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The New Great Wall Against China

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THE NEW GREAT WALL AGAINST CHINA

PAUL ROSE*

This essay documents some of the recent changes in foreign investment law as a manifestation of increasing concerns with Chinese investment specifically and globalization more generally. The essay first shows how foreign investment laws in major economies have become increasingly illiberal since the Financial Crisis. Next, the essay considers the justification and impact of recent United States rules designed to reduce Chinese investment. Comparing data on merger and acquisition activity in the United States with the number of filings made to the Committee on Foreign Investment in the United States (CFIUS), the essay documents that although merger and acquisition activity is very highly correlated with CFIUS notice filing activity over the past decade, the data suggest that enhanced regulation has had its intended effect in reducing the amount of foreign investment in regulated industries and firms. In particular, the regulation—and more importantly, the way that regulation has been enforced—has served its seemingly intended purpose as a new “great wall” against Chinese investment.

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INTRODUCTION

Nearly 100 years ago, a half dozen countries constructed a series of immigration laws that historians later dubbed the “Great Wall Against China.”¹ Constituting an arc that “ranged from the Americas across the Pacific to Australasia and then across the Indian Ocean to South Africa,” the countries enacted rules that protected domestic constituencies from “competition from cheap Chinese labor.”²

History repeats itself, this time as a wall of investment restrictions. The rapid growth of China’s economic and political power, coupled with aggressive and ambitious technology acquisition and foreign investment efforts, have generated anxieties around the world. These anxieties predictably appear most acute in countries whose citizens feel they have the most to lose, such as in the United States, Western Europe, Japan, and Australasia (and, notably, many of the same countries that create the Great Wall Against China a century ago). Reflective of this anxiety, views of China are more negative in countries with higher per capita gross domestic product, with some of the

¹ ARISTIDE R. ZOLBERG, *The Great Wall Against China: Responses to the First Immigration Crisis, 1885-1925*, in HOW MANY EXCEPTIONALISMS? EXPLORATIONS IN COMPARATIVE MACROANALYSIS (2008).

² MAE M. NGAI, *The Chinese Question: The Gold Rushes and Global Politics, 1849-1910*, in A GLOBAL HISTORY OF GOLD RUSHES 109 (Benjamin Mountford & Stephen Tuffnell eds., 2018).

highest negative perceptions in the United States, Japan, the Netherlands, Sweden, and Germany.³ China arguably stands as an avatar of globalization, representing dislocations and disruptions to the status quo.

Governments have responded to these disruptions by expanding existing rules, imposing new restrictions on foreign investment, or both, and much of this regulation appears designed specifically to curb Chinese investments and acquisitions, especially of critical technologies.⁴ The regulations create investment barriers that, like the immigration barriers of a century ago, operate as a new great wall against China.

This essay proceeds as follows. Part I frames the development of new investment restrictions as a response to the effects of globalization and the recent turn to more nationalistic and mercantilist views of cross-border investment. Then, Part II shows how foreign investment laws generally have become increasingly illiberal, especially since the Financial Crisis, while Part III describes specific foreign investment law changes made by the EU and Japan in response to perceived threats from Chinese investment—changes designed to screen, if not stifle, new foreign investments. Finally, Part IV turns to recent U.S. regulations, and specifically on the new U.S. wall against Chinese investment: the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). Comparing data on merger and acquisition activity in the United States with the number of filings made to the Committee on Foreign Investment in the United States, the essay contributes two key findings. First, investment activity (measured through mergers and acquisitions (M&A) data) is very highly correlated with CFIUS notice filing activity over the past decade. Second, despite high

³ Laura Silver et al., *Attitudes Toward China*, PEW RSCH. CTR. (Dec. 5, 2019), <https://www.pewresearch.org/global/2019/12/05/attitudes-toward-china-2019/>.

⁴ Chinese investment appears to be the proximate cause of many of these regulatory responses, but there are more fundamental movers driving these changes. Undoubtedly, the COVID-19 pandemic has played an important role in this reaction and retraction, as supply shocks reminded companies and countries of the risks associated with cross-border supply chains and highlighted the importance of health infrastructure as a critical element of national security. The trend has also been affected, no doubt, by the Financial Crisis of 2007, which exposed weaknesses in the links in the global financial system.

levels of M&A activity in recent years, FIRRMA has had its intended effect in reducing the amount of Chinese investment in regulated industries and firms since the construction of the new great wall. The essay then concludes.

I. GLOBALIZATION AS A VICTIM OF ITS OWN SUCCESS

The development of these investment barriers stands in contrast to decades of liberalization of cross-border investment. The trend of liberalization resulted from the confluence of several mutually-reinforcing phenomena in the 1970s and 1980s. First, companies began to increasingly rely on capital markets, which “fed and liquified the economy.”⁵ Second, governments increasingly privatized and deregulated their economies, a “silent revolution”⁶ that “evaporated” financial borders.⁷ Third, banks also became increasingly globalized as the result of aggressive growth and consolidation, with the value of international banking transactions rising from 6% of global GDP in 1972 to almost 40% by the early 2000s.⁸

Foreign direct investment (FDI) rose as financial walls fell. In the fifteen years preceding the Financial Crisis, countries enacted 2,159 national regulatory changes to liberalize or promote cross-border trade, compared to only 224 changes that restricted or hampered cross-border trade.⁹ The international investment climate became decidedly “more welcoming for foreign direct investors,”¹⁰ aided by regulatory changes as well as multilateral investment agreements and, particularly, bilateral investment agreements.¹¹

⁵ Jean-Yves Huwat & Loïc Verdier, *The 2008 Financial Crisis—A Crisis of Globalisation?* in ECONOMIC GLOBALISATION: ORIGINS AND CONSEQUENCES 126, 131 (OECD Publishing, 2013).

⁶ James Broughton, *Globalization and the Silent Revolution of the 1980s*, FIN. & DEV., March 2002, at 40, 41 (attributing the term to Michel Camdessus, Managing Director of the International Monetary Fund).

⁷ Huwat & Verdier, *supra* note 5, at 131.

⁸ *Id.* at 132.

⁹ UNITED NATIONS CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2008: TRANSNATIONAL CORPORATIONS AND THE INFRASTRUCTURE CHALLENGE 13 (2008).

¹⁰ KARL P. SAUVANT, FDI PROTECTIONISM IS ON THE RISE, WORLD BANK POL'Y RSCH. WORKING PAPER 5052, at 3 (2009).

