

# SUPERPOWER RIVALRY AND THE “MODERNIZATION” OF FOREIGN INVESTMENT RISK REVIEW

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*Managing U.S.-China relations is “the biggest geopolitical test of the 21st century.”<sup>1</sup> This Article explores a crucial, delicate part of that test: national security review of Chinese foreign investment. To address emerging threats from China, Congress passed the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), greatly strengthening the federal multi-agency body responsible for foreign investment screening—the Committee on Foreign Investment in the United States (“CFIUS”)—and vastly expanding its jurisdiction. This Article presents the first ever survey-based empirical study of FIRRMA’s impacts on Chinese investments in the United States. By analyzing a unique set of survey data, we find that a large percentage of Chinese investors lacked CFIUS awareness and those cognizant of the CFIUS process generally considered it to be politicized and nontransparent and reported negative impacts of FIRRMA on their U.S. businesses. Further analysis of considerable intercompany variations revealed associations between CFIUS awareness and four firm-specific attributes: past mergers or acquisitions in the United States, in-house legal capacity, access to the U.S. securities market, and the degree of business internationalization. Additional tests connected the varying FIRRMA impacts on Chinese investors’ U.S. businesses to their ownership type and plans for conducting mergers or acquisitions in the United States. Apart from FIRRMA’s investment effects, we also present a detailed account of the diffusion of the U.S. foreign investment screening system and its institutional implications in China. This Article offers a new direction forward for the literature on national security and investment, U.S.-China economic*

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1. Lara Jakes & Michael Crowley, *The Crisis That Defined Blinken’s First Year*, N.Y. TIMES (Feb. 6, 2022), <https://www.nytimes.com/2022/02/06/us/politics/antony-blinken.html> [https://perma.cc/4FDS-WBYF].

*decoupling, and state-owned multinationals of authoritarian regimes in the liberal global order. It also offers crucial empirical evidence for policy-making and lawmaking in all major economies seeking to strike an optimal balance between promoting an open environment for foreign investment and safeguarding national security.*

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#### I. INTRODUCTION

A tectonic shift in the global economic and geopolitical order is unfolding. China's meteoric rise in the past four decades and its outward expansion have disrupted the status quo of the post-World War II system put in place by the United States and its allies, and a consensus is forming among U.S. policymakers and legislators that regards the fast-growing authoritarian China as an imminent and existential threat.<sup>2</sup> This “national security threat No.1,”<sup>3</sup> however, was until a few years ago a greatly appreciated source of foreign investments. At a meeting with his Chinese counterpart Xi Jinping, then Vice President Joe Biden announced that his government saw “nothing but positive benefits flowing from direct investment in the United States from Chinese businesses and Chinese entities.”<sup>4</sup> Basked in the goodwill, Chinese multinationals moved to the U.S.

2. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (2017).

3. John Ratcliffe, *China Is National Security Threat No. 1: Resisting Beijing's Attempt to Reshape and Dominate the World Is the Challenge of Our Generation*, WALL ST. J. (Dec. 3, 2020, 1:20 PM), <https://www.wsj.com/articles/china-is-national-security-threat-no-1-11607019599> [<https://perma.cc/79ZA-AA8U>].

4. White House, Office of the Press Secretary, *Remarks by Vice President Biden and Chinese Vice President Xi at a U.S.-China Business Roundtable*, WHITE HOUSE (Aug. 19, 2011, 10:42 AM), <https://obama.whitehouse.archives.gov/the-press-office/2011/08/19/remarks-vice-president-biden-and-chinese-vice-president-xi-us-china-busi> [<https://perma.cc/F9B4-8MP5>].

market en masse. As shown in Figure 1 below, foreign direct investment (“FDI”) from China began to surge after 2011, when Biden and Xi met. And Chinese firms have particularly favored investments in sectors such as services and advanced technology, for the complementarity of the two economies. In 2015, for instance, the Chinese government announced its ambitious “Made in China 2025” campaign, and Chinese investors spent as much as \$9.9 billion, tripling the amount from the previous year, on acquiring equity interests in U.S. technology companies.<sup>5</sup> And due to the nature of the Chinese economy, a significant portion of the investments can be traced to Chinese firms owned by or affiliated with the state.<sup>6</sup> Such investments, though not entirely free of controversies, had been more or less tolerated by the U.S. government until Donald Trump’s election in 2016. Trump’s foreign policies triggered an abrupt deterioration in relations that continued unabated into the current Biden administration.<sup>7</sup> Against that backdrop, Chinese investors in the United States turned, instantly and unexpectedly, from honored guests into “agents” of a sovereign foe that must be strictly monitored, tightly regulated, and in some cases excluded and punished.<sup>8</sup>

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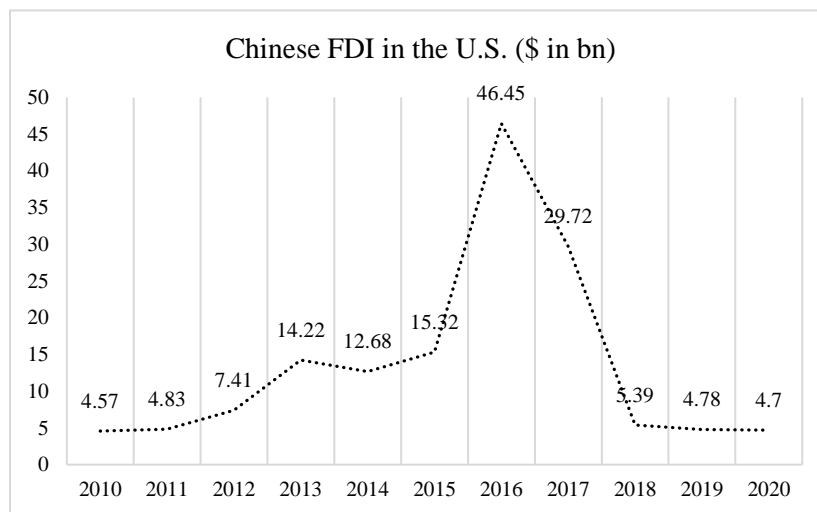
5. Uday Khanapurkar, *CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China*, 48 J. CURRENT CHINESE AFFS. 226, 227 (2020).

6. Ji Li, THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES 34 (2018).

7. See David Dollar, *What Does Biden’s First 100 Days Tell Us About His Approach to China?*, BROOKINGS (Apr. 26, 2021), <https://www.brookings.edu/blog/fixgov/2021/04/26/what-does-bidens-first-100-days-tell-us-about-his-approach-to-china/> [https://perma.cc/CA3L-ZDYX]; David Dollar, Ryan Hass & Jeffrey A. Bader, *Assessing U.S.-China Relations 2 Years into the Trump Presidency*, BROOKINGS (Jan. 15, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/01/15/assessing-u-s-china-relations-2-years-into-the-trump-presidency/> [https://perma.cc/Y7P6-QCR6].

8. See, e.g., Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); David Shepardson, *Biden Signs Legislation to Tighten U.S. Restrictions on Huawei, ZTE*, REUTERS (Nov. 11, 2021, 9:32 PM), <https://www.reuters.com/technology/biden-signs-legislation-tighten-us-restrictions-huawei-zte-2021-11-11/> [https://perma.cc/DN87-2HQG].

FIGURE 1: VALUE OF CHINESE FDI IN THE U.S., 2010–JUNE 2020



*“Chinese direct investment in the U.S. before 2010 was modest, totaling well below \$1 billion per year. The only exception was 2005. . . . Annual direct investment accelerated quickly thereafter, reaching nearly \$5 billion in 2010 and \$14 billion in 2013 on the back of Shuanghui’s acquisition of Smithfield Foods. Chinese FDI in the US jumped again in 2016 to more than \$46 billion thanks to several multi-billion dollar acquisitions and then moderated back to \$29 billion in 2017.”*

*-- Rhodium Group: Two-Way Street: 2019 Update US-China Investment Trends*

At the forefront of the systematic economic decoupling between China and the United States is the Committee on Foreign Investment in the United States (“CFIUS”), a once obscure federal agency established in 1975 to research the national security implications of foreign investments in U.S. businesses.<sup>9</sup> More than a decade later, the 1988 Exon-Florio Amendment to Title VII of the Defense Production Act (“DPA”) empowered the President to suspend or prohibit any covered transaction that threatens the national security of the United States.<sup>10</sup> The President then delegated the authority to review foreign investments to CFIUS, which screened acquisitions of U.S. business by investors “controlled by or acting on behalf of a foreign government” and transactions that would result in “control of a person that could affect the U.S. national security.”<sup>11</sup>

Despite the agency’s broad authority and discretion, it had generally refrained from active interference in foreign investments in the United States, and

9. Matthew J. Baltz, *Institutionalizing Neoliberalism: CFIUS and the Governance of Inward Foreign Direct Investment in the United States Since 1975*, 24 REV. INT’L POL. ECON. 859, 860 (2017).

10. Harvey L. Pitt, *On the Precipice: A Reexamination of Directors’ Fiduciary Duties in the Context of Hostile Acquisitions*, 15 DEL. J. CORP. L. 811, 867–68 (1990).

11. H.R. Res. 5006, 102d Cong. (1993) (enacted).

the President very rarely exercised his veto power.<sup>12</sup> But the rise of China and the escalating tensions between the two superpowers fueled acute national security concerns in the United States,<sup>13</sup> much like how surging Japanese investment stoked fear and hostility in the 1970s and 1980s that culminated in the Exon-Florio Amendment and the empowerment of CFIUS.<sup>14</sup> Facing a more assertive China, U.S. policymakers began to criticize the existing investment screening regime and pushed for another systematic reform of CFIUS review targeted mainly at Chinese investments.<sup>15</sup>

In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (“FIRRMA”), which significantly expanded CFIUS’s power and jurisdiction. After the reform, Chinese FDI in the United States plummeted from its peak of \$46 billion in 2016<sup>16</sup> to merely about \$6 billion in 2019.<sup>17</sup> Apart from the dramatic decrease of Chinese deals, however, we know close to nothing about the reactions of Chinese investors to this major CFIUS reform. Most of the nascent studies on CFIUS comprise either extended policy discussion or research using published corporate data.<sup>18</sup> While they shed valuable light on the subject, considerable knowledge gaps remain as to the perceptions and reactions of Chinese multinationals to the U.S. national security review regime and its latest overhaul. Moreover, few scholars have explored the institutional ramifications of FIRRMA abroad, particularly, the Chinese government’s reactions to the CFIUS reform targeting primarily Chinese investors.

As will be detailed, knowledge about FIRRMA’s impacts on Chinese investors and the Chinese investment screening mechanism is crucial to multiple ongoing policy and scholarly debates. To narrow the gaps, this Article examines Chinese multinationals’ awareness of the CFIUS process and the impacts of FIRRMA on their U.S. businesses. In doing so, we analyze a data set compiled from directly surveying Chinese-invested businesses in the United States. Moreover, we investigate how the Chinese government reacted to the U.S. reform by remodeling its foreign investment screening regime. We find, contrary to

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12. For instance, in 1990, President Bush ordered the Chinese National Aero-Technology Corporation to divest its control over Mamco, a U.S. aircraft parts company that used technology subject to U.S. export controls; in 2012, President Obama ordered divestiture from the Chinese-owned Ralls Corporation of its acquired wind turbine companies; in 2016, President Obama blocked the sale of German chip equipment maker Axistron to China’s Fujian Grand Chip Investment Fund. John B. Bellinger, III et al., *New Presidential Order Blocking Chinese Acquisition of Semiconductor Firm Flags a Trend of Heightened CFIUS Review of Chinese Investments*, Mondaq (Sept. 25, 2017), <https://www.mondaq.com/unitedstates/export-controls-trade-investment-sanctions/631538/new-presidential-order-blocking-chinese-acquisition-of-semiconductor-firm-flags-a-trend-of-heightened-cfius-review-of-chinese-investments> [<https://perma.cc/BC6K-5NY8>].

13. Patrick Griffin, *CFIUS in the Age of Chinese Investments*, 85 *FORDHAM L. REV.* 1757, 1774–76 (2017).

14. Ji Li, *Investing Near the National Security Black Hole*, 14 *BERKELEY BUS. L.J.* 1, 4 (2017).

15. Khanapurkar, *supra* note 5, at 227.

16. See Sichong Chen, Wenxue Li & Qi Wang, *Are Chinese Acquirers Discriminated Against in Cross-Border Mergers and Acquisitions? An Analysis Based on Covered Transactions Filed with CFIUS*, 28 *CHINA & WORLD ECON.* 37, 37–38 (2020).

17. Thilo Hanemann, Daniel H. Rosen, Cassie Gao & Adam Lysenko, *Two-Way Street—US-China Investment Trends—2020 Update*, RHODIUM GRP. (May 11, 2020), <https://rhg.com/research/two-way-street-us-china-investment-trends-2020-update/> [<https://perma.cc/T87Q-Y6QY>].

18. See discussion *infra* Part III.

conventional wisdom and widely adopted assumptions, that many Chinese investors in the United States have remained ignorant about the CFIUS regime, even after the passage of FIRRMA. Moreover, four corporate variables—listing status, recent U.S. mergers or acquisitions, in-house legal capacity, and the degree of internationalized operations—are associated with better management knowledge of CFIUS review. Moreover, state-owned Chinese investors and those planning U.S. deals are more likely to report negative impacts of FIRRMA on their operations. The findings add a crucial empirical aspect to several ongoing policy and academic debates, such as the international diffusion of the U.S. investment screening system and how sovereign governments should balance an open economy, which allows the host states to benefit from foreign investments, and safeguarding national security in an increasingly hostile and complex geopolitical environment.

The rest of this Article proceeds as follows. Part II introduces the framework of CFIUS review, with a focus on the post-FIRRMA phase, and briefly describes the U.S. policy concerns over Chinese FDI that hastened the CFIUS reform. Next, Part III critically reviews the existing literature on the national security review regime, underscoring its insights and the enormous empirical gaps. Part IV then describes the comprehensive surveys of Chinese multinationals in the United States, provides an overview of the relevant survey data, and runs a series of statistical tests on the selected dataset to explore factors that might hypothetically affect Chinese investors' knowledge about the CFIUS regime and their perceived impacts of FIRRMA. As just noted, contrary to conventional wisdom, about half of the Chinese investors remained ignorant about CFIUS, and those equipped with such knowledge tend to have internationalized operations, in-house legal managers, recent experience of mergers and acquisitions ("M&A"), and access to the U.S. securities market. Additionally, Chinese investors of majority state ownership and those with plans to engage in M&A in the United States are more likely to report negative impacts of FIRRMA. Apart from the investment effects, the U.S. national security review regime, including its recent overhaul, reverberated abroad and shaped the evolution of its parallel institution in China. Part V recounts that extraterritorial institutional effect by surveying the development of the relatively new Chinese national security review mechanism. Part VI enumerates the contributions and concludes this Article.

## II. CFIUS AND CHINESE FDI IN THE UNITED STATES

CFIUS, the powerful federal agency pivotal to the U.S.-China rivalry, has caught a great deal of academic and public attention in the past decade or two. The agency, as just noted, had a humble origin. Established by an executive order of President Ford in 1975, CFIUS's initial mandate was merely to study FDI in the United States and its implications.<sup>19</sup> In the following decades, however, the federal agency went through several phases of institutional transformation that

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19. Dustin Tingley, Christopher Xu, Adam Chilton & Helen V. Milner, *The Political Economy of Inward FDI: Opposition to Chinese Mergers and Acquisitions*, 8 CHINESE J. INT'L POL. 27, 36 (2015).

ultimately led to a great expansion of its jurisdiction and authority (see Figure 1). Part II traces the evolution of the CFIUS review system, with a focus on the enactment of FIRRMA in 2018.

The evolution of the CFIUS regime, propelled by a series of political outcries, unfolded through roughly four stages (see Figure 1).<sup>20</sup> The first one started in 1975 with the agency's formation and ended in 1988 with the passage of the Exon-Florio Amendment to Title VII of the DPA ("Stage One"). The second stage lasted for about two decades from 1988 to 2007, when Congress enacted the Foreign Investment and National Security Act of 2007 ("FINSA") ("Stage Two"). The third stage spanned the period between the enactment of FINSA and the passage of FIRRMA in 2018 ("Stage Three"). Right now, the CFIUS review regime is in its fourth post-FIRRMA stage ("Stage Four").

*Stage One:* The evolution of the CFIUS process has largely echoed intermittent ebbs and flows of U.S. geopolitical insecurity. At its inception, the agency was tasked with monitoring the impacts of foreign investment in the United States and coordinating federal policies in this subject matter area.<sup>21</sup> It lacked authority to review specific foreign investments.<sup>22</sup> The absence of perceived threat from foreign investors in the mid-1970s explained the agency's frailty at this early stage.<sup>23</sup> The Cold War separated the Soviet block from the Western market, China had not yet emerged from the economic and political chaos of the Cultural Revolution, and Japan, a crucial military and political ally of the United States, had not been regarded as a worthy competitor that might one day end the U.S. dominance over the world economy.<sup>24</sup> In the 1980s, however, Japan's formidable economic machine appeared set to dethrone the United States,<sup>25</sup> so Japanese investors' acquisition of U.S. technology companies stimulated strong political resistance.<sup>26</sup> Consequently, Congress in 1988 passed the Exon-Florio Amendment to Title VII of the DPA, allowing the President to block any transaction that would result in foreign control of U.S. businesses and that

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20. See, e.g., David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 90–97 (2009).

