.

Alaskan law defines *aliens* as individuals without US citizenship, nationality, or residence; legal persons not created under US or state laws; and legal persons formed in the US but controlled by the two prior categories. It defines *affiliates* as persons who control, including through intermediaries, a corporation.[194] *Control* is defined as direct or indirect ownership of 25 percent or more of voting securities or "influencing or affecting in any substantive manner the election of a majority" of a company's directors.[195]

Corporations established in Alaska must provide the name and address of all "alien affiliates" at the time of incorporation or when the corporation undergoes a merger.[196] Alaskan authorities may dissolve a company that fails to report its alien affiliates.

Norway

Norway's strong economy, advanced industries, natural resources, and skilled workforce make the country an attractive target for FDI. In 2019, Norway had a GDP of roughly $403 billion USD.[197] The country is widely considered to be welcoming to foreign investment, and as of 2019 the World Bank listed Norway at number nine globally in its Ease of Doing Business

[194] *Alaska Corporations Code*, http://www.legis.state.ak.us/basis/statutes.asp#10.06.010.§10.06.990(2)-(3)

[195] Ibid., §10.06.990 (12).

[196] Ibid., §§10.06.208 and .564.

[197] "GDP (Current US$) – Norway," The World Bank, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=NO.

rankings.[198] In 2019, Norway's FDI inflows reached just under $4.3 billion USD, with an FDI inward stock of approximately 167 billion USD.[199] The majority of FDI into the country is invested in the mining and quarrying industry, followed by financial and insurance activities and manufacturing.[200] (For more on CNA's findings on PRC investment and economic activity in the Norwegian economy, visit www.cna.org/ArcticFDI.)

FDI screening

Foreign investment screening in Norway is decentralized. Explicit FDI screening is limited to narrow security concerns.

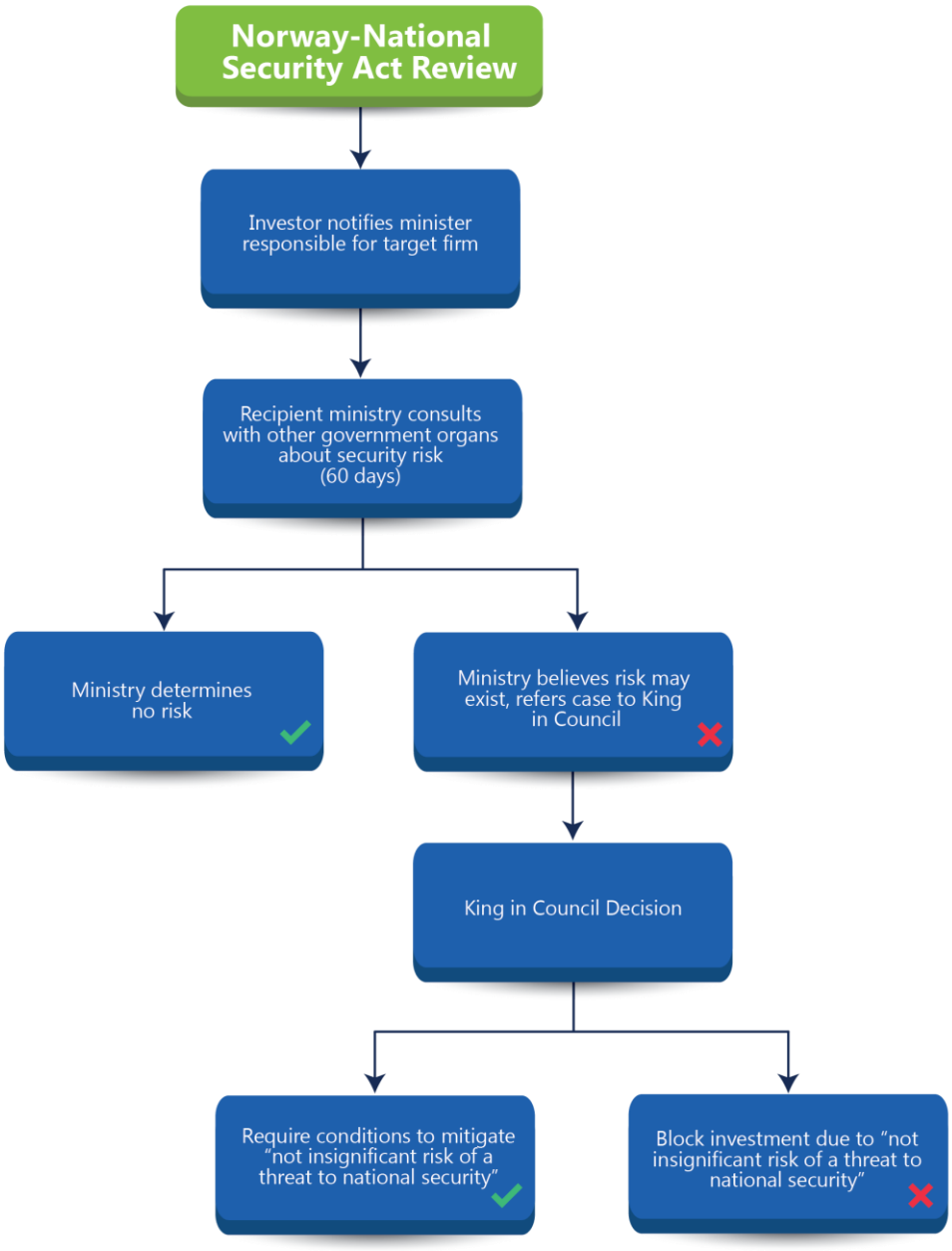
Since January 1, 2019, the Act Relating to National Security (Security Act) has provided Norwegian authorities a legal basis to scrutinize certain foreign investments that might have negative effects for Norwegian national security. The screening process is visualized in Figure 6.

[198] "Ease of Doing Business Rankings," The World Bank Group, 2020, https://www.doingbusiness.org/en/rankings.

[199] *World Investment Report 2020*, United Nations Conference on Trade and Development, 2020, https://unctad.org/system/files/official-document/wir2020_en.pdf.

[200] "Direkteinvesteringer," Statistisk Sentralbyrå, Jan. 20, 2021, https://www.ssb.no/utenriksokonomi/fordringer-og-gjeld-overfor-utlandet/statistikk/direkteinvesteringer.

Figure 6. Norway's FDI screening under the National Security Act



Source: CNA.

Norway has explicitly framed the new law as necessary on national security grounds. A February 2020 notification by Norway on its new investment policy to the Organization for Economic Cooperation and Development (OECD) explained that increasing foreign investments have led to "growing concern that some of these investments may pose national security risks," and that Norway must "maintain necessary control over businesses vital to national security interests."[201] Likewise, a 2021 risk report by Norway's National Security Authority states that investments can be "used as a means to achieve strategic objectives," including access to sensitive and strategic information.[202]

The Security Act decentralizes screening to the various Norwegian ministries, but supervision is centralized in the National Security Authority (Nasjonal Sikkerhetsmyndighet, or NSM).

Covered transactions

The act did not establish a dedicated entity for screening specific FDI transactions. Instead, it assigns responsibility to the ministry responsible for the sector in which the transaction is taking place. According to Section 2-1 of the act, each ministry will assume a number of major responsibilities related to "protective security work," which the act defines as "planning, facilitation, implementation and checking of protective measures targeting activities which present a threat to security and the consequences of such activities." These responsibilities include:

- Identifying and maintaining overviews of fundamental national functions and undertakings of material importance to fundamental national functions.
- Deciding that an undertaking applies under the act.
- Notifying the National Security Authority of its overviews and decisions.

The National Security Authority (NSM) plays a major supervisory role in the implementation of the Security Act. The NSM is responsible for security in every sector, and it takes on the screening role of an individual ministry when an investment does not fall under the area of responsibility of a specific ministry. Section 2-2 lays out the responsibilities and authorities established for the NSM under the Security Act, including:

- Supervising compliance with the Security Act.

[201] *Investment Policy Related to National Security, Notification by Norway*, Organization for Economic Co-operation and Development, 2020, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/INV/RD(2020)2&docLanguage=En.

[202] *Risiko 2021 – Helhetlig Sikring mot Sammensatte Trusler*, Nasjonal Sikkerhetsmyndighet, 2021, https://nsm.no/aktuelt/risiko-2021-helhetlig-sikring-mot-sammensatte-trusler.

- Formulating inspection criteria and evaluating information relevant to protective security work.
- Providing guidance and developing necessary measures for protective security work.

If an undertaking is determined to fall under the provisions that necessitate screening, the Security Act stipulates that the undertaking must receive advanced notice, and the NSM has the right to submit recommendations for these decisions to an individual ministry. According to Section 1-3, undertakings that are potentially subject to investment screening under the act include those that are engaged in whole or in part in three areas, including:

- Handling of classified information.
- Controlling information, information systems, objects, or infrastructure that is critical for fundamental national functions.
- Activities critical to fundamental national functions.

No comprehensive list within the act identifies explicitly which undertakings fall under the provisions of the act, and it does not contain sector-specific restrictions on FDI. As described above, each ministry is responsible for developing a list of the undertakings that are critical to Norway's national functions and thereby subject to the act. The lists of undertakings drafted by each individual ministry are shared with the NSM, which develops a list of affected undertakings that do not fall under the authority of a specific ministry.