¹¹ *Id.*

But globalization itself has propagated seeds of discontent,¹² with inequalities linked to an increasing divergence in high-skilled and low-skilled employee wages, increasing concentrations of wealth, and the globalization of capital markets;¹³ globalization has brought tremendous wealth, but critics have argued that this wealth has benefitted the few at the expense of the many.¹⁴ Increasingly, foreign trade is no longer viewed as a “positive sum game” in which cross-border trading serves to “enlarge the pie to mutually benefit all participants in the system.”¹⁵ Instead, foreign investment is taking a nationalistic turn. Cross-border trade is viewed as a “zero sum game,” and the pie of global wealth “is of a permanently fixed size so that if one nation obtains a gain in trade than another nation must suffer a corresponding loss.”¹⁶ In this framing, China’s rise represents a fall for its economic competitors.

In the United States, as in other countries, foreign investment law has always served both as a reflection of political and economic worries and a means to respond to those worries. From concerns over rising German and Japanese economic power in the post-World War II era¹⁷ to more recent responses to the purchase of U.S. firms and assets by Middle Eastern¹⁸ and Chinese

¹² U.N. Secretary-General, *Fulfilling the Promise of Globalization: Advancing Sustainable Development in an Interconnected World*, ¶ 23, U.N. Doc. A/72/301 (Aug. 8, 2017) (noting that support for globalization and multilateralism has recently been “undermined by popular discontent”).

¹³ *Id.* The report identifies three “mega-trends” that are significantly shaped by globalization, including a shift in production and labor markets, rapid advances in technology, and climate change. As examples of how globalization directly impacts equality, the report notes that “trade openness has improved the mobility of capital relative to labour, eroding the bargaining power of labour”; rapid advances in technology will “leave those countries and people that are structurally disadvantaged behind, and will thus reinforce inequalities at the national and global levels”; globalization is also a “contributing factor to climate change and environmental degradation,” and those with less wealth are less able to mitigate many of the risks associated with climate change.

¹⁴ See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 24, 29, 35 (2002).

¹⁵ Ian Sheldon et al., *The Revival of Economic Nationalism and the Global Trading System*, 40 CARDOZO L. REV. 2133, 2137 (2019).

¹⁶ *Id.* at 2136 (noting that “[t]he adoption of an approach that is so fundamentally at odds with the underlying logic of the GATT/WTO by the world’s most powerful trading nation poses a threat to the entire foundations of the multilateral trading system”).

¹⁷ See Jeffrey S. Arpan et al., *Foreign Direct Investment in the United States: The State of Knowledge in Research*, 12 J. INT’L BUS. STUDIES 137 (1981) (noting the use of terms such as “threat,” infiltration,” and “industrial offensives” to describe foreign investment in the 1970s).

¹⁸ See JAMES K. JACKSON, CONG. RSCH. SERV. RL33388, *The Committee on Foreign Investment in the United States (CFIUS)*, 4 (2018) (describing the Foreign Investment and National Security Act of 2007 (FINSA) as a reaction to the 2006 sale of several sensitive U.S. port operations by the British firm Peninsular and Oriental Steam Navigation Company (P&O) to Dubai Ports World (DP World)).

acquirors,¹⁹ U.S. law has regularly adapted to threats presented by politically-sensitive foreign investment activity. Foreign investment law can also reveal more general economic anxieties, as the shape and design of a barrier can give insights into what it is designed to protect against. Viewing recent regulatory changes in this light, the increasing illiberality of foreign investment laws in the United States—and in many other developed economies—reveals increasing public dissatisfaction with foreign trade and, more broadly, the effects of globalization, including immigration,²⁰ rapid technological shifts, and rising wealth inequality. This dissatisfaction was most clearly expressed through the “America First” doctrine of the Trump administration (and indeed, was among the explanations for the election of President Trump²¹), but the trend towards a more domestically-focused economic policy had already begun under President Obama,²² and, given early indications, is likely to continue under President Biden.²³

II. DATA ON FOREIGN INVESTMENT LAW TRENDS

As the data in this section make clear, foreign investment law has undoubtedly trended towards liberalization over the past several decades, and largely continues to do so. To be clear, these data do not show that investment laws have reached a tipping point in which the overall trend

¹⁹ See *infra* note 34 and accompanying text.

²⁰ See, e.g., CECILIA TACOLI & DAVID OKALI, INT’L INST. FOR ENV. AND DEV., THE LINKS BETWEEN MIGRATION, GLOBALISATION, AND SUSTAINABLE DEVELOPMENT (2001), <https://pubs.iied.org/sites/default/files/pdfs/migrate/11020IIED.pdf> (noting that “[i]ncreased migration is one of the most visible and significant aspects of globalisation: growing numbers of people move within countries and across borders, looking for better employment opportunities and better lifestyles.” The ratio of world trade to GDP—a measure of globalization—tripled in the years between 1960 and 2005. Likewise, the share of foreign-born population living in OECD countries also tripled between 1960 to 2005. See Hillel Rapoport, *Migration and Globalization: What’s in it for Developing Countries?*, GLM|LIC, at 1, 2 (Aug. 2016).

²¹ See, e.g., Laurence Chandy & Brina Seidel, *Donald Trump and the Future of Globalization*, BROOKINGS INST. (Nov. 18, 2016), <https://www.brookings.edu/blog/up-front/2016/11/18/donald-trump-and-the-future-of-globalization/> (noting that “a resistance to globalization was arguably the foremost policy theme in Trump’s election campaign”).

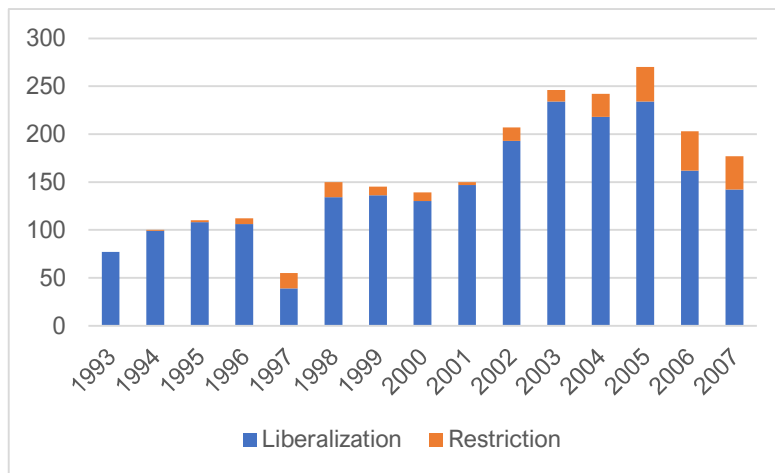
²² See *The Obama Administration’s Unprecedented Trade Enforcement Record*, U.S. TRADE REPRESENTATIVE (Jan. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/january/fact-sheet-obama-administration%E2%80%99s>.

²³ See *Biden’s New China Doctrine*, THE ECONOMIST (July 17, 2021), <https://www.economist.com/leaders/2021/07/17/bidens-new-china-doctrine> (describing the doctrine as “protectionist” with an “us-or-them rhetoric”).

is moving against globalization. However, the data do buttress the argument that governments are facing increased public dissatisfaction with globalization, and are addressing that dissatisfaction in part through increased investment restrictions. While increasing levels of investment restrictions do not signal the death of globalization, to be sure, they may yet function as an early warning sign of significant dangers ahead.

