

11-2023

China's National Security Review of Foreign Investment: A Comparison with the United States

Robin Hui Huang
Chinese University of Hong Kong

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Robin Hui Huang, China's National Security Review of Foreign Investment: A Comparison with the United States, 56 *Vanderbilt Law Review* 1261 (2023)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol56/iss5/3>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



DATE DOWNLOADED: Fri Nov 1 09:29:33 2024

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Robin Hui Huang, China's National Security Review of Foreign Investment: A Comparison with the United States, 56 VAND. J. TRANSNAT'L L. 1261 (November 2023).

ALWD 7th ed.

Robin Hui Huang, China's National Security Review of Foreign Investment: A Comparison with the United States, 56 Vand. J. Transnat'l L. 1261 (2023).

APA 7th ed.

Huang, Robin Hui. (2023). China's national security review of foreign investment: comparison with the united states. *Vanderbilt Journal of Transnational Law*, 56(5), 1261-1302.

Chicago 17th ed.

Robin Hui Huang, "China's National Security Review of Foreign Investment: A Comparison with the United States," *Vanderbilt Journal of Transnational Law* 56, no. 5 (November 2023): 1261-1302

McGill Guide 9th ed.

Robin Hui Huang, "China's National Security Review of Foreign Investment: A Comparison with the United States" (2023) 56:5 Vand J Transnat'l L 1261.

AGLC 4th ed.

Robin Hui Huang, 'China's National Security Review of Foreign Investment: A Comparison with the United States' (2023) 56(5) *Vanderbilt Journal of Transnational Law* 1261

MLA 9th ed.

Huang, Robin Hui. "China's National Security Review of Foreign Investment: A Comparison with the United States." *Vanderbilt Journal of Transnational Law*, vol. 56, no. 5, November 2023, pp. 1261-1302. HeinOnline.

OSCOLA 4th ed.

Robin Hui Huang, 'China's National Security Review of Foreign Investment: A Comparison with the United States' (2023) 56 Vand J Transnat'l L 1261
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

China's National Security Review of Foreign Investment: A Comparison with the United States

Robin Hui Huang*

ABSTRACT

This paper critically examines China's national security review regime of foreign investment and compares it with that of the United States. Over the years, China has gradually established a comprehensive legal framework for national security review of foreign investment. Recent efforts were made to refine the public enforcement mechanism of the review in tandem with a new "pre-establishment national treatment plus negative list" system under the 2020 Foreign Investment Law. The United States also enacted the Foreign Investment Risk Review Modernization Act of 2018 to enhance its national security review regime.

By analyzing the law and practices of China and the United States, this paper finds that the national security review regimes of the two jurisdictions have functional convergences despite some formal divergences caused by diverse political-economy landscapes. Their functional convergences are highlighted by China's local practices, such as the de-facto national security screening in the name of anti-monopoly review. There are many factors affecting China's national security review regime for foreign investment, including the ongoing (and escalating) US-China competition (or conflict) at the international level and the evolution of state or party capitalism at the domestic level. These research findings will not only contribute to the existing comparative law scholarship but also benefit multinational enterprises that seek to enter Chinese and the US markets.

TABLE OF CONTENTS

I.	INTRODUCTION	1263
II.	THE EVOLUTION OF CHINA'S NSR	1265
	A. Stage 1 (1979-2003): Market Entry Restrictions	1265

* Chair Professor, Faculty of Law, Chinese University of Hong Kong. High-level Visiting Professor, Shanghai Jiaotong University; Guest Professor, Jiangxi University of Finance and Economics. This research receives funding support from the Hong Kong Research Grants Council's Humanities and Social Sciences Prestigious Fellowship Scheme, 'Cross-border Listings and Regulatory Responses: Chinese Experiences and International Implications' (project number: CUHK 34000322). Thanks to Charles Chao Wang, Yue Meng, Warwick Wang Lik Chan and Tan Shi Hui for their excellent research assistance.

	B. Stage 2 (2003-2015): NSR for Foreign M&A.....	1266
	C. Stage 3 (2015-2020): NSR in General	1267
	D. Stage 4 (From 2020): NSR for Foreign Investment.....	1268
III.	CHINA'S CURRENT NSR REGIME.....	1269
	A. Overview.....	1269
	1. Key Concepts	1269
	2. Office of the Working Mechanism Decision-Making Factors	1271
	B. Review Agencies.....	1271
	1. The Agency that Accepts Applications	1271
	2. The Agency that Makes Decisions	1272
	C. Review Procedures	1273
	1. Filing Procedures and Documents	1273
	2. Formal Review and Informal Consultation	1273
	D. Review Decisions.....	1274
IV.	THE NSR REGIME IN THE UNITED STATES	1275
	A. Overview.....	1275
	B. The 1950 Defense Production Act	1275
	1. Substantive Rules	1275
	2. Procedural Rules	1276
	C. The 2018 FIRREA	1278
	1. Substantive Rules	1279
	2. Procedural Rules	1280
	D. The 2022 Executive Order.....	1281
V.	A CHINA-US COMPARISON OF NSR: LAW AND PRACTICE	1283
	A. Comparing the Law on the Books	1283
	1. The Convergence	1284
	2. The Divergence.....	1285
	B. Comparing the Law in Practice.....	1287
	1. The United States	1287
	2. China.....	1292
VI.	EXPLANATIONS AND IMPLICATIONS	1293
	A. General Observations	1293
	B. Explaining Jurisdictional Similarities and Differences	1294
	1. Similarities	1294
	2. Differences	1295
	3. Functional Convergence	1297
	C. Implications for the International Relationship.....	1298
VII.	CONCLUSION	1300

I. INTRODUCTION

Drawing upon the experiences of other jurisdictions, particularly the United States, China has gradually established its national security review (NSR) regime for foreign investment.¹ The basic national-level laws enacted by the National People's Congress include the 2015 National Security Law² and the 2020 Foreign Investment Law.³ To implement the laws, the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) under the State Council have issued relevant rules to provide guidance on the NSR of foreign investment in China. On the other hand, a growing number of Chinese enterprises have gone overseas under the “going global” policy of the Chinese government.⁴ In this process, these outbound Chinese enterprises have increasingly encountered the issue of national security review for their investment and business in host countries overseas. For example, in 2005, China National Offshore Oil Corporation launched a bid for Unocal, the then-ninth largest oil company in the United States, but the deal was vehemently opposed by some members of the US Congress owing to national security concerns, which forced China National Offshore Oil Corporation to withdraw the offer in the end.⁵ In July 2013, another Chinese company experienced similar difficulties in the case of *Ralls*, in which the Committee on Foreign Investment in the United States (CFIUS) decision to block foreign investment was challenged for the first time in history.⁶

In the United States, CFIUS, a multi-agency government body chaired by the Secretary of the Treasury, is responsible for reviewing foreign investments for national security considerations.⁷ The CFIUS can take measures relevant to its mandate, such as limiting a foreign investor's access to a US company's R&D information, and in extreme

1. For the definition of foreign investment and the notion of NSR under the Chinese law, *see* discussion *infra* Part III.A.1.

2. *See* Zhonghua Renmin Gongheguo Guojia Anquan Fa (中华人民共和国国家安全法) [National Security Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., July 1, 2015, effective July 1, 2015) [hereinafter National Security Law].

3. *See* Zhonghua Renmin Gongheguo Waishang Touzi Fa (中华人民共和国外商投资法) [Foreign Investment Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020) [hereinafter Foreign Investment Law].

4. *See* *China's Approach to Global Governance*, COUNCIL ON FOREIGN REL. <https://www.cfr.org/china-global-governance/>, [<https://perma.cc/LG83-X294>] (archived Aug. 21, 2023).

5. *See, e.g.*, Matt Pottinger, Russell Gold, Michael M. Phillips & Kate Linebaugh, *Cnooc Drops Offer for Unocal, Exposing US-Chinese Tensions*, WALL ST. J. (Aug. 3, 2005), <https://www.wsj.com/articles/SB112295744495102393>, [<https://perma.cc/HY4R-SZMW>] (archived Aug. 21, 2023).

6. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 296 (D.C. Cir. 2014).

7. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> [<https://perma.cc/E2T4-UTBU>] (archived Aug. 21, 2023).

cases, the CFIUS can advise the parties to abandon a deal.⁸ If a formal ban or divestment order is needed, the CFIUS can submit the matter to the president.⁹ The CFIUS's jurisdiction has remained unchanged in the past thirty-five years since the US Congress first passed the 1988 Exon-Florio Amendment, which added Section 721 to the Defense Production Act of 1950.¹⁰ In 2018, the United States passed the Foreign Investment Risk Review Modernization Act (FIRRMA) to modernize and reshape its national security review system.¹¹ This new statute aims to strengthen the US government's ability to protect national security while preserving its open investment policy.¹² FIRRMA has significantly expanded the scope of transactions reviewable by the CFIUS so that current concerns can be addressed more effectively.¹³

With the escalation of China-US trade frictions, the US government has made more frequent use of national security review to restrict Chinese enterprises from carrying out business activities in the United States. Since the passing of FIRRMA, there has been a growing number of national security review cases against Chinese "national strategic buyers"¹⁴ investing in the US market. For example, Huawei Technologies Co., Ltd. (Huawei) is listed as a national security threat and thus forbidden to conduct certain business activities in the United States.¹⁵ Another example is TikTok, a social media company from China, which was temporarily removed from app stores on the ground of endangering national security in the United States.¹⁶

This paper critically examines China's national security review regime of foreign investment and to compares it with that of the United States. Part II discusses the four stages of the evolutionary trajectory of national security review in China and summarizes their unique characteristics. Part III analyses the key elements of the current

8. U.S. Department of the Treasury, *CFIUS Monitoring and Enforcement*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-monitoring-and-enforcement> (archived Aug. 21, 2023).

9. Jeanne Whalen, *TikTok Was Just the Beginning: Trump Administration Is Stepping Up Scrutiny of Past Chinese Tech Investments*, WASH. POST (Sept. 29, 2020), <https://www.washingtonpost.com/technology/2020/09/29/cfius-review-past-chinese-investment/> [<https://perma.cc/MR7W-SVEM>] (archived Aug. 21, 2023).

10. *CFIUS Laws and Guidance*, U.S. DEPT OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance>, [<https://perma.cc/WQH3-NRL7>] (archived Aug. 22, 2023).

11. Foreign Investment Risk Review Modernization Act of 2018, H.R. 5841, 115th Cong. (2d Sess. 2018).

12. See *id.*

13. See *FIRRMA FAQs*, U.S. DEPT OF THE TREASURY, <https://home.treasury.gov/system/files/206/FIRRMA-FAQs.pdf>, [<https://perma.cc/3CCR-8WRU>] (archived Aug. 22, 2023).

14. See Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a National Strategic Buyer: Toward a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192, 192–193 (2019).

15. See, e.g., Christopher Balding & Donald C. Clarke, *Who Owns Huawei?* 11 (Apr. 17, 2019) (unpublished paper), <https://dx.doi.org/10.2139/ssrn.3372669> [<https://perma.cc/XAL5-HMC2>] (archived Nov. 11, 2023).

16. See Whalen, *supra* note 9.

regime for national security review in China, including review procedures, legal effects, and enforcement mechanisms. This is followed by Part IV which looks at the national security review regime in the United States. Part V compares the law and practice of national security review in China and the United States, revealing the jurisdictional differences and similarities. Part VI tries to identify the factors contributing to the convergences and divergences between China and the United States and discusses the implications for the future development of national security review.

II. THE EVOLUTION OF CHINA'S NSR

The Foreign Investment Law, enacted in 2020, marks the accomplishment of China's long-planned comprehensive NSR regime.¹⁷ The formation of the Chinese national security review system is a response to the rapid increase in foreign direct investment (FDI) and Mergers & Acquisitions (M&A) in China.¹⁸ China's system tries to maintain a balance between ensuring national security and embracing foreign investment.¹⁹ While China's NSR regime seems to be immediately triggered by several failed acquisitions made by Chinese companies in the United States,²⁰ it is also a long-term strategy for China to cope with the challenges brought by the general economic globalization and the specific China-US tension. The development of China's NSR regime can be broadly divided into four stages.

A. Stage 1 (1979-2003): Market Entry Restrictions

At the first stage, China's national security review system was based on the examination and approval of enterprise establishment and industry access for greenfield investment.²¹ Upon opening up to the world, China reviewed foreign investment and domestic investment in similar ways. The concept of national security first appeared in the 1995 Interim Provisions on Guiding the Orientation of Foreign Investment.²² Under this scheme, foreign-invested projects were categorised as projects that were either encouraged, permitted,

17. See Foreign Investment Law, (promulgated by the Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020).

18. See Qingxiu Bu, *China's National Security Review: A Tit-for-Tat Response*, 6 L. & FIN. MKT. REV. 343, 343, 345 (2012) (describing the respective increases and associated national security concerns).

