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NAVIGATING FOREIGN DIRECT INVESTMENT REGULATION: CRITICAL MINERALS



Control of foreign investment in critical minerals

Foreign Direct Investment (FDI) regulation is an area of increasing activity and enforcement worldwide. Against a backdrop of heightened geopolitical tensions and the residual pressure to keep strategic industries 'onshore', an increasing number of FDI regimes globally now apply not only to outright acquisitions but also to minority investments, even where the interests acquired do not confer control over the target business or its assets.

FDI controls may typically require parties to notify a monitoring authority of their intended transactions. Where a notification obligation applies, it will frequently be unlawful for parties to complete the transaction without first obtaining consent from the monitoring authority. In some cases, however, countries do not maintain FDI screening regimes in this traditional sense, but instead regulate

FDI via "negative list" arrangements that limit or prohibit foreign ownership, or impose other regulatory requirements on foreign ownership.

FDI regimes are typically applied as an additional layer of regulation on top of other rules such as merger control and industry regulations. Moreover, especially in significant cross-border investments, it is quite possible for multiple FDI regimes to apply to a single transaction. With this in mind, conducting a multi-jurisdictional FDI analysis is now an essential part of any M&A or investment due diligence exercise.

Common features of FDI regimes

FDI regimes typically apply to **specified classes of investments** – increasingly these are not limited to controlling interests but can capture minority investments even where they do not confer control over the target business or its assets.

Often there are **no turnover or other thresholds** for the FDI rules to be engaged.

Mandatory notification obligations may apply and clearance may be required before transactions can complete.

Some regimes **prohibit or restrict** all foreign investment in specified industries.

Decision-making can be far more **politically-driven and secretive** than in other regulatory processes such as merger control. Outcomes can therefore be harder to predict and more difficult to explain.

FDI and Critical Minerals

FDI controls are often perceived as being concerned with the protection of national security interests. While security is certainly a common core component, its scope (and that of FDI more generally) continues to be broadened and it is now common for FDI regimes to cover activities going well beyond those typically associated with national security, such as military/dual-use technology and critical infrastructure. Critical minerals are an example of this, being increasingly caught by FDI regimes globally despite not always having a clear link to national security.

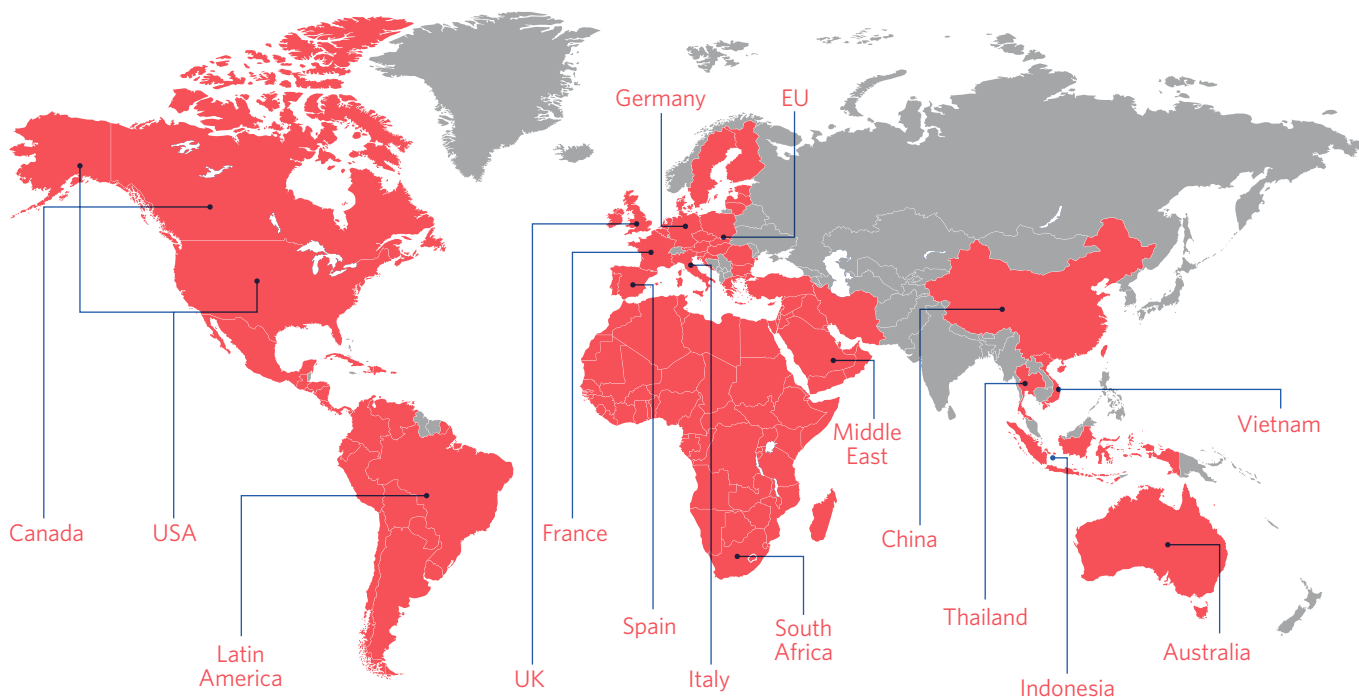
The scope of critical minerals that are subject to FDI controls is not consistent across jurisdictions. In many regimes, critical minerals are covered, whether expressly or implicitly, under a broader sectoral description such as "critical raw materials" (as in France), "critical inputs" (Spain) or "advanced materials" (UK). Other jurisdictions define the activity (mining) rather than the output, and others do not specifically define the activity at all.