The lists of specific covered firms compiled by ministries and delivered to the NSM are not public. After the Security Act went into effect, the National Security Authority's website provided further information about who would be subject to the new regulations, announcing that the lists of organizations would remain "dynamic" but that the details would not be made public.[203]

The NSM has been more transparent with economic and social sectors considered fundamental for national security. In early 2021, the authority's website produced a list of 38 fundamental national functions and the ministries responsible for them as of March 2021. These include the ability to defend Norwegian or allied territory; safe water, food, and energy supplies; free and secret elections; and maintenance of essential internet access.[204] The authority's website also provides detailed guides to assist each ministry in identifying fundamental national functions that fall under their areas of responsibility.[205]

[203] "Sikkerhetsloven og Forskrifter," Nasjonal Sikkerhetsmyndighet, https://nsm.no/regelverk-og-hjelp/sikkerhetsloven-og-forskrifter/.

[204] "Oversikt over Innmeldte Grunnleggende Nasjonale Funksjoner."

[205] "Grunnleggende Nasjonale Funksjoner," Nasjonal Sikkerhetsmyndighet, https://nsm.no/regelverk-og-hjelp/rad-og-anbefalinger/grunnleggende-nasjonale-funksjoner-gnf/grunnleggende-nasjonale-funksjoner/.

The Security Act uses the industry lists generated under Section 2 for scoping companies subject to its national security investment screening process. Section 10 requires individuals who intend to obtain a "qualified ownership" in any undertaking determined to fall under Section 1-3 of the act to notify the government of the planned acquisition. Firms can fall under Section 1-3 if they serve one of the "fundamental national functions" identified in the Section 2 lists. If this condition is met, an investor must notify the competent minister or the NSM. Section 10-1 states that "qualified ownership" is present if an acquisition will provide an individual any of the following:

- At least one-third of an undertaking's share capital, participating interests, or votes.
- Rights to own at least one-third of an undertaking's share capital or participating interests.
- Significant influence over an undertaking's management.

"Qualified ownership interest" in an undertaking applies whether ownership is direct or indirect. The Security Act applies equal status to the shares of the individual shareholder and those of the shareholder's associates in accordance with Section 2-5 of Norway's Securities Trading Act.

Screening process

If an investment meets the conditions of "qualified ownership," the acquirer must notify the ministry in charge of that sector, or the National Security Authority when a firm does not fall under the area of responsibility of a specific ministry. The Security of Undertakings Regulations, which came into force alongside the Security Act, provides a detailed description of the types of information required when an acquirer is notifying the government of an acquisition that meets the criteria of "qualified ownership interests." Some of the information required include the following:

- The acquirer's personal information, including name, address, and national identity number.
- The acquirer's ownership structure and the interests to be held after acquisition is complete.
- Personal information for the acquirer's board and general management, including "commercial interests outside the undertaking in question."
- The acquirer's other ownership interests subject to the act or in "the relevant sector."
- Any other information that could "be potentially significant in the assessment."

Once the responsible ministry receives the notice, that ministry has 60 days to scrutinize the proposed investment. The ministry may consult with other bodies to determine whether the investment will pose any risk to Norway's national security. If the screening entity determines that an acquisition may pose potential security risks, the case move to the King-in-Council for

consideration. The King-in-Council may stop an acquisition or apply certain conditions if it finds that an acquisition "may present a not insignificant risk of a threat to national security interests."

Although restrictions on "qualified ownership" are a major part of Norway's current investment screening mechanism, Section 2-5 of the Security Act also grants the authority to the King-in-Council to "make necessary decisions to prevent activities which present a threat to security or other planned or ongoing activities which may present a not insignificant risk of a threat to national security interests." Although this section of the act does not specifically reference FDI, it is notable because it was the regulation cited in the case of Bergen Engines, in which the Norwegian government decided to block a foreign acquisition out of national security concerns, described in more detail below.

Notification and investment transparency

Since 2002, Norway has not legally required foreign investors to notify the government when acquiring shares in a Norwegian company.[206] In addition, as a member of the EEA, Norway is not allowed to limit the investments of EEA nations unless those limits "are derived from the pursuit of specific policy objectives and the same restrictions apply to Norwegian citizens."[207] Despite the lack of specific reporting requirements before the introduction of the Security Act, Norway still had other means of restricting investment in key areas of the Norwegian economy.[208]

In media, the Norwegian Media Authority is charged with collecting and publicizing information about ownership structures and interests in Norwegian media.[209]

Sectoral walls

In addition to explicit FDI screening, Norway's economic and industrial policies functionally screen or prevent investment in certain sectors and under certain conditions Sector-based constraints include:

- **Land and real estate:** Acquisitions and leases longer than 10 years and ownership of certain land require concessions.

[206] *Trade Policy Review, Report by the Secretariat, Norway*.

[207] Ibid.

[208] Ibid.

[209] *Lov om åpenhet om eierskap i medier, LOV-2016-06-17-64 (Act on transparency of media ownership)*, Lovdata, (17 June 2016), https://lovdata.no/dokument/NL/lov/2016-06-17-64.

- **Waterfalls and mining:** The competent ministry must license any person's proposed use of waterfalls of a certain strength to generate energy.[210] Likewise, all persons engaged in mine exploration, exploitation, or operation must obtain a license.[211] Mining concessions to state resources must be publicized in the land register.[212]
- **Financial institutions:** Acquisitions greater than 10 percent require a suitability assessment, non-EEA banks are required to set up a subsidiary or branch, and Norwegian or EEA nationals or residents must make up at least half of the bank's board and corporate assembly.
- **Oil and gas:** Both exploration and production in this sector require "discretionary government license."
- **Commercial fishing:** Firms can receive a license if 60 percent of the capital and shares are owned by Norwegian citizens.[213]
- **Air transportation:** Foreign ownership of Norwegian or EEA-registered aircraft may not exceed one-third of the company's capital.
- **Maritime transportation:** Norwegian or EEA citizens must possess at least 60 percent capital in vessels registered under the Ordinary Ship Register.[214]

Foreign investments in the Norwegian economy may also be subject to the Norwegian Competition Act. According to the Norwegian Competition Authority (Konkurransetilsynet), any mergers, acquisitions, or agreements that result in "concentrations" of multiple undertakings must be reported to the authority if they meet certain annual turnover conditions. If the combined turnover of the parties involved in the concentration of undertakings exceeds 1 billion NOK annually, the parties are required to notify the authority, but this obligation is removed if only one of the parties involved in the concentration of undertakings surpasses an annual turnover of 100 million NOK. Even in situations in which the minimum turnover threshold is not met, the authority still has the right to review a concentration of undertakings if it determines it may still have an effect on competition, but must do so within three months of the conclusion of the agreement.[215]

[210] *Vannfallrettighetsloven*, 14 Dec. 1917., §§ (3) and (12).

[211] *Mineralloven*, 19 June 2009., §§ 13, 29, 43.

[212] Ibid., §36.

[213] *Deltakerloven (The Participant Act)*, 26 Mar. 1999.

[214] *Trade Policy Review, Report by the Secretariat, Norway*.

[215] "When Must Mergers and Acquisitions be Notified to the Norwegian Competition Authority?," Norwegian Competition Authority, https://konkurransetilsynet.no/currently-reviewed/mergers-and-acquisitions/?lang=en.

The Norwegian government can also ensure effective control over certain sectors of the economy through the exercise of state ownership. As of 2019, the state exercises ownership over 73 Norwegian companies, managed by 12 separate ministries.[216] The Ministry of Trade, Industry, and Fisheries states that the government prefers private ownership of Norwegian companies, but that state ownership can occur when it "is the best means of meeting the state's needs."[217] Although the government may choose to exercise ownership of a company for a variety of economic reasons, one of the government's motivations includes the maintenance of civil protection and emergency preparedness.[218] By exercising ownership in certain sectors, the state can ensure that the Norwegian government maintains control over companies that are vital to its economic and security interests, and can effectively restrict foreign entities from acquiring control over them.

Since the Norwegian government developed its new investment screening mechanism, the National Security Authority has implemented a public education campaign for those affected by the new security regulations. For example, just months after the Security Act took effect, the authority began offering regional seminars in major cities across Norway to discuss the new regulations. Between May and June, National Security Authority representatives provided three-hour lectures on the "background of the law and what it means for activities in the public and private sectors."[219] Outside of these lectures, the authority also offers a publicly available e-learning course on its website that gives brief overviews of the types of undertakings subject to the law, ministry and National Security Authority responsibilities, how certain individuals and activities are affected, and useful links for further information.[220] At the time of this writing, the authority also provides 19 handbooks on its website that provide detailed information on particular aspects of the Security Act that are also available to the public.[221]

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[216] *Statens Eierberetning*, Nærings- og Fiskeridepartementet, 2019, https://www.regjeringen.no/contentassets/ca3c0a55b6b041ff8be7d04cf6b0a3cd/statenseierberetning2019_uu_v4.pdf.

[217] "Why the State is an Owner," Regjeringen.no, September 8, 2020, https://www.regjeringen.no/en/topics/business-and-industry/state-ownership/hvorfor-staten-eier/id2607021/.

[218] Ibid.