21. Tingley et al., *supra* note 19, at 36.

22. See *id.* at 36–37.

23. See *id.* at 36.

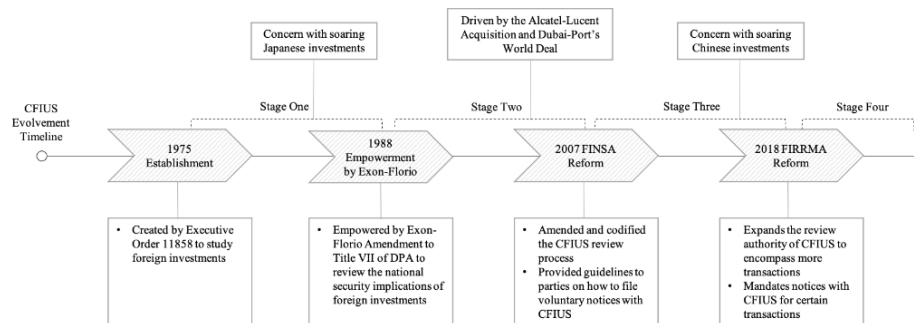
24. Paul B. Stephan, *The Cold War and Soviet Law*, 93 AM. SOC'Y INT'L L. PROC. 43, 50 (1999); John Ruwitch & Michael Martina, *China Must Never Repeat Cultural Revolution: People's Daily*, REUTERS (May 16, 2016, 10:30 PM), <https://www.reuters.com/article/us-china-culturalrevolution/china-must-never-repeat-cultural-revolution-peoples-daily-idUSKCN0Y80BZ> [<https://perma.cc/SCL6-K5WT>]; Yoshiaki Nohara, *Japan's Economy Shows Greater Strength as Global Outlook Darkens*, BLOOMBERG (Sept. 7, 2022, 8:10 PM), <https://www.bloomberg.com/news/articles/2022-09-07/japan-s-second-quarter-growth-beats-initial-estimate> [<https://perma.cc/9Y3Q-QVZH>].

25. See, e.g., EZRA VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* 21 (1979); PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* 418 (1989).

26. See generally Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1 (1989).

might impair national security.<sup>27</sup> To grant the executive branch sufficient discretion on this matter, the amendment excluded from judicial review the President's decision to suspend or prohibit a transaction.<sup>28</sup> In 1988, President Reagan delegated to CFIUS the power to review foreign investments for national security risks.<sup>29</sup>

FIGURE 2: CFIUS EVOLUTION



*Stage Two:* The wave of U.S. economic nationalism receded as Japan's economy entered into an extended period of stagnation.<sup>30</sup> For more than a decade since the enactment of the Exon-Florio Amendment, the presidential veto was rarely exercised to block foreign acquisitions of U.S. companies, with a notable exception—in 1990 President George H. W. Bush ordered China National Aero-Technology Import and Export Corporation to divest its interest in MAMCO Manufacturing, a Seattle aerospace supplier.<sup>31</sup> CFIUS, however, woke up from this prolonged hibernation to political outcries following a series of high-profile foreign acquisitions of U.S. businesses in 2005 and 2006, including the Alcatel-Lucent merger and the purchase by Dubai Ports World (which was owned by the UAE government) of a British firm that managed six major U.S. ports.<sup>32</sup> CFIUS, having approved both deals, attracted a great deal of negative publicity, and a cohort of Congress members questioned the adequacy of the investment screening system to safeguard U.S. national security.<sup>33</sup> The political pressure led to the

27. 50 U.S.C. app. § 2170(a)(3) (Defense Production Act of 1950 § 721, later amended by the Foreign Investment and National Security Act of 2007 and the Foreign Investment Risk Review Modernization Act of 2018).

28. The Exon-Florio Amendment was passed as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107 (1988). Executive Order 12661 implements the Omnibus Trade and Competitiveness Act of 1988. See Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

29. See Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

30. See Li, *supra* note 14.

31. Harriet King, *China Ends Silence on Deal U.S. Rescinded*, N.Y. TIMES (Feb. 20, 1990), <https://www.nytimes.com/1990/02/20/business/china-ends-silence-on-deal-us-rescinded.html> [https://perma.cc/4J5Y-DD7T].

32. Jayden R. Barrington, *CFIUS Reform: Fear and FIRRMA, An Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 TENN. J. BUS. L. 77, 87 (2019).

33. *Id.* at 87–88.



passage of FINSA, which amended the CFIUS review mechanism and significantly enhanced Congressional oversight.<sup>34</sup>

*Stage Three:* FINSA clarified the jurisdiction of CFIUS and confined its national security purview to “covered transactions,” defined as any “proposed, pending” or completed “merger, acquisition, or takeover” that “could result in foreign control of any person engaged in interstate commerce in the United States.”<sup>35</sup> And control was broadly defined as “the power, direct or indirect, whether or not exercised, . . . to determine, direct or decide matters affecting an entity.”<sup>36</sup> While FINSA granted broad power to CFIUS, it did not require foreign investors to file notices with CFIUS prior to a covered transaction.<sup>37</sup> In other words, the filing was largely voluntary.<sup>38</sup> But given the agency’s authority to initiate a review unilaterally at any time during and after a covered transaction, foreign acquirers of U.S. businesses would have strong incentives to notify CFIUS and acquire its pre-approval by following a specified filing procedure.<sup>39</sup> According to FINSA and its implementing regulations, the process would typically begin with a filing of notice by a relevant party.<sup>40</sup> After receiving the notice, CFIUS would conduct an initial review within thirty days.<sup>41</sup> If a national security issue was identified, the agency would then initiate an investigation that should normally last no more than forty-five days, at the end of which CFIUS would take one of three actions: unconditional approval of the transaction, approval of the transaction contingent on satisfactory mitigation measures negotiated with and adopted by the foreign investor, or rejection.<sup>42</sup> A rejection could be further reviewed by the President, who had fifteen days to decide whether to block the deal.<sup>43</sup> That decision would be final and exempt from judicial review.<sup>44</sup> While FINSA streamlined and codified the CFIUS process, it failed to fully resolve the tensions between maintaining an open U.S. market for foreign investments and protecting national security against perceived threats that had multiplied as the world’s geopolitical order underwent profound changes.<sup>45</sup> Before long, political pressure built again to reform the CFIUS regime. And this time, China was labelled as the foreign foe.

*Stage Four:* After the enactment of FINSA, the U.S. government continued to adhere to the “Open Investment Policy,” a commitment to treat all foreign

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34. Zaring, *supra* note 20, at 95–96.

35. 50 U.S.C. app. § 2170(a)(3) (2006) (Defense Production Act of 1950 § 721, amended by the Foreign Investment and National Security Act of 2007).

36. 31 C.F.R. § 800.208.

37. Li, *supra* note 14, at 4–5.

38. *Id.*

39. *Id.* at 5.

40. Griffin, *supra* note 13, at 1774–75.

41. Li, *supra* note 14, at 4–5.

42. *Id.* at 5.

43. *Id.*

44. See Isaac Lederman, *The Right Rights for the Right People? The Need for Judicial Protection of Foreign Investors*, 61 B.C. L. REV. 703, 711–12 (2020).

45. Griffin, *supra* note 13, at 1774–75.

investors in a fair and equitable manner under the law.<sup>46</sup> The policy, coupled with the voluntary filing procedure under FINSA, resulted in only 5% of all foreign investments in the United States going through the CFIUS process.<sup>47</sup> As Chinese investments in the United States soared (see Figure 2),<sup>48</sup> federal legislative actions to further strengthen the national security review regained momentum.<sup>49</sup>

Two characteristics of Chinese investments evoked grave national security concerns. First, extensive state ownership of many large Chinese multinationals as well as the government's close relationships with privately-owned Chinese firms raised the concern that Chinese investments might be driven by political or policy objectives of the home state rather than the investors' commercial interests.<sup>50</sup> Second, some Chinese investments in the United States have concentrated in sectors arguably related to national security.<sup>51</sup> As alluded to earlier, given the complementarity of the two economies, a high percentage of Chinese investors invested in the United States to acquire advanced technologies.<sup>52</sup>

To be fair, CFIUS was not sitting on its hands. Prior to the enactment of FIRRMA, CFIUS had already reviewed an increasing number of filings made by Chinese investors.<sup>53</sup> From 2012 to 2018, Chinese investments generated the largest portion of notices filed each year (see Figure 3). The agency appeared to have applied more rigorous standards when reviewing and investigating Chinese transactions,<sup>54</sup> so it would be natural that more Chinese deals were blocked. Excluding the transactions that were approved with mitigation measures, withdrawn by parties, rejected due to failure to comply with filing procedures, or subsequently refiled, CFIUS ordered Chinese investors to divest \$13 billion worth of U.S. business in 2018 alone, and an additional \$20 billion in asset sales were pending by the end of that year.<sup>55</sup> Still, U.S. lawmakers expressed concerns that Chinese investors, advised by U.S. lawyers, were able to circumvent the

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46. Statements on United States Commitment to Open Investment Policy, 1 PUB. PAPERS 685 (June 20, 2011).

47. Richard Chesley, *Initiating Substantial Uncertainty into an Already Uncertain Process: The Intersection of National Security and Bankruptcy*, DLA PIPER (Mar. 25, 2013), [https://www.dlapiper.com/en/us/insights/publications/2013/03/initiating-substantial-uncertainty-into-an-alrea\\_/](https://www.dlapiper.com/en/us/insights/publications/2013/03/initiating-substantial-uncertainty-into-an-alrea_/) [<https://perma.cc/F5WG-VEQ2>].

48. Thilo Hanemann, Daniel H. Rosen, Cassie Gao & Adam Lysenko, *Two-Way Street: 2019 Update, US-China Investment Trends*, RHODIUM GRP. (May 8, 2019), <https://rhg.com/research/two-way-street-2019-update-us-china-direct-investment-trends/> [<https://perma.cc/6GK7-3KGN>].

49. Griffin, *supra* note 13, at 1774–75.

50. Ji Li, *In Pursuit of Fairness: How Chinese Multinational Companies React to U.S. Government Bias.*, 62 HARV. INT'L L.J. 375, 380, 387 (2021).

51. Hanemann et al., *supra* note 48, at 30–32 tbl.2 fig.6.

52. Ji Li, *THE CLASH OF CAPITALISMS?: CHINESE COMPANIES IN THE UNITED STATES* 38 (2018).

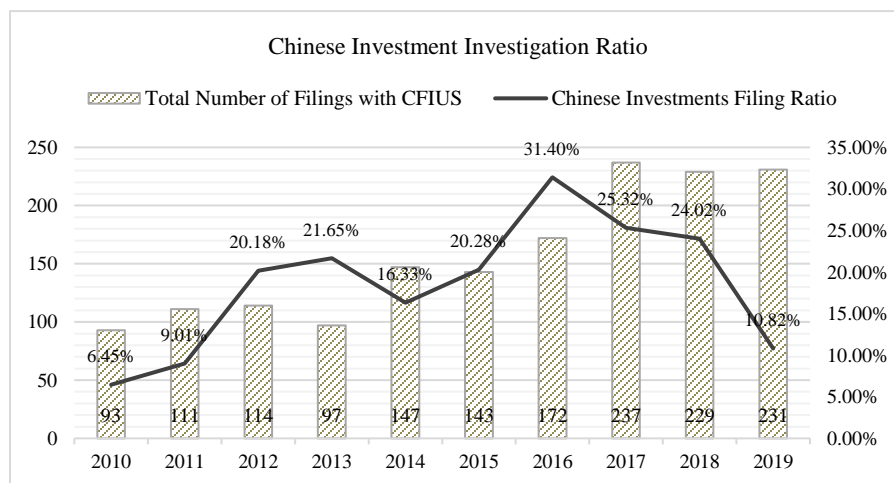
53. Evan Zimmerman, *The Foreign Risk Review Modernization Act: How CFIUS Became a Tech Office*, 34 BERKELEY TECH. L.J. 1267, 1269 (2019).

54. *See generally, e.g.*, U.S. DEP'T OF THE TREASURY, COMMITTEE ON FOREIGN INVESTMENT IN THE U.S.: ANNUAL REPORT TO CONGRESS 2018, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables> [<https://perma.cc/M8LB-W64H>].

55. *See* Hanemann et al., *supra* note 48 at 11, 28 box 1.

investment screening mechanism.<sup>56</sup> Finally, against the backdrop of the escalating U.S.-China trade war, FIRRMA came into effect in August 2018, empowering CFIUS to further tighten and widen its review over foreign investments, particularly investments from China.<sup>57</sup>

FIGURE 3: RATIO OF CHINESE FDI IN THE U.S. FILED WITH CFIUS REVIEW, 2010–2019



FIRRMA and its implementing regulations overhauled the CFIUS review regime in three major aspects. First, as previously noted, they significantly broadened the scope of the agency’s review to encompass real estate transactions and certain nonpassive, noncontrolling investments in critical infrastructure, critical technologies, or sensitive personal data of U.S. citizens.<sup>58</sup> Second, FIRRMA created a dual-track filing system that, unlike the voluntary filing system under FINSAs, allowed for expedited, short-form filing of transactions with low national security risk<sup>59</sup> but mandated filings for transactions involving critical technologies, critical infrastructure, and sensitive personal data in which a “foreign government has, directly or indirectly, a substantial interest.”<sup>60</sup> It also enabled CFIUS to request a filing for every foreign investment in critical technology businesses that met specific threshold criteria.<sup>61</sup> Third, FIRRMA boosted the

56. Robert Williams, *CFIUS Reform and U.S. Government Concerns over Chinese Investment: A Primer*, LAWFARE INST. (Nov. 13, 2017, 7:34 AM), <https://www.lawfareblog.com/cfius-reform-and-us-government-concerns-over-chinese-investment-primer> [https://perma.cc/UV3L-VSK6].

57. Heath P. Tarbert, *Modernizing CFIUS*, 88 GEO. WASH. L. REV. 1477, 1500, 1510 (2020).

58. See U.S. DEP’T OF THE TREASURY, SUMMARY OF THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018.

59. Tarbert, *supra* note 57, at 1523.

60. David Fagan & Brian Williams, *Intersection of National Security with M&A: The Committee on Foreign Investment in the United States*, TAX EXEC. (Jan. 30, 2020), <https://taxexecutive.org/intersection-of-national-security-with-ma-the-committee-on-foreign-investment-in-the-united-states/> [https://perma.cc/4JWK-58PX].

61. *Id.*

agency's capacity to handle more review and investigation and began to levy fees up to the lesser of \$300,000 or 1% of the proposed value of the transaction.<sup>62</sup>

This most recent CFIUS reform marked a major rebalancing of the decades-long “Open Investment Policy” and national security protection, to which Chinese investors appeared to have reacted swiftly. In 2018, Chinese FDI in the United States dropped to \$5.39 billion from \$29.72 billion in the previous year.<sup>63</sup> It then hovered slightly above that low level in 2019 (US \$6.3 billion) and 2020 (US \$7.2 billion).<sup>64</sup> Coinciding with the plunge of Chinese investments is a dramatic decline in the number of CFIUS filings by Chinese investors (see Figure 6 below).

Moreover, apart from heightened scrutiny of current and future investments from China, CFIUS opened investigations retroactively on past Chinese transactions and ordered some Chinese investors to unravel their U.S. investments. For instance, in July 2020 CFIUS investigated the acquisition by ByteDance, the Chinese owner of TikTok, of Musical.ly.<sup>65</sup> That transaction took place in 2018, and Musical.ly was a firm “founded by two Chinese entrepreneurs, headquartered in Shanghai, managed from China, and majority owned and controlled by Chinese shareholders.”<sup>66</sup> As a result, ByteDance skipped the CFIUS filing as it deemed that an acquisition of a China-based firm specializing in social media apps with “only a small U.S. presence” posed no threat to U.S. national security.<sup>67</sup> The retroactive CFIUS investigation, however, resulted in a Presidential order for ByteDance to divest from TikTok by mid-September of 2020.<sup>68</sup> The order cited the concern that the TikTok app could capture information from its U.S. users, “including internet and other network activity, such as location data and browsing and search histories.”<sup>69</sup> Similarly, CFIUS investigated and promptly ordered another Chinese company, Beijing Shiji Information Technology Co., and its subsidiary to divest their 2018 acquisition of U.S.-based hotel-

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62. Compare 50 U.S.C. § 2170(p)(3) (2007) (containing no provision affording CFIUS the power to levy fees on transactions), with 50 U.S.C. § 4565(p)(3) (providing CFIUS the power to levy filing fees as amended by FIRRMA).