The United Nations Conference on Trade and Development (UNCTAD) compiles data on shifts in foreign investment laws, dating back decades.²⁴ Comparing these data shows a shift towards more restrictive trade practices over the past three decades, with a steep COVID-19 pandemic-related trend in 2020 (Figures 1 and 2).

Figure 1: Changes in national investment policies, 1992 – 2007



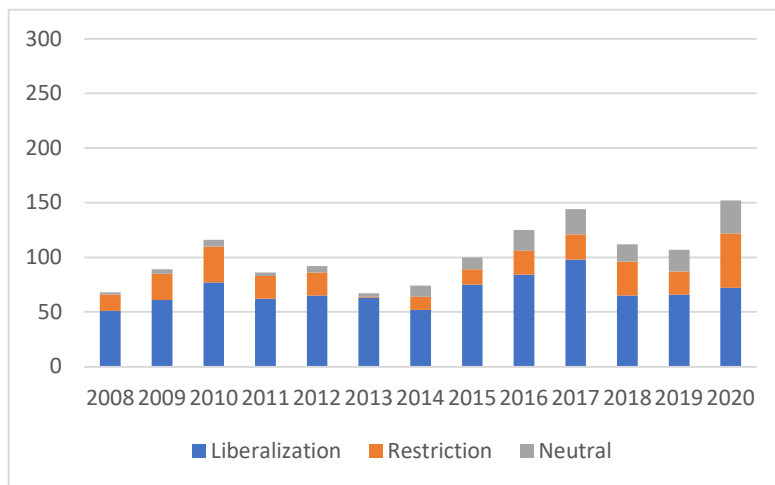
Source: United Nations Conference on Trade and Development.²⁵

In the wake of the Financial Crisis, liberalization efforts continued to decrease, while restrictions increased as an overall percentage of foreign investment law changes, as seen

in in trend from 2008-2020.

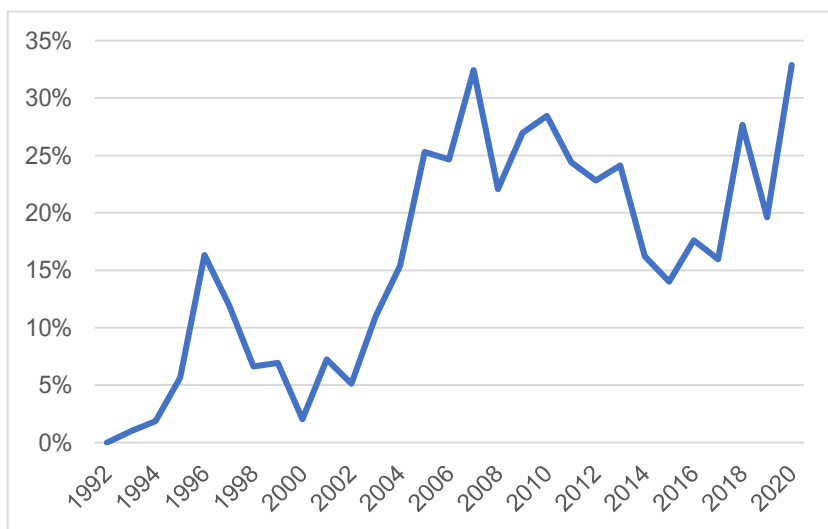
²⁴ See U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT, [https://unctad.org/publications-search?f\[0\]=product%3A397](https://unctad.org/publications-search?f[0]=product%3A397) (providing investment reports and statistics dating from 1991).

²⁵ See U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, 77, https://unctad.org/system/files/official-document/wir2010_en.pdf; [hereinafter WORLD INVESTMENT REPORT 2010]; U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2021, INVESTING IN SUSTAINABLE RECOVERY, 109, https://unctad.org/system/files/official-document/wir2021_en.pdf [hereinafter WORLD INVESTMENT REPORT 2021].

Figure 2: Changes in national investment policies, 2008 – 2020

Source: United Nations Conference on Trade and Development.²⁶

As shown in Figure 3 below, restrictive foreign investment policies have been gradually (through unevenly) increasing in relation to liberal or neutral policies.

Figure 3. Restrictionist foreign investment policies changes as a percentage of total policy changes

Source: United Nations Conference on Trade and Development.²⁷

COVID-19 also undoubtedly impacted foreign trade policies. Of seventy countries surveyed by UNCTAD, almost one third introduced new screening measures that

allow regulators to block transactions in the health and life science sectors.²⁸

UNCTAD sees two relative bright spots in these data. First, the “huge [2020] surge in regulatory or restrictive investment policy measures is mainly due to an extraordinary crisis

²⁶ UNCTAD notes that the data do not include measures related to the general business climate, such as corporate taxation, environmental or labor legislation.

²⁷ See WORLD INVESTMENT REPORT, *supra* note 24, at 76; WORLD INVESTMENT REPORT 2021, *supra* note 25, at 109-10.

²⁸ See WORLD INVESTMENT REPORT 2021, *supra* note 25, at 134.

situation and therefore does not necessarily indicate a permanent change in the policy trend.”²⁹ On the other hand, it is also true that the twenty years between 2000 and 2020 saw a growing trend toward more restrictive foreign investment regulation. And while UNCTAD data also show that the number of countries implementing policies of liberalization and investment promotion still outweigh the number of countries restricting investment, that data point also hides a salient characteristic, revealed by a careful review of the list of countries liberalizing foreign investment and those restricting foreign investment.³⁰ Taking the period of greatest change, from May 2020 – December 2020,³¹ it becomes apparent that the countries restricting trade were more likely to be larger, developed countries—the ones that have the most to lose by disruption of the current regime—while the countries still pursuing liberalization were poorer, developing countries, as seen in Table 1.

Table 1. Countries Liberalizing and Restricting Foreign Investment, May 2020 – December 2020

Liberalizing Foreign Investment	Restricting Foreign Investment
Algeria, China, Ethiopia, India, Indonesia, Lao People’s Democratic Republic, Philippines, United Arab Emirates, Angola, Cambodia, Cuba, Iraq, Pakistan, Colombia, Panama, Rwanda, Uruguay, Viet Nam, Bolivia, Uzbekistan, and Sri Lanka	Austria, Canada, China, Finland, France, Germany, Hungary, Italy, Japan, Republic of Korea, Malta, New Zealand, Poland, Russian Federation, Slovenia, Spain, United Kingdom and the EU, Kenya, Oman, and the United States of America

Lest it be argued that these regulatory responses were due simply to the particular concerns (say, related to supply chain disruptions) of the pandemic, one can also review the list of countries that implemented FDI screening mechanisms immediately *prior to* COVID-19. These include: Australia, Austria, Belgium, Canada, China, Denmark, Finland, France, Germany, Hungary, Iceland, India, Italy, Japan, Latvia, Lithuania, Mexico, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Spain, South Africa, the United Kingdom and the United

²⁹ *Id.* at 109.