However they are defined, critical minerals play an essential role in global supply chains and transactions affecting this sector are likely to come under increasing scrutiny in the coming years. The UK Government, in its November 2023 Call for Evidence on the National Security and Investment Act 2021, highlighted several factors demonstrating the importance of critical minerals in the context of national security, and FDI more broadly. These include:

- high global supply risk and economic vulnerability;
- lack of good substitutes; and
- growing demand, especially in the context of technological change and shifting geopolitical landscapes.



Critical Minerals and FDI regimes around the world



EUROPE



UK

Under the National Security and Investment Act (**NSIA**) a mandatory and suspensory notification obligation applies to certain transactions involving a target entity that carries out activities in the UK of a specified description in one or more of the 17 specified sectors (certain transactions that do not trigger mandatory notifications can still be reviewed at the authority's discretion). Activities relating to critical minerals are currently captured by the Advanced Materials sector, which includes a range of activities including processing, producing and recycling critical minerals.

In late 2023/early 2024 the UK government conducted a Call for Evidence on the NSIA regime, in which it indicated that it was actively considering creating a separate critical minerals mandatory filing sector. Following that process, the government confirmed that it would consult on formal proposals to create a standalone critical minerals specified sector. It is not yet clear whether the new government will pursue this.

The government's proposal was that the definition for critical minerals would be in line with the British Geological Survey's latest assessment of critical minerals, due for publication in early 2025. This would be an update to the 18 minerals which are currently assessed as critical.



EU

The Regulation for the screening of FDI into the EU on security and public order grounds became fully operational on 11 October 2020 (**EU FDI Regulation**). The EU FDI Regulation does not establish FDI screening at EU level but creates a framework for pan-EU cooperation on FDI screening:

Each Member State must notify the Commission and other Member States of any FDI in their territory undergoing screening.

The Commission may request information on FDI likely to affect security or public order of another Member State or a project or programme of EU interest.

Common criteria and standards are set for national FDI mechanisms if maintained or adopted, but there is no obligation to adopt new FDI screening mechanisms.

The EU FDI Regulation sets out a non-exhaustive list of sensitive sectors and other relevant factors that may be taken into account to determine whether FDI poses a risk to security or public order. This includes the impact of the investment on supply of critical inputs, such as raw materials.

Proposals have recently been introduced that, if implemented, will result in a stricter framework at EU level, including mandatory FDI screening mechanisms for all EU Member States.



France

France has an active FDI regime that imposes mandatory filing requirements. The regime is suspensory i.e. clearance must be obtained pre-closing.

Pre-completion approval is required from the Ministry of Economy (Ministère de l'Économie, des Finances et de l'Industrie) for foreign investments occurring in sensitive or strategic sectors if they result in the (i) acquisition of control of any French law entity or of branches/establishments (succursale) registered in France of a foreign company; (ii) acquisition of all or part of any business division (branche d'activité) operated by a French law entity; or (iii) for non-EU/EEA investors only, the acquisition, directly or indirectly, solely or in concert, of more than 25% of voting rights of a French law entity, or for listed French companies, 10% or more.