63. Hanemann et al., *supra* note 17; see Uptin Saiidi, *China's Foreign Direct Investment into the US Dropped Precipitously in 2018, Data Show*, CNBC (Jan. 15, 2019, 4:01 AM), <https://www.cnbc.com/2019/01/15/chinese-foreign-direct-investment-to-the-us-falls-in-2018-data.html> [<https://perma.cc/6KCB-R2ZB>].

64. Hanemann et al., *supra* note 17.

65. Greg Roumeliotis, Yingzhi Yang, Echo Wang & Alexandra Alper, *Exclusive: U.S. Opens National Security Investigation into TikTok—Sources*, REUTERS (Nov. 1, 2019, 10:21 AM), <https://www.reuters.com/article/us-tiktok-cfius-exclusive-idUSKBN1XB4IL> [<https://perma.cc/V8G6-A52G>]; Brief for Petitioner at 16, *TikTok I.N.C., v. CFIUS*, No. 20-1444 (D.C. Cir. Aug. 22, 2022).

66. Brief for Petitioner, *supra* note 65, at 8.

67. *Id.* at 12.

68. *Id.* at 17; Proclamation No. 10061, 85 Fed. Reg. 51,297 (Aug. 18, 2020); see *CFIUS Review Culminates in Order Directing ByteDance, Ltd. to Divest TikTok*, CROWELL (Aug. 18, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/All/CFIUS-Review-Culminates-in-Order-Directing-ByteDance-Ltd-to-Divest-TikTok> [<https://perma.cc/CF2Q-RYRG>].

69. Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); see Torres Trade Law PLLC, *CFIUS Review of Chinese Investment in the United States: The Good, the Bad, and the Ugly*, LEXOLOGY (Sept. 22, 2020), <https://www.lexology.com/library/detail.aspx?g=3baefe13-76b2-494b-b501-77a9ed41dec> [<https://perma.cc/VHW4-7X58>].

management software company StayNTouch, Inc., alleging that the transaction enabled Beijing Shiji to access U.S. hotel guest data through StayNTouch.<sup>70</sup>

To summarize, the CFIUS regime evolved in the past few decades in response to episodic outbursts of anxiety from voters and lawmakers perceiving foreign challenges to U.S. geopolitical and economic dominance. In the 1980s, it was Japan, and the most recent CFIUS reform targeted Chinese investments. At each stage of the institutional transformation, U.S. lawmakers alleged inadequacies of the then existing screening system and the necessity of major procedural or jurisdictional amendments. The politicians' assertions, however, are nearly all that we have. As will be elaborated below, except for a few empirical research studies based on incomplete public data, we know close to nothing about how exactly the CFIUS reforms impacted foreign investors and even less about their institutional ramifications abroad. To elucidate the investment effects and the extraterritorial institutional impacts of the U.S. investment screening regime, the rest of this Article empirically examines the reactions of Chinese investors to the FIRRMA reform and the Chinese government's reciprocal reform of its foreign investment screening mechanism. But before proceeding, we take stock of the existing literature in the following Section and highlight its valuable insights and inadequacies.

### III. LITERATURE ON THE CFIUS REGIME

As the key agency tasked with screening foreign investments for national security threats, CFIUS has captured a great deal of attention from scholars, practitioners, and policymakers, which has spawned a sizable body of literature. Part III canvases the literature and highlights its major insights and gaps. As will be shown, Chinese FDI has figured prominently in the research about the U.S. investment review regime, yet much remains unexplored.

One stream of the existing research on the CFIUS process has adopted at face value its articulated policy objectives in examining how well the agency has performed.<sup>71</sup> Taking the sovereign state as the unit of analysis, researchers of this camp inquire about how "CFIUS has sought to strike a balance between promoting an open investment environment and protecting our nation's security."<sup>72</sup> Under this account, the evolution of the regime trails shifting international economic and geopolitical contexts that necessitate periodic recalibration of the agency's priorities and continual expansion of its authority. In contrast, another stream of research unpacks the unified sovereign state and traces the origin and the evolution of the investment screening regime to tensions within the federal government.<sup>73</sup> For instance, focusing on the inter-branch conflicts of interest, one such

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70. Torres Trade Law, PLLC, *supra* note 69.

71. See, e.g., Andreas Heinemann, *Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism?* 15 J. INT'L ECON. L. 843, 844–47 (2012); Tarbert, *supra* note 57, at 1508, 1521.

72. Tarbert, *supra* note 57, at 1477.

73. See, e.g., David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 83 (2009).

study characterizes CFIUS as mainly providing Congressional notification service.<sup>74</sup> And another attributes the creation of the agency to an ideological compromise between “proponents and opponents of neoliberalism,”<sup>75</sup> that is, between “an ‘internationalist’ Executive and a ‘protectionist’ Congress.”<sup>76</sup>

Given CFIUS’s expanding power, several studies have focused on the use and abuse of the screening mechanism. For instance, Tingley and colleagues find objections of foreign investment on alleged national security grounds are often vehicles through which various stakeholders “channel other grievances.”<sup>77</sup> Moreover, corporate boards may deploy CFIUS review as an antitakeover device or use it to deter foreign investors from bidding for U.S. assets.<sup>78</sup> Relatedly, as CFIUS’s actions are undoubtedly consequential, a few studies have explored their myriad impacts. One identifies major effects of CFIUS interventions on the stock prices of U.S. companies in the sectors affected by potential foreign investments—the agency’s actions “lead to multibillion-dollar wealth transfers per action.”<sup>79</sup> Another finds the CFIUS process to have a significant, discriminatory effect against Chinese enterprises, deterring them from investing in U.S. businesses, especially after the abrupt policy changes initiated by the Trump administration.<sup>80</sup>

As the U.S. screening regime has evolved along with its equivalents in other countries, some legal scholars have conducted comparative analyses of the investment screening systems.<sup>81</sup> The research largely centers on the varying forms and policy objectives of the systems<sup>82</sup> and suggests how multinationals should adapt to the increasingly complex and politicized FDI context.<sup>83</sup> Given the intensified competition between China and the United States, recent scholarship

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74. *Id.*

75. Matthew Baltz, *Institutionalizing Neoliberalism: CFIUS and the Governance of Inward Foreign Direct Investment in the United States Since 1975*, 24 REV. INT’L POL. ECON. 859, 861 (2017).

76. *Id.* at 860, 861.

77. Tingley et al., *supra* note 19, at 27.

78. Amy Westbrook, *Securing the Nation or Entrenching the Board: The Evolution of CFIUS Review of Corporate Acquisitions*, 102 MARQ. L. REV. 643, 644, 677 (2018).

79. Paul Connell & Tian Huang, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT’L L. 131, 163 (2014).

80. *See* Chen et al., *supra* note 16, at 37–38.

81. *See, e.g.*, Heinemann, *supra* note 71, at 843; Gil Lan, *Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative*, 47 VAND. J. TRANSNAT’L L. 1261, 1261 (2014); 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 (2012); Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERKELEY BUS. L.J. 255, 262 (2016); *see generally* CHENG BIAN, NATIONAL SECURITY REVIEW OF FOREIGN INVESTMENT: A COMPARATIVE LEGAL ANALYSIS OF CHINA, THE UNITED STATES AND THE EUROPEAN UNION (2020).

82. *See generally* Vinod Aggarwal & Andrew Reddie, *Economic Statecraft in the 21st Century: Implications for the Future of the Global Trade Regime*, 20 WORLD TRADE REV. 137 (2021) (noting how industrial policy is a “key component[] of economic statecraft”).

83. *See, e.g.*, Jingli Jiang & Gen Li, *CFIUS: For National Security Investigation or for Political Scrutiny*, 9 TEX. J. OIL, GAS, & ENERGY L. 67, 100 (2013); *see generally* Paul Giordano, *Considerations for In-House Counsel in Navigating CFIUS Issue in Cross-Border Transactions*, 11 INT’L. IN-HOUSE COUNSEL J. 1 (2017) (providing CFIUS considerations for internal counsel, acquirers, and sellers).

has paid much attention to FIRRMA, the legislation of which clearly targeted Chinese investments, and its policy implications.<sup>84</sup> One line of the research criticizes FIRRMA for falling short of achieving its legislative goal.<sup>85</sup> Specifically, some contend that FIRRMA has failed to fully address threats arising from other sources of investment such as greenfield investment and indirect investment<sup>86</sup> and has failed to equip CFIUS with sufficient guidance, authority, and resources to succeed in its role.<sup>87</sup> Others argue that FIRRMA has burdened CFIUS with overly broad jurisdiction and authority.<sup>88</sup> Another school cautions that FIRRMA could backfire on the U.S. economy, as both the obscurity in the guidance provided for foreign investors and the overly restrictive oversight on foreign investment will result in a loss of inbound capital, which could otherwise contribute to the U.S. economy and employment.<sup>89</sup> There are also studies highlighting some unintended effects of FIRRMA.<sup>90</sup> Most of these studies, however, are grounded on informed speculations about the effects of the CFIUS process and present insufficient empirical evidence.

The existing literature sheds valuable light on how Chinese multinationals interact with the CFIUS system. The vast majority of the studies, however, have concentrated on the analysis of law, policy, or anecdotal cases, with only a few notable exceptions that employ rigorous empirical methods to investigate the patterns and effects of CFIUS review.<sup>91</sup> Even fewer studies have empirically explored CFIUS's impacts on Chinese investments or the Chinese FDI screening regime.<sup>92</sup> The few that have touched on the topics, however, are handicapped by the lack of direct data, as the CFIUS process remains highly confidential. Having to rely on data extracted from public records or media reports, these studies present a biased or partial picture of CFIUS's investment effects.<sup>93</sup>

In summary, the CFIUS process and its recent structural reform under FIRRMA has caught much public and academic attention. By expanding the jurisdiction and power of CFIUS, FIRRMA has further tightened the scrutiny over Chinese investments in the United States. At the same time, investors face a

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84. See e.g., PHILIPPE LE CORRE, EUROPE IN AN ERA OF GROWING SINO-AMERICAN COMPETITION: COPING WITH AN UNSTABLE TRIANGLE 138–51 (Sebastian Biba & Reinhard Wolf, eds., 1st ed. 2021); Carrie Shu Shang, *US-China Transnational Law in a Time of Trade Crisis*, 28 IND. J. GLOB. LEGAL STUD. 139, 159–60 (2021); Gregory Shaffer, *Governing the Interface of US-China Trade Relations*, 115 AM. J. INT'L LAW 622, 648 (2021); Uday Khanapurkar, *CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China*, 48(2) J. CURRENT CHINESE AFF. 226, 227 (2020).

85. See, e.g., Jayden Barrington, *CFIUS Reform: Fear and FIRRMA, An Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 TRANSACTIONS 77, 103 (2019).

86. *Id.* at 103, 122.

87. Zimmerman, *supra* note 53, at 1269.

88. See, e.g., Barrington, *supra* note 85, at 105; Amy Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEO. MASON L. REV. 1347, 1379 (2013).

89. J. Russell Blakey, *The Foreign Investment Risk Review Modernization Act: The Double-Edged Sword of U.S. Foreign Investment Regulations*, 53 LOY. L.A. L. REV. 981, 1013 (2020).

90. Cf. Westbrook, *supra* note 78, at 696.

91. See generally, e.g., Connell & Huang, *supra* note 79; Tingley et al., *supra* note 19, at 40; Li, *supra* note 14, at 1; Chen et al., *supra* note 16, at 37.

92. Chen et al., *supra* note 16, at 40–41.

93. *Id.* at 42–43.

Sisyphean challenge fighting a CFIUS action in court, both before and after FIRRMA.<sup>94</sup> The secrecy clouding CFIUS review, coupled with the agency's wide discretion and the judicial deference in this subject matter area, have arguably deterred Chinese investors and accelerated the economic decoupling between the two superpowers. Few prior studies, however, have explored Chinese investors' reactions to CFIUS, especially after the passage of FIRRMA, and even less has been done to investigate FIRRMA's institutional ramifications in China. Better knowledge and understanding of the investment effects and the institutional effects of FIRMMA, aimed primarily at Chinese FDI, is essential to ongoing debates about the U.S.-China competition and the future of the global economic and legal ordering. This Article narrows the knowledge gaps by analyzing a set of comprehensive survey data about Chinese investors' views on the CFIUS process and the impacts of FIRRMA on their U.S. businesses and by examining the reciprocal transformation of the Chinese investment screening mechanism.

#### IV. IMPACTS OF CFIUS REVIEW ON CHINESE FDI IN THE UNITED STATES

As noted in the preceding section, in the debates about national security review of foreign investments, U.S. policymakers and scholars have very limited access to direct evidence about the perspectives of Chinese investors. In other words, prior research has largely inferred from indirect data that are inherently biased or incomplete. To narrow the gaps, we empirically analyze direct survey data about Chinese investors' knowledge and perception of the CFIUS process and its impacts on their businesses upon the passage of FIRRMA.

Part IV proceeds in two Sections. The first Section offers an empirical overview of the data collected in collaboration with the Chinese General Chamber of Commerce-U.S.A. ("CGCC") from 2014 to 2020. CGCC, by far the largest business association of Chinese multinationals with investments in the United States, conducts an annual comprehensive survey on its members.<sup>95</sup> In each of the years under study, the questionnaire contained a few questions about the CFIUS process. The data from the responses form the core empirical evidence for this study. Additionally, we supplement the descriptive survey data with data from the annual reports of CFIUS to Congress from 2005 to 2019.<sup>96</sup> As will be illustrated in a moment, the data exhibit both longitudinal changes and significant intercompany variations. The second Section then statistically analyzes both the Chinese investors' varying knowledge about the CFIUS process and the varied impacts of FIRRMA on their U.S. investments. The findings fill important gaps in our understanding about the CFIUS regime and the FIRRMA reform.

94. Li, *supra* note 14, at 6, 9, 36.

95. *Id.* at 22 (CGCC was founded in 2005 and is the largest and most influential nonprofit organization representing Chinese enterprises in the U.S. More than 1,500 Chinese and U.S. companies have joined the organization and fifty-four of them are ranked on the 2019 Fortune Global 500. CGCC conducts an annual survey on its China-based members from 2014 and 2020 and issues its Annual Business Survey Reports.).

96. *See generally* U.S. DEP'T OF THE TREASURY, *supra* note 54.



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A. *Overview of the Data on Chinese Investors and CFIUS*

1. *Perceptions of the CFIUS Review System*

The annual surveys conducted by CGCC elucidate Chinese investors' perceptions of the CFIUS process. As Figure 4 shows, the perceptions oscillate over time, yet the overall distributions remain relatively static. First, somewhat surprisingly, roughly half of the Chinese investors lacked any knowledge about CFIUS review, and the widely publicized FIRRMA does not appear to have notably raised the investors' awareness. Several factors may explain this puzzling finding. As mentioned at the beginning of this Article, prior to the abrupt deterioration of U.S.-China relations, U.S. policymakers by and large welcomed Chinese FDI. And CFIUS review, reflecting the broader political environment, mostly stayed focused on covered transactions posing rather clear national security threats. According to an insider, the agency at this time was "genuinely reluctant" to intervene in as many covered transactions as it did.<sup>97</sup> Given the diminished risk, many Chinese investors as well as their U.S. targets probably sidelined the filing of a CFIUS notice when negotiating a covered transaction. And the Chinese investors would not have sought additional information about the CFIUS process if no mergers or acquisitions of U.S. businesses had occurred since their entry into the U.S. market. Moreover, unlike Chinese FDI in developing countries, Chinese multinationals investing in the United States span a wide range of sectors.<sup>98</sup> Only some of the sectors are conceivably related to national security, though, as just noted, the scope of CFIUS review has greatly augmented in the wake of the U.S.-China rivalry. For instance, a Chinese investor purchasing a textile factory in rural South Carolina would reasonably stay ignorant about the CFIUS process. Furthermore, some Chinese investors have been testing the U.S. market. The limited amount of investment (and the small budget for U.S. legal services<sup>99</sup>) does not justify incurring the cost of CFIUS compliance. Also, self-selection may partially explain the high percentage of Chinese investors lacking knowledge about CFIUS. Presumably, those with the requisite knowledge are more likely to be deterred from investing in the U.S. market or have exited once the U.S.-China relations deteriorated. Hence, Chinese investors oblivious of the CFIUS review process should be relatively over-represented in the survey sample.