³⁰ *See id.* at 110-21.

³¹ *See id.* at 112, 116, 118-19 (noting that China’s rules both liberalized foreign investment rules in some respects, while also enhancing some restrictions).

States.³² Of course, as UNCTAD notes, the increase and concentration in FDI screening in more developed countries may be explained by the fact these countries “are the main global destinations for foreign investment, making them therefore more exposed to foreign takeovers in sensitive sectors and activities.”³³ Further, “many of these economies show a relatively high degree of openness towards foreign investment, including in key economic sectors and infrastructure.”³⁴ They are thus the countries benefitting from (but also very much affected by) globalization.

Domestic political factors often press against globalization, and help to explain the prevalence of FDI screening mechanisms. Politicized, “backlash” responses to investment are most common, naturally, following high-profile investments from political and economic rivals. During the 1970s and 1980s, for example, concerns over “petrodollar investments from Middle Eastern members of the Organization of Petroleum Exporting Countries,”³⁵ as well as increasing German and Japanese investment, appeared to produce widespread popular concern over foreign investment.³⁶ This trend continued with the FINSA amendments³⁷ following the Dubai Ports World investment controversy in 2006, and the 2018 FIRRMA amendments³⁸ in response to Chinese investment activity.

Scholars have recognized this backlash response as the root of most major foreign investment regulations. For example, Canes-Wrone, Mattioli, and Meunier investigated the predictors of FDI backlash by analyzing large Chinese investments in the United States from 2000-

³² U.N. Conference on Trade and Development, *Investment Policy Monitor: National Security-Related Screening Mechanisms for Foreign Investment*, at 3 (Dec. 2019), https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf [hereinafter *Investment Policy Monitor*].

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ Brandice Canes-Wrone, Lauren Mattioli & Sophie Meunier, *Foreign Direct Investment Screening and Congressional Backlash Politics in the United States*, 22 BRIT. J. POL. INT’L REL. 666, 669 (2020).

³⁶ *Id.* (citing a 1975 poll finding that 70% of American adults favored restrictions on “Arab oil money” investments, and 14% were in favor of a complete ban). Canes-Wrone, Mattioli, and Meunier also note that polling from the 1980s suggested that “more Americans viewed [foreign investment] as bad than good for the economy . . . and that Japanese investment in particular was viewed as more of a ‘threat’ than a positive development for the US economy.” *Id.*

³⁷ *See id.*

³⁸ *See id.* at 669-71.

2014 and considering factors more likely to contribute to the initiation of a backlash³⁹ by members of Congress. Their findings suggest that domestic politics condition the likelihood of backlash, and that “the higher the percentage of unionised workers in an area, and the higher the percentage that work in manufacturing, the more likely a completed deal is to receive congressional backlash.”⁴⁰ As an unsurprising corollary, the members of Congress that tend to push for new regulations do not represent the state receiving the investment, but instead tend to be from states with “higher levels of labour unionisation and manufacturing, but which are not the economic beneficiaries of the inward FDI;”⁴¹ in other words, from those states most susceptible to dislocation from globalization.

III. THE SHAPE OF FOREIGN INVESTMENT REGULATION

A brief review of the changes in regulations reveals concern with globalization in general, but with particular unease among global economic powers with Chinese state investment, even though not every country is explicit in naming China as a potential national security threat. Consider the European Union’s implementation of Regulation 2019/452,⁴² for example, which establishes a “framework for the screening of foreign direct investments into the Union.”⁴³ The regulation was written against a backdrop of increasing Chinese investment in Europe, particularly from 2010 –

³⁹ See *id.* at 667. The authors build from a definition of “backlash” offered by Alter and Zürn in which a backlash is “a particular form of political contestation with a retrograde objective as well as extraordinary goals and tactics that has reached the threshold level of entering public discourse.” Karen J. Alter & Michael Zürn, *Conceptualizing Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison*, 22 BRIT. J. POL. INT’L REL. 563, 576-77 (2020). In their definition, Canes-Wrone, Mattioli, and Meunier define congressional backlash as an effort by members of Congress to “reshape the institutions and processes through which the investments are screened by the administrative state.” Canes-Wrone, Mattioli & Meunier, *supra* note 35, at 667.

⁴⁰ Canes-Wrone, Mattioli & Meunier, *supra* note 35, at 675.

⁴¹ See *id.*

⁴² Regulation 2019/452, of the European Parliament and of the Council of 19 March 2019, Establishing a Framework for the Screening of Foreign Direct Investments Into the Union, 2019 O.J. (L 79) 1, 1 [hereinafter Regulation 2019/452].

⁴³ *Id.*

2016, accompanied by a realization that China acts as “an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance.”⁴⁴

Regulation 2019/452 was promulgated to provide the EU and its member states with a greater ability to address “risks to security or public order” and to “adapt to changing circumstances,” while still allowing member states the flexibility to impose even more restrictive foreign investment regulations as dictated by individual member states’ security and public order concerns.⁴⁵ Note that the language of the regulation itself suggests a deviation from economic liberalism. Rather than restricting the implementation of foreign investment rules to situations implicating the national security of states—a traditional justification for foreign investment rules that trumps free trade imperatives—states may put in place rules to address risks to the capacious notion of “public order,” and to put in place rules that restrict the free movement of capital “on grounds of public policy.”⁴⁶

Under the rules, Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order; the rules must be transparent and not discriminate between third countries.⁴⁷ Member States must also set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules.⁴⁸ In all, fourteen European jurisdictions imposed new regulations post-COVID-19, but the EU had set in motion a revision to member state FDI rules in 2019, before the pandemic. Importantly, and similar to the U.S. regulations described in Part IV, the development of the EU

⁴⁴ *EU-China – A Strategic Outlook*, EUR. COMM’N 1 (Mar. 12, 2019), <https://ec.europa.eu/info/sites/default/files/communication-eu-china-a-strategic-outlook.pdf>.

⁴⁵ Regulation 2019/452, *supra* note 42, at 2.

⁴⁶ *Id.* at 1 (noting that the examples provided as factors for member states to consider in drafting legislation relate to traditional concerns of national security, such as critical infrastructure, critical technologies, and investments by state-controlled entities).

⁴⁷ *Id.* at 6-7.

⁴⁸ *See id.* at 7.

amendments followed a spike in Chinese investment in 2016.⁴⁹ Chinese investment decreased in the following years due both to domestic headwinds—as “an acute focus on domestic recovery and risk mitigation has reduced the appetite for outbound investment among Chinese regulators”⁵⁰—and because of the “rising regulatory barriers”⁵¹ in the EU.