The sensitive/strategic sectors include:

- a. activities prejudicial to national defence, public authority or to public order and public security;
- b. infrastructure, goods or essential services that ensure the supply of certain services (eg energy, water, transportation, space operations, etc.) including the integrity, security, and continuity of the extraction, processing and recycling of critical raw materials; and
- c. R&D activities prejudicial to the activities in (a) or (b).

While 'critical minerals' is not specifically mentioned in the list of activities requiring pre-completion approval, it appears to fall within the scope of 'critical raw materials'



Germany

Germany has an active FDI regime that imposes mandatory filing requirements. The regime is suspensory i.e. clearance must be obtained. Pre-closing approval is required from the Federal Ministry for Economic Affairs and Climate Action.

The FDI regime is engaged by acquisitions of either: (i) 25% (direct or indirect control) of voting rights in a German company by a non-EU/EFTA company (in which case the Ministry is entitled to call-in the transaction for review); (ii) 10% if the target company operates in certain sectors (eg critical infrastructure in sectors such as energy), (in which case a mandatory filing is triggered); or (iii) 20% in certain other sectors (in which case a mandatory filing is triggered). The latter category includes critical raw materials.

Our experience is that the German government is particularly cautious with regard to the screening of transactions in the critical minerals sector, and in practice this can lead to protracted reviews (eg as a result of the authority sending various information requests which 'stop the clock' on the review) and make clearance more difficult to obtain.

A new investment screening act is expected to be adopted in Germany. There are indications that this will include stricter rules for sensitive sectors including raw materials (which will presumably include critical minerals). Draft legislation has not yet been published, was expected for Q 4 in 2024 but given the recent political developments in Germany and the early federal elections on 23 February 2025, new legislation is now expected in the second half of 2025.



Italy

Italy has an active FDI regime that imposes mandatory filing requirements. The regime is suspensory i.e. clearance must be obtained pre-closing. Pre-closing approval is required from the Presidency of the Council of Ministers.

Notifications are required for transactions relating to 'strategic assets', including security of supply of critical products such as raw materials. While 'critical minerals' is not specifically mentioned, it appears to be included within the scope of 'raw materials'.



Spain

Spain has an active FDI regime. There is a suspensory foreign direct investment (FDI) screening mechanism in place that applies in the following scenarios:

- a. a Foreign Investor (as defined below) acquires a shareholding interest of 10% or more in any Spanish company and/or Spanish asset; or as a result of any transaction, the Foreign Investor acquires effective control of such Spanish company and/or asset; **and either**
- b. the investment is made in Restricted Sectors, including critical inputs (which includes critical minerals). With respect to 'critical minerals', clearance is "for transactions involving activities related to the exploration and exploitation of mineral deposits containing strategic raw materials, as defined relevant Spanish and EU provisions; **or**
- c. when the Foreign Investor:
 - i. is directly or indirectly controlled by the government (including state bodies or the armed forces) of a third country; or
 - ii. has made investments or has taken part in sectors that affect public safety, public policy or public health in another Member State; or
 - iii. there is a risk that the Foreign Investor conducts illegal activities affecting public safety, public policy or public health.

MIDDLE EAST



Middle East

FDI in the Middle East is relatively nascent, and the majority of jurisdictions do not have FDI regimes requiring pre-notification and clearance.

Some jurisdictions, such as Kuwait and Oman, have a 'negative list' which prohibit foreign ownership in certain sectors (eg real estate, labour recruitment, extraction of natural gas and crude oils, manufacturing of gas, etc). Critical minerals do not appear to be identified on these 'negative lists'.

In the UAE, foreign investments in UAE companies are restricted in some strategic industries and prohibited in industries such as security and defence, financial services, insurance, TV and radio broadcasting stations, and satellite communication services.

In Saudi Arabia, a new investment law applicable to all investors (local and foreign) is set to come into effect in February 2025. Such new law does not include a 'negative list' containing all activities in which foreign investment is prohibited, but instead provides that ministerial approval will be needed to undertake 'excluded activities' as will be updated by relevant authorities.

AFRICA

Africa
(excluding South Africa)

The African continent is a significant region for critical minerals. However, most African countries do not have specific FDI regimes. Instead, they may regulate and monitor foreign investment through other means, such as through exchange control regulations and treasury approvals. In some cases, FDI regulation is more nebulous – regulation is carried out by way of broad policy considerations conveyed to investors through informal discussions with government or through licensing requirements imposed on an ad hoc basis at the time of the investment.