Meanwhile, a significant minority of the Chinese investors consider CFIUS review to be politicized and opaque. The percentages vary over time, with the lowest in 2017 (coinciding with the peak of Chinese investment in the United States) and the highest in 2014. The 2014 figures may surprise casual observers. An earlier empirical study by one of the authors attributed the negative view of CFIUS to several high-profile Chinese acquisitions the agency had scrutinized

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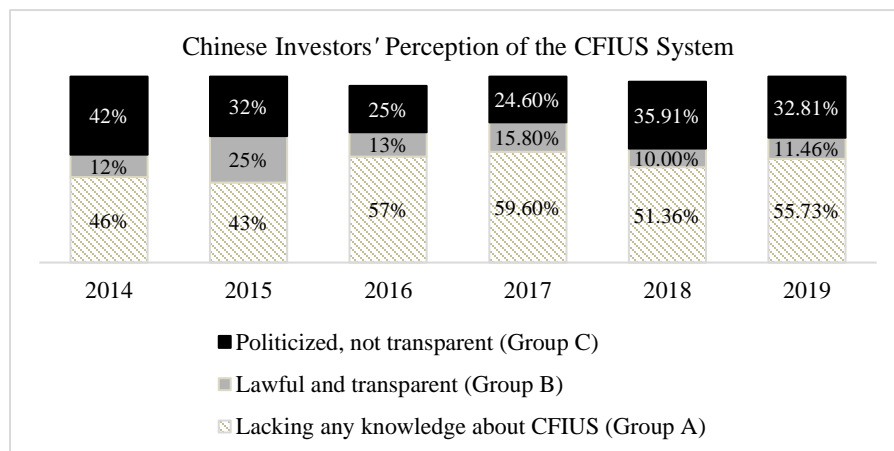
97. Li, *supra* note 14, at 16.

98. Li, *supra* note 52, at 33, 34 fig.2.4.

99. Ji Li, *Meeting Law's Demand: Chinese Multinationals as Consumers of U.S. Legal Services*, 46 YALE J. INT'L L. ONLINE 72, 88 (2021).

or rejected.<sup>100</sup> For instance, a Chinese investor, Sany Heavy Machinery Group (“Sany”), invested in a windfarm business in Oregon and neglected the CFIUS risk before closing the transaction.<sup>101</sup> The agency initiated an investigation, concluded that the investment would impair U.S. national security, and ordered the Chinese investor to divest under draconian terms.<sup>102</sup> Risking the loss of its entire U.S. investment, the Chinese multinational decided to file a lawsuit against CFIUS, the first ever lawsuit in the agency’s entire history.<sup>103</sup> The case, *Ralls Corp. v. CFIUS* (“*Ralls*”),<sup>104</sup> and the alleged mistreatment caught much public attention and gave Chinese investors the impression that CFIUS review was a highly politicized process—hence the negative view recorded by the 2014 CGCC survey (see Figure 4 below). But much to the surprise of almost everyone following the lawsuit, including national security law experts, the Chinese investor prevailed in the D.C. Circuit Court against the federal agency and thereafter settled the case on more favorable terms.<sup>105</sup>

FIGURE 4: SURVEY RESPONSES REGARDING CHINESE INVESTORS’ VIEW OF THE CFIUS SYSTEM



The outcome of the lawsuit apparently had a major impact on Chinese investors’ perception of the CFIUS regime, for the percentage of those expressing a negative view declined quite a bit in the following two years. That trend, however, was reversed in 2018 by the U.S.-China trade war. Also, the lawsuit and the unexpected win of the Chinese investor probably explain why 25% of Chinese investors in 2015, right after the appellate court decision was announced,

100. See Li, *supra* note 14, at 39, 42.

101. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 304–05 (D.C. Cir. 2014).

102. *Id.* at 305.

103. *Id.* at 306.

104. *Id.* at 296.

105. Li, *supra* note 14, at 8.

considered the CFIUS process to be lawful and transparent.<sup>106</sup> That positive view, however, turned out to be evanescent, as the percentage dropped back to the 10% range in 2016 and has remained at that low level ever since.<sup>107</sup> Despite Sany's legal success, Chinese investors soon realized the limitations of the court's holdings. Although *Ralls* confirms that the CFIUS process falls within the constitutional purview, the case promises no more than a bare minimal procedural guarantee for foreign investors sanctioned by CFIUS.<sup>108</sup> A thorough research of the cases in subsequent years shows that the issue of subject matter jurisdiction remains. U.S. courts continue to avoid interfering in matters that are intimately connected to foreign policy like that in *Ralls*, a sphere conventionally reserved by the constitutional design to the executive branch.<sup>109</sup> While *Ralls* has been heavily cited for its rulings on the due process violation tests and its jurisdiction analysis, no cases that referenced *Ralls* have ever since revisited the issue of judicial reviewability of CFIUS decisions. Although FIRRMA amended DPA to allow judicial review of CFIUS actions,<sup>110</sup> courts' concern with usurping the executive branch's power in foreign affairs has not subsided. In other words, judicial review on CFIUS decisions peaked in *Ralls*, and that may explain why the percentages of Chinese investors holding the positive view about the screening process dropped considerably again in 2015 and plateaued thereafter.

The sharp turn of the China policy and the passage of FIRRMA also played a role in the rise of the negative view toward the CFIUS process. The post-FIRRMA CFIUS review has manifestly become more vexing, especially for Chinese investors. As shown in Figure 5, the investigation/notice ratio of inbound foreign investments experienced a sharp rise after 2016, and it declined after most Chinese investors ceased to acquire U.S. businesses. Recall that Chinese investments in the United States dropped to \$5.39 billion in 2018, representing an 81.86% decrease from the amount in 2017 (see Figure 2). At the same time, the number of filings with CFIUS by Chinese investors plummeted from 2018 to 2019 (see Figure 6). Both frequent interventions by opaque CFIUS investigations and the increasingly hostile political and regulatory environment inevitably dimmed the Chinese investors' perception of the U.S. investment screening mechanism.

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106. See *supra* Figure 4.

107. See *id.*

108. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 325 (D.C. Cir. 2014).

109. See *Sikhs for Just. "SFJ", Inc. v. Kerry*, No. 15 CV 433-LTS, 2015 U.S. Dist. LEXIS 162254, at \*7-8 (S.D.N.Y. Dec. 3, 2015) (rejecting Plaintiffs' assertion that the Defendant Secretary of State John Kerry owed them a duty to designate a third party as a foreign terrorist organization, of which the decision was made by the Defendant's sole discretion); *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 99 (D.D.C. 2016) (holding that the decision by the Secretary of State to designate an organization as a "foreign terrorist organization" is a foreign-policy judgment that is constitutionally committed to the political branches, not the judiciary).

110. 50 U.S.C. § 4565(e)(2) (allowing civil actions to be brought in the United States Court of Appeals for the District of Columbia Circuit).

FIGURE 5: CHANGE IN NUMBER OF NOTICES FILED WITH CFIUS AND CFIUS’S INVESTIGATION/NOTICE RATIO, 2005–2019.<sup>111</sup>

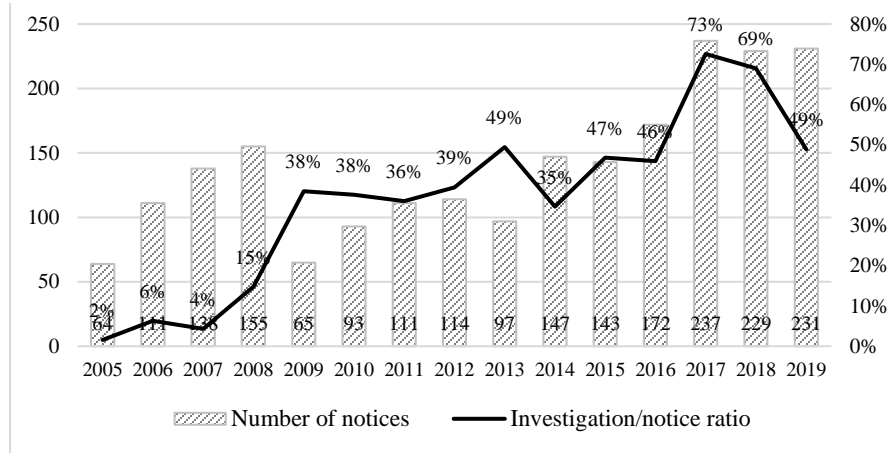
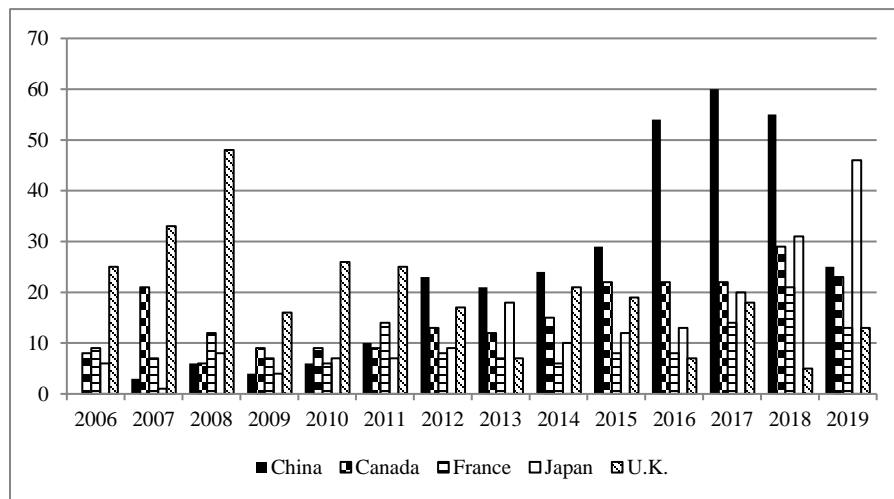


FIGURE 6: NUMBER OF NOTICES FILED ORGANIZED BY COUNTRY



2. *FIRRMA’s Impacts and Chinese Investors’ Investment Strategies*

As previously noted, the FIRRMA reform of the CFIUS process aimed primarily at restraining Chinese investments in the United States. But whether and how the reform has impacted the U.S. operations of Chinese multinationals remain underexplored. The overall volume of Chinese FDI shrank in 2018 when

111. See generally U.S. DEP’T OF THE TREASURY, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ANNUAL REPORT TO CONGRESS (2005–2019).

FIRRMA took effect.<sup>112</sup> That much we know. But the investment decrease and the CFIUS reform might be symptoms of the escalating superpower rivalry. In other words, prior research has not separated FIRMMA's direct investment effects from those of the deteriorating U.S. political and regulatory environment. To what extent do changes in the U.S. businesses of Chinese investors reflect the amended CFIUS review instead of the increasingly hostile host-state institutional environment? The preceding Subsection has shed light on that question, but a negative perception of CFIUS does not necessarily translate into disruptions of Chinese investors' U.S. businesses. Additionally, what possible reactions might the investors undertake in response to the post-FIRRMA CFIUS risk? We attempt to answer these questions in this Subsection.

On the eve of FIRRMA's passage in 2018, the CGCC inserted a question in its annual survey inquiring about the respondents' view toward the potential impact of the new legislation on their U.S. investments.<sup>113</sup> Largely consistent with the data on the CFIUS awareness, nearly 60% of the respondents were unfamiliar with the issue.<sup>114</sup> Among the respondents aware of it, slightly more than half anticipated FIRRMA to affect their company's new investments (see Figure 7)

FIGURE 7: 2018 CGCC ANNUAL SURVEY, ESTIMATED IMPACT OF FIRRMA

*In November 2017, Foreign Investment Risk Review Modernization Act (FIRRMA) was submitted to the Congress, proposing an increase of CFIUS's power, expansion of the CFIUS review's scope and strictness, and revision of review process. If the FIRRMA will be passed, how would it impact your company's new investment?*

Answer Choices	Responses	
Not familiar with the issue at all	59.80%	122
No impacts	18.63%	38
Have impacts	21.57%	44
	<b>Answered</b>	<b>204</b>

After the passage of FIRRMA, the CGCC surveys conducted in 2019 and 2020 asked the responding Chinese firms cognizant of CFIUS review whether and how the reformed investment screening mechanism affected their U.S. investment plans (see Figure 8). As the survey data illustrate, about one third of the respondents reported in 2019 that their U.S. investments plans were affected by the FIRRMA-reformed CFIUS review. And more than 40% of those that reported CFIUS's impacts altered the direction of their business development in the United States, and roughly the same percentage abandoned their U.S. investment plans. Additionally, about a third of the responding firms reported to have changed the scale of the U.S. investments and 30% adjusted the method of investing in the U.S. market. In contrast to the extant literature summarized earlier, our data here offer direct evidence demonstrating substantial effects of the

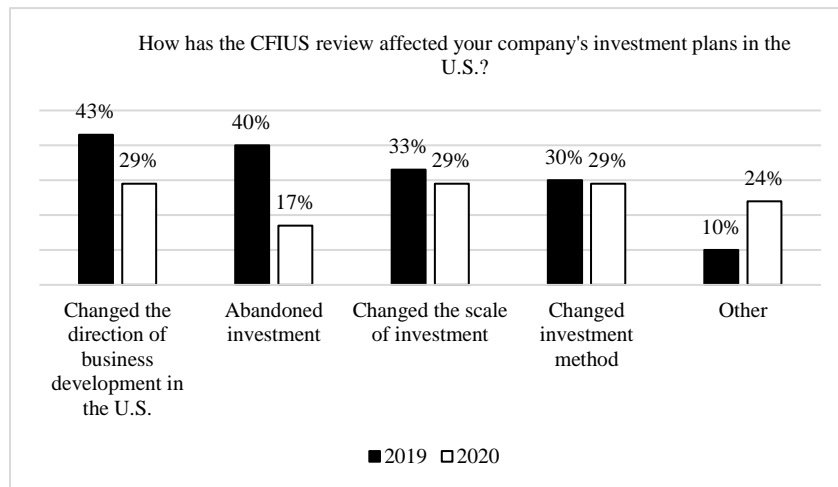
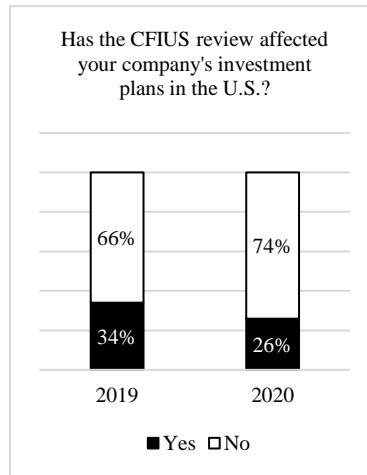
112. See *supra* notes 16–17 and accompanying text.

113. See *infra* Figure 7.

114. *Id.*

CFIUS process, as amended by FIRRMA, on the U.S. investments of Chinese multinationals.

FIGURE 8: IMPACT OF CFIUS REVIEW ON RESPONDENTS' INVESTMENT PLANS, 2019–2020



Note: only those who reported to have knowledge about CFIUS review responded to these questions.

Note that the percentages of Chinese investors affected by the reformed CFIUS review declined from 2019 to 2020 and that the same drop is observed in the fractions of Chinese investors that have modified the direction of their U.S. investment or even shelved their U.S. investment plans. Given the deteriorating bilateral relations and the adverse environment for Chinese FDI in the United

States, we ascribe the percentage drop to selection effects and adaptation. First, FIRRMA’s effects on Chinese investments in the United States in 2019 rippled over and changed the investors’ responses in the following year, as some Chinese investors either steered their U.S. investments away from sensitive sectors or gave up their original plans. Those that stayed on the same course were inevitably less concerned about the elevated post-FIRRMA CFIUS scrutiny. Put another way, the filtering effect of FIRRMA produced a sample of Chinese investors for the 2020 survey that was less affected by CFIUS review. Relatedly, the plunge of Chinese FDI in the United States from 2018 to 2020 should have also contributed to the percentage drop illustrated in Figure 8, as those investors that remained committed to the U.S. market must have considered CFIUS risk to be insignificant, manageable, or justified by high expected investment return, despite the worsening bilateral relations and the prejudicial legislation of FIRRMA. Second, some Chinese investors who value direct access to the U.S. market might have adapted by circumventing the CFIUS process. Since the U.S. investment screening generally focuses on foreign acquisitions of U.S. businesses, quite a few Chinese investors have opted for making greenfield investment—setting up a U.S. business from scratch instead of purchasing an established U.S. firm. According to the 2019 and 2020 survey, more than half of the respondents reportedly entered the U.S. market through greenfield investments (see Figure 9). By comparison, less than 10% established their U.S. footholds by acquiring equity of U.S. businesses, a method of investment that is more likely to fall into CFIUS jurisdiction. Dovetailing with the data, the number of Chinese firms that planned to conduct M&A in the United States veered sharply downward during the same period (see Figure 10).