Japan, too, has implemented new foreign investment rules. Under the revised rules, even relatively small, non-controlling investments can be reviewed or blocked.⁵² While formerly the acquisition of 10% or more of the stock of a company in a restricted sector could trigger a review of the transaction, the Foreign Exchange and Foreign Trade Act revisions now require notification and potential review in deals involving only 1% or higher of stock in restricted sector companies.⁵³ For deals involving the acquisition of 10% or more of stock in a target company that does not do business in a restricted sector, the acquirer must submit a “post investment report.”⁵⁴

As with the U.S. rules, described below, Japan’s rules are designed to address potential threats from Chinese firms and Chinese state-owned enterprises.⁵⁵ Sovereign wealth funds—of which China has some of the largest in the world, including the \$1.2 trillion China Investment

⁴⁹ See THILO HANEMANN ET AL., TWO-WAY STREET—US—CHINA INVESTMENT TRENDS—2021 UPDATE, RHODIUM GRP. (2021), <https://rhg.com/research/twowaystreet-2021/> (noting that the capital of Chinese investment in American Companies rose to \$70 billion in 2016, which was the highest level to date before tapering off beginning in 2017).

⁵⁰ *Id.*

⁵¹ See AGATHA GRATZ ET AL., CHINESE FDI IN EUROPE—2020 UPDATE, RHODIUM GRP. (2021), <https://rhg.com/research/china-europe-2020/>.

⁵² See *Frequently Asked Questions on the Amendment Bill of the Foreign Exchange and Foreign Trade Act*, JAPAN MINISTRY OF FINANCE (Oct. 19, 2021), https://www.mof.go.jp/english/international_policy/fdi/faq_191031.pdf (elaborating on the Japanese legislature’s national security rationale for reducing the threshold of foreign ownership in a Japanese corporation that triggers scrutiny and review from government financial officials from 10% to 1%) [hereinafter *Frequently Asked Questions*].

⁵³ The restricted sectors include oil, railways, utilities, arms, space, nuclear power, aviation, telecoms and cybersecurity. Amendment Bill of the Foreign Exchange and Foreign Trade Act (Oct. 21, 2019). The Ministry of Finance has clarified the reach of the regulation by categorizing each of Japan’s some 3,800 listed companies as falling into one of the three following categories: companies subject to post-investment report only; companies for which prior-notification is required but exemption is applicable; and companies for which prior-notification is required and exemption is not applicable. See *Frequently Asked Questions*, *supra* note 52.

⁵⁴ See *Frequently Asked Questions*, *supra* note 52.

⁵⁵ Manesh Samtani, *Japan’s New Foreign Investment Rules Take Effect*, REGULATION ASIA (May 10, 2020), <https://www.regulationasia.com/japans-new-foreign-investment-rules-take-effect/> (stating that “the move to tighten foreign investment restrictions is said to be aimed at preventing sensitive information and critical technologies from leaking to other countries (such as China), and follows similar steps taken by the US and EU nations to protect national security”).

Corporation and the \$800 billion State Administration of Foreign Exchange (SAFE) Investment Company⁵⁶—are specifically noted in the FAQs accompanying the regulation. The commentary is notable for its understatement and elision. The question posed in the law’s commentary section notes that state-owned enterprises (SOEs) are *not* eligible for the exemption from prior notification (“Does this mean that SWFs (sovereign wealth funds) and pension funds cannot benefit from the exemption and always have to submit prior notification?”).⁵⁷ The response in the commentary obliquely states that “[i]f SWFs and pension funds are deemed to pose no risk to national security, they are eligible for exemption from prior-notification,”⁵⁸ a kind of uncertainty and freedom of operation loved by regulators and loathed by SWF dealmakers seeking clarity on the application of the law.

China, interestingly, has trended in the opposite direction, modernizing and liberalizing their foreign investment laws.⁵⁹ Of course, China has historically been less open and liberal to foreign trade, and is still below the new, lowered mean of foreign investment openness.⁶⁰

⁵⁶ See *Ranking*, GLOBAL SWF, <https://globalswf.com/top-100> (ranking the top 100 sovereign wealth funds) .

⁵⁷ *Frequently Asked Questions*, *supra* note 52.

⁵⁸ *Id.* The FAQ also notes that “If SWFs and pension funds invest in listed companies through financial institutions eligible for exemption and do not become shareholders of the listed companies, those SWFs and pension funds do not need to submit prior-notification.” *Id.*

⁵⁹ See INVESTMENT POLICY HUB, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, FOREIGN INVESTMENT LAW OF THE PEOPLE’S REPUBLIC OF CHINA, <https://investmentpolicy.unctad.org/investment-laws/laws/317/china-foreign-investment-law-of-the-people-s-republic-of-china>. Under Article 28 of the Foreign Investment Law of the People’s Republic of China, investments that fall within the 123 categories on the Market Access Negative List (2020) are either prohibited or restricted. If restricted, investors may file an investment application with the relevant regulator. If the investment falls outside of the 123 categories, investors may access the investment on equal footing with Chinese investors. As a measure of increasing liberality, the number of sectors on the negative list has decreased from 151 (2018) to 131 (2019) to, most recently, 123 (2020), of which 5 categories are prohibited and 118 are restricted. The “prohibited” categories are themselves quite broad and nebulous, however, and include: 1) prohibited sectors clearly established by laws, regulations, and State Council directives; 2) products, technologies, processes, equipment, and behaviors that are prohibited or restricted by state industrial policies; 3) development activities that do not meet the requirements of the main functional area; financial related businesses in violation of regulations; and 5) prohibited internet-related business activities. See Dorcas Wong, *China Releases 2020 Negative List for Market Access*, CHINA BRIEFING DEZAN SHIRA & ASSOCIATES, (Dec. 23, 2020), <https://www.china-briefing.com/news/china-2020-negative-list-market-access/>. The restricted list includes a wide variety of market sectors, including agriculture, mining, manufacturing, utilities, construction, wholesale and retail, transportation, warehousing, accommodations and catering, information services, finance, real estate, leasing and business services, scientific research, residential services, education, health and social work, culture, sports, and entertainment. *Id.*

⁶⁰ The OECD calculates the mean openness of OECD countries as 0.06 (on a scale of 0 to 1, with 0 being open and 1

IV. THE U.S. WALL: THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT AND ITS IMPACT ON CHINESE INVESTMENT

Foreign investment regulation is inherently political in the United States, as it is in other countries. Political and historical context provides a foundation for understanding why a particular regulation was created and how it has evolved over the years. Additionally, context helps explain how foreign investment regulation is not simply (or even primarily) about national security, but is often a reflection of national *in*securities. So it is with the recently enacted Foreign Investment Risk Review Modernization Act.⁶¹ As a result of growing American concern related to Chinese investment, the U.S. Congress recently revised its foreign investment law, less than a dozen years after the last major overhaul.⁶² This section describes the development of the most recent round of legislative changes, with particular focus on how those changes are meant to respond to U.S. worries about the rise of China as a technological power and, more specifically, about how China is using investments in sensitive U.S. technologies to facilitate that rise.