Many African countries also regulate foreign investment by ensuring that such investment is carried out in a responsible manner and for the benefit of the country (eg linking it to a social responsibility requirement to local communities or local industry).

Competition law regulations may include public interest considerations which may bring transactions involving critical minerals into the scope of review.

In an attempt to enhance downstream value addition, a number of African countries have imposed restrictions on the ability of mining companies to export minerals that have not undergone a domestic beneficiation process.



South Africa

While there is currently no separate foreign direct investment authority in South Africa, the South African Competition Commission (**SACC**) reviews mergers that meet prescribed financial thresholds. Foreign investors will, through this process, often be required by the SACC and/or Department of Trade, Industry and Competition to provide commitments that are responsive to the SACC's public interest mandate, notably in respect of local ownership, employment and procurement.

Aside from the merger notification, there is no general obligation to notify acquisitions in South African companies by foreign investors, or the establishment of new South African companies by foreign investors. However, foreign investment in South African companies active in the aviation, mining, and broadcasting sectors is restricted.

AMERICAS



Canada

Canada has an active FDI regime. All acquisitions of control of Canadian businesses by non-Canadians are subject to review under the Investment Canada Act (**ICA**).

The Canadian Government has restrictive critical minerals policies under which acquisitions by non-Canadians will only be approved on an exceptional basis if they involve a large Canadian headquartered firm or a buyer that is a State-owned entity (**SOE**).

A non-exhaustive list of factors that will be examined to determine whether an acquisition by a SOE would be approved include:

- the size, scope and location of the Canadian business;
- the nature and strategic value to Canada of the mineral assets or supply chain involved;
- the degree of control or influence an SOE would likely exert on the Canadian business, the supply chain and the industry;
- the effect the transaction may have on the ability of Canadian supply chains to exploit the asset or access alternative sources (including domestic supply); and
- the current geopolitical circumstances and potential impact on allied relations.

Canada represents an important source of critical minerals with many projects underway. Canada has taken action in the critical minerals sector under its FDI regime. It has blocked or ordered divestitures of numerous Chinese investments in critical minerals mining companies.



USA

The USA has an active FDI regime (**CFIUS**), which includes a mandatory filing component.

Critical minerals do not currently fall expressly within the mandatory notification regime.

The US Government – via Executive Orders issued by both President Trump and President Biden to improve the management of critical minerals needed for US energy security and to secure reliable supply chains for certain critical minerals – has articulated a strong interest in critical minerals and the related supply chains, emphasising their importance to US national security.

Even in the absence of mandatory CFIUS filing obligations, there is a very active CFIUS investigation and call-in regime that is not sector specific, and CFIUS has broad discretion to investigate and call-in for review covered transactions in the critical minerals space where CFIUS believes the transaction may present US national security concerns.



Latin America

Regulation in the region is increasingly intense, including with respect to protection of the environment and communities.

Several countries' FDI regimes have a particular focus on critical minerals.

In certain countries (eg Colombia and Peru) there are special regulatory regimes that apply to the mining sector, or prior approval is required in respect of certain foreign investments in mining rights.

ASIA-PACIFIC



Australia

Australia has an active FDI regime (**FIRB**). The Australian government identifies the extraction, processing or sale of critical minerals as a key area of national security concern and focus on the sector appears to be increasing.

Critical minerals are seen as an important part of Australian economy. There have been recent high profile blocking decisions – eg in 2023, the Treasurer blocked a Chinese company, Austroid Corporation, from acquiring 90.10% of lithium miner Alita Resources Limited (to take its interest to 100%)

There are no specific mandatorily notifiable national security actions linked to critical minerals. However, FIRB recommends voluntary notification even where typical mandatory reporting thresholds are not triggered. Reviewable actions have low thresholds – including minority stakes (10%), or potentially even less in certain circumstances (eg where there is a position of influence or control, or other agreement).



China

China has an FDI screening regime as well as a screening list (**Negative List**). The Negative List regime applies to acquisitions by foreign investors in Chinese companies (and other forms of foreign investment in China), and does not apply monetary jurisdictional thresholds.

China has a significant domestic critical minerals industry.

Certain mining activities are restricted by the Negative List regime (ie foreign investment in mining of certain minerals such as rare earth is prohibited).