FIGURE 9: CORPORATE STRUCTURE OF CHOICE, 2019–2020

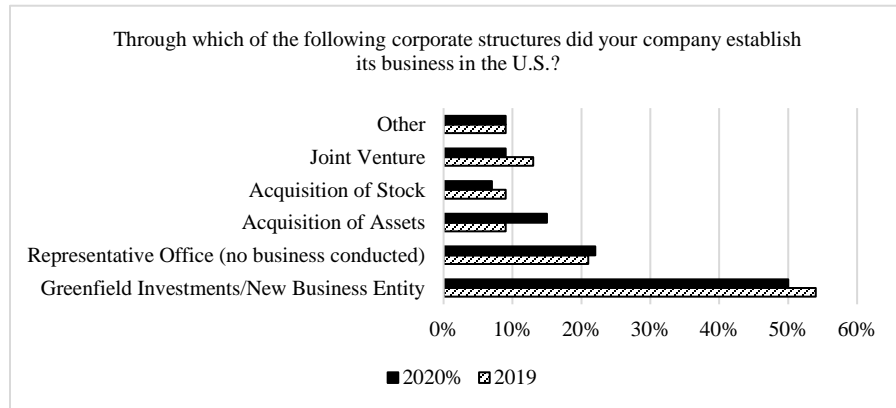
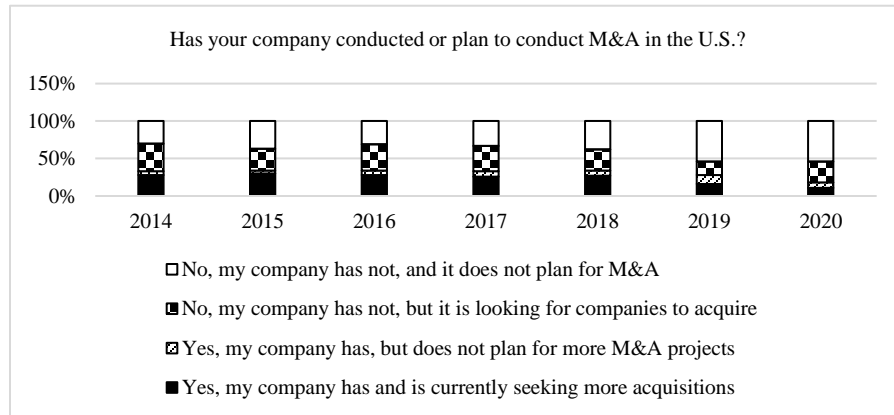


FIGURE 10: M&A TRANSACTIONS CONDUCTED BY OR PLANNED BY CHINESE INVESTORS, 2014–2020



To summarize, the CFIUS process, recently amended by FIRRMA, has negatively impacted Chinese FDI in the United States. As will be elaborated in the end of this Article, the descriptive survey data presented herein add an important layer of empirical evidence essential to multiple ongoing policy and academic debates, including, inter alia, national security review of foreign investments, U.S.-China relations, and multinationals' management of growing, intricate geopolitical risks. Meanwhile, the data also reveal significant intercompany variations in the knowledge about the CFIUS regime and the perceived impacts of FIRRMA. What may explain the variations? The existing literature is completely silent on this important question because no prior studies had access to adequate firm-level information. Using the comprehensive CGCC survey data, the following Subsection attempts some preliminary answers.

### B. *Intercompany Variations in CFIUS Knowledge and FIRRMA Impacts*

#### 1. *Varying Knowledge About CFIUS Review*

Why do Chinese investors differ in their knowledge about CFIUS review, an intrusive, unpredictable, and consequential process that all foreign firms contemplating U.S. investment should in theory take seriously? In other words, why have some Chinese investors acquired knowledge about CFIUS, whereas others remained ignorant? The answer is essential to understanding their reactions to the U.S. investment screening system and its recent overhaul. Yet, as just noted, the prior literature has barely touched on this and other relevant topics. To fill the lacuna, we run statistical tests on a range of variables that may correlate with the investors' CFIUS awareness. For the dependent variable, we construct a dummy that equals one if a respondent to the CGCC 2019 survey reported knowledge about CFIUS review and zero if otherwise. We use the data of the 2019 survey, as it was conducted right after the enactment of FIRRMA.



Drawing on insights from the prior research and the articulated policy objectives of the U.S. investment screening regime, we investigate possible effects of the following factors on the Chinese investors' knowledge. First, state ownership of Chinese investors merits some attention. Even before the legislation of FIRRMA, CFIUS was obliged to scrutinize investors controlled by foreign governments, especially those not considered U.S. allies.<sup>115</sup> Also, several high-profile U.S. investments by foreign state-owned companies once stimulated heated debates in the United States and culminated in either divestment or withdrawn bids (*e.g.*, Dubai Port and CNOOC).<sup>116</sup> The extensive media coverage of these transactions might have put state-owned Chinese investors on notice of the CFIUS risk and even informed them of the basic contour of the U.S. screening regime. To capture varying state ownership in Chinese investors, we formulate two dummy variables. The first dummy—majority state ownership—equals one if a Chinese government body owns more than 50% of a Chinese investor and zero if otherwise. The second dummy—significant minority state ownership—equals one if a Chinese government body owns between 50% and 10% of a Chinese investor and zero if otherwise. When both dummies equal zero, state ownership is either nonexistent or insignificant. At less than 10%, state ownership is conventionally treated as passive portfolio investment that typically raises no U.S. national security concern.<sup>117</sup>

Second, a Chinese investor's industry sector may also correlate with the CFIUS awareness. Some sectors relate intimately to national security. For instance, covered transactions targeting U.S. critical infrastructure has been singled out to automatically trigger a CFIUS investigation upon notice.<sup>118</sup> Likewise, FDI in telecommunications have been frequently investigated.<sup>119</sup> Though Congress refuses to clearly define national security, it offers a list of considerations for the CFIUS analysis, including a foreign acquirer's sector.<sup>120</sup> To test this hypothetical connection, we create a dummy variable that equals one if a Chinese foreign investor operates in a "sensitive sector" and zero if otherwise. The tricky issue in coding this variable is how to define "sensitive sector" when the formal definition remains ambiguous. Based on the enumerated factors in the regulations and prior research, we define the term broadly to include crucial infrastructure, information, transportation, heavy machinery with dual use potential, public utilities, and the defense industry.<sup>121</sup>

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115. Li, *supra* note 14, at 17.

116. Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199, 222–24 (2009).

117. See 50 U.S.C. app. § 2170(b)(1)(C) (as amended by FIRRMA).

118. See 31 C.F.R. § 800.503(b)(2) (2011).

119. For instance, the Chinese telecommunications company, Huawei, has been investigated several times by CFIUS, and its acquisitions of U.S. business have been prohibited. See Ji Li, *I Came, I Saw, I... Adapted: An Empirical Study of Chinese Business Expansion in the United States and Its Legal and Policy Implications*, 36 NW. J. INT'L L. & BUS. 143, 169 (2016).

120. See Giordano, *supra* note 83, at 6–9.

121. We define sensitive industries to include: 1) industries such as capital goods, commercial and professional services, and transportation; 2) the financial industry, such as banking, insurance and diversified finance;

Third, the CFIUS process is but one part of a highly complex regulatory environment for Chinese investment in the United States. To effectively navigate the system requires sufficient legal capacity, which may have an effect on the knowledge about the CFIUS risk. To be more concrete, all else being equal, Chinese investors equipped with professional in-house legal counsel are more likely to stay informed of major host-state legal and regulatory risks that might implicate their U.S. investments.<sup>122</sup> To measure this type of corporate legal capacity, we create a dummy that equals one if a Chinese investor has employed a full-time legal manager who is licensed to practice U.S. law and zero if otherwise.

TABLE 1: SUMMARY STATISTICS

Variable	Mean	Standard Deviations	Min	Max	Observations
<b>Knowledge about CFIUS</b>	0.443	0.498	0	1	192
<b>FIRRMA impact</b>	0.165	0.372	0	1	194
<b>State ownership (50%)</b>	0.304	0.461	0	1	230
<b>State ownership (10%)</b>	0.078	0.269	0	1	230
<b>Sensitive industries</b>	0.650	0.478	0	1	234
<b>In-house legal capacity</b>	0.346	0.477	0	1	188
<b>Degree of business internationalization</b>	0.411	0.493	0	1	197
<b>Entry mode</b>	0.214	0.410	0	1	220
<b>M&amp;A in the past</b>	0.270	0.445	0	1	178
<b>M&amp;A plan</b>	0.326	0.470	0	1	178
<b>US revenue</b>	2.535	1.587	1	5	202
<b>Investment duration</b>	10.270	8.325	1	38	218
<b>Listing status (US exchanges)</b>	0.066	0.249	0	1	226

Source: CGCC 2019 survey

Fourth, the degree of a Chinese investor's business globalization may relate to the managers' knowledge about foreign investment screening regimes. Domestic transactions are by their nature exempt from foreign investment review, so Chinese firms without any overseas operations would not have gained any prior experience handling such a regulatory risk.<sup>123</sup> By contrast, those that have

3) chemical, building materials, container packaging, metals, mining, papermaking, forest products and other material industries; 4) healthcare industries such as medical devices and services, pharmaceuticals, biotechnology and life sciences; 5) energy industries, such as energy equipment and services, oil and gas, and consumable fuels; (6) alternative carriers, integrated telecommunications services, wireless telecommunications services and other telecommunications services; and 7) information technology industry, such as software and services, technical hardware and equipment, semiconductors and semiconductor equipment. We created a dummy variable that equals one if the response falls into one of these sensitive industries and zero if otherwise. *See id.* at 6.

122. *See* Giordano, *supra* note 83, at 1.

123. *See infra* notes 143–45 and accompanying text.

expanded businesses globally might have gone through some forms of national security review in the United States or other major host countries.<sup>124</sup> As a result, the executives might have accumulated some basic awareness of the regime. To test this hypothesis, we create a proxy dummy variable for measuring the degree of business globalization. The 2019 CGCC survey contained a question asking respondents to highlight their firms' competitive advantages.<sup>125</sup> Among the choices is "globalized resource allocation."<sup>126</sup> We assign the dummy variable the value of one if a Chinese investor made that selection (considering globalized resource allocation to be its competitive advantage) and zero if otherwise.

Fifth, Chinese investors' mode of entry into the U.S. market may also matter. As previously noted, the U.S. foreign investment screening rules have generally exempted greenfield investments from CFIUS scrutiny.<sup>127</sup> In the eyes of the U.S. lawmakers, foreign investors that build their U.S. business operations from scratch do not pose any significant national security threat that cannot be adequately addressed by other U.S. laws.<sup>128</sup> Therefore, Chinese investors that entered the U.S. market through greenfield investments may remain rationally ignorant about the CFIUS process. To assess this hypothesis, we add a dummy variable that equals one if a Chinese firm invested in the U.S. market by acquiring the equity of a U.S. business or by forming a joint venture and zero if otherwise.<sup>129</sup>

Sixth, a Chinese investor's recent experience with U.S. mergers or acquisitions may relate to their CFIUS knowledge. Because CFIUS's jurisdiction is generally restricted to foreign acquisitions of U.S. businesses, a Chinese investor that recently engaged in such a transaction is more likely to have at least contemplated the CFIUS risk and, as a result, have acquired some relevant information. To test this hypothesis, we construct a dummy variable that equals one if a respondent to the 2019 CGCC survey reported to have engaged in a U.S. merger or acquisition in the two prior years and zero if otherwise. Moreover, anticipated M&A in the United States may also influence the CFIUS awareness of Chinese investors. In other words, Chinese firms with plans to purchase U.S. businesses are presumably more attentive to major regulatory risks. And CFIUS review would no doubt constitute such a risk given the passage of FIRRMA and the deteriorating U.S.-China relations. To assess this additional hypothesis, we create another dummy and assign it the value of one if a Chinese investor, regardless

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124. See the discussion in Part VI for a brief survey of countries that have established foreign investment risk review mechanisms.

125. CHINA GEN. CHAMBER OF COM., 2019 ANNUAL BUSINESS SURVEY REPORT 52 (2019), <https://www.cgccusa.org/wp-content/uploads/2019/06/CGCC-Survey-Report-2019.pdf> [<https://perma.cc/8V35-4PF9>].

126. *Id.*

127. See discussion *supra* Part III.

128. See 31 C.F.R. §§ 800.301(c), (e)(3) (2021).

129. Prior to FIRRMA, forming a joint venture may enable a foreign investor to bypass CFIUS review. See Lin Cui & Fuming Jiang, *FDI Entry Mode Choice of Chinese Firms: A Strategic Behavior Perspective*, 44 J. WORLD BUS. 434, 442 (2009). FIRRMA expanded CFIUS authority to enable it to review joint ventures involving foreign investors. See 50 U.S.C. app. § 2170(a) (as amended by FIRRMA).

of its prior M&A experience, reported in the 2019 survey to have made plans to engage in such transactions in the future and zero if no such plan was in place.

Seventh, the size of a Chinese investor's U.S. operations may correlate with its CFIUS knowledge. Intuitively, how much a multinational invests in the United States shapes the cost-benefit analysis of a CFIUS investigation and sanction. For instance, anyone contemplating an acquisition of a multi-billion-dollar U.S. business should seek the safe harbor protection of a CFIUS notification prior to closing the deal.<sup>130</sup> By contrast, foreign investors may readily assume the risk of bypassing CFIUS if the interest at stake is less substantial (*e.g.*, acquiring a U.S. firm valued at no more than a million dollars).<sup>131</sup> Additionally, a Chinese investor's U.S. business size may be taken as a proxy of its financial capacity to bear the cost of CFIUS compliance. The 2019 survey included a scale question about the Chinese investors' U.S. business revenue, and we convert the data from that question to test the hypothesis.

Eighth, learning may play a role in the varying CFIUS knowledge. Arguably, Chinese investors exposed to the U.S. investment environment for an extended period are more likely to have picked up some information about the CFIUS process from host-state media or simply from long-term socialization with peers. Also, investment duration presumably correlates with several of the other interested variables. Take as an example the ownership type of Chinese investors. Due to the structure of the Chinese political economy, state-owned enterprises pioneered China's outbound FDI, whereas privately owned Chinese firms began to venture abroad more recently.<sup>132</sup> To test and control the variable of investment duration, we rely on a measure that equals the number of years a Chinese investor had operated in the United States by 2019.

Ninth, a Chinese investor's listing status may correlate with its awareness of the CFIUS process. Access to capital markets necessarily entails heightened regulations.<sup>133</sup> Particularly, Chinese firms listed on a U.S. securities market are subject to arguably the most sophisticated and stringent securities law, which requires timely disclosure of all material circumstances that may affect the price of the traded securities.<sup>134</sup> The risk of CFIUS review would easily meet the condition and therefore be thoroughly analyzed and properly disclosed. To test this hypothetical connection between Chinese investors' access to U.S. securities markets and their knowledge about CFIUS, we create a dummy that equals one if a surveyed investor is listed on a U.S. stock exchange and zero if otherwise.

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130. *See, e.g.*, Li, *supra* note 14, at 7–8.

131. *See* discussion *infra* Part V.

132. *See* Li, *supra* note 6, at 33.

133. *See* Li, *supra* note 50, at 415.

134. Ji Li, *Meeting Law's Demand: Chinese Multinationals as Consumers of US Legal Services*, 46 *YALE J. INT'L L. ONLINE* 72, 90 (2021).

TABLE 2: TEST RESULTS (DEPENDENT VARIABLE: KNOWLEDGE OF CFIUS)

	(1)	(2)	(3)	(4)	(5)	(6)
<b>M&amp;A in the past</b>	2.170*	2.242*	2.465**	2.507**	2.7178**	2.632**
<b>M&amp;A plan</b>	1.768	1.760	1.807	1.777	1.918	2.137*
<b>In-house legal capacity</b>	3.533***	3.586***	3.485***	3.445***	4.022***	3.948***
<b>Degree of business internationalization</b>	2.504**	2.391**	2.373**	2.373**	2.378**	2.242**
<b>Listing status (US exchanges)</b>	6.442**	6.020**	5.423**	5.358**	5.896**	5.501**
<b>State ownership (50%)</b>		1.599	1.412	1.378	1.395	1.317
<b>State ownership (10%)</b>		1.658	1.777	1.724	1.714	1.678
<b>Sensitive industries</b>			1.875	1.835	1.579	2.242
<b>Entry mode</b>				.8151	.7766	.776
<b>US revenue</b>					.9448	.935
<b>Investment duration</b>						1.011
<b>Constant</b>	.184***	.1572***	.1063***	.1144***	.1338***	.126***
<b>N</b>	169	168	167	166	161	153
<b>Pseudo R<sup>2</sup></b>	0.174	0.179	0.189	0.187	0.194	0.193

Source: CGCC 2019 Survey; logistic regression; odds ratio reported; \*p<0.1; \*\*p<0.05; \*\*\*p<0.01.

Because the dependent variable is binary, we run a series of logistic regression tests. As shown in Table 2, four independent variables are significant and robust across all the model specifications. First, recent experience with U.S. mergers or acquisitions is positively associated with Chinese investors' knowledge about CFIUS review.<sup>135</sup> As previously discussed, CFIUS jurisdiction is largely restrained by law to foreign acquisitions of U.S. businesses.<sup>136</sup> And acquisitions by Chinese investors have always drawn elevated scrutiny from the agency, especially after Trump's election and the subsequent escalation of the U.S.-China confrontation.<sup>137</sup> Given the salience of the risk associated with the national security review, especially the dire consequences of a CFIUS investigation, competent U.S. lawyers advising Chinese clients in purchasing U.S. target businesses should properly inform them of the process and the importance of seeking safe harbor protection with a duly filed CFIUS notice. Once approved, a covered transaction will not later be subject to CFIUS investigation.<sup>138</sup> In brief, the looming presence of the regulatory risk posed by the current U.S. investment screening regime explains the significant, positive association between, on the one hand, Chinese investors' CFIUS knowledge and, on the other, their recent experience with U.S. mergers and acquisitions.<sup>139</sup>

Second, Chinese investors' internal legal capacity is highly significant, and the finding is robust across all the model specifications.<sup>140</sup> Compared to outside

135. See Li, *supra* note 14, at 29.

136. See *supra* Part II.

137. See Li, *supra* note 99, at 74.

138. Li, *supra* note 4, at 13–14.

139. Note that having plans to engage in such transactions is weakly significant in one model, though the results in the other models are close to the 10% significance level.