[219] "Regionale Seminarer om Ny Sikkerhetslov – Nå Også I Oslo," Nasjonal Sikkerhetsmyndighet, May 16, 2019, https://nsm.no/aktuelt/regionale-seminarer-om-ny-sikkerhetslov-na-ogsa-i-oslo.

[220] "Kort om Ny Sikkerhetslov," Nasjonal Sikkerhetsmyndighet, https://rise.articulate.com/share/k58m6mGHKjK2Htg5GSk6UJrzgUepxA4C#/.

[221] "Veiledere og Håndbøker til Sikkerhetsloven," Nasjonal Sikkerhetsmyndighet, https://nsm.no/regelverk-og-hjelp/veiledere-og-handboker-til-sikkerhetsloven/.

The case of Bergen Engines

On February 4, 2021, Rolls-Royce announced a 150 million Euro agreement with the Russian engineering firm TMH Group for the sale of the engine manufacturer Bergen Engines.[222] The Norway-based Rolls-Royce subsidiary Bergen Engines, which manufactures power systems for a wide range of industrial and shipping applications, is also a supplier for the Norwegian Navy.[223] According to the Rolls-Royce statement on the planned acquisition, TMH International would operate Bergen Engines "as a stand-alone business" once the purchase was finalized later in 2021.[224]

Initial Inaction

Weeks after the sale was announced publicly, several government officials and experts familiar with the issue began expressing concerns over the sale. On February 24, *Bergensavisen*, a major Bergen-based newspaper, reported that Emilie Enger Mehl, parliamentarian and member of the Standing Committee on Foreign Affairs and Defence, demanded that the Norwegian government stop the sale of Bergen Engines. Mehl argued that the government should use the country's new Security Act to stop the sale to TMH Group, which she asserted had close ties to the Russian government.[225] One day later, Norway's NRK Broadcasting Company reported that NSM Assistant Director Frode Skårnes was "extremely skeptical of the sale."[226]

Government Review

On March 7, just over one month after the public announcement of the sale of Bergen Engines, Minister of Defence Frank Bakke-Jensen and Minister of Justice and Public Security Monica Mæland co-authored a piece directly addressing the planned acquisition under the title "Bergen Engines and Norwegian Security." According to the piece, even though Bergen Engines had yet to be subject to the provisions of the Security Act, the act contains a "wide range of tools" that can be applied to cases that are potential risks to national security. The ministers

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[222] "Rolls-Royce Signs Agreement to Sell Bergen Engines to TMH Group," Rolls-Royce, February 4, 2021, https://www.rolls-royce.com/media/press-releases/2021/04-02-2021-rr-signs-agreement-to-sell-bergen-engines-to-tmh-group.aspx.

[223] "About Us," Bergen Engines, https://bergen.rolls-royce.com/; Adrian Broch Jensen, "Russisk Oppkjøp av Motorfabrikk får Forsvaret til å Reagere," *Teknisk Ukeblad*, February 22, 2021, https://www.tu.no/artikler/russisk-oppkjop-av-motorfabrikk-far-forsvaret-til-a-reagere/507109.

[224] "Rolls-Royce Signs Agreement to Sell Bergen Engines to TMH Group."

[225] "Sp: – Regjeringen Må Stanse Salget av Bergen Engines," *Bergenavisen*, February 24, 2021, https://www.ba.no/sp-regjeringen-ma-stanse-salget-av-bergen-engines/s/5-8-1557187.

[226] Eivind Fondenes, "Beskylder Forsvarsministeren for å ta for Lett på Sikkerhetsrisiko ved Russisk Oppkjøp," *NRK*, February 25, 2021, https://www.nrk.no/vestland/mener-forsvarsministeren-tar-for-lett-pa-salg-av-bergen-engines-1.15391104.

stated the government would wait to make a final determination on the acquisition once "all the facts were on the table," but acknowledged that they were conducting an investigation into the acquisition based on the potential security risks it raises.[227]

After this public statement, the government continued to release official statements on steps they were taking in the case. On March 10, three days after the two ministers publicized their concerns on the sale, the Ministry of Justice and Public Security ordered the companies to pause the acquisition while it made an assessment, stating that "it cannot be ruled out that the sale of Bergen Engines AS to TMH Group may pose a risk to national security interests." The ministry reaffirmed that Bergen Engines was not an undertaking listed in Section 1-3 of the Security Act, and was therefore not subject to ownership restrictions. However, the ministry's statement confirmed that the government could use other aspects of the law to handle the case and ordered that the process be halted until the government came to a decision.[228]

Blockage

Just over two weeks later, the Ministry of Justice and Public Security made public a royal decree officially blocking TMH Group's acquisition of Bergen Engines and the reasoning behind its final determination. According to the announcement, the government had enough information to stop the sale based on national security concerns, and made its decision based on Section 2-5, "Decisions in response to a risk of harm to national security interests," of the Security Act (described above). The statement gave four main reasons for the government decision to halt TMH Group's acquisition:

- Bergen Engine's technologies and engines could be strategically significant for the Russian military, allowing them to increase military capabilities that are "in clear contravention" of the "security policy interests" of Norway and its allies.
- Current export controls do not cover Bergen Engine's products or technologies, but Russia has had difficulties accessing these types of items due to recent sanctions.
- The acquisition could be an attempt by Russia "to circumvent export control regulations" and "gain access by underhand means to knowledge and technology of great military strategic significance to Russia."

[227] Frank Bakke-Jensen and Monica Mæland, "Bergen Engines og Norsk Sikkerhet," Regjeringen.no, 7 Mar. 2021, https://www.regjeringen.no/no/aktuelt/bergenengines/id2837289/.

[228] "NSM Notifies Rolls-Royce that it is Considering Blocking the Sale of Bergen Engines," Government.no, March 10, 2021, https://www.regjeringen.no/en/aktuelt/nsm-notifies-rolls-royce-that-it-is-considering-blocking-the-sale-of-bergen-engines/id2837561/.

- Exporting Bergen Engine's products to Russia would go against the "security policy interests" of Norway and its allies.[229]

Lessons Learned

After the final decision was made to stop the sale of Bergen Engines, multiple officials involved in the process received criticism for the way the case was managed by their respective ministries. On April 19, NRK reported that Prime Minister Solberg, Minister of Defense Bakke-Jensen, Minister of Trade and Industry Nybø, Minister of Justice and Public Security Mæland, and Minister of Foreign Affairs Eriksen Søreide participated in hearings before the Storting Standing Committee on Foreign Affairs and Defence to answer questions about the handling of the case.[230] According to NRK, "one by one, members of the government admitted to mistakes" after learning of the sale, while the "prime minister admitted to several unfortunate assessments." Minister Mæland acknowledged that the government had been informed of the potential sale by December 15, 2020, but that the subsequent assessment on the 16 "was not good enough." Mæland claimed that insufficient communication between her ministry and the Police Security Services (Politiets sikkerhetstjeneste) was a factor in delaying the handling of the case, and argued that the government needs "clearer points of contact with authorities when we obtain information," and that the government should "consider thresholds for notification in the legislation."[231]

During the hearing, Minister Nybø acknowledged that she first learned of the sale of Bergen Engines on January 11, only after an "external actor" contacted an employee in her ministry. Nybø also expressed regret that a state minister from her ministry made an earlier statement to the media that the ministry should not intervene between two commercial actors. She acknowledged there "was a limited group of people who were familiar with the case," and that the statement should have been checked beforehand.[232] Prime Minister Solberg stated she became aware of the sale on February 4 via the newspaper *Bergen Tidende*, and expressed agreement with Minister Mæland that the government should have responded to the sale much sooner than it did. According to NRK, Head of the Intelligence Services Nils Andreas Stensønes stated that the Norwegian intelligence services received notice of the sale of Bergen Engines on December 16, 2020; were tasked with assessing the sale on January 14; and then conducted

[229] "Government Blocks Sale of Bergen Engines," Government.no, March 26, 2021, https://www.regjeringen.no/en/aktuelt/government-blocks-sale-of-bergen-engines/id2841869/.

[230] Valentina Baisotti, Sindre Vik Helgheim, and Even Norheim Johansen, "Solberg om Bergen Engines-saken: – En Klar Sikkerhetsrisiko," *NRK*, April 19, 2021, https://www.nrk.no/vestland/fire-ministere-ma-svare-i-horing-om-bergen-engines_-_-vurderingen-var-ikke-god-nok-1.15461469.

[231] Ibid.

[232] Ibid.

a "preliminary assessment" that was handed over to the Ministry of Defense, Ministry of Justice and Public Security, and the intelligence, surveillance, and security services[233] on January 18. The intelligence services then provided an extended report that followed on February 12, and another extended report on March 11 after intelligence services were tasked again on March 4 by the Ministry of Defense. According to Stensønes, the intelligence service's "main assessment is that the acquisition would contribute to strengthening Russia's military modernization capability over the long term."[234]

During a May 19 meeting of the Standing Committee on Foreign Affairs and Defence, members of the Storting continued to criticize the government's response to the Bergen Engines case. According to *Bergensavisen*, a majority of the Storting believed that the government's response "uncovered major shortcomings in the government's security routine," and proposed the following three measures to prevent the mistakes from recurring:

- Full review of the security competencies in each ministry
- Public report on the areas of use and vulnerabilities of the Security Act
- Assessment of the security understanding and interactions in and among the ministries[235]

Russia

Although factors such as sanctions and international tensions have proven obstacles to some FDI in Russia in the last several years, a number of countries are still investing in many of Russia's industries, with FDI increasing 167 percent from 2015 to 2019.[236] Energy is overwhelmingly Russia's dominant export, making FDI in Russia depend significantly on the cost of oil.[237] In 2018–2019, the most significant Russian industries for foreign investment

[233] These include the Intelligence Service, Police Security Service, National Security Authority, and Defence Security Department.