19. See *id.* at 343.

20. Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L. & BUS. 199, 215 (2012).

21. For more discussions on greenfield investment in China, see Hui Huang, *The Regulation of Foreign Investment in Post-WTO China: A Political Economy Analysis*, 23 COLUM. J. ASIAN L. 185, 187-188 (2009).

22. Zhidao Waishang Touzi Fangxiang Zanzing Guiding (指导外商投资方向暂行规定) [Provisional Regulations on Direction Guide to Foreign Investment] (promulgated by the State Development Planning Commission, the State Economic & Trade Commission and the Ministry of Civil Affairs, June 20, 1995, effective June 20, 1995).

restricted, or prohibited.²³

The legal regime did not provide detailed guidance on what factors the government would consider when reviewing foreign investment in China. The underdevelopment of China's national security review during this period can be explained by economic reasons. Cross-border M&As in the 1990s accounted for only a very small portion of the total FDI in China.²⁴ It was not until China promised to embrace more foreign investment as part of its WTO accession commitments in 2001 that foreign investment started flocking into China.

B. *Stage 2 (2003-2015): NSR for Foreign M&A*

During the second stage, China's national security review became an increasingly important tool to regulate foreign M&As. The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the Foreign M&A Provisions) were issued in 2003.²⁵ These provisions aimed to deal with rapidly growing foreign M&As of domestic companies after China's WTO accession.²⁶ Article 19 required foreign investors to submit a report of national security if the government had deemed it necessary.²⁷ The 2008 Anti-Monopoly Law was enacted to combat monopolistic business activities in China.²⁸ It introduced a specific provision, Article 31, to deal with national security issues in relation to M&As.²⁹ Under this provision, NSR is conducted where a foreign investor merged with or acquired a domestic enterprise and where national security issues were involved.³⁰ Further, in 2006 and 2009, the MOFCOM issued and revised the Provisions on M&A of a Domestic Enterprise by Foreign Investors.³¹ However, all the rules noted above just mentioned the importance of NSR, without

23. *Id.* at art. 4.

24. Huan Zou & Paul Simpson, *Cross-Border Mergers and Acquisitions in China: An Industry Panel Study, 1991–2005*, 14 ASIA PAC. BUS. REV. 491, 492–93 (2008).

25. Waiguo Touzizhe Binggou Jingnei Qiye Zaxing Guiding (外国投资者并购境内企业暂行规定) [Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Foreign Trade and Economic Cooperation, the State Taxation Administration, the State Administration for Industry and Commerce, and the State Administration of Foreign Exchange, Mar. 7, 2003, effective Apr. 12, 2003) [hereinafter 2003 Foreign M&A Provisions].

26. China's Foreign Direct Investment Hits US\$53bln in 2003, January 14, 2004, CONSULATE-GENERAL OF THE PEOPLE'S REPUBLIC OF CHINA IN CHICAGO, <http://www.chinaconsulatechicago.org/eng/zt/aboutchina/t58507.html>, last visited May 1, 2023; Eric Jensen, *Balancing Security and Growth: Defining National Security Review of Foreign Investment in China*, 19 PAC. RIM L. & POL'Y J. 161, 165–66 (2010).

27. 2003 Foreign M&A Provisions, art. 19.

28. Zhonghua Renmin Gongheguo Fanlongduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) [hereinafter Anti-Monopoly Law].

29. *Id.* at art. 31.

30. *Id.*

31. Guanyu Waiguo Touzizhe Binggou Jingnei Qiye De Guiding (关于外国投资者并购境内企业的规定) [Provisions on M&A of a Domestic Enterprise by Foreign Investors] (promulgated by the MOFCOM, Aug. 6, 2006, revised June 22, 2009). For more details, see Hui Huang, *China's New Regulation on Foreign M&A: Green Light or Red Flag?*, 30 UNIV. N.S.W. L. J. 802, 802–03 (2007).

providing detailed guidance on its application.

In 2011, the State Council issued the Notice of the General Office on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011 M&A NSR Notice).³² This regulation provides some detailed guidance on the application of NSR in relation to foreign M&A transactions targeting domestic enterprises. It makes clear that the NSR mainly applies to foreign M&As in several key industries such as national defense and important infrastructural facilities.³³ Subsequently, in the same year, the MOFCOM issued the Provisions on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011 M&A NSR Provisions).³⁴ This regulation provides the legal basis for establishing a mechanism of inter-departmental Joint Meetings under the State Council to handle NSR issues,³⁵ and sets out the procedure for conducting national security review.³⁶

C. Stage 3 (2015-2020): NSR in General

In 2015, China enacted the National Security Law (2015 NSL), elevating national security to the status of national-level strategy for the first time. The law authorizes the government to formulate guidelines for achieving specific national security objectives, strategies, and policies in key fields.³⁷ When ensuring national security, the government is required to consider economic and social development.³⁸ The state's basic economic system and the socialist market economy order must be protected from economic security risks, especially among important industries and crucial economic fields.³⁹ Apart from listing a number of key aspects of state security, the law also contains a provision to give the government broad discretionary power.⁴⁰

Under the 2015 NSL, the government is authorized to establish

32. Guowuyuan Bangongting Guanyu Jianli Waiguo Touzizhe Binggou Jingnei Qiye Anquan Shencha Zhidu De Tongzhi (国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知) [Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the State Council, Feb. 3, 2011, effective Mar. 3, 2011) [hereinafter 2011 M&A NSR Notice].

33. *Id.* at art. 1.

34. Shangwubu Shishi Waiguo Touzizhe Binggou Jingnei Qiye Anquan Shencha Zhidu De Guiding (商务部实施外国投资者并购境内企业安全审查制度的规定) [Provisions of the MOFCOM on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the MOFCOM, Aug. 25, 2011, effective Sept. 1, 2011) [hereinafter 2011 M&A NSR Provisions].

35. *Id.* at art. 3.

36. *Id.* at art. 4.

37. National Security Law (promulgated by the Nat'l People's Cong., July 1, 2015, effective July 1, 2015), art. 6 (China).

38. *Id.* at art. 8.

39. *Id.* at art. 19.

40. *Id.* at art. 34.

mechanisms for conducting NSR in various areas, such as foreign investment transactions, specified materials, key technologies, internet information technology products and services, and construction projects involving national security issues.⁴¹ Relevant departments of the central government are empowered to make and implement national security review decisions.⁴² Local governments are responsible for national security review within their respective administrative regions.⁴³ Overall, the 2015 NSL, as a formal law at the national level, confirms the importance of NSR in the specific area of foreign investment, but does not add much substance to the then-existing regime for conducting NSR for foreign investment.

D. *Stage 4 (From 2020): NSR for Foreign Investment*

The fourth stage is characterized by the formation of a comprehensive NSR framework for all foreign investments. The 2020 Foreign Investment Law clarifies the scope of China's NSR regime, setting up a "pre-establishment national treatment plus negative list" system.⁴⁴ Foreign investors may not invest in a field on the "negative list for access of foreign investment,"⁴⁵ while national treatment will be accorded to foreign investment outside of the negative list.⁴⁶ If a foreign investment project is not on the negative list, it will be deemed not to be a threat to China's national security.⁴⁷

To further facilitate the application of NSR, the NDRC issued the Measures for the Security Review of Foreign Investment (the 2020 NSR Measures) on November 27, 2020, which entered into force on January 18, 2021.⁴⁸ This rule extends the NSR regime from foreign M&A transactions to cover greenfield foreign investment. Further, it introduces two types of review processes, namely general review and special review.⁴⁹ Under the leadership of the NDRC and the MOFCOM, the Office of the Working Mechanism was established to take responsibility for the routine NSR work, replacing the former "Joint Meeting" mechanism.⁵⁰ Interestingly, the new office is located in the NDRC, which means that the NDRC replaces the MOFCOM as the leading NSR regulator.⁵¹ In summary, the 2020 NSR Measures have made significant improvements on China's NSR regime in terms

41. *Id.* at art. 59.

42. *Id.* at art. 60.

43. *Id.* at art. 61.

44. Foreign Investment Law (promulgated by the Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020), art. 4 (China).

45. *Id.* at art. 28.

46. *Id.* at art. 4.

47. *Id.* at art. 6.

48. Waishang Touzi Anquan Shencha Banfa (外商投资安全审查办法) [Measures for the Security Review of Foreign Investments] (promulgated by the NDRC, Nov. 27, 2020, effective Jan. 18, 2021) (China) [hereinafter 2020 NSR Measures].

49. *Id.* at art. 8.

50. *Id.* at art. 3.

51. *Id.* at art. 3. This provision puts the NDRC in front of the MOFCOM, which means the NDRC outranks the MOFCOM in dealing with NSR issues.

of its scope of application and procedures.

Finally, China has continuously improved the “negative list” system as a key component of the NSR regime. In 2015, the State Council issued the Opinions of the State Council on Implementing the Market Access Negative List Regime, providing guidance for the establishment of a negative list system for domestic and foreign investments, respectively, for the first time.⁵² Since 2018, the NDRC and the MOFCOM have jointly issued the Special Administrative Measures for Foreign Investment Access Negative List (Negative List Measures).⁵³ The 2020 Export Control Law⁵⁴ and the 2020 Provisions on the Unreliable Entity List (the Unreliable Entity List Provision)⁵⁵ were promulgated to supplement the negative list system.

III. CHINA'S CURRENT NSR REGIME

The 2020 Foreign Investment Law and the 2020 NSR Measures are the main components of China's current NSR regime. Further, the two regulations issued in 2011 to deal with M&A transactions are still in effect, namely 2011 M&A NSR Notice and the 2011 M&A NSR Provisions. When it comes to reviewing foreign M&A transactions, the specific rules in the two M&A regulations issued in 2011 will apply where the 2020 Foreign Investment Law and the 2020 NSR Measures are silent or unclear on relevant matters.

A. Overview

1. Key Concepts

Under the 2011 M&A NSR Notice, the scope of NSR includes foreign M&A of domestic enterprises in key areas such as military industries, major and sensitive military facilities, and other entities relating to the national defense security.⁵⁶ NSR can be triggered if a foreign investor becomes the controlling shareholder or actual

52. Guowuyuan Guanyu Shixing Shichang Zhunru Fumian Qingdan Zhidu De Yijian (国务院关于实行市场准入负面清单制度的意见) [Opinions of the State Council on Implementing the Market Access Negative List Regime] (promulgated by the State Council, Oct. 2, 2015, effective Dec. 1, 2015), https://www.chinadaily.com.cn/business/2015-11/13/content_22446386.htm (last visited Aug. 20, 2023) [<https://perma.cc/KN34-ERXS>] (archived Aug. 23, 2023).

53. The most updated version was issued in 2021. See Waishang Touzi Zhunru Tebie Guanli Cuoshi Fumian Qingdan Erling Eryi Nian Ban (外商投资准入特别管理措施 (负面清单) (2021年版)) [Special Administrative Measures for Foreign Investment Access Negative List] (promulgated by the NDRC and the MOFCOM, Dec. 27, 2021, effective Jan. 1, 2022) [hereinafter 2021 Negative List Measures].

54. Zhonghua Renmin Gongheguo Chukou Guanzhi Fa (中华人民共和国出口管制法) [The Export Control Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Oct. 17, 2020, effective Dec. 1, 2020) [hereinafter the 2020 Export Control Law].

55. Bukekao Shiti Qingdan (不可靠实体清单规定) [The Provisions on the Unreliable Entity List] (promulgated by the State Council, Sept. 19, 2020, effective Sept. 19, 2020).