140. See Li, *supra* note 99, at 90.

lawyers, in-house counsels should be more familiar with firm-specific risks, including those of CFIUS review. As the U.S. screening regime targets foreign investments, most U.S. corporate lawyers whose clientele comprises mainly domestic firms have probably never come across it in their practice. Recall the earlier description of the well-known lawsuit, *Ralls v. CFIUS*. In that case, the U.S. lawyers advising the Chinese investor in its acquisition of the U.S. business failed to advise on the CFIUS review risk, and the Chinese investor learned about it only after the consummation of the deal.<sup>141</sup> In-house lawyers at Chinese multinationals, by comparison, specialize in all major legal and regulatory issues concerning their employers, and therefore are more likely to educate their colleagues about the CFIUS risk. Affirming this argument, we uncovered a significant, positive association between the Chinese investors' in-house legal capacity and their CFIUS knowledge.

Third, the degree of business globalization is significant and positively associated with knowledge of the CFIUS process. Put differently, all else being constant, Chinese firms with globalized resource allocation are more likely to have learned about the U.S. foreign investment screening system. As just discussed, Chinese firms, most of which are new participants in the world economy, vary greatly in their global footprints.<sup>142</sup> Those that expanded abroad decades ago should have encountered institutionalized host-country suspicion about Chinese investments.<sup>143</sup> Such investors, when expanding into the U.S. market, naturally develop a keen sensitivity to the national security review risk and an inclination to acquire necessary information for its mitigation—hence the positive association between the degree of business internationalization of a Chinese investor and its CFIUS awareness.<sup>144</sup>

Fourth, a Chinese investor's access to U.S. securities markets is also significant, and the finding is robust across all the model specifications. All the other variables held constant, Chinese investors with shares listed on a U.S. exchange are more likely to have acquired some knowledge about the CFIUS process.<sup>145</sup> As previously argued, the heightened disclosure requirements imposed by the U.S. securities law compel listed Chinese investors to stay alert to all major risks that may materially affect their businesses and share prices, and given the U.S.-China rivalry, few risks would be as impactful and detrimental as the one of being labeled a threat to U.S. national security—hence the empirical finding that Chinese investors listed on a U.S. stock exchange tend to have a better understanding of the CFIUS process.<sup>146</sup>

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141. Li, *supra* note 14, at 7.

142. See, e.g., Jing-Lin Duanmu, *Firm Heterogeneity and Location Choice of Chinese Multinational Enterprises (MNEs)*, 47 J. WORLD BUS. 64, 65 (2012); Ping Lv, Louise Curan, Francesca Spigarelli & Elisa Barbieri, *One Country, Many Industries: Heterogeneity of Chinese OFDI Motivations at Meso Level*, 69 CHINA ECON. REV. 1 (2021).

143. See Li, *supra* note 30, at 40.

144. See *id.* at 41.

145. See *id.*

146. See *supra* Table 2.

Interestingly, the ownership type of Chinese investors is insignificant. Though a conclusive inference cannot be drawn from this test result due to the limited sample size, it nonetheless indicates that state ownership alone does not raise the investor's awareness of the CFIUS risk.<sup>147</sup> In other words, all else being equal, state-owned Chinese investors are largely indistinguishable from their privately owned counterparts in acquiring information about the U.S. investment screening regime. We suspect that self-selection plays a part. The surveys were conducted on Chinese multinationals that already established a foothold in the U.S. market. Given the adverse regulatory environment for state-owned Chinese investors, those that had set up operations in the United States should be either less prone to CFIUS scrutiny or ignorant about the risk.

Also surprising is the insignificance of the sector variable.<sup>148</sup> Again, this finding may be attributable to the limited sample size.<sup>149</sup> And we speculate that the broad definition of "sensitive sectors," justified in our view by FIRRMA and the wide discretion of CFIUS and its expanding jurisdiction, may partially explain the absence of any significant association with the investors' CFIUS knowledge. Moreover, as just noted, Chinese investors in sensitive sectors might have already adjusted their investments in light of the deteriorating U.S.-China relations and the increasingly intrusive CFIUS process, which should have diminished the statistical significance of any sectoral effect. It is also possible that some Chinese investors in sensitive sectors are simply unaware of the CFIUS risk and, for various reasons, have managed to avoid the agency's attention.

## 2. *Varying FIRRMA Impacts*

As illustrated by Figure 8, the Chinese investors reported varying impacts of the FIRRMA-reformed CFIUS process. For reasons articulated below, we hypothesize that some of the above-listed variables should also associate with the inter-company variations in the CFIUS impacts. Since the reasons underlying the hypotheses overlap with those detailed in Subsection IV.B.1, we will discuss them only briefly.

First, we are interested in possible connections between state ownership of Chinese investors and the firm-level FIRRMA impact. As noted, FIRRMA legislation targeted primarily Chinese acquirors of U.S. businesses, especially those subject to Chinese state control.<sup>150</sup> And the geopolitical environment put enormous pressure on CFIUS to aggressively enforce the law. Therefore, all else being equal, one would expect state-owned Chinese investors to suffer more losses under the new regime than their privately owned peers.

Second, FIRRMA marked a major expansion of the CFIUS regime, and Chinese investors contemplating future acquisitions of U.S. businesses presumably bear the most direct and immediate impact. The descriptive data shown in

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147. See Li, *supra* note 30, at 38.

148. See *id.*

149. See *id.*

150. See Barrington, *supra* note 32, at 96–97.

Figure 8 clearly indicate an association between the enactment of FIRRMA and interrupted plans of Chinese investors to purchase U.S. businesses. Moreover, as noted earlier, while FIRRMA is supposed to alter the future course of screening Chinese FDI in the United States, an overzealous CFIUS may and has opened investigations of past transactions. Hence, it is also plausible that Chinese investors' entry mode and prior M&A experience in the United States relate to their perceived FIRRMA impacts.

Third, the size and duration of a Chinese investor's U.S. operations may correlate with varying firm-level ramifications of FIRRMA. It is conceivable that large Chinese operations face a higher risk of falling under the expanded purview of the post-FIRRMA CFIUS. Meanwhile, Chinese multinationals that ventured into the U.S. market decades ago might have established a track record of compliance, mitigating any suspicion about their intent.

Fourth, the in-house legal capacity of Chinese investors might also play a role. Given their access to firm-specific information, in-house lawyers may provide more customized and effective assistance to their employers in addressing the risks of FIRRMA. Thus, they might have different experience with the CFIUS reform.

Fifth, we include in the tests a Chinese firm's sector of investment. FIRRMA broadened CFIUS jurisdiction and the scope of filing requirements. Chinese investors in sensitive sectors may consider the risk of CFIUS investigation too high and adjust their investments accordingly.

To evaluate these hypotheses, we create a dummy dependent variable that equals one if a firm responding to the 2019 survey reported that FIRRMA had "somewhat negative" or "very negative" impact on its U.S. business and zero if otherwise.<sup>151</sup> Since the dummy is binary, we again run a series of logistic regressions, incorporating different combinations of the variables just described: ownership type of Chinese investors, entry mode, recent U.S. M&A experience, having plans to engage in a M&A transaction in the United States, U.S. investment size, investment duration, in-house legal capacity, and sectoral sensitivity. The test results are shown in Table 3 below.

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151. The answer to the survey question ("what influence does FIRRMA have on your firm?") contains the following choices: no knowledge about the influence, very negative, somewhat negative, no influence, somewhat positive, and very positive. *See supra* Figure 7.



TABLE 3: TEST RESULTS (DEPENDENT VARIABLE: FIRRMA IMPACTS ON US BUSINESS)

	(1)	(2)	(3)	(4)	(5)	(6)
<b>State ownership (50%)</b>	4.794***	3.975***	3.687**	3.452**	3.174**	2.523
<b>State ownership (10%)</b>	2.967	3.052	3.049	2.639	2.554	2.407
<b>M&amp;A plan</b>	3.014**	2.749**	2.733**	2.692**	2.736**	2.692*
<b>M&amp;A in the past</b>	1.185	1.034	1.096	1.135	1.121	.9813
<b>In-house legal capacity</b>		1.052	1.032	1.053	1.170	1.157
<b>Degree of business internationalization</b>		2.180	2.212	2.276*	2.221	1.973
<b>Listing status (US exchanges)</b>			.6723	.6004	.6503	.6706
<b>Sensitive industries</b>			1.697	1.564	1.434	1.607
<b>Entry mode</b>				.3491	.331	.3616
<b>US revenue</b>					.887	.8191
<b>Investment duration</b>						1.019
<b>Constant</b>	.0524***	.0391***	.0286***	.0360***	.0534***	.0603***
<b>N</b>	174	173	171	170	164	156
<b>Pseudo R<sup>2</sup></b>	0.119	0.126	0.132	0.145	0.133	0.121

Source: CGCC 2019 Survey; logistic regression; odds ratio reported; \*p<0.1; \*\*p<0.05; \*\*\*p<0.01.

The tests return two significant and robust results: state ownership and M&A plans in the United States. First, majority state ownership is positively associated with the likelihood of reporting a negative business impact of FIRRMA.<sup>152</sup> All the other variables held constant, Chinese investors majority owned by a home-state government body are more likely to see their U.S. operations negatively influenced by the recent CFIUS reform. The finding is direct evidence that FIRRMA has achieved at least one of its major legislative goals: preventing foreign governments, especially the Chinese government, from acquiring U.S. businesses through state-owned firms.<sup>153</sup>

Second, having M&A plans is also significantly associated with firm-level FIRRMA impacts. While CFIUS review and investigation of foreign investment is not time barred, and, as noted earlier, an increasingly powerful and assertive CFIUS has initiated retroactive investigations of several past acquisitions by Chinese investors, the changes FIRRMA has ushered in generally apply to transactions after its enactment—hence the association between U.S. M&A plans and negative FIRRMA effects. For the same reason, neither past M&A nor entry mode is significant.<sup>154</sup> Moreover, none of the other variables are significant.<sup>155</sup> Again, due to the limited sample size, we refrain from drawing any definitive conclusion from these findings of nonsignificance.

152. See *supra* Table 2.

153. JAMES JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, 39 (CFIUS) (2020).

154. See *supra* Table 2.

155. *Id.*

To summarize, this Section presented the first ever empirical analysis of direct evidence about Chinese investors' knowledge of CFIUS as amended by FIRRMA and the investment impacts of the recent regime overhaul. The descriptive survey data revealed drastic decline of Chinese FDI in the United States and significant intercompany variations in the investors' awareness of the U.S. investment screening system.<sup>156</sup> Further statistical analysis identified associations between CFIUS awareness and four firm-specific attributes: past M&A in the United States, in-house legal capacity, access to the U.S. securities market, and the degree of business internationalization.<sup>157</sup> Additional tests connected the varying FIRRMA impacts on Chinese investors' U.S. businesses to their ownership type and plans for engaging in M&A in the United States.<sup>158</sup> These empirical findings add to multiple intense debates, which we will elaborate after analyzing in the following Part FIRRMA's institutional ramifications in China.

## V. THE NEW CHINESE NATIONAL SECURITY REVIEW REGIME

As previously discussed, perceived challenges to U.S. hegemony have stimulated the creation and periodical reforms of the CFIUS mechanism, and the intensified rivalry with China led to the recent legislation of FIRRMA and the expansion of CFIUS's authority to scrutinize and block Chinese FDI. The full policy impacts of FIRRMA, however, extend far beyond waning Chinese capital flow into the U.S. market. They have also manifested in how China designed its own national security review system. This Part traces the emergence of the Chinese equivalent of CFIUS review and how the two are linked in the context of the superpower rivalry.

China is by no means the only other country that has subjected FDI to formal national security review. Along with the evolution of CFIUS, similar foreign investment screening regimes have surfaced around the world in the past few decades.<sup>159</sup> Such transnational institutional diffusion is nothing new to scholars of international law and international relations, who have devised various analytical frames for its research.<sup>160</sup> While disagreements persist, diffusion scholars have reached the consensus that worldwide appearance of similar new policies and institutions turns on "complex interdependence of international and domestic factors."<sup>161</sup> And "multiple kinds of international interactions" between states (e.g., coercion, persuasion, learning, and mimicry) enable cross-border

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156. See *supra* Figures 6 and 7.

157. See *supra* Tables 1 and 2.

158. See *supra* Figure 7.

159. See, e.g., Tomoko Ishikawa, *Investment Screening on National Security Grounds and International Law: The Case of Japan*, 7 J. INT'L & COMP. L. 71 (2020); Subrata Bhattacharjee, *National Security with a Canadian Twist: The Investment Canada Act and the New National Security Review Test*, 1 TRANSNAT'L CORP. REV. 12 (2009); Zinan Hu, *The Tightened Supervision of Foreign Investment Security Review by the UK, France and Germany* (英法德三国收紧外商投资安全审查监管研究), INT'L F. (国际论坛) (2021).

160. Chang Kil Lee & David Strang, *The International Diffusion of Public-Sector Downsizing: Network Emulation and Theory-Driven Learning*, 60 INT'L ORG. 883, 886 (2006).

161. Ann E. Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below"*, 66 INT'L ORG. 179, 184 (2012).

institutional diffusion.<sup>162</sup> As to the analytical focus, some emphasize “material structures and effects” and others “less tangible social structures that channel peer effects, the availability of models, and social tendencies to emulate admired exemplars.”<sup>163</sup>

According to the diffusion literature, state rivalry induces implicit mimicry of policies.<sup>164</sup> The logic is that governments compete in a globalized market for capital, investments, valuable goods and services, and the behavior of each country that alters the market incentives indirectly influences the calculation of its competitors.<sup>165</sup> For instance, a state’s reduction of investment barriers attracts more capital, forcing those competing, comparable states to adopt the same policy. In our view, however, this argument places too much weight on the power of the globalized market, so it falls short of explaining policy or institutional diffusion between strategic rivals such as China and the United States. Also, as will be demonstrated, the Chinese investment screening regime is derivative to a broader institution regulating FDI, which also exhibits convergence to the U.S. model, and the Chinese mimicry of CFIUS must be understood within that context.<sup>166</sup> Drawing on insights from the diffusion scholarship, the rest of this Part will analyze the development of the Chinese national security review system, which, due to its relatively short history and dormancy, has remained underexplored.<sup>167</sup>

Like the development of CFIUS, the Chinese foreign investment screening system has also gone through several phases of transformation, shaped by changing configurations of major domestic and international factors where U.S.-China relations figure prominently.<sup>168</sup> China’s first regulation on foreign investment can be traced back to 1979, when the *Law on Sino-Foreign Equity Joint Ventures* ushered in a new era of incremental economic liberalization and integration into the global market led by the United States.<sup>169</sup> The Chinese government just stepped out of the political and economic chaos of the Cultural Revolution, and FDI in China was tightly constrained.<sup>170</sup> Joint ventures provided the only venue of investment for foreign firms.<sup>171</sup> Given the requirement of a domestic partner and extensive government review of joint venture proposals, a separate national security review system would have been redundant. Hence, the 1979 statute was

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162. *Id.* at 184–85.

163. Beth A. Simmons, Paulette Lloyd & Brandon M. Stewart, *The Global Diffusion of Law: Transnational Crime and the Case of Human Trafficking*, 72 INT’L ORG. 249, 255–56 (2018).

164. Chang Kil Lee & David Strang, *The International Diffusion of Public-Sector Downsizing: Network Emulation and Theory-Driven Learning*, 60 INT’L ORG. 883, 890 (2006).

165. See Xun Cao, *Global Networks and Domestic Policy Convergence: A Network Explanation of Policy Change*, 64 WORLD POL. 375, 382 (2012).

166. See *infra* Part V.

167. Several notable exceptions are Li, *supra* note 81, at 262; Saha, *supra* note 81, at 199.

168. Li, *supra* note 81, at 263.

169. See Zhang Yuqing, *Like Bamboo Shoots After a Rain: Exploiting the Chinese Law and New Regulations on Sino-foreign Joint Ventures*, 8 NW. J. INT’L L. & BUS. 59, 62 (1987).

170. Chung Ming Lau & Garry D. Bruton, *FDI in China: What We Know and What We Need to Study Next*, 22 ACAD. MGMT. PERSP. 30, 31 (2008).

171. *Id.*

entirely silent on the subject.<sup>172</sup> Obviously, at this embryonic stage of the market reform, the Chinese institutional context for regulating FDI was also vastly different from the one of the United States. In particular, the two future rivals, having just re-established formal diplomatic relations, were collaborating closely to counter the expansion of the Soviet Union.