[234] Valentina Baisotti, Sindre Vik Helgheim, and Johansen, "Solberg om Bergen Engines-saken: – En Klar Sikkerhetsrisiko."

[235] "Stortinget Retter Sterk Kritikk mot Regjeringen for Håndteringen av Bergen Engines-Salget," *Bergensavisen*, May 19, 2021, https://www.ba.no/stortinget-retter-sterk-kritikk-mot-regjeringen-for-handteringen-av-bergen-engines-salget/s/5-8-1614542.

[236] Vassily Rudomino et al., "The Foreign Investment Regulation Review: Russia," The Law Reviews, Oct. 20, 2020, https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/russia.

[237] Marta Dominguez-Jimenez and Niclas Poitiers, "FDI another day: Russian reliance on European investment ", *Bruegels Policy Contribution*, no. 3 (2020): 1-2, https://www.bruegel.org/wp-content/uploads/2020/02/PC-03_2020_-1.pdf.

were mineral extraction, transport, and seaport services.[238] (For more on CNA's findings on PRC investment and economic activity in the Russian economy, visit www.cna.org/ArcticFDI.)

Russian foreign investment laws have evolved significantly over the past two decades as the government aims to make Russia more attractive for FDI. Through attempts to make the system less complicated, Moscow hopes to make collaboration between foreign investors and the Russian government easier.[239] The laws have increased transparency and replaced ad hoc FDI approval processes.[240]

The Ministry of Economic Development's Department of Investment Policy is the main government organ tasked with implementing investment policy in Russia through coordination of all federal entities charged with bringing FDI into the country.[241] The Foreign Investment Advisory Council, formed in 1994 and chaired by the Russian prime minister, is responsible for attracting foreign investment, provides counsel to the government on potential regulations, and even gives some foreign investors a forum to provide feedback on improvements to the Russian investment climate.[242] In 2015, the Russian government began an FDI incentive plan called Special Investment Contracts, which makes foreign investors eligible to receive certain benefits, including preferential customs treatment.[243] The contracts also open up certain subsidies to foreign producers who set up local production in Russia.[244] However, despite ample government attempts to attract FDI, some restrictions are still in place, including those related to investing in certain strategic sectors, as described below.

Most foreign investment in Russia takes one of two forms: (1) establishing a branch or representative office of a foreign legal entity within Russia, or (2) creating a new company or obtaining shares in existing Russian entities.[245] With the first option, foreign organizations can

[238] "The Foreign Investment Regulation Review: Russia."

[239] *Doing Business in Russia*, UHY, 2020, 11, https://www.uhy.com/wp-content/uploads/Doing-Business-in-Russia.pdf.; "The Foreign Investment Regulation Review: Russia."

[240] *OECD Investment Policy Review: Russian Federation*, OECD, 2008, 9, https://www.oecd.org/daf/inv/investment-policy/41065076.pdf.

[241] Konstantin Dobrynin and Anton Immenov, "Investing in the Russian Federation," Thomas Reuters Practical Law, Mar. 1, 2019, https://uk.practicallaw.thomsonreuters.com/3-617-3173?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[242] "2019 Investment Climate Statements: Russia," U.S. Department of State, 2019, https://www.state.gov/reports/2019-investment-climate-statements/russia/.

[243] Ibid.

[244] Ibid.

[245] *Doing Business in Russia*, 13.

operate on Russian territory without needing to form a legal entity in Russia itself.[246] With the second option, FDI can take the form of regular legal entities including LLCs, joint-stock companies, and partnerships such as joint ventures. Because of recent changes to the legal system, it is increasingly common for foreign investors and a Russian partner to collaborate on a joint venture, with the Russian partner typically having considerable experience conducting business in Russia.[247]

FDI Screening

The Russian government enacted the first law specifically aimed at FDI in 1991, and replaced it in 1999 with the currently applicable federal law.[248]

General Review

The law On Foreign Investments in the Russian Federation is the basis for FDI within Russia and aims to attract foreign investors to the country.[249] It defines a *foreign investor* as being: (1) a foreign entity not under the control of a Russian entity or person; (2) foreign peoples, unless they also hold Russian citizenship; or (3) foreign countries and international organizations, including entities they control. The law stipulates that the legal system governing FDI cannot be less favorable than that governing Russian investors, though there may be exceptions established under federal law, including those aimed at protecting, for example, the Russian constitution, state security, or public health.[250]

On July 18, 2017, the Russian government passed Federal Law No. 165-FZ, which amends Article 6 of the foreign investments law to grant a Russian government organ significant power to oversee FDI. The act grants the Government Commission on Monitoring Foreign Investment in the Russian Federation, chaired by the prime minister and composed of heads of certain government organs, the ability to review any transaction through which a foreign investor acquires control of a Russian company if the prime ministers deems the company necessary for Russian defense and state security.[251] The process will be the same as that outlined below for the review of foreign investment in Russia's strategic sectors, and the Federal Anti-trust Service (FAS) will notify the foreign investor within three days of the prime minister's decision

[246] Ibid., 21. Representative offices may not generate profit, whereas branches may.

[247] "The Foreign Investment Regulation Review: Russia."

[248] Ibid.

[249] *FZ N. 160-1999*, 9 July 1999.

[250] Ibid.

[251] *Legal Guide for Foreign Investors in Russia*, Herbert Smith Freehills, 2019, 2, 7, https://www.herbertsmithfreehills.com/latest-thinking/legal-guide-for-foreign-investors-in-russia-2019; *FZ N. 160-1999*, 9 July 1999.

of the need to submit documents about the transaction for review.[252] The law also expanded the original definition of a *foreign investor* to include (1) entities broadly under the control of foreign individuals, including those entities registered in Russia, and (2) Russian citizens who hold foreign citizenship.[253] In determining control of a company, the government will assess whether the foreign investor holds more than half of the company's shares.[254] At present, there is no official word on what will specifically trigger the review, though the government seems to be using the process more often when the transactions involve such sensitive spheres as industrial gases and some chemical products.[255]

Strategic Sector Review

An important federal law preceding this amendment is No. 57-FZ, passed in April 2008, which regulates FDI in strategic sectors of the Russian economy and places constraints on foreign investors' ability to gain control over entities in areas important to Russian defense and security.[256] Figure 7 shows this process. *Control* is defined broadly as the "ability to influence, directly or indirectly, the decisions made by a Strategic Company" through a delineated list of methods, including voting at a shareholders meeting and participating in company management.[257] Although there are some guidelines for determining control, they are not exhaustive, giving the government flexibility to decide what constitutes control on a case-by-case basis.[258] There are also restrictions on foreign investors obtaining more than 25 percent of a strategic sector company's property.[259] The list of strategic sectors has 46 types of organizations, including major telecommunications companies and some types of marine port operations. To be considered a "strategic entity," a company needs only to be involved in the strategic sector, which does not need to be its core business.[260]

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[252] *Doing Business in Russia*, Baker McKenzie, 2021, 53, https://www.bakermckenzie.com/en/-/media/files/insight/publications/2021/04/doing_business_in_russia_2021.pdf.

[253] Igor Ostapets and Ksenia Tyunik, "Russian Federation," White & Case, Oct. 30, 2020, https://www.whitecase.com/publications/insight/foreign-direct-investment-reviews-2020-russia.

[254] Ibid.

[255] *Legal Guide for Foreign Investors in Russia*, 2, 7; "Russian Federation."

[256] *Doing Business in Russia*, 11-12.