56. 2011 M&A NSR Notice, arts. 1.1–1.2.

controller of a domestic enterprise through M&A.⁵⁷ If the foreign investor's share of a domestic enterprise exceeds 50 percent, or has enough voting power to exert a material impact on corporate resolutions, the investor will be regarded as having actual control of the domestic enterprise.⁵⁸

Under the 2020 Foreign Investment Law, foreign investors and foreign-funded enterprises conducting investment activities within China are prohibited from compromising China's national security.⁵⁹ A "foreign investment" means investment activities within mainland China directly or indirectly conducted by foreign natural persons, enterprises, and other organizations.⁶⁰ A "foreign-funded enterprise" means an enterprise formed and registered within mainland China under Chinese laws in which all or part of the investment is made by a foreign investor.⁶¹ The 2015 NSL defines "national security" as a status in which major state interests are not threatened internally or externally.⁶²

The 2020 NSR Measures provide further guidance on the relevant terms. For instance, "foreign investment" means the investing activities conducted by a foreign investor directly or indirectly in China, including investing in a new project or by the formation of an enterprise, investing via M&A, or investing by any other means.⁶³

The NSR regime covers the following industries: (1) Foreign investment in the arms industry. This includes an ancillary to the arms industry, or any other field related to national defense security.⁶⁴ The law also mentions foreign investments in sensitive areas surrounding a military installation or an arms industry facility;⁶⁵ (2) Foreign investment in several key manufacturing and other industries where the foreign investor has actual control. The law enumerates extensively the industries, like critical equipment manufacturing, important agricultural products and key technology, followed by a catch-all provision (any other important fields related to national security);⁶⁶ (3) Where a foreign investor's purchase of stock in a Chinese listed company affects national security, the specific national security review rules shall be formulated by the CSRC in conjunction with the Office of the Working Mechanism.⁶⁷

57. *Id.* at arts. 1.1, 1.3.

58. *Id.* at art. 1.3.

59. *Id.* at art. 6.

60. *Id.* at art. 2.

61. *Id.*

62. National Security Law of the People's Republic of China 2015 (2015 NSL) (中华人民共和国国家安全法), art. 2.

63. 2020 NSR Measures, art. 2.

64. *Id.* at art. 4.

65. *Id.* at art. 4.

66. *Id.* at art. 4.

67. *Id.* at art. 22.

2. Office of the Working Mechanism Decision-Making Factors

The 2020 NSR Measures does not clarify what factors the Office of the Working Mechanism may consider when making decisions. Thus, the 2011 M&A NSR Notice continues to be relevant in shedding light on the factors that the Office of the Working Mechanism may consider in the NSR exercise:

- (1) The influence of M&A transactions on the national defense security must be reviewed, including the ability for producing domestic products and providing domestic services required for national defense and the relevant equipment and facilities
- (2) The influence of M&A transactions on the stable operation of the national economy
- (3) The influence of M&A transactions on the order of basic social life
- (4) The influence of M&A transactions on the capacity of research and development of key technologies involving national security.⁶⁸

Article 7 of the 2020 Unreliable Entity List Provisions enumerates the relevant factors that may lead to a foreign entity being considered unreliable, including: (1) the degree of danger to national sovereignty, security or development interests of China; (2) the degree of damage to the legitimate rights and interests of enterprises, other organizations, or individuals of China; (3) whether there is compliance with internationally accepted economic and trade rules; and (4) other factors that shall be considered.⁶⁹

B. Review Agencies

1. The Agency that Accepts Applications

Under the 2011 M&A NSR Notice, the MOFCOM is the agency authorized to accept NSR applications for foreign M&A deals.⁷⁰ The NSR application is usually made by foreign investors. The foreign investor needs to file an application with the MOFCOM, which will then request that members of the Joint Meeting review the transaction within five workdays.⁷¹ If the applicant fails to apply, the local department of commerce shall require the applicant to file an application within five workdays and report the relevant situations to the MOFCOM.⁷² There are other ways to initiate the NSR process. For instance, the relevant department of the State Council,⁷³ a national

68. 2011 M&A NSR Notice, art. 2.

69. The Provisions on the Unreliable Entity List (promulgated by the State Council, Sept. 19, 2020, effective Sept. 19, 2020), art. 7.

70. 2011 M&A NSR Provisions, art. 1.

71. *Id.* at art. 3.

72. *Id.* at art. 2.

73. The State Council (国务院) is the Chinese central government.

industrial association, an enterprise of the same profession, or an upstream/downstream enterprise may propose a security review to the MOFCOM. Further, the members of the Joint Meeting may decide to conduct a security review if they deem it necessary.⁷⁴

The 2020 NSR Measures refine the review procedures, stipulating three ways to initiate the NSR process: (1) A foreign investor is obligated to proactively report the foreign investment within certain sensitive areas to the Office of the Working Mechanism; (2) The Office of the Working Mechanism has the power to require the foreign investor to report the investment within these areas;⁷⁵ (3) A relevant agency, enterprise, social group, or member of the general public among others may propose a security review to the Office of the Working Mechanism if it deems that necessary.⁷⁶

2. The Agency that Makes Decisions

Although the MOFCOM is responsible for accepting NSR applications from foreign investors, it does not make the final decision on the application. The 2011 M&A NSR Notice established a system of Joint Meeting for making review decisions.⁷⁷ Members of the Joint Meeting were from the State Council, the NDRC, the MOFCOM, and other relevant departments.⁷⁸ However, the 2011 M&A NSR Notice did not clearly delineate the division of power between the NDRC and the MOFCOM.

The 2020 Foreign Investment Law extends the NSR regime from foreign M&A transactions to all foreign investments, stating that the NSR regime is administered by the commerce department and the investment department.⁷⁹ Later, the 2020 NSR Measures were issued to establish a Working Mechanism for carrying out the NSR of foreign investment.⁸⁰ Under the joint leadership of the NDRC and the MOFCOM, the Office of the Working Mechanism is responsible for the routine work of NSR.⁸¹ Importantly, the Office of the Working Mechanism is located within the NDRC,⁸² which is empowered to formulate and implement strategies of national economic and social development and to coordinate economic and social development. As such, the NDRC seems to take on a more important role in the NSR process than the MOFCOM under the 2020 NSR Measures.

74. 2011 M&A NSR Notice, art. 4.

75. 2020 NSR Measures, art. 4.

76. *Id.* at art. 15.

77. 2011 M&A NSR Notice (promulgated by the State Council, Feb. 3, 2011, effective Mar. 3, 2011), art. 3.

78. *Id.* at art. 3.

79. Foreign Investment Law, art. 7.

80. 2020 NSR Measures, art. 3.

81. *Id.*

82. *Id.*

C. Review Procedures

1. Filing Procedures and Documents

The 2011 M&A NSR Provisions set out procedural rules for the NSR process. If the NSR application documents submitted are complete, the MOFCOM will notify the applicant in writing of receipt of the application. If the transaction falls within the scope of M&A security review, the MOFCOM shall notify the applicant in writing within fifteen workdays and, within five workdays thereafter, submit it to the Joint Meeting for review.

The 2020 NSR Measures refine the filing procedures. Under Article 4 of this instrument, if foreign investors want to make investments in China in relevant areas of national security concerns, they have an affirmative duty to report the investment to the Office of the Working Mechanism prior to actually making the investment. Article 6 requires the submission of relevant documents and information for the reporting purposes.⁸³

Within fifteen working days of receiving the relevant materials, the Office of the Working Mechanism will decide whether a security review is required.⁸⁴ The foreign investor will be notified in writing to continue the investment if the Office of the Working Mechanism finds that the investment does not require national security review.⁸⁵ If a national security review is required, then the Office of the Working Mechanism will take the case further to the review stage, which will be discussed in more detail in the following sections.

2. Formal Review and Informal Consultation

The 2011 M&A NSR Notice provides for two kinds of review processes: general review and special review. For a transaction that may give rise to national security concerns, a general review will first be conducted and, if the transaction fails to pass the general review, a special review will follow.⁸⁶ Under the 2020 NSR Measures, the general review shall be completed by the Office of the Working Mechanism within thirty working days.⁸⁷ After the general review, the Office of the Working Mechanism decides whether to initiate a special review.⁸⁸

There may be a voluntary informal consultation process between the foreign investor and the MOFCOM. The foreign investor may submit a consultation application to the MOFCOM to discuss its case before filing a formal application. The consultation is not a procedure that the foreign investor must go through before filing a formal application, and the result of the consultation will not have any binding

83. *Id.* at art. 6.

84. *Id.* at art. 7.

85. *Id.*

86. 2011 M&A NSR Notice, art. 4.

87. 2020 NSR Measures, art. 8.

88. *Id.* at art. 8.

legal effect.⁸⁹ This informal consultation mechanism offers a useful channel for foreign investors to communicate with the regulators before embarking on the burdensome NSW process.

D. *Review Decisions*

Under the 2020 NSR Measures, the Office of the Working Mechanism can make three types of decisions. Firstly, if the foreign investment does not affect national security, it will pass the security review. Secondly, if the reported foreign investment affects national security, it will prohibit the investment. The foreign investor should stop the investment or dispose of its equities or assets and take necessary measures to eliminate the harmful effect on national security.⁹⁰ Thirdly, if the imposition of conditions accepted by the foreign investor in writing is sufficient to eliminate the effect on national security, the security review can be passed conditionally. The party shall make the investment subject to the imposed conditions.⁹¹

There are certain legal consequences for foreign investors who violate the NSR regime. For instance, where a foreign investor within the reporting scope fails to report, the Office of the Working Mechanism shall order the foreign investor to report or dispose of its resultant equities or assets within a specified period and take necessary measures to eliminate the effect on national security.⁹² Further, where a foreign investor provides any false material or conceals any relevant information, the Office of the Working Mechanism shall order it to take corrective action or revoke the relevant decision, or order the party to dispose of its resultant equities or assets within a specified period and take necessary measures to eliminate the effect on national security.⁹³ Moreover, where any foreign investor fails to make the investment in compliance with the imposed conditions, the Office of the Working Mechanism shall order it to take corrective action or order it to dispose of its resultant equities or assets within a specified period and take necessary measures to eliminate the effect on national security.⁹⁴ Finally, if the foreign investor does not comply with the law, it will receive negative credit, which shall be included in the relevant credit information system of the state.⁹⁵

89. 2011 M&A NSR Provisions, art. 4; 2020 NSR Measures, art. 5.

90. 2020 NSR Measures, art. 12.

91. *Id.*

92. 2020 NSR Measures, art. 16.

93. *Id.* at art. 17.

94. *Id.* at art. 18.

95. *Id.* at art. 19.

IV. THE NSR REGIME IN THE UNITED STATES

A. Overview

Compared to China, the United States has a much longer history of national security review.⁹⁶ The Defense Production Act of 1950 is the major legal instrument for NSR in the United States, and it has been supplemented by other laws such as the Foreign Investment and National Security Act of 2007.⁹⁷ During the 1980s, several high-profile foreign takeovers of American enterprises led to the enactment of the 1988 Exon-Florio Amendment.⁹⁸ Section 721 of the Defense Production Act of 1950 was introduced as the legal basis for the establishment of the CFIUS, which is authorized to conduct the NSR review of relevant M&A transactions.⁹⁹

B. *The 1950 Defense Production Act*

1. Substantive Rules

Section 721 of the Defense Production Act covers any merger, acquisition, or takeover that is proposed or pending by or with any foreign person, and that could result in foreign control of any person engaged in interstate commerce in the United States.¹⁰⁰ However, the law does not provide a clear definition of national security; instead, it enumerates several factors for the government to take into account.¹⁰¹ In general, there must be a possibility that a foreign company may obtain sensitive technology or may dominate an industry deemed critical for national defense.¹⁰² The NSR regime applies to the so-called “foreign government-controlled transaction,” namely transactions that could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by a foreign government.¹⁰³ “National security” refers to issues relating to “homeland security,” including critical infrastructure.¹⁰⁴

The eleven consideration factors are specified in Section 721(f), covering major aspects of the capacity of domestic industries to meet

96. See Sam Karson, *Caught Between Superpowers: Alaska's Economic Relationship with China Amidst the New Cold War*, 36 ALASKA L. REV. 47, 47 (2019).

97. Foreign Investment and National Security Act of 2007 (FISIA), Pub. L. No. 110-49, 121 Stat. 246.

98. *CFIUS Laws and Guidance*, U.S. DEPT OF TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance> [https://perma.cc/BGM7-STEE] (archived Aug. 9, 2023).

99. Christina E. Holzer, *Committee on Foreign Investment in the United States and Judicial Review*, 13 J. INT'L BUS. & L. 169, 170–172 (2014).

100. Defense Production Act of 1950 § 721(a)(3), 50 U.S.C. § 4501 (2023).

101. Yang Wang, *Incorporating the Third Branch of Government into US National Security Review of Foreign Investment*, 38 HOUS. J. INT'L L. 323, 325 (2016).

102. Defense Production Act of 1950 § 721(a)(4), 50 U.S.C. § 4501 (2023).

103. *Id.* § 721(a)(4).