The following three decades witnessed significant economic liberalization in China. The reform, however, was carried out incrementally, as reflected in the Chinese FDI regulation.<sup>173</sup> Over time, the Chinese government passed multiple sets of laws and regulations to control foreign investment in China, including the *Law on Sino-Foreign Cooperative Joint Ventures* of 1988, the *Law on Wholly Foreign-Owned Enterprises* of 2000, the *2006 Rules on Mergers and Acquisitions*, and the *Anti-Monopoly Law* of 2007.<sup>174</sup> Together, these foreign investment rules “subject [foreign investors] to a different regulatory regime from domestic Chinese investors.”<sup>175</sup> The scope of initial foreign investments and their subsequent changes were limited by the *Catalogue for the Industrial Guidance of Foreign Investments*.<sup>176</sup> Because of the differential treatment of foreign investment, the Chinese government also handled national security review in ways distinct from CFIUS. Each of the formal rules contained provisions that explicitly or implicitly bore on FDI screening for national security threats, yet they amount to no more than vague and general policy statements.<sup>177</sup> For instance, Article 3 of the *Law on Sino-Foreign Cooperative Joint Ventures* stipulated that “cooperative enterprises shall obey the provisions of laws and regulations of China, and shall not harm social and public interests of China.”<sup>178</sup> The same provision can be found in the *Law on Wholly Foreign-Owned Enterprises*.<sup>179</sup> But neither specified national security as social and public interest. Notably, Article 31 of the *Anti-Monopoly Law*, which allegedly borrowed from Exon-Florio,<sup>180</sup> provides that foreign acquisitions with possible national security implications shall undergo a

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172. 中华人民共和国中外合资经营企业法 [Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures (1979)] (promulgated by the Standing Comm. Nat’l People’s Cong., July 8, 1979, revised in 1990, abolished on Jan. 1, 2020).

173. See Lau & Bruton, *supra* note 170, at 31.

174. See Law of the People’s Republic of China on Sino-Foreign Cooperative Joint Ventures (adopted by the Nat’l People’s Cong., Apr. 13, 1988, rev’d Oct. 31, 2000); Law of the People’s Republic of China on Wholly Foreign-Owned Enterprises (adopted by the Nat’l People’s Cong., Apr. 12, 1986, rev’d Oct. 31, 2000); Regulations On Mergers And Acquisitions Of Domestic Enterprises By Foreign Investors (promulgated Aug. 8, 2006, effective Sept. 8, 2006); Anti-Monopoly Law of the People’s Republic of China (adopted by the Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008).

175. Meichen Liu, Comment, *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 38 Nw. J. INT’L L. & BUS. 285, 287 (2018).

176. *Id.* at 288.

177. *Id.* at 297.

178. Law of the People’s Republic of China on Sino-Foreign Cooperative Joint Ventures (adopted by the Nat’l People’s Cong., Apr. 13, 1988, rev’d Oct. 31, 2000).

179. 中华人民共和国外资企业法 [Law of the People’s Republic of China on Wholly Foreign-Owned Enterprises of 2000, art. 4] (adopted by the Nat’l People’s Cong., Apr. 12, 1986, rev’d Oct. 31, 2000).

180. Mu Yaping & Xiao Xiaoyue, *我国外资并购中的国家安全审查制度* [Foreign Mergers and Acquisitions in China’s National Security Review System], 5 法学研究 52, 53 (2009) (China).

separate national security review.<sup>181</sup> But none of these formal rules set out the review procedure.<sup>182</sup> And foreign investments were still subject to extensive and often variable administrative approval process,<sup>183</sup> with FDI in certain industries being either restricted or prohibited.<sup>184</sup> Meanwhile, Chinese outbound investment, despite years of fast growth, had remained at a relatively low level prior to the global financial crisis, and the investment surge thereafter was generally welcomed by host-state governments as contributing much needed capital to troubled domestic businesses.<sup>185</sup> In other words, the three decades of reform transformed China from a rigid, isolated Soviet-style planned economy to a market economy with heavy state intervention that was increasingly integrated into the U.S.-led global economic order.<sup>186</sup> Internally, extensive government scrutiny over foreign investment continued, enabling the state enormous discretion to block foreign acquisitions, whereas externally, Chinese outbound FDI had not yet encountered strong political resistance in the United States, much less been perceived as a long-term national security threat.<sup>187</sup>

Consequently, the Chinese national security review regime remained highly fluid, fragmented, and largely dormant. To provide review agencies maximal discretion, the formal rules failed to define national security or any other key terms necessary for administering an investment screening system, nor did they provide clear guidance for foreign investors to comply or to assess the associated risks.<sup>188</sup> More importantly, no penalty was specified for noncompliance.<sup>189</sup> Hence, during this period the Chinese agencies conducted very few foreign investment reviews for distinctly national security purposes.<sup>190</sup>

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181. Anti-Monopoly Law of the People's Republic of China (adopted by the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008).

182. The government issued implementation rules of the statutes that included national security in the review and approval of the formation of the enterprises. JI MA, *National Security Review for Foreign Investment in China: A Transnational Evolution*, in *REGULATING STATE CAPITALISM: AN INTERDISCIPLINARY AND COMPARATIVE EXAMINATION* 419–432 (Julien Chaisse, Jędrzej Gorski & Dini Sejko eds., 2022).

183. See, e.g., Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (adopted by the Nat'l People's Cong., Apr. 12, 1986, rev'd Oct. 31, 2000), art. 6.

184. Though foreign investors have relied on VIEs to invest in certain restricted or prohibited industries in China. See, e.g., Liu, *supra* note 175, at 289.

185. Robert Dujarric, *China's Welcome FDI*, DIPLOMAT (Sept. 9, 2011), <https://thediplomat.com/2011/09/chinas-welcome-fdi/> [<https://perma.cc/369K-AWDZ>].

186. See, e.g., EDWARD S. STEINFELD, *PLAYING OUR GAME: WHY CHINA'S ECONOMIC RISE DOESN'T THREATEN THE WEST* 49 (2010).

187. See Khanapurkar, *supra* note 5, at 227. But occasional politicization of Chinese acquisitions of U.S. business had already occurred before 2008. See, e.g., Joshua W. Casselman, Note, *China's Latest 'Threat' to the United States: The Failed CNOOC-UNOCAL Merger and Its Implications for Exon-Florio and CFIUS*, 17 *IND. INT'L & COMP. L. REV.* 155, 161–64 (2007).

188. See Li, *supra* note 81, at 263–64.

189. See generally Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures (adopted by the Nat'l People's Cong., Apr. 13, 1988, rev'd Oct. 31, 2000); Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (adopted by the Nat'l People's Cong., Apr. 12, 1986, rev'd Oct. 31, 2000); Anti-Monopoly Law of the People's Republic of China (adopted by the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008).

190. See Li, *supra* note 81, at 264–65.

As Chinese outbound FDI continued to grow exponentially, however, it began to draw political attention in major host countries, especially the United States. Chinese investors' frustration with CFIUS review turned into a salient issue and spurred discussion about establishing a similar regime.<sup>191</sup> But it was not until March 2011 that the State Council published a notice detailing the national security review procedure.<sup>192</sup> And a few months later, the Ministry of Commerce ("MOFCOM") published additional implementing rules, marking the creation of a distinct operative procedure for screening foreign investments in China.<sup>193</sup> The Chinese regime exemplifies crossborder institutional diffusion through mimicry and learning.<sup>194</sup> The Chinese government, in devising its own national security review of FDI and for lack of prior experience,<sup>195</sup> transplanted some key elements of the then existing CFIUS regime.<sup>196</sup> For instance, the filing and review procedure under the previous Chinese rules resembled the CFIUS process. Moreover, the Chinese screening agency also comprised multiple government bodies, an institutional innovation characterizing CFIUS.<sup>197</sup> Furthermore, both review systems targeted mergers and acquisitions that would result in foreign control, excluding other types of transactions such as greenfield investments.<sup>198</sup> Nonetheless, notable differences existed between the two. For instance, the Chinese rule adopted a clear cutoff threshold of 50% equity interests as the definition of foreign control triggering national security review,<sup>199</sup> whereas CFIUS has relied on a largely open-ended conceptualization of foreign control in order to retain maximum flexibility and agency discretion. While the formal institution for national security screening had been established, the extensive government regulation of FDI remained in place, rendering an independent national security review of foreign acquisitions largely redundant.<sup>200</sup>

191. See, e.g., Shao Shaping & Wang Xiaocheng, *国外资并购国家安全审查制度探析—兼论中国外资并购国家安全审查制度的构建* [An Analysis of the National Security Review System for Foreign Mergers and Acquisitions in the United States—Also on the Construction of the National Security Review System for Foreign Mergers and Acquisitions in China], 3 FA XUE JIA [THE JURIST] 154, 154 (2008); Zeng Wenge & Kang Daoping, *我国外资参与经营者集中国国家安全审查法律制度的不足及其完善* [On the Inadequacies and Improvements of China's Laws Governing National Security Review of Foreign Acquisitions], 2 YUNNAN DAXUE XUEBAO [YUNNAN U.J.] 114, 114 (2010); Zhang Aifeng, *论外资并购中国经济安全审查机制的构建* [On The Construction of National Security Review System for Foreign Investment], 4 GUOJI GUANXI XUEYUAN XUEBAO [J.U. INT'L RELS.] 56, 56 (2010); Hu Haiyan, *外资并购国家安全审查：美国的立法对我国的启示* [National Security Review of Foreign Investment: Lessons from U.S. Legislation], 6 ZHISHI JINGJI [KNOWLEDGE ECON.] 49, 49 (2009).

192. See Li, *supra* note 81, at 265.

193. See *id.*

194. See Per-Olof Busch, Helge Jörgens & Kerstin Tews, *The Glob. Diffusion of Regul. Instruments: The Making of a New Int'l Env't Regime*, 598 ANNALS, AM. ACAD. POL. & SOC. SCI. 146, 146 (2005).

195. Liu, *supra* note 175, at 299.

196. Li, *supra* note 81, at 259; Liu, *supra* note 175, at 299.

197. See Liu, *supra* note 175, at 301–02.

198. *Id.* at 301.

199. The Chinese rules included a catch-all provision, but the practical implementation of the screening rules was expected to rely primarily on the 50% cutoff threshold. *Id.*

200. Feng Qishi, *港媒：中国对外商投资“国家安全审查”将走上台面* [Hong Kong Media: China's "National Security Review" of Foreign Investment Will Come to the Fore], MING BAO (July 22, 2014, 12:28 PM),

Then the U.S.-China relations started to deteriorate. It is hard to identify a clear turning point, but President Obama's "Pivot to Asia" policy, announced in 2012, was widely viewed by Beijing as a comprehensive U.S. strategy to encircle and contain China.<sup>201</sup> Since then, the Chinese national security regime has evolved along a path shaped by domestic economic restructuring and the downward trajectory of the U.S.-China relations. Domestically, the Chinese government reformed the legal system governing foreign investment to end the decades-long disparate treatment of foreign investors in China.<sup>202</sup> The nationwide legislation, initiated by a draft *Foreign Investment Law* ("FIL") published for public comments in January 2015,<sup>203</sup> was preceded by local experiments. The government first set up free trade zones where foreign invested businesses were subject to fewer restrictions.<sup>204</sup> Correspondingly, in 2015, the State Council promulgated the *Interim Measures for National Security Review of Foreign Investment in the Free Trade Zones*.<sup>205</sup> Meanwhile, the national legislature amended the *National Security Law* in 2015, mandating the review of foreign investments that have impaired or might impair China's national security.<sup>206</sup> These domestic changes reflect rising tensions between China and the United States. As the Trump administration initiated a trade war with China, Beijing, anticipating enormous downward economic pressure, expedited the deliberation of the FIL and enacted the statute in 2019, which took effect in January 2020 and replaced three sets of rules that had been regulating FDI in China for the past forty years.<sup>207</sup> Consistent with the rivalry-induced diffusion argument, the Chinese government intended the new FIL to mitigate the damages caused by deteriorating U.S.-China relations.<sup>208</sup> The statute improved the investment environment by offering foreign investors pre-establishment national treatment and replaced the catalogue system with a negative list, allowing foreign investment fast entry into the Chinese market in all the off-the-list sectors.<sup>209</sup> This major reform marked a significant

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at <https://www.chinanews.com.cn/hb/2014/07-22/6412165.shtml> [<https://perma.cc/LU57-4VPL>] (summarizing the article).

201. John Ford, *The Pivot to Asia Was Obama's Biggest Mistake*, DIPLOMAT (Jan. 21, 2017), <https://the-diplomat.com/2017/01/the-pivot-to-asia-was-obamas-biggest-mistake/> [<https://perma.cc/4TK5-WPYV>].

202. Liu, *supra* note 175, at 287.

203. Li, *supra* note 81, at 263.

204. For a general description of the Free Trade Zone experiment, see, for example, Daqing Yao & John Whalley, *The China (Shanghai) Pilot Free Trade Zone: Background, Developments and Preliminary Assessment of Initial Impacts*, 39 WORLD ECON. 2, 2 (2016).

205. State Council of the People's Republic of China, *National Security Review for FTZ Foreign Investment*, ENGLISH.GOV.CN, [http://english.www.gov.cn/policies/latest\\_releases/2015/04/20/content\\_281475092497263.htm](http://english.www.gov.cn/policies/latest_releases/2015/04/20/content_281475092497263.htm) (Apr. 20, 2015, 1:51 PM) [<https://perma.cc/5AY2-UVAQ>].

206. 中华人民共和国国家安全法 [National Security Law of the People's Republic of China, art. 59] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 2015, effective July 1, 2015).

207. Abrogated law includes: Law on Chinese-Foreign Equity Joint Ventures of 1979 (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended Apr. 4, 1990), Law on Sino-foreign Cooperative Joint Ventures of 1988 (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 1988, later repealed), and Law on Wholly Foreign-Owned Enterprises (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, rev'd Oct. 31, 2000).

208. Sandra Marco Colino, *The Internationalization of China's Foreign Direct Investment Laws*, 45 FORDHAM INT'L L.J. 275, 310 (2021).

209. *Id.* at 304.

institutional convergence between China and the United States in FDI regulation. And convergence in primary institutions triggers mimicry in derivative institutions. Since the FIL leveled the playground for foreign investment, the Chinese government, having circumscribed its comprehensive administrative discretion in reviewing and blocking FDI, needed a more rigorous and independent mechanism to safeguard its national security. In reforming the existing one, the government again turned its attention to the United States and borrowed from FIRRMA. The new *Measures for the Security Review of Foreign Investment* (“the Measures”), evincing institutional mimicry and learning, adopted some of the core features of FIRRMA. First, it requires all foreign investments in military and military-related industries to notify the review agency, and filing is required for foreign investments that meet the “control” threshold in prescribed sensitive sectors.<sup>210</sup> Second, the Measures designates an interministerial national security review office (“NSR Office”), led by the National Development and Reform Commission of PRC (“NDRC”) and MOFCOM, as the permanent government agency responsible for organizing, coordinating, and guiding the national security review.<sup>211</sup> Third, the NSR Office monitors very much the same sectors as FIRRMA does, including military and its supporting industries and surrounding areas, information and communications technology, infrastructure, transportation, construction, and so on.<sup>212</sup> Fourth, the Measures lays out a procedure for notification, which is generally comparable to the CFIUS process as amended by FIRRMA.<sup>213</sup> Upon receiving the notice, the Chinese agency will initiate a formal review process to determine whether the proposed transaction poses any national security threat.<sup>214</sup> If so, the investment must be modified or withdrawn.<sup>215</sup> And failures to comply with the filing requirements may result in compelled divestiture and other penalties as determined by the agency.<sup>216</sup> As for the CFIUS process, the Measures allows investors to consult the NSR Office about questions regarding the notification.<sup>217</sup>

Of course, the two institutions are not identical. First, the Measures differs from FIRRMA in demarcating the screening agency’s jurisdiction, which captures almost all types of foreign investments, including greenfield investments and investments in domestic securities.<sup>218</sup> In comparison, CFIUS recognizes an

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210. Measures for the Security Review of Foreign Investment (promulgated by the Nat’l Dev. & Reform Comm’n & P.R.C. Ministry of Com., Dec. 19, 2020, effective Jan. 18, 2021), art. 4.

211. *Id.* at art 3.

212. *Id.* at art 4.

213. Compare *id.* at art. 6, with 50 U.S.C. 4565(b)(1)(C).

214. Measures for the Security Review of Foreign Investment, (promulgated by the Nat’l Dev. & Reform Comm’n & P.R.C. Ministry of Commerce, Dec. 19, 2020, effective Jan. 18, 2021), arts. 7–8.

215. *Id.* at arts. 11–12.

216. *Id.* at arts. 16–18.

217. *Id.* at art. 5.