The principal U.S. regulator of foreign investment, the Committee on Foreign Investment in the United States, was designed to exercise “primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.”⁶³ In reviewing the history of CFIUS and foreign investment regulation since its creation in 1975, one cannot separate the economic from the political; amendments to the CFIUS process have been a series of political reactions to political *and* economic concerns. Arguably, CFIUS has been a tool for

being closed). China’s score of 0.21 is significantly higher than the mean, though the US is also more restrictive than the mean, with a score of 0.09. *See FDI Restrictiveness*, OECD, <https://data.oecd.org/fdi/fdi-restrictiveness.htm>.

⁶¹ Foreign Investment Risk Review Modernization Act of 2018.

⁶² The Foreign Investment and National Security Act of 2007 (FISIA), Pub. L. No. 110-49, 121 Stat. 246.

⁶³ Executive Order 11858, 40 Fed. Reg. 20,263 (May 7, 1975).

dealing with the insecurities brought about by globalization, rather than merely a tool to enforce domestic security through the regulation of the sale of sensitive technology to foreign investors.

Through the Foreign Investment Risk Review Modernization Act of 2018, CFIUS has most recently been tasked with staunching the flow of technology to China.⁶⁴ And, if CFIUS is also designed to help manage globalization insecurity, CFIUS seems to be tasked with staunching a perceived flow of wealth, prestige, and power to China. CFIUS is not just a shield against these forces, however; it is also a sword that can be used to pursue executive political prerogatives and force other countries into a defensive political and economic posture.

China presents a unique problem for U.S. foreign investment regulation as it is at once the United States' most "consequential" trading partner while also its "most significant military and geopolitical rival."⁶⁵ The list of U.S. government grievances against Chinese trade and industrial policies is extensive. As was summarized by the Trump administration, China "uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities,"⁶⁶ "imposes substantial restrictions on, and intervenes in, U.S. firms' investments and activities, including through restrictions on technology licensing terms;"⁶⁷ "directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in

⁶⁴ See Mercy A. Kuo, *CFIUS and China: The FIRRM Factor*, THE DIPLOMAT (October 17, 2018), <https://thediplomat.com/2018/10/cfius-and-china-the-firrma-factor/>; Evan Zimmerman, *The Foreign Risk Review Modernization Act: How CFIUS Became a Tech Office*, 34 BERKELEY TECH. L.J. 1267 (2019).

⁶⁵ Kuo, *supra* note 64.

⁶⁶ Press Release, President Trump Announces Strong Actions to Address China's Fair Trade (March 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/president-trump-announces-strong>.

⁶⁷ *Id.*

industries deemed important by Chinese government industrial plans.”⁶⁸ and “conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies.”⁶⁹

In response to these concerns, FIRRMA sets up a variety of new definitions to help capture and regulate transactions that threaten national security. CFIUS may consider “whether a covered transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States [technological and industrial leadership] in areas related to national security,”⁷⁰ a provision written with China clearly in mind, given the Made in China 2025 Plan.⁷¹ The legislation also responds to the *Ralls* case, in which Chinese investors purchased a windfarm near a U.S. military installation and were forced to unwind the transaction,⁷² but later successfully argued that CFIUS had not provided due process in its decisionmaking. FIRRMA empowers CFIUS to review transactions involving real estate purchases involving a “land, air, or maritime port,” or which involve land “in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security.”⁷³

FIRRMA also expands CFIUS’s power to review transactions involving “critical technology,” and expands the range of transactions covered by the legislation to any investment (other than a passive investment) by a foreign person in any United States critical technology or United States critical infrastructure company that is unaffiliated with the foreign person.⁷⁴ FIRRMA

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Foreign Investment Risk Review Modernization Act of 2018, sec. 1701(c)(1).

⁷¹ For a description of the program, see KAREN M. SUTTER, CONG. RSCH. SERV., IF10964, “MADE IN CHINA 2025” - INDUSTRIAL POLICIES: ISSUES FOR CONGRESS (2020).

⁷² The *Ralls* corporation later successfully sued CFIUS, with the D.C. Circuit holding that CFIUS had not provided due process by affording “notice of, and access to, the unclassified information used to prohibit the transaction.” *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

⁷³ 50 U.S.C. 4565(a)(4)(B)(ii).

⁷⁴ See 50 U.S.C. § 4565. A “passive investment” is limited to investments which do not allow access to any material, nonpublic technical information, membership on the board, or “any involvement, other than through voting of shares, in substantive decisionmaking” relating to the management, governance, or operation of the United States critical infrastructure company or United States critical technology company. *Id.*

also heightened notice requirements, imposing a mandatory covered transaction declaration for transactions involving “an investment that results in the acquisition, directly or indirectly, of a substantial interest in a United States” critical infrastructure company or United States critical technology company by a foreign person “in which a foreign government has, directly or indirectly, a substantial interest.”⁷⁵

Finally, FIRRMA requires CFIUS to produce reports on Chinese investments particularly, including:

- The amount of total foreign direct investment from China in the U.S., disaggregated by ultimate beneficial owner.
- A breakdown of Chinese investments in the U.S. broken out by deal size, industry, investment type, and by government and non-government investments.
- A list of companies U.S. firms acquired through Chinese government investment.
- The number of United States affiliates of entities under Chinese jurisdiction, the total employees at those affiliates, and the valuation for any publicly-traded United States affiliate of a Chinese entity.
- An analysis of investment patterns, including by volume, type and sector, and the extent to which those patterns of investments align with the objectives outlined in the Made in China 2025 plan.⁷⁶

Taken together, the “clear intent” of FIRRMA’s provisions, in the view of a leading practitioner, is to “give CFIUS greater visibility into a range of Chinese investment in the United States, and in turn the legislation likely will limit somewhat the totality of Chinese investment in the United States.”⁷⁷

⁷⁵ *Id.* § 4565(b)(1)(C)(v)(IV)(bb)(AA).