Additionally, mandatory notification applies in certain sectors under the separate National Security Review measures – namely those related to military and military support industries that concern national defence and security, as well as non-military industries important to national security, which includes important natural resources and critical minerals. Mandatory filing requirements arise where there is an acquisition of a 50%+ stake, or where there are other circumstances that cause a foreign investor to have a significant impact on aspects such as business decision-making, personnel, finance, or technology.



Indonesia

Indonesia is a significant jurisdiction for critical minerals (in particular nickel mining).

Indonesia maintains a negative list regime that restricts foreign ownership in certain sectors – either prohibiting foreign ownership entirely or subjecting it to other requirements (eg a cap of 49% foreign ownership, or a requirement to partner with a local entity or SME). However, the negative list does not directly regulate the Indonesian mining sector.

Indonesia also restricts exports in certain sectors – critical minerals are particularly affected, including bans and/or restrictions on the export of nickel ore, bauxite, copper, iron ore, lead, zinc and anode mud.

Foreign investment in upstream mining and critical minerals is subject to a mandatory local divestment regime:

- Open Pit and Non-Integrated Smelting Facilities: obligation to gradually divest to a maximum of 49% foreign ownership by the 15th year of production.
- Open Pit and Integrated Smelting Facilities/Underground Mining and Non-Integrated Smelting Facilities: obligation to gradually divest to a maximum of 49% foreign ownership by the 20th year of production.
- Underground Mining and Integrated Smelting Facilities: obligation to gradually divest to a maximum of 49% foreign ownership by the 15th year of production.

Any direct transfer of shares in an Indonesian upstream mining company is subject to prior approval of the Indonesian Government.

In contrast, the downstream mining processing and refining industry is not subject to any foreign ownership restrictions or any government approvals for FDI.



Thailand

FDI is regulated via a negative list regime rather than pre-notification FDI screening.

Easements exist for investors from jurisdictions which have a free trade agreement with Thailand – eg the ASEAN countries, the US, Australia, Japan.

Unless an exemption applies, foreign investors are subject to licensing approval. A majority foreign-owned company may engage in mining operations only if at least 40% of its capital is held by Thai nationals/entities, or at least 25% of its capital (with Cabinet approval) is held by Thai nationals/entities. Additionally, at least two-fifths of the company's directors must be Thai nationals. Note that the authority's approach on granting of approvals are discretionary and on a case-by-case basis.

The majority of foreign investment approvals granted in 2023 related to Japanese and US investors but the Thai government is promoting investment from China, with the Thai Board of Investment recently establishing a further three offices in China.



Vietnam

Vietnam does not have an active FDI regime – foreign ownership is regulated by way of a Negative List. There are two negative lists which set out the sectors in which foreign ownership is either prohibited or limited subject to compliance with certain conditions.

Prohibited sectors are primarily concerned with areas unrelated to critical minerals (eg press activity, public polling, certain tourism activities, security and investigation services). However, the exploration, mining and processing of minerals fall under the list of sectors and businesses where market access is conditional for foreign investors.

Any foreign investment creating a new wholly or partly invested company is subject to an Investment Registration (IRC) requirement issued by the relevant provincial Department of Planning and Investment (DPI). Once an IRC has been obtained, investors can apply for an Enterprise Registration Certificate (ERC) which confirms the company is validly established under Vietnamese law.

Vietnam permits 100% foreign ownership of critical material businesses, however authorities have a degree of discretion to decide whether to approve foreign ownership (eg when granting an IRC or ERC). IRCs and ERCs are only issued if the applicant demonstrates compliance with applicable foreign ownership restrictions.

Vietnam has agreed certain liberalisation measures under the EU-Vietnam Trade Agreement and the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).

Outlook for the future

In recent years, FDI regulation has featured increasingly on the radar for cross-border M&A, against a backdrop of amplified protectionist rhetoric.

Critical minerals have been drawing more attention from governments as valuable inputs for technology hardware in particular, and will continue to do so in view of the rapid acceleration in artificial intelligence (AI) development and the global green transition.

FDI regimes continue to develop globally, and many address critical minerals under the scope of critical inputs. However, critical minerals are starting to gain traction as a specific category requiring greater scrutiny.

There have been a number of recent FDI decisions in the critical minerals space and given the global focus on green transitions and fierce competition for these resources, going forward we can expect to see more intervention in this area. The call-in powers that FDI agencies have, in some cases for extra-territorial investments, are also likely to be used more frequently in this area.



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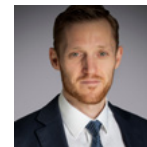
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