104. *Id.* §§ 721(a)(5)–(6).

national defense requirements.¹⁰⁵ For instance, the CFIUS will consider the potential effects of the proposed transaction on sales of military goods, equipment, or technology to any country that supports terrorism, and on the United States' international technological leadership, critical infrastructure, and critical technologies.¹⁰⁶ Foreign government-controlled transactions will be reviewed with more care.¹⁰⁷ There is a catch-all provision, which allows the president and the CFIUS to consider "other factors" as appropriate during the NSR process.¹⁰⁸

2. Procedural Rules

As a multi-agency committee, the CFIUS is mandated to perform the function of conducting NSR for relevant foreign investments in the United States.¹⁰⁹ When the CFIUS was established in 1975, it was perceived as a paper tiger due to its lack of enforcement power.¹¹⁰ In response to growing concerns about foreign takeovers, the US Congress passed the Omnibus Trade and Competitiveness Act of 1988.¹¹¹ It included the Exon-Florio Amendment, endowing the CFIUS with greater authority.¹¹² Any party or parties to any covered transaction is able to initiate a review of the transaction by submitting a written notice to the Chairperson of the CFIUS. Upon receiving written notification of any covered transaction, the president can review the transaction through the CFIUS to determine its effects on the national security.¹¹³ The review should be completed within thirty days.¹¹⁴ Besides the foreign investor, the president or the CFIUS may initiate a review if the foreign investor submits false or misleading material information, omitted material information, or intentionally and materially breaches a mitigation agreement.¹¹⁵

The review may be accompanied by an investigation process under certain conditions. The CFIUS will immediately conduct a national security investigation and take any necessary actions if a review of a covered transaction produces relevant findings, including but not limited to: first, the transaction threatens to impair the national security, which has not been mitigated during or prior to the review; second, the transaction is a foreign government-controlled transaction;

105. *Id.* § 721(f).

106. *Id.* § 721(f).

107. *Id.* § 721(f)(8).

108. *Id.* § 721(b)(1)(A).

109. *Id.* § 721(k).

110. Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 *NW. J. INT'L. & BUS.* 199, 215 (2012).

111. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (codified at 50 USC app. § 2170 (2012)).

112. Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 *NW. J. INT'L. & BUS.* 199, 215 (2012).

113. *Id.* § 721(b)(1)(A).

114. *Id.* § 721(b)(1)(E).

115. *Id.* § 721(b)(1)(D).

third, the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person.¹¹⁶ The CFIUS must determine that the transaction could impair national security, which has not been mitigated by assurances provided or renewed with the approval of the CFIUS.¹¹⁷ When the lead agency recommends and the CFIUS concurs, the CFIUS will conduct an investigation.¹¹⁸ An investigation should be completed within forty-five days.¹¹⁹ There are exceptions to the investigation when the Secretary of the Treasury and the head of the lead agency jointly determine that the transaction will not impair the national security.¹²⁰

Certain actions and findings of the president under Section 721(d) are non-reviewable.¹²¹ Under Section 721(d)(1), the president may take action to suspend or prohibit any covered transaction that threatens to impair national security and direct the attorney general to seek appropriate relief in the district courts to enforce the action.¹²² Furthermore, the president's findings under Section 721(d)(4) shall not be subject to judicial review.¹²³ This has been criticized as a violation of the due process rights of investors and an abuse of power by the executive branch.¹²⁴ Further, it has been argued that the CFIUS may pose a threat to economic productivity in an arbitrary and capricious manner.¹²⁵

Although the presidential findings and actions are exempted from judicial review under Section 721, the CFIUS decision may arguably be subject to judicial review.¹²⁶ The case of *Ralls* is the first judicial review case that challenged the CFIUS's decision to block a foreign investment.¹²⁷ In 2012, Ralls Corporation, a Chinese-owned Delaware company, planned to develop windfarms near the military zone of the US Navy.¹²⁸ The CFIUS blocked the transaction based on national security grounds, backed by President Obama's Presidential order.¹²⁹ Ralls filed a lawsuit for declaratory and injunctive relief against the CFIUS, claiming the violation of its due process rights.¹³⁰ Ralls

116. *Id.* § 721(b)(2)(A)(B).

117. *Id.* § 721(b)(2)(B).

118. *Id.* § 721(b)(2)(ii).

119. *Id.* § 721(b)(2)(C).

120. *Id.* § 721(b)(2)(D)(i).

121. *Id.* § 721(e).

122. *Id.* § 721(d)(1).

123. *Id.* § 721(e).

124. Wang, *supra* note 101, at 327.

125. Saha, *supra* note 20, at 200.

126. 50 U.S.C. § 2170(c) (2011). When CFIUS gives foreign entities a negative review, none of them have ever sought judicial review before the case of *Ralls*. See Holzer, *supra* note 99, at 181.

127. *Ralls and US Government Settle Only CFIUS Suit in History*, STEPTOE (Oct. 14, 2015), <https://www.steptoointernationalcomplianceblog.com/2015/10/ralls-and-u-s-government-settle-only-cfius-suit-in-history/> [https://perma.cc/T7ZC-FXF8] (archived Aug. 10, 2023).

128. See *Ralls Corp. v. Comm. on For. Inv. In the U.S.*, 926 F.Supp.2d 71, 75–76 (2013).

129. See *id.* at 76.

130. See *id.*

asserted that the CFIUS acted arbitrarily and capriciously beyond the scope of its empowerment,¹³¹ and the District Court had jurisdiction over the claim. The complaint was dismissed by the district court,¹³² but on appeal, the D.C. Circuit held that a constitutional claim challenging the process preceding the presidential action is reviewable despite the fact that final actions of the president are non-reviewable.¹³³ *Ralls* may set a dangerous precedent for judicial interference in national security and diplomacy.¹³⁴ However, the president's power to block transactions based on CFIUS recommendations remains unchanged.

C. *The 2018 FIRRMA*

The United States has failed to adequately screen foreign investment that has been pouring in from China and other countries in recent years, particularly low-profile venture-capital investments.¹³⁵ In response, the United States passed FIRRMA on 13 August 2018 to boost the CFIUS's funding and powers.¹³⁶ FIRRMA formed one part of a comprehensive defense bill for Fiscal Year 2019, signed by President Trump, and was largely a response to the Trump Administration's concerns over Chinese investment in the United States. Specifically, it mainly seeks to prevent the transfer of US technology by Chinese investors.¹³⁷

FIRRMA has systematically amended the current national security review regime in the United States. Although the law was not applied exclusively to Chinese investments, it primarily targets China.¹³⁸ It expands the scope of covered transactions and broadens the purview of the CFIUS.¹³⁹ The Department of the Treasury regards this law to be revolutionary for the landscape of foreign investment and the NSR regime in the United States.¹⁴⁰ However, these changes may also increase the possibility of politicizing NSR and compressing review relief channels.

131. *See id.* at 81.

132. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 71 (D.D.C. 2013).

133. *See generally* *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

134. Christopher M. Fitzpatrick, *Where Ralls Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1096 (2016).

135. Whalen, *supra* note 9.

136. FIRRMA, § 1702(b)(5); Sam Karson, *Caught Between Superpowers: Alaska's Economic Relationship with China Amidst the New Cold War*, 36 ALASKA L. REV. 47, 47 (2019).

137. Paul B. Edelberg, *Can Chinese Companies Still Invest in the United States: The Impact of FIRRMA*, 16 US-CHINA L. REV. 12, 13 (2019).

138. *See id.*

139. FIRRMA FAQs, U.S. DEPT OF TREASURY, at 1 <https://home.treasury.gov/system/files/206/FIRRMA-FAQs.pdf> [<https://perma.cc/C5QR-9C3A>] (archived Aug. 11, 2023).

140. *Id.*

1. Substantive Rules

Generally, FIRRMA covers any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person.¹⁴¹ These transactions could result in foreign control of any US business, including those carried out through a joint venture.¹⁴² The law can trace back to foreign deals struck as early as thirty-five years ago (August 23, 1988),¹⁴³ and, thus, all the investments in the recent era of globalisation since the 1990s will be examined and reviewed. Section 1702(c) of FIRRMA lists factors to be considered.¹⁴⁴ For instance, the CFIUS must consider whether a covered transaction involves a “country of special concern” that has shown a strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US leadership in areas related to national security.¹⁴⁵

Specifically, there are four new types of covered transactions: (1) a purchase, lease, or concession by or to a foreign person of real estate located in proximity to sensitive government facilities, which may function as part of an air or maritime port or provide the foreign person with the ability to collect intelligence; (2) any other investments by a foreign person in any critical technologies, critical infrastructure, and sensitive personal data of American citizens, which are collectively referred to as the “TID” business; (3) any change in a foreign investor’s rights resulting in foreign control of a US business or an “other investment” in the third category above; (4) any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction.¹⁴⁶

There are two highlights in FIRRMA reform, namely certain sensitive real estate investments and the TID investments.¹⁴⁷ On one hand, for the foreign acquisition of real estate, the law focuses on the proximity of the real estate to certain specified military and other government installations.¹⁴⁸ On the other hand, the CFIUS’s jurisdiction is expanded to cover small, non-controlling investments in

141. See Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), H.R. 5515, § 1703(4)(B) (2018).

142. *Id.* § 1703(4)(B) (2018).

143. This provision can be used to target off-shore joint ventures, which have been formed in the past years. To avoid CFIUS, U.S. companies used to transfer their assets to off-shore joint ventures (including Chinese joint ventures). See Edelberg, *supra* note 137.

144. *Id.* § 1702(c).

145. *Id.*

146. *Id.* § 1703(a)(4); see *Summary of the Foreign Investment Risk Review Modernization Act of 2018*, U.S. DEPT OF TREASURY, <https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf>. [<https://perma.cc/8N9W-6LPX>] (archived Aug. 13, 2023).

147. See Timothy J. Keeler, Duane W. Layton & Mickey Leibner, *US Treasury Finalizes Regulations to Expand CFIUS Reviews of Foreign Investment in the US*, MAYER BROWN (Jan. 15, 2020), <https://www.mayerbrown.com/en/perspectives-events/publications/2020/01/us-treasury-finalizes-regulations-to-expand-cfius-reviews-of-foreign-investment-in-the-us> [<https://perma.cc/2C5Y-Y693>] (archived Aug. 11, 2023).

148. See *id.*

the TID business.¹⁴⁹ FIRRMA covers these two types of investments, even if the foreign party does not gain control over the business.¹⁵⁰

The CFIUS is particularly focused on foreign companies that collect sensitive personal information. It will pay special attention to foreign investment in critical technologies such as chip and battery technology and biotechnology.¹⁵¹ In practice, the federal government has been sending national security officials to tech leaders to caution them about accepting Chinese investments.¹⁵²

2. Procedural Rules

In order to make the NSR more efficient, FIRRMA makes several important changes to the filing process. The new “declarations” procedure grants the CFIUS-wide discretionary power to require parties to file before closing a transaction.¹⁵³ To allow the CFIUS to better carry out its work, the review timelines are expanded: The CFIUS’s review period is increased from thirty days to forty-five days, and the period of an investigation is extended for an additional fifteen-day period under extraordinary circumstances.¹⁵⁴ In addition to the timelines, the law strengthens the requirements on the use of mitigation agreements, including compliance plans.¹⁵⁵ It gives special hiring authority to the CFIUS and establishes a fund for collection of new CFIUS filing fees.¹⁵⁶

FIRRMA also provides for exceptions to the filing requirement.¹⁵⁷ These exemptions generally apply to investors from “excepted foreign states” (the UK, Canada, and Australia) and investment funds managed exclusively and ultimately controlled by US nationals.¹⁵⁸

It is important to note that Section 1719(b) mandates periodic reports on Chinese investments in the United States.¹⁵⁹ Every two years after the enactment of FIRRMA through 2026, the Secretary of Commerce must submit to the US Congress and the CFIUS a report on foreign direct investment transactions made by Chinese entities in the United States.¹⁶⁰ This requirement seems to be a response to China’s initiative of “Made in China 2025,” under which the Chinese government aims to raise the domestic content of core components and

149. *See id.*

150. *See id.*

151. *Id.* § 1703(6).

152. Whalen, *supra* note 9.

153. FIRRMA, § 1706.

154. *Id.* § 1709.

155. *Id.* § 1718.

156. *Id.* § 1723(3).

157. For instance, Section 1706 (v)(IV)(bb)(CC) of the 2018 FIRRMA provides exceptions for a foreign investor to submit a declaration.

158. *See* Christine Daya, *New Regulations Reinforce CFIUS’s Expanded Role with Respect to Foreign Investments in the United States*, DLA PIPER (Jan. 16, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/01/new-regulations-reinforce-cfius-expanded-role/> [https://perma.cc/95EU-MKS3] (archived Aug. 23, 2023).

159. Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, § 1719(b) (2018).

160. *See* FIRRMA, § 1719(b)(1), 50 U.S.C. § 4565.

materials to 70 percent by 2025.¹⁶¹ The US government reached a consensus that the “Made in China 2025” initiative poses a special national security threat to the US economy and technological advantages. Indeed, one of the explicit objectives of FIRRMA is to prevent the transfer of technology to Chinese companies.¹⁶²

D. *The 2022 Executive Order*

To cope with evolving national security risks, President Biden signed an executive order on September 15, 2022.¹⁶³ It is the first executive order to provide formal presidential direction on national security review.¹⁶⁴ The 2022 Executive Order explicitly ties the CFIUS’ role with the US government’s overall national security priorities. It was mainly targeted at risks from a “country of special concern,”¹⁶⁵ which has been emphasized by Section 1702(c) of FIRRMA. The executive order is a result of heightened geopolitical competition between the US and China.¹⁶⁶

In conjunction with the old factors,¹⁶⁷ the 2022 Executive Order added several new national security factors.¹⁶⁸ After the reforms, the CFIUS received greater powers and responsibilities. On October 20, 2022, the CFIUS released its first-ever enforcement and penalty guidelines, which came just a few weeks after President Biden issued an executive order.¹⁶⁹ The table below compares the consideration factors of the 2018 FIRRMA and the 2022 Executive Order.

161. See Melissa Cyrill, *What is Made in China 2025 and Why Has it Made the World So Nervous?*, CHINA BRIEFING (Dec. 28, 2018), <https://www.china-briefing.com/news/made-in-china-2025-explained/> [https://perma.cc/WT35-KU8Q] (archived Aug. 23, 2023).

162. See Edelberg, *supra* note 137, at 14.

163. See Exec. Order No. 14,083, 87 Fed. Reg. 57,369 (Sept. 15, 2022) (The White House Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States); THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN SIGNS EXECUTIVE ORDER TO ENSURE ROBUST REVIEWS OF EVOLVING NATIONAL SECURITY RISKS BY THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/> [https://perma.cc/7SRF-4RER] (archived Aug. 23, 2023).

164. See THE WHITE HOUSE, *supra* note 163.

165. See Exec. Order No. 14,083, 87 Fed. Reg. 57,369, § 1.

166. See *President Biden Issues Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, 117 AM. J. INT’L L. 340, 341 (Apr. 2023).

167. See Defense Production Act § 721(f), 50 U.S.C. § 4565; Foreign Investment Risk Review Modernization Act of 2018 § 1702(c), 50 U.S.C. § 4565.

168. See Exec. Order No. 14,083, 87 Fed. Reg. 57,369, § 2.

169. See U.S. DEP’T OF TREASURY, CFIUS ENFORCEMENT AND PENALTY GUIDELINES (2022), <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines> [https://perma.cc/2ZAL-2967] (archived on Aug. 23, 2023).

Table 1: Consideration Factors of the 2018 FIRRMA and the 2022 Executive Order

	2018 FIRRMA	2022 Executive Order
Consideration Factors	(1) a “country of special concern”; (2) control of critical infrastructure, energy asset, critical material, or critical technology; (3) foreign person’s US law compliance history; (4) control of US industries and commercial activity, including the availability of human resources, products, technology, materials, and other supplies and services; (5) sensitive data; (6) cybersecurity risks.	(1) resilience of critical US supply chains, including those outside of the defense industrial base; (2) US technological leadership in key areas (microelectronics, AI, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies); (3) industry investment trends; (4) cybersecurity risks; (5) sensitive data.

The reforms reflect the evolutionary nature of US national security review laws and policies.¹⁷⁰ The 2018 FIRRMA and the 2022 Executive Order have some common grounds. First, both address geopolitical risks from China, which is arguably the United States’ top rival in the world. Second, both emphasize personal data protection and cybersecurity, stressing critical technologies and infrastructure. However, their focuses are different. While the 2018 FIRRMA focuses on the more traditional spheres of national security, the 2022 Executive Order aims at filling loopholes in NSR practices. The CFIUS began to bring new factors into consideration, such as the resilience of critical US supply chains and US technological leadership in AI and other key areas.

There are several possible explanations for the evolution of the US NSR regime. First, the 2018 FIRRMA was enacted in an era when the Sino-US trade war had just begun. Among others, the Trump administration’s main goal was to ensure the United States’ economic interests and network security and to prevent intellectual property theft, brain drain, and job losses. The cases of Huawei and TikTok were rare examples that cannot indicate a full-scale Sino-US tech war.¹⁷¹ When Biden took office, the tech war was fully underway, as the 2022

170. See THE WHITE HOUSE, *supra* note 163.

171. See Grant Schneider, *President Trump Unveils America’s First Cybersecurity Strategy in 15 Years*, NAT’L SEC. & DEF. (Sept. 20, 2018), <https://trumpwhitehouse.archives.gov/articles/president-trump-unveils-americas-first-cybersecurity-strategy-15-years/> [<https://perma.cc/6Q2Y-4N8W>] (archived Aug. 23, 2023).

CHIPS and Science Act illustrate. The Science Act requires that funded recipients do not build certain facilities in China.¹⁷² The Biden administration needed to further impose a technological blockade on China to ensure its leading position in key areas such as artificial intelligence technology.¹⁷³ Second, the COVID-19 pandemic has exerted great impacts on the Sino-US relationship. As the world's factory, China implemented a stringent Zero-COVID policy that led to serious supply chain crises in the US.¹⁷⁴ Therefore, the 2022 Executive Order attaches great importance to the United States' supply chain security and economic independence from China.

V. A CHINA-US COMPARISON OF NSR: LAW AND PRACTICE

The preceding Parts have discussed the NSR regime in China and the United States separately. This Part will look at them together from a comparative perspective. The examination will include both the law on the books and the law in practice. This comparative study is important not only because China and the United States are two important jurisdictions but also because they actually interact to influence the way the NSR regime evolves in each of them.

A. *Comparing the Law on the Books*

In China, the enactment of the 2020 Foreign Investment Law laid the legal basis for establishing a comprehensive NSR framework for all foreign investments, including foreign M&A transactions and greenfield investment.¹⁷⁵ The 2021 NSR Measures added more details to the implementation of the review decision-making and enforcement process. The 2011 M&A NSR Notice and the 2011 M&A NSR Provisions continue to apply as specific rules for foreign M&A transactions. The MOFCOM serves as the agency that accepts NSR applications, while the Office of the Working Mechanism located within the NDRC is tasked with making decisions. The foreign investor as well as other organizations can initiate the NSR. There is an informal consultation process between the foreign investor and the Chinese regulators.

In the United States, the 2018 FIRRMA and the 2022 Executive Order expanded the NSR regime from covering only foreign takeovers to covering foreign acquisition of real estate and the TID business.¹⁷⁶ To make the review mechanism more efficient, the review process was

172. See Chips and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366.

173. See Ellen Nakashima & David J. Lynch, *Biden Order Proposes New Restrictions on China Tech Investment*, Wash. Post (Aug. 9, 2023), <https://www.washingtonpost.com/national-security/2023/08/09/china-ban-technology-biden-military/> [<https://perma.cc/manage/create?folder=18940>] (archived Aug. 23, 2023).

174. See Martin Farrer, *Zero-Covid Policy Is Costing China Its Role As The World's Workshop*, GUARDIAN (Dec. 3, 2022), <https://www.theguardian.com/world/2022/dec/03/zero-covid-policy-is-costing-china-its-role-as-the-worlds-workshop>, [<https://perma.cc/E86A-BXW2>] (archived Aug. 23, 2023).

175. See *supra* Part II.

176. See *supra* Part IV.

streamlined and the CFIUS was granted more discretionary powers. As the United States' biggest rival, China seems to be the major target of the NSR reforms in the US. For instance, real estate investments and TID investments are highlighted against the backdrop of the China-US trade and tech wars. The periodic reporting regime on Chinese investments in the United States is also closely related to China's "Made in China 2025" initiative.

The table below summarizes some important aspects of the NSR regime in China and the United States.

Table 2: Key Elements of the NSR Regime in China and the United States

	China	The United States
Legal Sources	2020 Foreign Investment Law 2020 NSR Measures; 2011 M&A NSR Notice; 2011 M&A NSR Provisions;	1950 Defense Production Act 2018 FIRRMA 2022 Executive Order
Reviewer	Office of the Working Mechanism in the NDRC	CFIUS
Review Scope	(1) Greenfield investment, (2) M&A of domestic enterprises, and (3) other investment by foreign investors	Any merger, acquisition, or takeover by or with any foreign person that could result in foreign control of any US business.
Review Period	30 days for general review; 60 days for special review (may be extended under exceptional circumstances)	30 days review period; 45 days investigation period
Consideration Factors	4 factors	Over 10 factors
Judicial Review	No	No

1. The Convergence

As Table 2 shows, there are some convergences in terms of the law on the books between China and the United States. First, the common

feature of the review agency is the inter-departmental attribute of both the Office of the Working Mechanism and the CFIUS. The review periods in both countries are at least thirty days. These arrangements ensure the efficient and smooth operation of the national security review among the governmental departments.

Second, the NSR scopes of the two countries are quite broad, since they cover all kinds of sensitive foreign investments that may impact national security. China forbids foreign investors from substantially evading the review in any form.¹⁷⁷ Both jurisdictions have significantly broadened the applicable scope of their NSR regimes from traditionally sensitive industries to non-sensitive industries. For example, the 2018 FIRRMA and the 2022 Executive Order expanded the security review to real estate and other traditionally non-sensitive areas. In both countries, the term “national security” is not limited to specific areas of domestic industries, leaving the government with flexible discretionary powers.¹⁷⁸

Lastly, both countries have excluded the courts from the national security review process. They have explicitly shut down the judicial remedy channel for foreign investors to challenge review decisions. As mentioned earlier, FIRRMA also explicitly excludes any judicial review of the president's and the CFIUS's decisions on foreign investment. After the 2022 Executive Order was issued, the CFIUS received greater powers and responsibilities. In China, the 2020 Foreign Investment Law explicitly stipulates that a decision legally made upon a security review shall be final in terms of legal effect.¹⁷⁹ This arrangement can be viewed as a response to the reforms in the United States.

2. The Divergence

Although their national security regimes are similar in some respects, there are significantly more differences or divergences between China and the United States.

First, China's NSR framework is far from complete and clear, leaving the government with tremendous discretionary powers. The 2020 NSR Measures contain very few provisions on how the system works in detail. Compared with the United States, there is much less legislative and judicial monitoring of the governmental decisions in China. In comparison, the US government has been constrained by the detailed provisions of statutes. Due to the evolving nature of the national security review regime, the United States has enumerated many more factors to be considered by the CFIUS.¹⁸⁰

177. See 2011 M&A NSR Provisions, art. 9 (including forms like holding shares on behalf of others, trust, multi-level reinvestment, leasing, loans, agreement-based control and overseas transactions).

178. See H. L. Fu & Richard Cullen, *National Security Law in China*, 34 COLUM. J. TRANSNAT'L L. 449, 451–452 (1996).

179. See Foreign Investment Law of 2020 (promulgated by the 13th Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020) art. 35.

180. See THE WHITE HOUSE, *supra* note 163.

Second, unlike the US practice, China's NSR incorporates a negative list regime. The 2021 Negative List Measures provide an updated negative list that regulates the market access of foreign investments in China. The number of forbidden or restricted foreign investment items on the negative list has been continuously reduced to speed up the process of opening up key areas of service industry in China. Traditional restrictions on the ratio of foreign shareholdings in securities companies, securities investment fund management companies, futures companies, and life insurance companies have been abolished.¹⁸¹ However, bans on foreign investment in certain internet service industries are still maintained for cybersecurity concerns.¹⁸² Foreign investments on the negative list are not granted licensing, enterprise registration, or other related matters.¹⁸³

Third, China has lower transparency in terms of NSR decision-making processes. There may be wider room for informal consultation and shadow screening in China. Most review outcomes are not disclosed on the government's official website. The media only covers the most famous and controversial cases. Through the informal consultation process, the Chinese government may notify foreign investors in private that their investments will not pass the national security review. As a result, they will probably relinquish their plan to apply for a formal review.¹⁸⁴ The NSR regime of China may thus sometimes function in a disguised manner. For example, the foreign investments in China may be blocked by the Chinese government for anti-monopoly reasons. The case of Coca-Cola's attempted acquisition of Huiyuan Juice is a good example.¹⁸⁵ In the United States, the CFIUS's review decisions are usually disclosed to the public, although its review standards may be politicized.