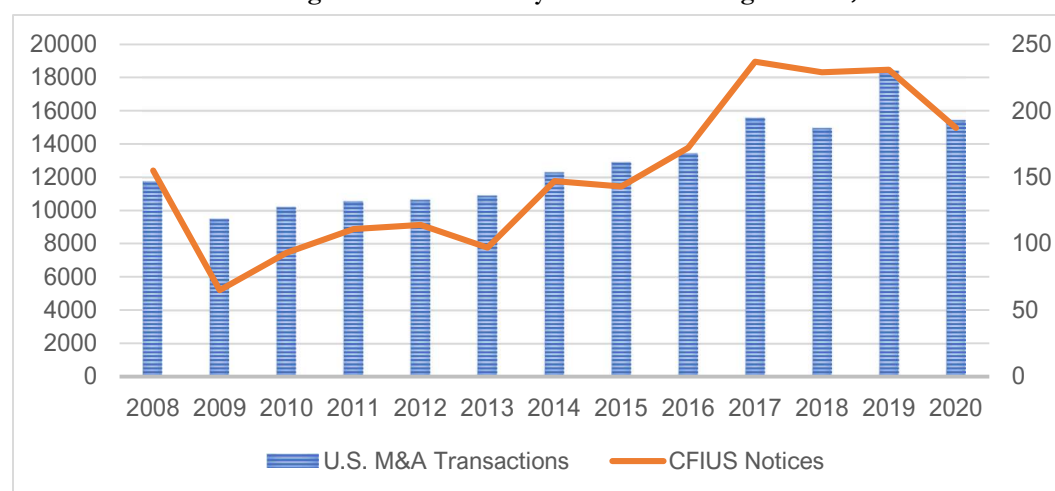
⁷⁶ *See* Foreign Investment Risk Review Modernization Act of 2018, sec. 1719(b)(2).

⁷⁷ Kuo, *supra* note 64.

An important question arising with any foreign investment regulation is indeed its effect on overall foreign investment. Accepting the liberal economic order's assumption that the investment environment should remain open to "good" investment while still allowing countries to screen out "bad" investment on the grounds of national security, recent U.S. Treasury data illuminates the impact of the shift in foreign investment regulation.⁷⁸ Data provided by the Treasury Department shows a significant increase in CFIUS enforcement activity under the Trump administration.⁷⁹ CFIUS data should always be viewed within the context of mergers and acquisition (M&A) activity generally; fewer CFIUS notices should be expected in years in which M&A activity is lower, and more should be expected in years of stronger M&A activity. Comparing M&A activity with CFIUS notices from the post-FINSA era, we see that is indeed the case (Figure 5).

⁷⁸ This framing is common with foreign investment regulation generally. See, for example, the comments of Treasury Secretary Steven Mnuchin on the signing of FIRRMA: "FIRRMA delivers much-needed reforms that will ensure CFIUS has the tools necessary to identify, examine, and address national security concerns arising from foreign investment. America is a vibrant place to invest, and better protecting critical U.S. technology and infrastructure will ensure it stays that way." *Treasury Secretary Mnuchin Statement on Signing of FIRRMA to Strengthen CFIUS*, US DEPT' OF TREAS. (August 13, 2008), <https://home.treasury.gov/news/press-releases/sm457>.

⁷⁹ Practitioners noted this increase as well. See, e.g., Mario Mancuso, *CFIUS Report Shows Trump Admin's Push to Curb Risky M&A*, KIRKLAND & ELLIS (Nov. 25, 2019), <https://www.kirkland.com/news/in-the-news/2019/11/cfius-report-shows-trump-admins-push-to-curb-risky> (noting that the "uptick reflects the general feeling among many CFIUS-focused attorneys that the interagency committee doubled down on efforts to flag potentially risky transactions after President Donald Trump took office").

Figure 5. M&A Activity and CFIUS Filing Notices, 2008-2020

Source: Institute for Mergers, Acquisitions and Alliances (IMAA)⁸⁰ and U.S. Treasury⁸¹ data.

The correlation coefficient between CFIUS notices and total U.S. M&A activity over that period is 0.93, indicating, as one would expect, that CFIUS notice activity over the period is very strongly related to overall M&A activity. This correlation thus helps to isolate the impact of CFIUS enforcement activity over the period. The extremely high correlation between CFIUS notices and M&A activity suggests that CFIUS regulation of FDI did not have an impact on the total number of covered transactions; the total number of covered transactions tends to go up and down with M&A activity generally. However, CFIUS enforcement can have a significant impact on how many transactions are ultimately rejected (by CFIUS⁸² or the President), withdrawn, or cleared with mitigation, and thus some of the impacts on FDI may take several years to reveal themselves, as foreign investors respond to transactional frictions over time. The CFIUS data, as noted above, does show a marked increase in enforcement by the number of investigations, the number of transactions cleared only after mitigation measures were put in place, or the number of notices withdrawn.

⁸⁰ Institute for Mergers, Acquisitions and Alliances, *M&A in The United States*, <https://imaa-institute.org/m-and-a-us-united-states/>.

⁸¹ U.S. DEP'T OF TREASURY, INFORMATION REGARDING NOTICES AND PRESIDENTIAL DECISIONS FOR COVERED TRANSACTIONS, <https://home.treasury.gov/system/files/206/CFIUS-Summary-Data-2008-2019.pdf>.

⁸² Treasury notes that “[n]otices can be rejected by the Committee if the parties do not satisfy the requirements in the regulations or if, during the course of CFIUS review, there is a material change to the transaction or information comes to light that contradicts material information provided in the notice by the parties.” *Id.*

Figure 6. CFIUS Filing Notice Outcomes, 2008-2020

Year	Number of Notices	Number of Investigations	Notices Rejected	Presidential Rejections	Notices Cleared with Mitigation	Total Notices Withdrawn	Notices Withdrawn and Transactions Abandoned in Light of CFIUS-Related National Security Concerns
2008	155	23	2	0	2	23	2
2009	65	25	0	0	5	7	1
2010	93	35	0	0	8	12	2
2011	111	40	0	0	8	6	0
2012	114	45	0	1	5	22	8
2013	97	49	2	0	9	8	6
2014	147	52	1	0	9	12	2
2015	143	67	1	0	12	13	3
2016	172	79	0	1	17	27	5
2017	237	172	0	1	30	74	24
2018	229	158	2	1	37	66	18
2019	231	113	1	1	28	30	8
2020	187	88	1	1	16	29	7

Source: U.S. Department of Treasury, Information Regarding Notices and Presidential Decisions for Covered Transactions⁸³

The impact of the Trump administration's focus on foreign transactions also becomes clearer when set out as percentages of transactions withdrawn (some of which were refiled, such as after mitigation measures were put in place to ensure U.S. national security interests), or were abandoned entirely, as shown in Figure 7.

Figure 7. Percentage of Covered Transactions Withdrawn

Year	Percent of Covered Transactions Withdrawn	Percent of Covered Transactions Withdrawn and Abandoned
2008	15%	1.3%
2009	11%	1.5%
2010	13%	2.2%
2011	5%	0.0%
2012	19%	7.0%
2013	8%	6.2%
2014	8%	1.4%
2015	9%	2.1%
2016	16%	2.9%
2017	31%	10.1%
2018	29%	7.9%
2019	13%	3.5%
2020	16%	3.7%

Source: U.S. Department of Treasury, Information Regarding Notices and Presidential Decisions for Covered Transactions⁸⁴

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 2-3.