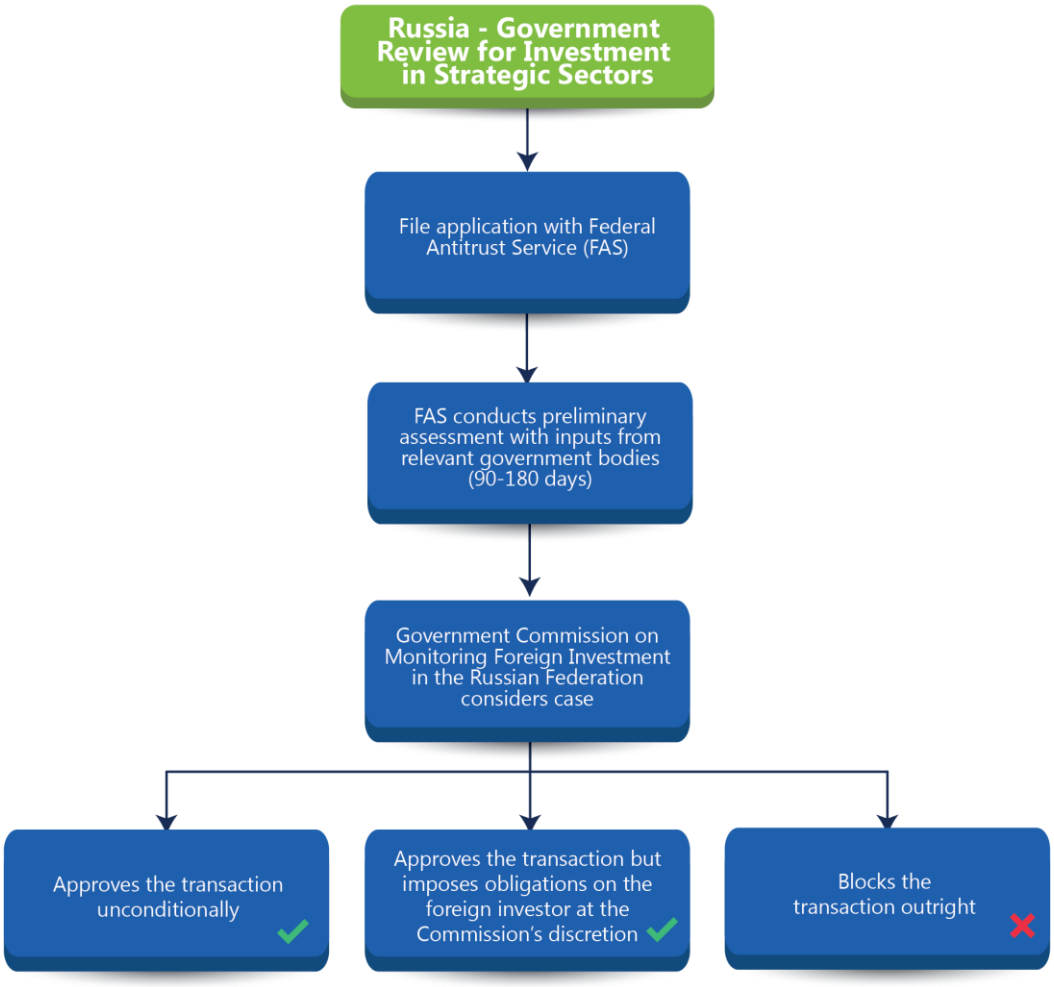
[257] *Legal Guide for Foreign Investors in Russia*, 8.

[258] Ibid.

[259] "Russian Federation."

[260] *A Legal Overview of Foreign Investment in Russia's 'Strategic' Sectors*, Clifford Chance, 2020, 5, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/05/2005_Client%20Briefing%20-%20A%20Legal%20Overview%20of%20Foreign%20Investment%20in%20Russia%27s%20Strategic%20Sectors.pdf.

Figure 7. Russian FDI screening process



Source: CNA.

If a foreign investor wishes to gain control of a strategic entity, the investor needs the agreement of the FAS and the permission of the Government Commission.[261] The FAS first reviews an application and conducts a preliminary assessment based on inputs from relevant government bodies, including the Ministry of Defense and Federal Security Service, on whether the transaction poses a threat before preparing materials to pass the case on to the

[261] "Russian Federation."

commission.[262] The law does not provide many additional details on the review process under which the government evaluates transactions.[263] Although the statutory period for the review is three months from when the process begins, the commission can extend this period for an additional three months and generally does.[264] In practice, the process can often take much longer than the period laid out in the law, and there is no official means of fast-tracking an application.[265] In addition, cases have shown the crucial role actors not formally a part of the FDI review process, including state-owned companies and government actors, can have in the approval or denial of applications for FDI in strategic sectors.[266]

The Government Commission ultimately approves most transactions, but the approval stipulates the terms under which the parties may complete the transaction and may impose obligations on the foreign investor at the commission's discretion. Possible obligations include transferring certain essential technologies and capabilities to local businesses, localizing production, training local personnel, export requirements, disclosure of software source code, and designating Russian nationals as managers, among many possibilities.[267] In a recent case concerning a Eurasian drilling company, the FAS for the first time suggested a "sanctions backstop" for the foreign entity during the FDI screening process, which included "exit clauses" if the transaction fell under sanctions.[268]

From 2008 to May 2020, the commission approved 170 out of 282 transactions unconditionally and 80 with conditions attached.[269] It wholly blocked 23 transactions.[270] The law does not delineate what constitutes the basis for blocking a transaction, and the commission has complete discretion in this regard.[271] The commission is also not required to explain why it made a certain decision.[272] It is clear, though, that an investor's refusal to comply

[262] Ibid.

[263] Ibid.

[264] Ibid.

[265] *Doing Business in Russia*, 56.

[266] Kesarev, "Government Relations Aspects in FDI Screening Procedure in Russia," (Dec. 3, 2020), https://www.ibanet.org/MediaHandler?id=24388614-a2d1-4db5-b992-29d6292c04f8.

[267] Ibid.

[268] Ibid.

[269] *A Legal Overview of Foreign Investment in Russia's 'Strategic' Sectors*, 11.

[270] Ibid.

[271] *Multi-jurisdiction guide for screening of foreign investments*, DLA Piper, 2019, 111, https://www.dlapiper.com/en/uk/insights/publications/2019/11/multi-jurisdiction-guide-for-screening-of-foreign-investments/.

[272] *Doing Business in Russia*, 56.

with the conditions imposed on an agreement will also lead to the commission refusing to approve a transaction.[273] Although it is possible to appeal a commission decision in the Supreme Court of the Russian Federation, in practice overturning a decision can be essentially impossible because the commission does not have to provide reasoning for blocking a transaction.[274] Although the law does not require the commission to publish its decisions, in practice, screening review results typically appear on the FAS and Russian government sites.[275] However, the vague assessment criteria, wide leeway given to the commission, occasional critical input of non-commission members, and non-transparency of decision-making mean the process is largely opaque to outsiders.[276]

Federal Law No. 165-FZ, which amended the foreign investments law, also amended the strategic sector law in a few key ways. First, it imposed harsher punishments for a foreign investor's failure to notify the FAS when the investor acquires 5 percent or more of a strategic entity's shares.[277] Second, it established new requirements for offshore companies wanting to invest in Russia's strategic sectors.[278] It also added three new strategic activities to the list, bringing the total number of strategic sectors up to 49.[279] The chart in Figure 8 depicts the requirements for a foreign investor to notify the Russian government of a transaction, and Figure 9 shows the exemptions that might free a foreign investor from the notification requirement.

[273] *Multi-jurisdiction guide for screening of foreign investments*, 111.

[274] *Doing Business in Russia*, 57.

[275] *Multi-jurisdiction guide for screening of foreign investments*, 111.

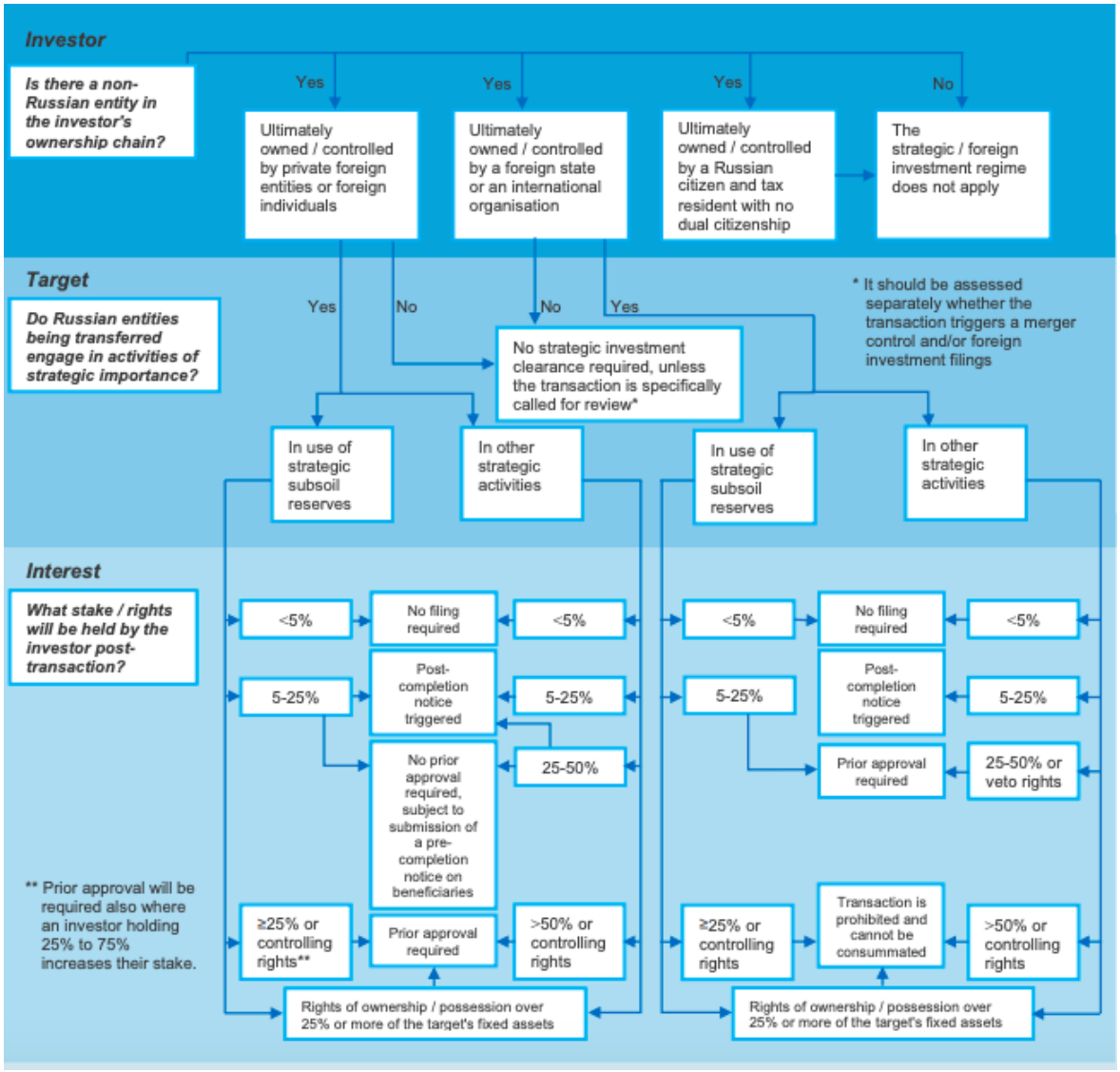
[276] Kesarev, "Government Relations Aspects in FDI Screening Procedure in Russia."