Fourth, China's NSR legislative history has been accompanied by

181. See Tuijin Gengao Shuiping Duiwai Kaifang Yi Kaifang Cu Gaige Cu Fazhan Guojia Fazhan Gaige Wei Youguan Fuzeren Jiu Erling Erling Nianban Waishang Touzi Zhunru Fumian Qingdan Da Jizhe Wen (推进更高水平对外开放, 以开放促改革促发展——国家发展改革委有关负责人就 2020 年版外商投资准入负面清单答记者问) [Promoting A Higher Level of Opening Up and Promoting Reform and Development Through Opening Up], NAT'L DEV. & REFORM COMM'N (June 24, 2020), http://www.gov.cn/zhengce/2020-06/24/content_5521526.html [<https://perma.cc/manage/create?folder=18940>] (archived Aug. 23, 2023).

182. See 2021 Negative List Measures (promulgated by the NDRC and the MOFCOM, Dec. 27, 2021, effective Jan. 1, 2022) Category VII (China); see generally Robin Hui Huang, Charles Chao Wang & Olivia Xin Zhang, *The Development and Regulation of Robo-Advisors in Hong Kong: Empirical and Comparative Perspectives*, 22 J. CORP. L. STUD. 229 (2022) (providing more discussion on China's national interests in cybersecurity).

183. See 2021 Negative List Measures, art. II. (China).

184. See *id.* at arts. IV, V (providing informal consultation rules).

185. Although the MOFCOM's decision to block the transaction was stated to be based purely on anti-monopoly concerns, there has been widespread speculation of national economic security concerns about the potential loss of famous Chinese brands to foreigner investors. See Yuwen Li & Cheng Bian, *A New Dimension of Foreign Investment Law in China: Evolution and Impacts of the National Security Review System*, 24 ASIA PAC. L. R. 149, 154 (2016).

legal transplantation efforts.¹⁸⁶ The path dependence of selectively borrowing overseas rules explains why China's NSR regime has been based on flexible departmental statutes instead of national-level laws. The American NSR regime has a long history in congressional legislation, while the Chinese national security review regime has less experience. The four stages of Chinese national security review development show that China established its NSR framework for M&A and foreign investment in a short amount of time and based it on Western experiences. That said, it only borrows from elements of the US experience selectively.

Last but not least, China did not clearly state whether the law has a retrospective effect on foreign investments while FIRRMA has a retrospective effect of thirty years. This may be explained by the relatively short history of China's accession into the WTO.¹⁸⁷ The United States has a much longer history of attracting foreign investments.¹⁸⁸ China has transplanted the NSR regime from foreign countries since the 1990s. However, it was not until China's accession into the WTO that foreign investments started pouring into China. The Chinese NSR regime was built in a piecemeal, ad hoc way, which is consistent with the trial-and-error nature of China's economic reforms over the past several decades.¹⁸⁹

B. Comparing the Law in Practice

1. The United States

In practice, the CFIUS has reviewed only a small fraction of foreign investment in the United States.¹⁹⁰ Nevertheless, Chinese investment in the United States has been a major target for the NSR mechanism. There are several possible causes for this phenomenon. First, the trade relationship between both countries has created dramatically lopsided trade deficits. Second, China's massive investment in US debt provides political leverage in the United States. Third, China's current FDI policy in the United States poses a more

186. See generally Robin Hui Huang & Charles Chao Wang, *The Mandatory Bid Rule Under China's Takeover Law: A Comparative and Empirical Perspective*, 53 INT'L LAWYER 195 (2020) (discussing history and features of China's legal transplantation); Robin Hui Huang & Charles Chao Wang, *The Law and Practice of Substantial Shareholding Disclosure in China: Comparative Perspectives and Recent Developments*, 48 SEC. REG. L.J. 216 (2020) (same).

187. See Bob Davis, *When the World Opened the Gates of China*, WALL ST. J. (July 27, 2018), <https://www.wsj.com/articles/when-the-world-opened-the-gates-of-china-1532701482> [<https://perma.cc/84BS-8PRT>] (archived Sept. 18, 2023).

188. See *supra* Part IV.

189. See generally Hui Huang, *The Regulation of Foreign Investment in Post-WTO China: A Political Economy Analysis*, 23 COLUM. J. ASIAN L. 185 (2009) (providing additional discussions on greenfield investment in China).

190. In 2010, the FDI entering the US totaled \$194 billion. See Christina E. Holzer, *Committee on Foreign Investment in the United States and Judicial Review*, 13 J. INT'L BUS. & L. 169, 174 (2014). However, the number of notices reviewed were ninety-three with thirty-five investigations and no Presidential action. See *id.*

direct threat.¹⁹¹ From 1990 to 2016, the CFIUS blocked several takeover attempts of US enterprises by Chinese companies based on national security, as seen from the table below.¹⁹² The first security review case that successfully withstood judicial review in the United States was the case of *Ralls v. Corp. v. Comm. on Foreign Inv. in the U.S.*¹⁹³ Huawei has been the main target of the US government in the last decade. Huawei claims itself to be privately owned by the trade union committee, but it is viewed by many people as a de facto state-owned enterprise (SOE).¹⁹⁴

Table 3: Chinese Companies Blocked by the CFIUS from 1990 to 2016

Year	Acquirer v. Target	Industry	The Reasons for Rejection by the CFIUS
1990	China National Aero-Technology Import & Export Corporation v. Mamco	Aviation Technology	The deal involves US export controls on China
2005	China National Offshore Oil Corporation v. Unocal Corporation	Energy	China National Offshore Oil Corporation is under the control of Chinese government
2007	Huawei and Bain Capital v. 3Com	High-tech telecommunication network	Huawei has a military background
2009	Northwest Nonferrous International	Mining	The project is too close to the naval training base and may

191. See Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L L. & BUS 199, 199–205 (2012).

192. See Tu Xinquan (屠新泉) & Zhou Jinkai (周金凯), *Meiguo Guojia Anquan Shencha Zhidu Dui Zhongguo Guoyou Qiye Zaimei Touzi De Yingxiang Ji Duice Fenxi* (美国国家安全审查制度对中国国有企业在美投资的影响及对策分析), [The Influence of the USA National Security Review of Foreign Merger and Acquisition Towards State-owned Enterprises of China and the Related Suggestions], 031(005) QINGHUA DAXUE XUEBAO (清华大学学报) [J. TSINGHUA UNIV.] 74–83 (2016).

193. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 71, 80 (D.D.C. 2013), *rev'd and remanded*, *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 326 (D.C. Cir. 2014).

194. Taking into consideration the functions of trade unions in China, some scholars argue that Huawei may be deemed effectively state-owned. See, e.g., Balding & Clarke, *supra* note 15, at 11.

	Investment Co v. First Gold		be controlled by Chinese government
2010	Huawei v. 2Wire	High-tech telecommunication network	Huawei has a military background
2010	Huawei v. Motorola mobile network infrastructure	High-tech telecommunication network	Huawei has a military background
2010	Tangshan Caofeidian Investment Group v. Emcore	Energy Smelting	Concerns about the leakage of core technology
2010	Anshan Iron and Steel Group Co., Ltd v. US Steel Development Co.	Smelting	As a state-owned enterprise, the acquirer may obtain the new steel production technology and in US defense infrastructure
2010	Huawei, ZTE v. Sprint	High-tech telecommunication network	The acquirers have close relationships with the Chinese government
2011	Huawei v. 3Leaf	High-tech telecommunication network	Huawei has a military background and is subsidized by the government
2012	Ralls v. Terna (Butter Creek)	Energy	The project is too close to the naval training base and may be controlled by the Chinese government for obtaining military information
2015	Tsinghua Unigroup v. MicronTechnology	Semiconductor technology	The deal may lead to leakage

			of core technology
2016	Tsinghua Unigroup v. Western Digital Corp	Storage technology	The deal involves core high technology

In recent years, the US NSR regime has restricted Chinese investment tremendously, especially in US technology companies. These investment restrictions will apply to any trade deal between the United States and China, causing Chinese investments in US businesses to fall by 95 percent as compared to 2016.¹⁹⁵ In 2020, the US government decided to ban the use of WeChat in the United States on the basis of national security concerns. In response to President Trump's Executive Orders, the Department of Commerce announced prohibitions on transactions relating to WeChat and TikTok on September 18, 2020, because these apps threatened the US national security.¹⁹⁶ Subsequently, US Magistrate Judge Laurel Beeler issued a preliminary injunction to block the US Commerce Department order. After that, the US Justice Department asked Judge Beeler to put on hold her preliminary injunction, concluding that WeChat constituted a threat to the national security and foreign policy of the United States. The Justice Department argued that WeChat acts as a tool for the Chinese government to control information dissemination and influence US WeChat users.¹⁹⁷ According to the court, the US Department of justice did not provide substantial evidence to support that "such a broad swipe at WeChat was necessary to address a national security threat".¹⁹⁸ Judge Beeler admitted the significance of the government's overarching national security concerns. However, she doubted the sufficiency of the evidence: "While the government has established that China's activities raise significant national security concerns — it has put in scant little evidence that its effective ban of WeChat for all U.S. users addresses those concerns."¹⁹⁹

The ban of WeChat shows that the US government attaches great importance to the review of the country of origin of a foreign investment, namely which country the investor comes from. Whether

195. See Steve Dickinson, *CFIUS Shuts Down Chinese Investment in U.S. Technology*, CHINA L. BLOG (Jan. 16, 2019), <https://www.chinalawblog.com/2019/01/cfius-shuts-down-chinese-investment-in-u-s-technology.html> [<https://perma.cc/2W2U-ARCB>] (archived Aug. 23, 2023).

196. See *US Justice Department Asks Judge to Allow WeChat ban: Apple and Google Stores Face Potential Bans on Allowing Downloads of Tencent App*, NIKKEI ASIA (Sept. 25, 2020), <https://www.reuters.com/article/usa-wechat-idINKCN26G0GB> [<https://perma.cc/D6JW-UZ7Y>] (archived Aug. 23, 2023).

197. See Katy Stech Ferek, *Justice Department Appeals Injunction Against WeChat*, WALL ST. J. (Oct. 2, 2020), <https://www.wsj.com/articles/justice-department-appeals-injunction-against-wechat-11601663698> [<https://perma.cc/R37D-DD6G>] (archived Aug. 23, 2023).

198. Steven Overly, *Judge Hits Pause on Trump Administration's WeChat Ban*, POLITICO (Sept. 20, 2020), <https://www.politico.com/news/2020/09/20/judge-wechat-ban-418764> [<https://perma.cc/K2JP-NET7>] (archived Aug. 23, 2023).

199. *Id.*

the country is an ally or competitor is an important basis for judging whether a foreign investment may pose a threat to US national security. Concerning WeChat, the Department of Justice believes that WeChat has the ability to collect information abroad, and its servers can be accessed freely by the Chinese government. There is a perceived risk that China may easily infringe the personal privacy of WeChat users, thereby damaging the network information security of the United States.²⁰⁰

Another representative case is the US block of ByteDance's acquisition deal. In 2020, the CFIUS conducted an exhaustive review of Chinese company ByteDance's acquisition of Musical.ly (now known as TikTok). It then recommended the TikTok ban to the president to protect US users' personal data. On August 14, 2020, President Trump issued an order prohibiting ByteDance's acquisition of TikTok. ByteDance was required to divest all interests and rights in any assets or property used to support the operation of TikTok, and any data obtained from TikTok users.²⁰¹

The TikTok case indicates that the US federal government has stepped up its efforts to scrutinize past Chinese investments, even for older deals executed years ago. Since the ban of TikTok, the CFIUS has contacted dozens of US companies to screen shareholders for national security risks. There seems to be no clear time limit on such foreign investments. The US federal government can ban a foreign investor from transactions which have taken place long before it initiates the NSR or investigation procedures. After the CFIUS gathers details from the foreign companies, it can decide whether to probe the matter further and can even force the foreign investor to divest its interests or rights in relation to the impugned investment.²⁰²

There are two new trends under the Biden administration. First, the CFIUS has become increasingly focused on Chinese investment cases in American high-tech and data security industries.²⁰³ According to the CFIUS annual report, there was a total of forty-four official declarations from Chinese investors in 2021.²⁰⁴ China overtook Japan in accounting for the highest proportion among all countries.²⁰⁵ Most of the industries involve finance, information, and services. Second, the NSR has functioned together with export control measures. On October 7, 2022, the Biden administration announced restrictions on exports of

200. Stech Ferek, *supra* note 197.

201. *See Statement by Secretary Steven T. Mnuchin on the President's Decision Regarding the Acquisition by ByteDance Ltd. of the US Business of musical.ly*, U.S. DEPT OF TREASURY (Aug. 14, 2020), <https://home.treasury.gov/news/press-releases/sm1094> [<https://perma.cc/5TXD-8FXH>] (archived Aug. 23, 2023).