What is apparent is an immediate jump in enforcement in the first year of Trump administration enforcement, followed by a smoothing out that perhaps represented more careful notice filings. A reduction in transactions likely followed that would be covered under CFIUS, as some foreign investors presumably avoided deals that would trigger CFIUS. Merger activity in 2019, for example, showed an uptick in deals but no proportionate increase in CFIUS filings. This possibility, suggested by the lack of a significant increase in CFIUS notices in a year (2019) marked by significantly higher M&A activity, indicates that perhaps foreign investors were beginning to respond to a less welcoming U.S. investment environment in 2019 by avoiding CFIUS-covered deals. In 2020, M&A activity decreased by 16%, but CFIUS filings decreased by a greater 19%, again potentially suggesting that filings were not keeping up with M&A activity as they traditionally would. Data from 2021 (to be released by CFIUS later this year) will provide evidence on enforcement priorities under the Biden administration.

With reference to China specifically, Chinese investment activity in the United States has markedly decreased since the passage of FIRRMA. For example, the U.S.-China Investment Project reports that venture capital investment from China in 2019 dropped by almost half after the 2018 enactment of FIRMMA, although investment rebounded in somewhat in 2020.⁸⁵

It is not merely foreign investment barriers that cause decreasing foreign investment, of course. Particularly when addressing Chinese foreign investments, the domestic constraints on Chinese investments play a key role in determining how and when Chinese firms (whether state-owned or not) invest in foreign markets. Much of the recent data on decreased Chinese investment activity is not attributable to FIRRMA, but to Chinese capital controls. In late 2016, Chinese

⁸⁵ US-China Investment Project, *Two-Way Street: 2021 Update, US-China Investment Trends* 29, RHODIUM GRP., https://rhg.com/wp-content/uploads/2021/05/RHG_TWS-2021_Full-Report_Final.pdf (finding that “[i]nvestment dropped by almost half to \$2.3 billion in 2019 after the enactment of FIRRMA, which made certain venture transactions subject to CFIUS review. Defying the pandemic and US-China technology frictions, investment grew again in 2020 to \$3.2 billion”).

regulators sought to curb “irrational” outbound investment, in part to ensure the robust health of China’s reserves.⁸⁶ New restrictions encouraged certain investments while discouraging and prohibiting others; some of the restricted sectors, such as real estate, hospitality, and entertainment, had made up a large percentage of Chinese acquisitions in the United States in recent years.⁸⁷ Some of the downturn in flow has come from Chinese government efforts to restrict outbound capital flows. Year over year, Chinese M&A transactions in the United States declined by 90%.⁸⁸

Yet, we cannot assume these policies were made in a vacuum, solely to preserve Chinese reserves. President Trump had already taken office at the time of the shift. And, of course, for over a year prior to that, candidate Donald Trump had clearly signaled his interest in taking a tougher stand on China and Chinese investment in the United States. China may have been responding to Trump administration signaling while also acknowledging the need to focus on a domestic policy concern. China may also have determined to invest less in the United States for internal and external policy considerations. One data point supporting this more nuanced view is the fact that while Chinese investment in the United States remained low after the imposition of stricter capital controls, it rebounded in the rest of the world in the latter half of 2017.⁸⁹

More to the point, an enhanced focus on Chinese investment also served as a significant barrier even prior to the enactment of FIRRMA in 2018. In 2017, the first year of the Trump administration, an “unprecedented number of Chinese deals were delayed or abandoned . . . as parties failed to obtain approval from [CFIUS].”⁹⁰ From this perspective, FIRRMA is doing exactly

⁸⁶ Hu Yongqi, *Irrational Outbound Investment Curbed*, CHINA DAILY (Oct. 24, 2017), https://www.chinadaily.com.cn/business/2017-10/24/content_33638951.htm.

⁸⁷ Thilo Hanemann & Daniel H. Rosen, *Chinese FDI in the US in 2017: A Double Policy Punch*, RHODIUM GRP. (Jan. 17, 2018), <https://rhg.com/research/chinese-fdi-in-the-us-in-2017-a-double-policy-punch/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (noting that among the transactions “abandoned during the year because of unresolved CFIUS concerns” were Canyon Bridge Capital’s acquisition of Lattice Semiconductor, Zhongwang’s acquisition of Aleris Corp, Orient Hontai’s acquisition of a stake in Applovin and HNA’s acquisition of a stake in Global Eagle Entertainment). In 2018, Ant Financial abandoned its proposed acquisition of Moneygram. Rhodium estimates that “[i]f completed, these deals would have added at least another \$7-8 billion to the 2017 headline figure.” *Id.*

what it was intended to do with respect to Chinese investment: Chinese deals have dropped significantly, and those that survive appear to be subject to heightened scrutiny. While the Trump administration was never able to build the wall that featured so prominently in President Trump's campaign speeches, the United States erected and enforced a strong barrier against Chinese investment during his term.

V. CONCLUSION

Foreign investment regulation is a poor tool to manage discontent with globalization. Even when viewed in a more limited role as a means to limit technology transfer to China, foreign investment rules are likely to be lacking. Much of the technology transfer that occurs is not through Chinese direct investment, but rather through forced technology transfer arrangements involving firms operating in China.⁹¹ As a mechanism for managing China's ascension, foreign investment regulation also fails to “take on the crucial long-term concern of assimilating China as a normal actor in the global economic system”⁹² by failing to recognize China's asymmetric motives in its foreign investments: while sellers to Chinese firms have private motives for pursuing transactions, at least some Chinese acquirers have “non-economic motivations.”⁹³

Foreign investment regulation may help deal with some of the symptoms of globalization—like tariffs, CFIUS can be used to provide a visible response to politically-sensitive international transactions. But it does not pretend to deal with the realities of dislocation and disruption associated with globalization.

⁹¹ See Zimmerman, *supra* note 64, at 1292.

⁹² Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a 'National Strategic Buyer': Towards a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192, 200-01 (2019).

⁹³ *Id.* at 198.

There seems to be an important causal claim implicit in the recent cycle of restrictive foreign investment regulations: such regulation acts as a response to foreign (and especially Chinese) behavior, rather than as a response to domestic concerns. But causal links may rely on a more complex mix of foreign and domestic forces. For example, other countries may enjoy certain comparative advantages, such as a surplus of relatively inexpensive labor, resulting in domestic concerns about closed factories and jobs lost to global competition. This is not to argue that recent changes in foreign investment regulation, like FIRRMA, are not justified by China's investment practices. But these changes may also flow from domestic anxieties related to technological changes and outsourcing decisions made solely to maximize shareholder value—decisions linked to globalization generally—rather than merely as a direct result of Chinese monetary and investment practices.