218. Article 2 of the Measures defines “foreign investment” to be “the investing activities conducted by a foreign investor directly or indirectly in the territory of the People’s Republic of China,” including “(1) A foreign investor, alone or together with another investor, invests in a new project or invests by the formation of an



exemption for greenfield investment, though the scope of such exemption can be very narrow in practice.<sup>219</sup> Second, compared to the Measures, FIRRMA and its implementation rules spelled out in more detail most of the key terms such as critical technologies and infrastructure.<sup>220</sup> Given the importance of these terms, leaving them undefined would grant the agency too much discretion and potentially undermine the applicability of the screening mechanism and the ability of foreign investors to comply. The Chinese government's solution is to define the terms in subsequent rules pertinent to national security review in specialized areas.<sup>221</sup> For instance, critical information infrastructure is defined in the *Regulation on Protecting the Security of Critical Information Infrastructure* in 2021.<sup>222</sup> In other words, the U.S.-China rivalry gave rise to a whole set of security related laws in China aimed at addressing the same issues as FIRRMA does. Another notable difference between the Measures and FIRRMA is that the former mandates notification by all foreign investments falling within the scope of Article 2, whereas FIRRMA imposes mandatory filing requirements only for transactions involving foreign government ownership and investment in U.S. businesses concerning critical technology, critical infrastructure, and sensitive personal data.<sup>223</sup>

Much like CFIUS, the Chinese national security regime is constantly evolving in response to the dynamics of U.S.-China relations. And the escalating rivalry has been inducing further regulatory convergence in relevant areas.<sup>224</sup> In the past few years, the Chinese government has enacted multiple statutes and regulations showing clear signs of reciprocating perceived U.S. aggression.<sup>225</sup> For instance, after former President Trump issued two executive orders that compelled TikTok's Chinese investor to divest, the investor negotiated with potential American buyers.<sup>226</sup> Yet right before the deal was signed, the Chinese

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enterprise in China; (2) [a] foreign investor acquires any equity or asset of an enterprise in China by means of merger or acquisition; [and] (3) [a] foreign investor invests in China by any other means." *See id.* at § 2. Article 22 provides that "[w]here a foreign investor purchases the stock of an enterprise in China through a stock exchange or any other securities trading venue approved by the State Council, which affects or may affect national security, the specific measures for the application of these Measures to such investment shall be formulated by the securities regulatory agency of the State Council in conjunction with the Office of the Working Mechanism." *See id.* at § 22.

219. *See Li, supra* note 14, at 36.

220. *See id.* at 5.

221. *See Measures for the Security Review of Foreign Investment*, (promulgated by the Nat'l Dev. & Reform Comm'n & P.R.C. Ministry of Commerce, Dec. 19, 2020, effective Jan. 18, 2021), art. 2.

222. *See id.*

223. 50 U.S.C. § 4565(a)(4) (as amended by FIRRMA).

224. *See Mo Zhang, Change of Regulatory Scheme: China's New Foreign Investment Law and Reshaped Legal Landscape*, 37 UCLA PAC. BASIN L.J. 179, 238 (2020).

225. *See, e.g., Data Security Law of the People's Republic of China* (promulgated by the Standing Comm. People's Cong., June 10, 2021, effective Sept. 1, 2021); *Cybersecurity Law of the People's Republic of China* (promulgated by the Standing Comm. People's Cong., Nov. 7, 2016, effective June 1, 2017), CLI.1.283838(EN) (Lawinfochina); *Measures for the Security Review of Foreign Investment* (promulgated by the Nat'l Dev. & Reform Comm'n & Ministry of Com., Dec. 19, 2020, effective Jan. 18, 2021).

226. *See generally* Nikki Carvajal & Caroline Kelly, *Trump Issues Orders Banning TikTok and WeChat from Operating in 45 Days if They Are Not Sold by Chinese Parent Companies*, CNN (Aug. 7, 2020, 7:26 AM), <https://www.cnn.com/2020/08/06/politics/trump-executive-order-tiktok/index.html> [https://perma.cc/5D3R-UDW7].

government on August 28, 2020 issued an amended *Catalogue of Technologies Prohibited or Restricted from Export* (the Chinese equivalent of the U.S. export control system, reformed by the *Export Controls Act of 2018* to counter China<sup>227</sup>), which would subject any potential sale of the TikTok business to Chinese government's review and approval.<sup>228</sup> The new Chinese export control rule contains substantial revisions, most of which boil down to dual-use technologies,<sup>229</sup> a focal point of the U.S. export control that has been elevated to restrain the sale of advanced technologies to Chinese parties. In addition, the *PRC Data Security Law* enacted in 2021 contains an article with clear reciprocal language addressed to the United States:

Where any nation or region employs discriminatory, restrictive, or other similar measures against the PRC in areas such as investment or trade in data and technology for the exploitation and development of data, the PRC may employ equal measures against that nation or region based on the actual circumstances.<sup>230</sup>

To summarize, CFIUS review and its recent reform by FIRRMA generated broad institutional ramifications around the world. Due to the U.S.-China rivalry, one observes the most significant institutional impacts in China. While market power has induced the convergence of the Chinese FDI regulations to the U.S. model, it plays a lesser role in China's reform of the specific national security review mechanism. Instead, learning, mimicry, and retaliation explain its similarities with the CFIUS regime. In addition, the Chinese FDI screening rules grant the NSR Office enormous discretion,<sup>231</sup> so the practical impacts of the new mechanism remain uncertain. Yet, as the superpower rivalry intensifies, we expect further reciprocal policy and institutional convergence, and, more concretely, much of how the Chinese investment screening regime will unfold in the future turns on the dynamics of U.S.-China relations, the implementation of FIRRMA, and particularly the way CFIUS handles foreign investments originating from China.

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227. For a summary description of the reform and its implications, see Cindy Whang, *Undermining the Consensus-Building and List-Based Standards in Export Controls: What the US Export Controls Act Means to the Global Export Control Regime*, 22 J. INT'L ECON. L. 579 (2019).

228. *Recent Changes in Chinese Export Controls: Are Your China Operations Ready?*, CROWELL (Oct. 13, 2020) <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Recent-Changes-in-Chinese-Export-Controls-Are-Your-China-Operations-Ready> [<https://perma.cc/RNW8-XVKA>].

229. *Id.*

230. Data Security Law (adopted by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective Sept. 1, 2021), art. 26 (China).

231. Measures for the Security Review of Foreign Investment, (promulgated by the Nat'l Dev. & Reform Comm'n & P.R.C. Ministry of Commerce, Dec. 19, 2020, effective Jan. 18, 2021).

## VI. CONCLUSION

Despite the war in Ukraine, U.S. policymakers stay focused on China as the “biggest geopolitical challenge over the long term.”<sup>232</sup> In their view, regardless how the disruption of the existing world order unfolds, “China remains . . . the only country that can systematically challenge the United States for now and for the rest of this century, that means diplomatically, technologically, economically, militarily, geopolitically.”<sup>233</sup> This superpower rivalry has caught a great deal of public and academic attention. But a key part of the rivalry, the CFIUS review regime, recently amended by FIRRMA to address perceived national security threats from Chinese investors, had evaded systemic study. Especially lacking is research about FIRRMA’s effects on Chinese investments in the United States and the Chinese institution for screening FDI. Employing a unique set of survey data on Chinese multinationals, this Article narrowed these gaps by empirically examining the Chinese investors’ knowledge about CFIUS review and how the FIRRMA reform has affected their U.S. businesses. In addition, the Article explored FIRRMA’s extraterritorial institutional impacts, which played a key part in transforming the Chinese national security review regime.

The findings of this Article contribute to other important policy and scholarly debates. First, major economies such as Japan,<sup>234</sup> Canada,<sup>235</sup> Germany, France, and the UK have all expanded and strengthened their FDI review processes.<sup>236</sup> Meanwhile, the European Union implemented the *EU Framework Regulation for the Screening of Foreign Direct Investment* to address growing concern about acquisitions by Chinese investors.<sup>237</sup> All these institutional reforms, however, have been undertaken without adequate empirical analysis of their policy justifications and implications. And the existing literature on the proliferation of the FDI screening rules consists mainly of doctrinal comparisons. Our research reveals a new direction for future research that connects the variations in the national screening regimes to their disparate investment and institutional impacts.<sup>238</sup>

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232. James Politi, *CIA Director Says China “Unsettled” by Ukraine War*, FIN. TIMES (May 7, 2022) <https://www.ft.com/content/a4e8de3b-a2aa-4f10-a820-a910274175a8> [https://perma.cc/P49P-JDK8].

233. Gordon Lubold, David S. Cloud & Lindsay Wise, *Ukraine War Complicates Biden Administration’s Military Strategy on China and Russia*, WALL ST. J. (Mar. 21, 2022, 10:20 AM) <https://www.wsj.com/articles/biden-administrations-military-strategy-juggles-russia-concerns-china-threat-11647872415> [https://perma.cc/BVY4-DQLU].

234. See generally Tomoko Ishikawa, *Investment Screening on National Security Grounds and International Law: The Case of Japan*, 7 J. INT’L & COMP. L. 71 (2020).

235. See generally Subrata Bhattacharjee, *National Security with a Canadian Twist: The Investment Canada Act and the New National Security Review Test*, 1 TRANSNAT’L CORPS. REV. 12 (2009).

236. Zinan Hu, *The Tightened Supervision of Foreign Investment Security Review by the UK, France and Germany* (英法德三国收紧外商投资安全审查监管研究), INT’L F. (国际论坛) (2021).

237. Paweł Mateusz Gadocha, *Assessing the EU Framework Regulation for the Screening of Foreign Direct Investment—What Is the Effect on Chinese Investors?* 6 CHINESE J. GLOB. GOVERNANCE 36, 36–37 (2020).

238. See, e.g., Ji Ma, *International Investment and National Security Review*, 52 VAND. J. TRANSNAT’L L. 899, 899 (2019); Zinan Hu, *The Tightened Supervision of Foreign Investment Security Review by the UK, France and Germany* (英法德三国收紧外商投资安全审查监管研究), INT’L F. (国际论坛) 87, 87 (2021).

Second, this Article adds to the literature on crossborder institutional diffusion. The existing research identifies three key variables determining how policy instruments spread across countries: dynamics of the international system (which enables or hinders cross country communication), domestic factors, and policy characteristics (*e.g.*, problem similarity).<sup>239</sup> And scholars have generally associated state rivalry with market-driven policy convergence.<sup>240</sup> Our study revealed important nuances to these general arguments. While U.S.-China rivalry indeed induced convergence in FDI regulations, market force alone fails to account for the similarities between the national security screening mechanisms of the two countries. Rather, policy reciprocity or retaliation better explains the “lesson drawing” between the rivals.<sup>241</sup> In other words, sovereign rivalry may result in policy and institutional convergence, but the mechanism through which it occurs may vary depending on the nature and relationships between the institutions.

Third, the findings herein add to the debate about the economic decoupling between the United States and China.<sup>242</sup> We detected significant negative impact of FIRRMA on Chinese FDI and the transplantation of key FIRRMA features to the Chinese national security screening system.<sup>243</sup> Now both governments have parallel institutions ready to block acquisitions by investors of the other state on national security grounds. While CFIUS has been actively investigating Chinese deals, we know little about the Chinese side of the story. Yet given the rivalry-induced reciprocity, we expect the Chinese screening agency to mimic CFIUS and scrutinize more frequently U.S. investments. Left unchecked, the parallel agencies will facilitate the economic decoupling of the two superpowers.

Fourth, the empirical finding of this Article underscores the regulatory and political pressure on Chinese state-owned multinationals. For many years the state-owned enterprises pioneered China’s outbound FDI.<sup>244</sup> Yet, given the worldwide diffusion of foreign investment screening regimes modeled on CFIUS, investors with close ties to their home-state governments will face a daunting task trying to expand into the United States and other major economies sharing the same suspicion about the intent of the Chinese party-state.

Finally, we want to raise a few important questions for future research. Given the amorphous concept of national security and the enormous discretion of the national screening agencies, aggressive use or abuse of the systems is unavoidable. Creative lawyers have already devised strategies to introduce national

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239. Per-Olof Busch, Helge Jörgens & Kerstin Tews, *The Global Diffusion of Regulatory Instruments: The Making of a New International Environmental Regime*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 146, 150 (2005).

240. *See e.g.*, Cao, *supra* note 165, at 383.

241. *See generally* 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 (2012).

242. *See generally* Keith Johnson & Robbie Gramer, *The Great Decoupling*, FOREIGN POL’Y (May 14, 2020, 5:48 PM), <https://foreignpolicy.com/2020/05/14/china-us-pandemic-economy-tensions-trump-coronavirus-covid-new-cold-war-economics-the-great-decoupling/> [<https://perma.cc/MG26-K3W4>].

243. *See supra* Subsection IV.A.2.

244. *See* Ilan Alon, Hua Wang, Jun Shen & Wenxian Zhang, *Chinese State-Owned Enterprises Go Global*, 35 J. BUS. STRATEGY 3, 4–5 (2014).

security to resolving shareholder disputes<sup>245</sup> and blocking hostile takeovers. Take Broadcom's bid for Qualcomm as an illustrative example. To resist the deal, Qualcomm's lawyer crafted an innovative argument, which was later accepted by the U.S. government, that the takeover would "dramatically reduce investment and research at Qualcomm, giving an advantage to China."<sup>246</sup> The federal government duly intervened, and the takeover failed.<sup>247</sup> Since any consolidation of business may result in some speculative reduction of research and investment,<sup>248</sup> the precedent adds a new dimension of uncertainties to future corporate mergers and acquisitions. Given the profound implications, scholars have noticed and begun to explore the phenomenon.<sup>249</sup> Yet systemic empirical and theoretical inquiries have remained in short supply. Another question that merits in-depth research is the investment and institutional effects of the Chinese screening regime. Has it deterred foreign investors, especially U.S. investors, from expanding in the Chinese market? Anecdotal reports about the growing presence of Tesla, Apple, and GM seem to indicate a negative answer.<sup>250</sup> Also, how do investors interact with the review agency in the Chinese legal and political setting?<sup>251</sup> Moreover, does Chinese FDI screening in action discriminate against U.S. investment, and if so, will it trigger any reciprocal actions by CFIUS or U.S. lawmakers? Still another set of questions worth scholarly investigation concern the measures multinationals adopt to navigate the increasingly complex geopolitical environment. For large U.S. firms with substantial Chinese investment, exit is hardly an option. But how do they manage the risk to avoid the fate of Chinese multinationals such as Huawei, ZTE, and China Telecom, all of which suffered enormous losses for allegedly impairing U.S. national security?<sup>252</sup> While this Article has given some clues to all these important questions, more definitive answers await future research.

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245. See Kate O'Keeffe, *U.S., Chinese Investors Feud Over Startup Icon Aircraft During National Security Review of Deal*, WALL ST. J. (Feb. 8, 2022, 12:10 PM), [https://www.wsj.com/articles/u-s-chinese-investors-feud-over-startup-icon-aircraft-during-national-security-review-of-deal-11644340248?mod=Searchresults\\_pos1&page=1](https://www.wsj.com/articles/u-s-chinese-investors-feud-over-startup-icon-aircraft-during-national-security-review-of-deal-11644340248?mod=Searchresults_pos1&page=1) [<https://perma.cc/SX5Q-HXM8>].

246. Daniel Shane & Sherisse Pham, *Why the US Killed Broadcom's Giant Bid for Qualcomm*, CNN (Mar. 13, 2018, 7:31 AM), <https://money.cnn.com/2018/03/13/investing/broadcom-qualcomm-national-security/index.html> [<https://perma.cc/T76D-2AWH>].

247. See *id.*

248. Synergy is a major driver of mergers and acquisitions. See, e.g., Rikard Larsson & Sydney Finkelstein, *Integrating Strategic, Organizational, and Human Resource Perspectives on Mergers and Acquisitions: A Case Survey of Synergy Realization*, 10 ORG. SCI. 1, 18–20 (1999).

249. See Amy Deen Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, 102 MARQ. L. REV. 643, 654–57 (2019).

250. See generally Simon Alvarez, *Tesla China Looking to Hit Over 80k Deliveries This Month: Report*, TESLARATI (Sept. 26, 2022), <https://www.teslarati.com/tesla-china-80k-deliveries-september-2022-report/> [<https://perma.cc/5WV4-3MB7>]; Tim Higgins, *Apple Takes Smartphone Lead in China, Helping Drive Record Profit*, WALL ST. J. (Jan. 28, 2022, 7:00 AM), <https://www.wsj.com/articles/apple-takes-smartphone-lead-in-china-helping-drive-record-profit-11643371201> [<https://perma.cc/73TN-TP4B>]; *GM Delivers 484,000 Vehicles in China in the Second Quarter*, GM CORP. NEWSROOM (July 6, 2022), <https://media.gm.com/media/cn/en/gm/news-detail.html/content/Pages/news/cn/en/2022/Jul/0706-sales.html> [<https://perma.cc/QC3U-3TR8>].

251. Following the CFIUS model, the Chinese screening agency allows stakeholders to contact it with questions about compliance.

252. See generally Li, *supra* note 50, at 375–78.