202. *See Whalen, supra* note 9.

203. *See Treasury Releases CFIUS Annual Report for 2021*, U.S. DEPT OF TREASURY (Aug. 2, 2022), <https://home.treasury.gov/news/press-releases/jy0904> [<https://perma.cc/RU5F-9LBN>] (archived Sept. 17, 2023).

204. *See id.*

205. *See id.*

advanced integrated circuits and related technology to China.²⁰⁶ The export control measures were responsive to the United States' current strategic goals set in the Executive Order, the CHIPS and Science Act, and the Biden administration's National Security Strategy.²⁰⁷

2. China

The author of this Article searched the database of Chinese courts and the official websites of the NDRC and the MOFCOM, but did not find any judicial or regulatory decision regarding the NSR of foreign investment in China.²⁰⁸ The low transparency in the review process shows how sensitive the foreign investment issue is to the Chinese government. However, some of the most influential and representative cases of review can still be found in the media.

China's Xugong Group Construction Machinery Co's decision not to proceed with plans to sell a stake to US private equity group Carlyle was a clear example of the underdevelopment of China's national security review regime at that time.²⁰⁹ In October 2005, Carlyle signed an investment agreement with Xugong, agreeing to acquire 85 percent of Xugong shares for \$375 million.²¹⁰ However, after having waited for three years for the approval of the Chinese government, Carlyle had to abandon its bid because the investment agreement expired.²¹¹ The deal would have been the biggest foreign acquisition of a leading State-owned company in China.²¹² To relieve the concerns of Chinese government, Carlyle made several concessions, for example, by cutting its acquisition to 45 percent.²¹³ However, there were still serious concerns that China could lose its critical technologies to foreign competitors.²¹⁴ On the other hand, the foreign investment was sensitive partly because Xugong was controlled by the local government of Xuzhou.²¹⁵ China is a socialist country, and the state-controlled enterprises constitute the cornerstones of the domestic economy. One of the central government's responsibilities has been to

206. *Biden Administration Restricts U.S. Exports of Advanced Computing and Semiconductor Manufacturing Equipment, Software, and Technology to China*, DORSEY & WHITNEY, LLP (Nov. 28, 2022), <https://www.dorsey.com/newsresources/publications/client-alerts/2022/11/us-adds-strict-limits-on-technology-exports> [https://perma.cc/858E-N5ER] (archived Sept. 17, 2023).

207. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf> [https://perma.cc/E9EB-KYZP] (archived Sept. 17, 2023).

208. See discussion *supra* Part III, IV.

209. Tom Miller, *Carlyle, Xugong Ditch Contentious Stake Deal*, South China Morning Post (July 24, 2008), <https://www.scmp.com/article/646361/carlyle-xugong-ditch-contentious-stake-deal> (archived Sept. 17, 2023).

210. Wan Zhihong, *Carlyle Abandons Xugong Dream*, CHINA DAILY (July 24, 2008), http://www.chinadaily.com.cn/bizchina/2008-07/24/content_6873004.htm [https://perma.cc/XP2L-Q9X6] (archived Sept. 17, 2023).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. See *id.*

prevent losses of state assets.²¹⁶

Coca-Cola's attempted acquisition of Huiyuan Juice is an example of China's foreign merger control regime under the 2008 Anti-Monopoly Law.²¹⁷ In 2009, the Chinese government rejected Coca-Cola's planned \$2.4 billion acquisition of China's top juice maker Huiyuan Juice for anti-monopoly reasons.²¹⁸ The acquisition deal would have been the largest buyout ever of a Chinese company by a foreign rival, and thus the rejection has been seen as a sign of protectionism.²¹⁹ This indicates that MOFCOM does not welcome foreign acquisitions of Chinese companies with prominent brands.²²⁰ Although the MOFCOM's decision was stated to be based purely on anti-monopoly concerns, there has been widespread speculation of nationalistic concerns about the potential loss of Chinese brands to foreigners.²²¹ Chinese authorities may broadly interpret preexisting regulations to review deals that may raise national security issues.²²² Coca-Cola's attempted acquisition of Huiyuan is essentially a case of NSR disguised as an anti-monopoly review.²²³

VI. EXPLANATIONS AND IMPLICATIONS

A. General Observations

China and the United States have reformed their foreign investment NSR regimes. These reforms are aimed at strengthening the regimes in the face of globalised economic risks and challenges. There are certain common features between China and the United States from the perspectives of law and history. For example, both countries have established and empowered interdepartmental review agencies under the central or federal government. Both NSR regimes have also stipulated similar review periods, broadened the review scopes of domestic industries, and explicitly attempted to exclude the possibility of foreign investors seeking judicial remedies for adverse national security review decisions.

216. Xinhua News Agency, *China to Curb SOEs Assets Losses*, CHINA DAILY (Dec. 1, 2004), <http://www.china.org.cn/english/government/113697.htm> [https://perma.cc/D26M-JEHD] (archived Sept. 17, 2023).

217. Michael Wei, Tony Munroe, *China Rejects \$2.4 Billion Coke Bid for Huiyuan Juice*, REUTERS (Mar. 18, 2009), <https://www.reuters.com/article/us-huiyuan-cocacola-idUSTRE52H0QH20090318> [https://perma.cc/Z2GF-H4BD] (archived Sept. 17, 2023).

218. See Hannah C. L. Ha, *Coca-Cola / Huiyuan Deal Vetoed under China's Anti-Monopoly Law*, MAYER BROWN (Mar. 19, 2009), <https://www.mayerbrown.com/en/perspectives-events/publications/2009/03/cocacola-huiyuan-deal-vetoed-under-chinas-antimon> [https://perma.cc/GUG5-DBFL] (archived Sept. 17, 2023).

219. See *id.*

220. See Michael Wei & Tony Munroe, *China Rejects \$2.4 Billion Coke Bid for Huiyuan Juice*, REUTERS (Mar. 18, 2009), <https://www.reuters.com/article/us-huiyuan-cocacola-idUSTRE52H0QH20090318> [https://perma.cc/GQ5K-RUF9] (archived Sept. 17, 2023).

221. See Li & Bian, *supra* note 185, at 160.

222. See Ha, *supra* note 201.

223. Yuwen Li & Cheng Bian, *A New Dimension of Foreign Investment Law in China: Evolution and Impacts of the National Security Review System*, 24 ASIA PAC. L. R. 149, 154 (2016).

However, there have been even greater divergences between the two regimes. First, China's NSR framework is neither detailed nor complete, leaving the central government with tremendous discretionary powers. Second, the NSR regime has been cooperating with the negative list regime in China. Third, China has lower transparency of national security review decision-making processes. Fourth, China's legislative history of national security review has been accompanied by legal transplantation efforts of selectively borrowing foreign rules, which in turn explains the flexible departmental statutes of China's regime. Last but not least, China did not clearly state whether the law has a retrospective effect on foreign investments.

B. *Explaining Jurisdictional Similarities and Differences*

1. Similarities

The similarities between the recent reforms of the Chinese and the United States' regimes are rooted in the increasingly complex global political economy after decades of globalization. Specifically, the reconfiguration of the global value chain and global supply chain has been pushing lawmakers towards a more conservative stance. There are several explanations for this observation.

For starters, major advanced economies worldwide have been more or less influenced by the ideology of economic nationalism in a new era of globalization. Since the 1980s, there has been an unprecedented wave of global industrial consolidation in the value chain. Specifically, the global big business revolution allows core firms in advanced economies to extensively sell off low-end manufacturing businesses to upgrade their core technologies, while developing economies also achieved their economic and technological upgrading opportunities.²²⁴ Nevertheless, this has also led to the growing unemployment in these advanced economies, while the developing countries are rapidly catching up.

Indeed, advanced economies have grown cognizant to the risks brought about by globalization. For instance, in 2016, blue-collar voters in key industrial swing states voted for Donald Trump in the US presidential election. In the eyes of some people, the phenomenal win for President Trump was brought about by the oft-forgotten population whose interests have been neglected by profit-driven globalists and multinational enterprises. As a double-edged sword, economic globalization brings about unemployment and national security concerns albeit economic prosperity as well.

On the other hand, the developing countries are facing increasing pressure from the requirements of globalization as they are climbing towards the apex of the global value chain. They are latecomers in the

224. See Peter Nolan, Jin Zhang & Chunhang Liu, *The Global Business Revolution, the Cascade Effect, and the Challenge for Firms from Developing Countries*, 32 CAMBRIDGE J. ECON. 29, 34 (2008); Archibugi D & Pietrobelli C, *The Globalisation of Technology and Its Implications for Developing Countries: Windows of Opportunity or Further Burden?* 70(9) *Technological Forecasting and Social Change* 861 (2003).

game and want to catch up with or even surpass the advanced economies. To prevent this, the advanced economies have adopted protectionism, by kicking away the ladder after they have climbed up the value chain and then requiring latecomers to obey free trade rules in the global competition.²²⁵ Therefore, it could be harder for developing countries to obtain advanced technology at the apex due to the limitations of their comparative advantages.

In the specific case of China, although the country has already grown into the world's second largest economy, it is still lagging behind in terms of leading technology. Therefore, in order to climb up in the global value chain, Chinese policymakers are motivated to adopt a protectionist mindset, including encouraging scientists and researchers to import leading technologies and building up a self-controlled high-tech supply chain. The rapid growth and ascension of China has threatened the leading position of advanced economies, especially the United States, and has resulted in the China-US relationship becoming an economic competition or even confrontation. This has been well illustrated in the escalating trade war and technology export restrictions.

Therefore, the trade war, as well as the competition of technology between China and the United States, has exerted great impacts on both countries. The reform of the Chinese NSR regime was partly inspired by the enactment of FIRRMA by the Trump administration. FIRRMA overhauled the American national security review regime to improve the protection of national interests against foreign investment risks in a globalized world, especially from China. The Trump administration's "America First" policy contributed to the strengthening of US national interests, which was echoed by the US Congress in its response to the "Made in China 2025" initiative. The "Made in China 2025" initiative explicitly states that China's technology market shall be controlled by Chinese companies,²²⁶ which is a Chinese version of the "America First" policy.

2. Differences

The differences between China and the United States are caused by a diverse range of factors, which not only show the path-dependent features of their national security review regimes, but also reflect their divergent needs and national interests in the present era. Apart from the legal and institutional discrepancy between the two countries, there are also important differences in their stages of development. Specifically, China is currently in a phase where it needs to maintain its attractiveness to global investors while protecting its national security. In contrast, the United States relies less heavily on external investments and enjoys a stable leadership in the global financial system. These factors are analyzed in more detail below.

225. See Ha-Joon Chang, *Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective*, 31 OXFORD DEV. STUD. 21, 29 (2003).

226. See Cyril, *supra* note 161.

First, their legal systems are different. The Chinese government has unfettered discretionary powers in the NSR decision-making process; the legislature and courts do not have the authority to review specific decisions made by the government over the NSR issue.²²⁷ In comparison, the US government decisions are often challenged by the US Congress and courts. Thus, FIRRMA has to be very specific about the powers and obligations of the CFIUS.

Second, their political regimes are different. NSR is a highly political issue, especially for a socialist country like China. The United States has long been a capitalist country that emphasizes political and economic freedom. Acknowledging its lack of sufficient political trust and recognition in the capitalist world,²²⁸ the Chinese government should avoid frequently using the NSR in the economic field. It is advisable for China to deal with the issue through less controversial and less political ways, such as anti-monopoly reasons.

Third, China and the United States have sharply different domestic economic structures. The Chinese economy has maintained a socialist system where state-controlled enterprises are the cornerstones.²²⁹ The Chinese central government aims to prevent loss of state assets and develop big SOE groups to compete in the global market.²³⁰ The failure of the Xugong takeover by an American company was partly due to Xugong's SOE identity. In comparison, the United States is a capitalist country that prioritizes the prosperity of private firms. Foreign private firms investing in the United States would face fewer regulatory hurdles.

Fourth, Chinese and American economies have different degrees of reliance on foreign investments. China has been relying on investment from the United States in recent years.²³¹ In 2019, Chinese companies invested \$38.79 billion into US firms,²³² while the US

227. China's judiciary is subject to many internal and external controls from different levels of government. See *Judicial Independence in the PRC*, CONG.-EXEC. COMM. ON CHINA, <https://www.cecc.gov/judicial-independence-in-the-prc> [https://perma.cc/7FPL-TAR5] (archived Sept. 10, 2023).