[277] "Russian Federation."

[278] *A Legal Overview of Foreign Investment in Russia's 'Strategic' Sectors*, 2.

[279] "Russian Federation."

Figure 8. Requirements to notify the Russian government of FDI transactions



Source: *A Legal Overview of Foreign Investment in Russia's Strategic Sectors*, Clifford Chance, 2020, 3, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/05/2005_Client%20Briefing%20-%20A%20Legal%20Overview%20of%20Foreign%20Investment%20in%20Russia%27s%20Strategic%20Sectors.pdf.

Figure 9. Exemptions to the FDI notification requirements

Source: *A Legal Overview of Foreign Investment in Russia's Strategic Sectors*, Clifford Chance, 2020, 3, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/05/2005_Client%20Briefing%20-%20A%20Legal%20Overview%20of%20Foreign%20Investment%20in%20Russia%27s%20Strategic%20Sectors.pdf.

Sectoral Walls

A few additional federal laws apply to FDI.

Federal Law No. 488-FZ, passed December 31, 2014, established measures for attracting foreign investors, including Special Investment Contracts.[280] Under the contracts, the investor agrees to develop or modernize production in a Russian special economic zone, and in return, they receive preferential treatment with regards to taxes and customs.[281] Conversely, Russia still has a number of closed cities, including several in the Murmansk Oblast in the Arctic, where, for purposes of state security, foreign nationals cannot invest absent special federal government permission.[282]

The Russian Land Code prohibits foreign ownership of certain lands based on location or use. First, the code prohibits foreign nationals from owning land in border areas.[283] The regions

[280] T. A. Skvortsova et al., "Formation and Development of the Legal Regulation of Foreign Investments in Russia," *European Research Studies Journal* 21, no. 1 (2018): 436-437, https://www.ersj.eu/dmdocuments/41.SKVORTSOVA_2_XXI_S1_18.pdf.

[281] Ibid.

[282] Aleksandr Alekseenko, "Restrictions on Foreign Direct Investment (FDI) in State Controlled Entities under Russian Law," *Transnational Dispute Management* 17, no. 1 (2020), https://www.researchgate.net/publication/336278267_Restrictions_on_Foreign_Direct_Investment_FDI_in_State_Controlled_Entities_under_Russian_Law.

[283] "Ownership of land by foreigners in Russia," Право собственности на землю иностранцев в России, Department of the Federal Service for State Registration, Cadastre, and Cartography of the Krasnodarsk Krai,

covered by the Land Code, illustrated in Figure 10, include all districts along the Russian Arctic coast. Furthermore, the Land Code prohibits foreign ownership of agricultural land.

Figure 10. Border areas of Russia where foreigners may not own land

Source: CNA. According to Article 15.3 of the Land Code (Земельный Кодекс) and implementing regulations (Указ РФ от 09.01.2011 №26).

In addition, below the level of federal law are relevant government decrees and executive regulations that play a role in regulating FDI. For example, in 2011 the Russian government passed decree No. 456, which stipulates how the Russian government can conclude agreements "on the encouragement and mutual protection of capital investments" with foreign governments. The Government Commission on Monitoring Foreign Investments, which approves FDI transactions that fall within its purview, and the Advisory Council for Foreign Investments, which aims to attract FDI to Russia, also came into existence because of

Управление федеральной службы государственной регистрации, кадастра, и картографии по Краснодарскому краю, 2017, https://www.frskuban.ru/index.php?option=com_content&view=article&id=47995:-37-32&catid=99:-35-20&Itemid=210; *Land Code*, 25 Oct. 2001.

government resolutions.[284] Therefore, the Russian government is using a combination of formal federal law and supplemental acts to build the system that supports the development of FDI in Russia.

Finally, the regions also play a crucial role in regulating FDI within their territory. Their legislative activity has a large effect on investor rights and interests in the region. The local authorities are also a part of the FDI screening process if a foreign investor plans to have production facilities located within the regions.[285] However,

Greenland

A self-governing territory within the Kingdom of Denmark, Greenland is 81 percent covered by a permanent ice sheet second only to Antarctica in size. No roads connect the central interior, and inhabitants rely on ferries and flights to travel between settlements. Climate change and rising temperatures in the Arctic are opening once remote and isolated Greenland to new development opportunities. The ice slowly receding from Greenland's craggy shoreline is revealing more of the vast mineral resources thought to lie under the polar ice sheet. The exact extent of the island's mineral and hydrocarbon reserves is still unknown, but it is widely believed to hold large, and in some cases exceptional, endowments of iron ore, zinc, lead, nickel, heavy and light rare earth elements, rubies, and sapphires, as well as several offshore oil blocks.[286]

Greenland has no legislation requiring screening of FDI. The territory was specifically exempted from three laws passed by the Danish parliament in 2012, 2018, and 2020 restricting foreign ownership in enterprises involved in the manufacture of armaments and explosives;[287] in oil drilling and other development of Denmark's continental shelf;[288] and in critical telecommunications infrastructure. Greenland is also exempt from Denmark's latest FDI screening act, Screening of Foreign Direct Investments in Denmark, adopted by the Danish

[284] Skvortsova et al., "Formation and Development of the Legal Regulation of Foreign Investments in Russia."

[285] Kesarev, "Government Relations Aspects in FDI Screening Procedure in Russia."

[286] "Review of potential resources for critical minerals in Greenland ", Geological Survey of Denmark and Greenland, 6 Apr. 2017, accessed 29 June 2021, https://eng.geus.dk/about/news/news-archive/2017/apr/review-of-potential-resources-for-critical-minerals-in-greenland.

[287] *LBK nr 1004 af 22/10/2012, Bekendtgørelse af lov om krigsmateriel m.v.*, https://www.retsinformation.dk/eli/lta/2012/1004.

[288] *LBK nr 1189 af 21/09/2018 Bekendtgørelse af lov om kontinentalsoklen og visse rørledningsanlæg på søterritoriet*, (21 Sep. 2018), https://www.retsinformation.dk/eli/lta/2018/1189.

parliament on May 4, 2021, and in effect from July 1, 2021.[289] This section discusses Nuuk's status in relation to Denmark, Greenlandic policies that tangentially permit control of proposed FDI, and a possible way ahead.

An unanticipated benefit of the COVID-19 crisis may prove to be the pause it offers to Greenlandic authorities to reflect further on how to manage national priorities. The 2020–2021 COVID-19 pandemic temporarily halted the inflow of substantial FDI to build infrastructure necessary to support an expanded tourist industry and to develop mineral resources.[290] That re-evaluation process is already underway in the wake of Greenland's left environmentalist party, Inuit Ataqatigiit, winning the 2021 general elections. Resource development, in particular the opening of the Kvanefjeld uranium and rare earths mine,[291] was a major campaign issue. The incumbent center-left Siumut party backed the Kvanefjeld project, while Inuit Ataqatigiit opposed the project based on its environmental impact and uranium's dual-use nature.[292] The new Greenlandic government has halted the Kvanefjeld project, and other uranium mining projects have voluntarily frozen their activities pending new policies. Múte B. Egede, after becoming prime minister, framed the freeze in environmental terms.[293]

Greenland and the World

The following paragraphs discuss Greenland's political and economic relations with Copenhagen and the wider world, including Beijing and Washington.

Local versus Danish authorities

Where once the cost of extracting and marketing Greenland's mineral wealth would have been prohibitively high, the prospect of a receding ice sheet and an increasingly navigable Arctic Ocean changes the commercial calculus. Also affecting price sensitivity is rising demand for

[289] *LOV nr 842 af 10/05/2021 Lov om screening af visse udenlandske direkte investeringer m.v. i Danmark (investeringsscreeningsloven), (10 May 2021), https://www.retsinformation.dk/eli/lta/2021/842.*

[290] *Greenland's Economy Autumn 2020*, The Economic Council of Greenland, 2020, 3-5, https://naalakkersuisut.gl/~/media/Nanoq/Files/Attached%20Files/Finans/ENG/GOR_ny/G%C3%98R%20rapport%202020%20en.pdf.

[291] The mine was being developed by Australia's Greenland Minerals with backing from PRC-based rare-earths processor Shenghe Resources.

[292] Isabella Kwai, "Opposition Wins Greenland Election After Running Against Rare Earths Mine," *New York Times*, 7 Apr. 2021, https://www.nytimes.com/2021/04/07/world/europe/left-wing-greenland-election-mine.html.

[293] Vivienne Walt, "Greenland's New Leaders Want More from Relations with the U.S.," *TIME*, 19 May 2021, https://time.com/6049749/greenland-mute-egede-u-s-blinken/.

certain minerals used in the manufacture of high-tech equipment and an international drive to diversify rare earth mineral sources away from China.[294]

FDI screening in Greenland is complicated by Greenland's evolving relationship with Copenhagen. Greenland was first colonized by Denmark in 1721, and it remained firmly under Copenhagen's control until World War II.[295] In 1953, Greenland gained constitutional privileges, which Greenlanders used to gain home rule in 1979. In 2008, home rule took another step forward when 76 percent of Greenlanders approved a referendum on enhanced sovereignty and eventual independence. Greenlanders' desire to manage the development of their mineral, oil, and gas resources and control the financial benefits was an important factor in the 2008 referendum on seeking a self-rule status within the Kingdom of Denmark.[296]

The resulting Act on Greenland Self-Government came into force June 21, 2009. Under the terms of the act, the Greenland government assumed sovereignty over Greenlandic territories and responsibility for education, health, fisheries, environment and climate, property law, and mineral resources. The Kingdom of Denmark retained authority for foreign affairs, defense, and national security. Other government functions are listed as being subject to eventual assumption by the Greenlandic authorities (Lists I and II of the Act).[297] These include the administration of justice, business and labor, aviation, immigration and border control, and financial regulation. As of October 2021, many of those functions remain under the purview of the Danish government, but the constituent elements of the Kingdom have agreed to coordinate national security with areas within Greenlandic and Faroese competencies.[298]

Greenland's economy

Despite its mineral and tourism potential, Greenland's economy continues to depend on revenue from shrimp and fish exports, which in 2019 were valued at $1.2B, primarily resulting from sales of frozen fish, fish fillets, and processed fish and shrimp. Much of the Greenland catch was shipped to Denmark for onward distribution. The largest customers for Greenland

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[294] Toby Woodall, "Coronavirus disruption brings China's rare earth metals monopoly into focus ", S&P Global Market Intelligence, 29 Apr. 2020, accessed 29 June 2021, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/coronavirus-disruption-brings-china-s-rare-earth-metals-monopoly-into-focus-58151160.

[295] Axel Kjær Sørensen, *Denmark-Greenland in the twentieth century, (Museum Tusculanum Press, 2007), 15-31, https://www.ssoar.info/ssoar/handle/document/27136.*

[296] *Act no. 473 of 12 June 2009, Act on Greenland Self-Government*, (12 June 2009), https://naalakkersuisut.gl/~/media/Nanoq/Files/Attached%20Files/Engelske-tekster/Act%20on%20Greenland.pdf.

[297] Ibid.

[298] Eilís Quinn, "Greenland, Denmark and the Faroe Islands sign terms of reference for committee on foreign affairs and defence ", *CBC*, 4 Oct. 2021, https://www.rcinet.ca/eye-on-the-arctic/2021/10/04/greenland-denmark-and-the-faroe-islands-sign-terms-of-reference-for-committee-on-foreign-affairs-and-defence/.

fish and shrimp were China ($270M), Japan ($76.4M), Russia ($39.4M), and Taiwan ($35.3M).[299]

In the business sector, publicly owned enterprises dominate, a heritage from Greenland's colonial administrative structure. In addition to Royal Greenland (fisheries), these include the following: Air Greenland, TeleGreenland, PostGreenland, Royal Arctic Line (shipping), Arctic Umiaq Line (marine transportation), KNI (consumer services), and Nukissiorfiit (electricity). A large proportion of Greenland's labor force is employed in public jobs by the municipalities or the government of Greenland. The labor market follows the Scandinavian model with employee and employer organizations negotiating wage agreements and worker protection. People without Greenlandic, Danish, or Nordic citizenship must obtain residence and work permits. To meet labor demand, the fishing industry hires Thai, Filipino, and PRC workers on limited-stay contracts.[300]

Financial support

Because Greenland's budget is not yet self-sufficient, various financial packages from Denmark, the EU, and the US provide critical support.

Under the Act on Greenland Self-Government, Denmark committed to provide Greenland with an annual subsidy.[301] In 2019, Denmark's subsidy to Greenland amounted to 3.8 billion Danish kroner (roughly USD 605 million)—or about 20 percent of Greenland's GDP and half of government revenue.[302] The EU also provides Greenland an allocation to promote sustainable development and education. During the recently concluded period of 2014–2020, that payment amounted to about EUR 32 million ($39 million) per year.[303] The US has also recently begun direct contributions to the Greenlandic economy. On October 27, 2020, US Ambassador to Denmark and Greenland Carla Sands and Greenland Premier Kim Kielsen signed a Common Plan for US-Greenland Cooperation in Support of Our Understanding for Pituffik (Thule Air Base). The Common Plan outlines educational and advisory initiatives the US government will undertake with an estimated value of $12.1 million, and it helped to smooth relations in 2019

[299] "Greenland," Observatory of Economic Complexity, accessed 29 June 2021, https://oec.world/en/profile/country/grl.

[300] *"Greenland in Figures," Statistics Greenland, accessed 29 June 2021, https://stat.gl/dialog/topmain.asp?lang=en&sc=GF; "Greenland."*

[301] *"Greenland in Figures."; "Greenland."*

[302] *2020 Investment Climate Statements: Denmark* US Department of State, 30-31, https://www.state.gov/reports/2020-investment-climate-statements/denmark/; *Greenland's Economy Autumn 2020*.

[303] *EU cooperation with Greenland*, European Parliament, PE 637.922, 2019, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637922/EPRS_BRI(2019)637922_EN.pdf.

after President Donald Trump mused about purchasing Greenland and then canceled his state visit to Denmark.

Company formation

Foreign companies wishing to start businesses in Greenland may do so through a subsidiary, a registered affiliate, or a representative office. A subsidiary is liable only for its own assets and may take the form of a public or private LLC.[304] Registered affiliates are available only for a company with a legally registered office in the EU, the US, Canada, or the Nordic countries. The affiliate is not treated as an independent company but rather as an extension of the main company, with the head office being liable for all of the affiliate's assets or debts. The affiliate must annually file a certified copy of the foreign company's audited financial statements with the Greenland government.[305] A representative office may not enter into contracts or deliver services in Greenland, but may merely establish contacts to support the parent company eventually entering the market.[306]

Business ownership/residency requirements

A private limited corporation may be set up with only one shareholder and one director. At least one director must either reside in Greenland or be a citizen of Denmark or another Nordic country. A public limited corporation may be set up with one shareholder and three directors. At least one of the directors must reside in Greenland. A registered affiliate office may be opened with one director, who must reside in Greenland. A representative office may be opened by appointing a Greenland resident representative.[307]

Company registration

Foreign companies wishing to do business in Greenland must register with the Greenlandic Business Register. The following information is required: the foreign company name, address, and contact information; the company's Greenlandic branch's name, address, and contact information; the start date; the method of management; a description of business activity; and the names, dates of birth, and dates of arrival in Greenland for the responsible owners. Companies with employees must also register with the Greenlandic Employer Register providing information similar to that required by the Greenlandic Business Register.

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[304] "Denmark - Doing Business in Other Areas of Denmark; Greenland," Export.gov, accessed 29 June 2021, https://www.export.gov/apex/article2?series=a0pt0000000PAteAAG&type=Country_Commercial__kav.

[305] Ibid.

[306] Ibid.

[307] "Business Entities in Greenland," Healy Consultants, accessed 29 June 2021, https://www.healyconsultants.com/greenland-company-registration/setup-llc/.

Simultaneously, companies must also register with the Danish Business Authority and obtain a "CVR" identification number, which allows Danish authorities to track tax and employment compliance. A branch of a foreign company may be created through application with the Danish Business Authority. Companies within the EU and EEA may set up a branch in Greenland and Denmark without further approval from the Danish Business Authority. However, companies outside of the EU/EEA must obtain approval before registering.

Employment

Foreign companies wishing to start businesses in Greenland must comply with Danish and Greenlandic regulations on residency and the use of foreign labor. The Danish Immigration Service strictly controls the borders of the Kingdom of Denmark, including Greenland. Nordic citizens may freely settle and work in Greenland. Citizens from countries outside the Nordic region must have a work and residence permit in order to live and work in Greenland. Firms wishing to hire foreign labor must first demonstrate that no Greenlander is available or qualified for the position.[308]

In December 2012, Greenland passed legislation known as the Large Scale Projects Act, which would allow companies to employ foreign labor during the construction phase of mining or infrastructure projects with workforce requirements that exceed local labor supply. An Impact Benefit Agreement negotiated between the employer and the government of Greenland would establish the numbers of Greenlanders to be engaged and the exact conditions for employing foreign labor. Foreign workers would receive the same protections and wages as Greenlandic workers, but the employer could deduct a negotiated sum per week to cover company-provided lodging, food, and clothing.[309]

FDI screening

Greenland has no legislation requiring screening of FDI. The territory was specifically exempted from three laws passed by the Danish parliament in 2012, 2018, and 2020 restricting foreign ownership in enterprises involved in the manufacture of armaments and explosives;[310]

[308] "Gronlands Erhvervsportal," Gronlands Erhvervsportal, accessed 29 June 2021, https://www.businessingreenland.gl/en.