228. See Chris Patten, *No Country in the World Should Ever Trust China's Communist Leaders Again*, MARKETWATCH (Sept. 29, 2020), https://www.marketwatch.com/story/no-country-in-the-world-should-ever-trust-chinas-communist-leaders-again-2020-09-29?mod=search_headline [https://perma.cc/WM9R-KULA] (archived Sept. 10, 2023).

229. David C. Donald, *Conceiving Corporate Governance for an Asian Environment*, 12 UNIV. PA. ASIAN L. REV. 88, 99 (2016).

230. Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 743 (2013).

231. The Chinese government invested much of its foreign exchange reserves in US Treasury securities, being the world's largest holder of foreign exchange reserves in 2020. See CONG. RSCH. SERV., *US-CHINA INVESTMENT TIES: OVERVIEW* (Jan. 15, 2021) <https://fas.org/sgp/crs/row/IF11283.pdf> [https://perma.cc/TQ6H-VV6F] (archived Sept. 10, 2023).

232. *Foreign direct investment from China into the United States from 2000 to 2021*, STATISTA (Jul. 31, 2023), <https://www.statista.com/statistics/188935/foreign-direct-investment-from-china-in-the-united-states/> [https://perma.cc/Z8ML-BPUA] (archived Sept. 10, 2023).

investments in China were valued at \$105.61 billion.²³³ If China deals with the national security issue through anti-monopoly channels instead, the US government may be less likely to cut back on investments in China.

Fifth, China's selective borrowing of foreign national security review rules can be explained by the different social needs in historical development. Before joining the WTO, China did not need a comprehensive national security review framework due to the scarcity of foreign investment. After China's accession to the WTO, massive foreign acquisitions of famous domestic enterprises followed, making it imperative for the government to expedite the issuance of statutes tailored to the NSR of M&As.²³⁴ When the 2015 National Security Law was enacted, it became necessary to integrate existing national security review rules and build a comprehensive regime for all investment.

Lastly, the United States generally has a greater advantage over China in terms of its economy and presence of advanced technology. That is probably why the United States emphasizes the protection of sensitive technologies and TID businesses from China. The United States even mandates periodic reports on Chinese investments.²³⁵ That is also the main reason why FIRRMA has a retrospective effect reaching back to 1988: to target China offshore joint ventures.²³⁶ Because the negative list compiled by Chinese government is subject to changes year by year, this signifies to foreign investors that China may continue to open up to the global economy as its own economy and technical advantages grow.

3. Functional Convergence

In comparative law, one should take both the formal and functional approaches in considering the convergence and divergence.²³⁷ This part adopts this research method to compare the NSR regimes between China and the United States. The legislature of the recipient country, though transplanted from other jurisdictions, may be adapted to follow local regulatory imperatives.²³⁸ The development of Chinese NSR regime has been path-dependent on China's earlier legislative model, which was segregated and

233. *Direct investment position of the United States in China from 2000 to 2021*, STATISTA (Jul. 31, 2023), <https://www.statista.com/statistics/188629/united-states-direct-investments-in-china-since-2000/> [<https://perma.cc/S4LB-8MXE>] (archived Sept. 10, 2023).

234. See Huang, *supra* note 31, at 810-11.

235. Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, § 1719(b) (2018).

236. Edelberg, *supra* note 137.

237. See Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMPAR. L. 329, 337-39 (2001) (describing the different approaches).

238. China has always been selectively adopting and adapting foreign rules to further the state's interests. See *id.* at 356-57.

incremental.²³⁹ There are several functional convergences between China and the United States.

China's use of anti-monopoly excuses to conduct NSRs illustrates the formal divergence and functional convergence between the national security review regimes of the Chinese and the American. Although the MOFCOM stated its decision to block Coca-Cola's acquisition of Huiyuan as one based purely on anti-monopoly concerns, there were hidden nationalistic concerns about the potential loss of Chinese brands to foreigners. The MOFCOM deliberately evaded the application of the national security review to avoid public skepticism, and the decision based on anti-monopoly reasons in fact undertook similar functions of the NSR.²⁴⁰

The NSR regime is facilitated by the negative list regime in China, making up for the government's discretionary use of powers and low transparency. The State Council can lift the bans in relevant fields for specific foreign investments.²⁴¹ The list has been maintained by the MOFCOM,²⁴² which will decide whether to make an announcement of investigating a relevant foreign entity.²⁴³ It shall make decisions including restricting or prohibiting the foreign entity in the list from investing in China.²⁴⁴ The list is updated every year and disclosed on the government official website.

C. *Implications for the International Relationship*

Over the years, China has gradually established and strengthened its NSR system for foreign investment. In the post-financial crisis period of globalization, the legal foundations of Chinese national security review system consisted of two legal instruments issued in 2011. After nearly a decade of legal experiment in the foreign M&A business, the Chinese NSR system was comprehensively overhauled by the 2020 Foreign Investment Law and the 2020 NSR Measures.²⁴⁵ As discussed earlier, this reform was partly inspired by the enactment of FIRMA by the Trump administration, which overhauled the American NSR regime by prioritizing national interests over globalization efforts.²⁴⁶

First, the FIRMA reform will cause more chilling effects on US-China political and economic relations in the short term. On January 13, 2020, the Treasury Department issued landmark regulations that

239. For more discussions on the path dependence theory, see Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

240. See Li & Bian, *supra* note 185, at 167.

241. See 2021 Negative List Measures (promulgated by the NDRC and the MOFCOM, Dec. 27, 2021, effective Jan. 1, 2022) art. 5 (China).

242. See The Provisions on the Unreliable Entity List (promulgated by the State Council, Sept. 19, 2020, effective Sept. 19, 2020), art. 4 (China) (authorizing "relevant central departments" to organize and implement the regulatory system).

243. *Id.* at art. 5.

244. *Id.* at art. 10.

245. See *supra* Part II.

246. See *supra* Part VI.B.1.

dramatically expanded the scope of the CFIUS.²⁴⁷ It requires a mandatory filing for the acquisition of a “substantial interest” in an American TID business by a foreign person in which a foreign government had a “substantial interest.”²⁴⁸ These regulations aim to scrutinize foreign investments that are made in critical technology firms, especially those controlled by the Chinese government. Silicon Valley companies have become more cautious about accepting foreign investments.²⁴⁹ China-backed venture capital funds have to curb their activities in the American high-tech industries and other sensitive areas.²⁵⁰

Second, the competition between China and the United States over the global economy order will dominate the NSR in the long run. China may address trade frictions with developed economies by commercial and legal means,²⁵¹ but the conflicts between the United States and China are structural and systematic. FIRRMA has been the US governmental effort to prevent Chinese private and government-controlled entities from acquiring American technologies. At the end of the day, it is also meant to prevent more competitive disadvantages for the US economy in the global competition. The US government has expressed its concerns over the potential adverse impacts of “Made in China 2025.”²⁵² As mentioned, the Biden administration has shifted the focus to new national security issues arising in the escalated China-US tech war and COVID pandemic.²⁵³ The conflicts between China and developed economies in the making of trade rules are, by nature, a competition over the dominance of the global economic order.

Third, the state capitalism approach of SOEs and government-controlled private companies in China will face more challenges. It is not difficult to detect the relationship between FIRRMA’s new reporting regime on Chinese investments and the “Made in China 2025” initiative. The US executive and legislative branches reached a consensus that the “Made in China 2025” initiative poses a special national security threat to the United States.²⁵⁴ FIRRMA gives the US government more power to curtail the transfer of technology to foreign

247. Mira R. Ricardel, *These New Rules Might End Tech's Reliance on Chinese Investors*, FORTUNE (Jan. 20, 2020), <https://fortune.com/2020/01/20/cfius-rules-regulations-china-investment/> [<https://perma.cc/N37V-68FP>] (archived Sept. 10, 2023).

248. Keeler, Layton & Leibner, *supra* note 147.

249. Theodore Schleifer, *Silicon Valley is Awash in Chinese and Saudi Cash — and No One is Paying Attention (except Donald Trump)*, Vox, May 1, 2019, <https://www.vox.com/recode/2019/5/1/18511540/silicon-valley-foreign-money-china-saudi-arabia-cfius-firrma-geopolitics-venture-capital> (archived Sept. 10, 2023).

250. See Whalen, *supra* note 9.

251. See Pan Xiaoming, *A New Competitive Situation in the Digital Economy and China's Actions*, 82 CHINA INT'L STUD. 123, 139 (2020).

252. Edelberg, *supra* note 137, at 13.

253. See *supra* Part IV.

254. See Melissa Cyrill, *What is Made in China 2025 and Why Has it Made the World So Nervous?*, CHINA BRIEFING (Dec. 28, 2018), <https://www.china-briefing.com/news/made-in-china-2025-explained/> [<https://perma.cc/WT35-KU8Q>] (archived Aug. 23, 2023).

companies.²⁵⁵ It even mandates periodic reports on Chinese investments in the United States.²⁵⁶ Government-controlled enterprises will face more reviews and garner less trust in the world, as seen by the recent series of investment screening reforms in major economies. Privately owned enterprises are expected to be approved by the CFIUS as long as they do not impact the US national security.²⁵⁷ However, China's private enterprises may also be reviewed if the US government deems it necessary to protect national security, as can be seen in the case of Huawei. Although Huawei claims to be a private company, the US government believes that Chinese government can exert control over its businesses in many unofficial ways.²⁵⁸ The Chinese national strategic buyers will have to prove their commercial and financial motives behind the cross-border investments.²⁵⁹

Finally, there would be far-reaching implications for the development of the global supply chain. On the one hand, the current wave of globalization starting from the 1980s might be seriously interrupted. As both the United States and China have taken measures to protect their core interests in technology development, the national security review systems adopted by the two countries could eventually result in the emergence of two parallel industrial supply chains in the world. One may even argue that the world is at the risk of a new cold war, particularly in the economic arena. Nevertheless, the increasing complexity of US-China mutual economic reliance could force both countries to conduct NSRs in a more elastic manner. For instance, the United States cannot get rid of the cheap and quality products manufactured by Chinese companies, and China still needs key components with advanced technology from US suppliers. Therefore, it may eventually lead to a new structure of the global economic system where there is fierce competition at the apex of the value chain while maintaining parallel "safe" supply chains. This means that foreign investments could continue to flow, at least in industries with fewer concerns about national security due to the complex China-US economic coupling and mutual reliance.

VII. CONCLUSION

This Article analyzed the NSR regimes of China and the United States from a comparative perspective after China established a

255. FIRRMA, § 1702(b)(5); Sam Karson, *Caught Between Superpowers: Alaska's Economic Relationship with China Amidst the New Cold War*, 36 ALASKA L. REV. 47, 47 (2019).

256. Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, § 1719(b) (2018).

257. See Edelberg, *supra* note 137, at 20.

258. See Raymond Zhong, *Who Owns Huawei? The Company Tried to Explain. It Got Complicated.*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/technology/who-owns-huawei.html> [https://perma.cc/73YC-BTZ7] (archived Sept. 17, 2023).

259. See Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a National Strategic Buyer: Toward a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192, 202 (2019).

comprehensive NSR legal framework in 2021. FIRRMA has made extensive reforms on the American national security review regime and has exerted great influences over its Chinese counterpart. Both China and the United States have empowered interdepartmental review agencies under the central or federal government. By analyzing Chinese and the US law and practice, this Article shows many formal divergences between the two jurisdictions caused by their diverse legal and political systems. For example, China's NSR framework is not a detailed and complete one, leaving the central government with tremendous discretionary powers and thereby lowering transparency. The NSR regime has been cooperating with the negative list regime in China. China's NSR legislative history has been accompanied by legal transplantation efforts of selective borrowing foreign rules.

Based on these observations, this Article explains why the Chinese and American NSR regimes have converged functionally. It indicates the importance of a functional comparison between the two national security review regimes of different jurisdictions. From a future prospect perspective, the reforms of the national security review regimes in China and the United States will have profound influences on each other and the world. In the short run, the legal development in both countries will cause tremendous chilling effects on US-China political and economic relations. In the long run, the competition between China and the United States over the global economic order will dominate and reshape both national security review regimes. The state capitalism approach of SOEs and government-controlled private companies in China will face greater challenges and hostility. Nevertheless, due to the complex coupling and mutual reliance of the China-US economy, foreign investments could continue to flow, at least in the industries less concerned with national security.