[309] *Greenland Parliament Act no. 25 of 18 December 2012*, https://naalakkersuisut.gl/~/media/Nanoq/Files/Publications/Erhverv/Large-Scale%20Project%20Act/Unofficial%20translation%20of%20The%20LargeScale%20Projects%20Act%20incl%20amendments.pdf.

[310] *LBK nr 1004 af 22/10/2012, Bekendtgørelse af lov om krigsmateriel m.v.*, https://www.retsinformation.dk/eli/lta/2012/1004.

in oil drilling and other development of Denmark's continental shelf;[311] and in critical telecommunications infrastructure. Greenland is also exempt from Denmark's latest FDI screening act, Screening of Foreign Direct Investments in Denmark, adopted by the Danish parliament on May 4, 2021, and in effect from July 1, 2021.[312]

The Danish law was drafted in response to the EU's regulation adopted in March 2019 that called on member states to establish by October 11, 2020, an effective FDI coordinating mechanism to preserve Europe's strategic interests while keeping the EU market open to investment. The EU regulation provides for the following:

- Notification of existing national investment screening mechanisms.
- Establishment of formal contact points and secure channels in each EU member state and within the commission for the exchange of information and analysis.
- Procedures for member states and the commission to react quickly to FDI concerns and issue opinions.
- Informal cooperation when a foreign investment could influence the EU single market.[313]

The new Danish Act on Screening of Foreign Direct Investments introduces mandatory submission to screening by the Danish Business Authority if a foreign investor intends to acquire at least 10 percent of companies in the defense, information technology security, or critical infrastructure sectors, as well as companies producing dual-use items on the Control List or companies in the field of critical technology. If entering into a Special Economic Agreement would cause a foreign investor to gain a controlling interest over a Danish company in one of these sectors, that investment will also be subject to mandatory screening.[314]

Screening requirements do not apply to investments made in Danish enterprises by Danish citizens and Danish companies. Investments by EU/EAA citizens and companies must obtain approval for direct investments within particularly sensitive sectors and activities. Proposed investments by all non-EU/EAA citizens and companies will be screened. If a Danish company is controlled by EU/EEA citizens or companies, it will be treated as if it were an EU/EEA

[311] *LBK nr 1189 af 21/09/2018 Bekendtgørelse af lov om kontinentalsoklen og visse rørledningsanlæg på søterritoriet*, (21 Sep. 2018), https://www.retsinformation.dk/eli/lta/2018/1189.

[312] *LOV nr 842 af 10/05/2021 Lov om screening af visse udenlandske direkte investeringer m.v. i Danmark (investeringsscreeningsloven), (10 May 2021), https://www.retsinformation.dk/eli/lta/2021/842*.

[313] "EU foreign investment screening mechanism becomes fully operational," European Commission, 9 Oct. 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1867.

[314] *Lov om screening af visse udenlandske direkte investeringer m.v. i Danmark (investeringsscreeningsloven)*, 10 May 2021.

company. If a Danish company or an EU/EEA company is controlled by non-EU/EEA citizens and companies, it will be treated as non-EU/EEA.[315]

Indirect screening measures

Although Greenland has no explicit FDI screening measures, authorities can scrutinize and potentially deny economic activity in crucial sectors based on other policies.

Greenland's land policies afford the government significant powers over development. Land in Greenland is held collectively. Permission to build on a piece of land or use it for farming or other purposes must be granted by the district (*kommune*) or municipality. With permission of the authorities, houses or other structures may be sold and their ownership transferred, but the underlying land remains collectively held. Authorities must also approve any change in use or application to expand land use.[316] Thus, local authorities are involved in any move to build or develop facilities associated with any sector, including tourism.

Greenlandic authorities also have significant control over mineral sector activities. Minerals or hydrocarbon resources under the surface of the territory of Greenland are the property of the Greenlandic people. Management of mineral and hydrocarbon resources was one of the major tasks assumed by Greenland's government on achieving recognition of self-rule in 2009. Applicants for an exploration license must submit documentation regarding their financial and technical capabilities as well as their business registration with the Greenlandic and Danish authorities. The process for obtaining an exploitation license is more complex, requiring submission of environmental and social impact statements and completion of a period of public consultations and hearings.[317] The new Inuit Atalqatigiit government has signaled it will generally maintain these policies while restricting licensing for uranium mining.[318]

Greenland and the EU's calls for FDI screening

On July 1, 2021, the "Screening of Foreign Direct Investments in Denmark" entered force. The act was passed by the Danish parliament in response to the EU's call to all members to establish an effective FDI screening mechanism to protect Europe's strategic interests. It now falls to the newly elected government of Prime Minister Múte B. Egede to determine whether to submit

[315] Ibid.

[316] "4.1.3 Grønlands kommuner, Grønlands Selvstyre og Den Danske Stat ", Grønland - Samfund, økonomi og politik, https://glsamf.systime.dk/?id=184.

[317] *Greenland's Mineral Strategy 2020-2024*, https://govmin.gl/publications/greenlands-mineral-strategy-2020-2024/?ind=1584641534605&filename=Greenlands_Mineral_Strategy_2020-2024.pdf&wpdmdl=8360&refresh=60d84ca80245b1624788136.

[318] "Greenland says yes to mining but no to uranium," Mineral Resources Authority – Naalakkersuisut, 7 May 2021, accessed 29 June 2021, https://govmin.gl/2021/05/greenland-says-yes-to-mining-but-no-to-uranium/.

similar FDI screening legislation to the Inatsisartut, Greenland's parliament. The provisions of Denmark's FDI screening act do currently extend to Greenland as a self-governing part of the Danish realm.

Foreign companies wishing to do business in Greenland must now register with both the Greenlandic Business Register and the Danish Business Authority. Obtaining prior approval following FDI screening would add an extra step to the process but enhance transparency regarding the interests of the foreign investors. FDI screening would allow Greenlandic and Danish authorities to review jointly potential security concerns.

Siumut party leaders, who dominated Greenland politics from the start of self-rule in 2009 until the election this April, welcomed foreign investment from all sources. China, the largest single-country customer for Greenland's fish and shrimp exports, has demonstrated strong interest in investing in Greenland as a potential node in a "Polar Silk Road." In October 2020, then-finance minister Vittus Qujaukitsoq told Public Radio International reporter Mary Kay Magistad that the Greenland government had made annual trips to China to promote investment opportunities beginning in 2011: "At the end of the day, it's not interesting for me whether the money comes from the US, or from Canada or from any country. For me, the most interesting part is making progress and growth in Greenland."[319]

In a May 2021 interview with *Time Magazine*, new Prime Minister Múte Egede did not comment directly on investment in Greenland by PRC-based entities but said he hopes that, as China, Russia and the EU scramble for Greenland's natural resources, the US might be spurred to invest more: "The Greenlandic people want more growth than just that military base."[320]

[319] Mary Kay Magistad, "China's Arctic ambitions have revived US interest in the region," The World, 12 Oct. 2020, accessed 29 June 2021, https://www.pri.org/stories/2020-10-12/chinas-arctic-ambitions-have-revived-us-interest-region#:~:text=China%27s%20Arctic%20ambitions%20have%20revived%20US%20interest%20in,Ocean.%20It%27s%20also%20stoked%20concerns%20from%20the%20US."
[320] Walt, "Greenland's New Leaders Want More from Relations with the U.S.."

Figures

Figure 1. Value of investments by principal province of destination 2018–2019 22
Figure 2. Canada's net-benefit FDI screening review 24
Figure 3. Canada's national security review process 29
Figure 4. Icelandic FDI screening process 38
Figure 5. CFIUS FDI screening process 46
Figure 6. Norway's FDI screening under the National Security Act 54
Figure 7. Russian FDI screening process 68
Figure 8. Requirements to notify the Russian government of FDI transactions 71
Figure 9. Exemptions to the FDI notification requirements 72
Figure 10. Border areas of Russia where foreigners may not own land 73

Abbreviations

BIT	bilateral investment treaty
CAD	Canadian dollars
CFIUS	Committee on Foreign Investments in the United States
DPA	Defense Production Act
EEA	European Economic Area
EFTA	European Free Trade Area
ESA	EFTA Surveillance Authority
EU	European Union
FAS	Federal Anti-trust Service
FDI	foreign direct investment
FinCEN	Financial Crimes Enforcement Network
FIRRMA	Foreign Investment Risk Review Modernization Act
FTA	free trade agreement
FY	fiscal year
GiC	Governor in Council
ICA	Investment Canada Act
LLC	limited liability company
ISED	Innovation, Science and Economic Development (Canada)
KIA	Kitikmeot Inuit Association
NDAA	National Defense Authorization Act
NOK	Norwegian Kroner
NSM	Nasjonal Sikkerhetsmyndighet
NTI	Nunavut Tunngavik Incorporated
OECD	Organization for Economic Cooperation and Development
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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Act no. 473 of 12 June 2009, Act on Greenland Self-Government. 12 June 2009. https://naalakkersuisut.gl/~/media/Nanoq/Files/Attached%20Files/Engelske-tekster/Act%20on%20Greenland.pdf.

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