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CFIUS IN THE AGE OF CHINESE INVESTMENT

*Patrick Griffin**

As China's economy has developed, its companies, both state-owned and privately held, have moved to expand their operations in the United States to the point where many now seek to invest in—and on occasion, acquire—U.S. counterparts. This trend has set off alarm bells over fears that China's unique political and economic system, which gives the state extensive influence over all corporations regardless of their ownership structure, renders such transactions national security threats. Recent hostility toward Chinese-led inbound investment is not a new trend; Congress has attempted to assert itself into the screening process undertaken by the Committee on Foreign Investment in the United States (CFIUS) since its establishment. This Note examines both the framework the U.S. government has utilized to screen potential national security threats posed by foreign investment and how the eccentricities of China's state-capitalist system present unique challenges to that framework. It argues for an executive order to mandate CFIUS review for transactions in sensitive industries which touch upon national security issues, particularly telecommunications in an age of increasing cyberwarfare. This will prepare CFIUS to handle the challenges posed by increasing investment in the United States by Chinese corporations without needlessly constructing barriers to the same where no real security threat exists.

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INTRODUCTION

In the summer of 2013, several members of Congress expressed concern regarding a looming national security threat posed by China.[1] The potential threat did not involve Beijing's attempts to assert itself in the South China Sea, its refusal to rein in North Korean nuclear saber rattling, or its increased aggression toward U.S. treaty allies like Japan and the Philippines—it involved pigs.

Shuanghui, China's largest pork producer, had announced plans to acquire Smithfield, an American hog supplier, in what would be the largest acquisition in history by a Chinese company of an American counterpart.[2] A number of senators—all from midwestern states with substantial farming industries—expressed concern that the deal would endanger U.S. food security, urged strict oversight of the deal, and questioned the real motivation behind Shuanghui's gambit.[3]

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1. *See* Hongjun Tao & Chaoping Xie, *A Case Study of Shuanghui International's Strategic Acquisition of Smithfield Foods*, 18 INT'L FOOD & AGRIBUSINESS MGMT. REV. 145, 145–46 (2015).

2. *See id.* The total value of the deal was $7.1 billion. *See id.* at 146.

3. *See* Ros Krasny & Rachelle Younglai, *U.S. Lawmakers Air Concerns About Smithfield-Shuanghui Deal*, REUTERS (June 5, 2013, 7:21 PM), http://www.reuters.com/

Congress's attempts to sink the merger ultimately proved unsuccessful. The Committee on Foreign Investment in the United States (CFIUS or "the Committee"), the executive body charged with screening foreign investment deals for potential national security threats, quickly approved the deal.[4] This outcome was unsurprising as the pork industry does not quite fit into the rubric for analyzing national security threats, the Secretary of Agriculture does not participate in CFIUS, and food security (as a general category) is not within the scope of threats historically examined by the Committee.[5]

While President Donald Trump's threats throughout the 2016 presidential campaign to challenge China on trade and currency manipulation received a great deal of attention,[6] the challenges posed by Chinese investment and the reaction of the U.S. government to these challenges have largely gone unnoticed. The Shuanghui-Smithfield merger occurred amid the backdrop of a number of controversial investment deals pertaining to China, some of which *were* derailed by CFIUS.[7] Since the Shuanghui deal was approved, members of Congress have initiated attempts to expand the scope of the Committee's review process.[8] Much of this sentiment has been directed at Chinese corporations' investments in the United States which, though potentially beneficial and on the rise in recent years, are uniformly met with suspicion.[9] This hostile attitude toward Chinese investment has, in turn, soured many in China to the prospect of investing in the United States.[10]

Apprehension of Chinese investment is not entirely unwarranted. Despite its rapid economic transformation, China has, in many respects, retained the statist model it operated under prior to embarking on market reforms in the late 1970s.[11] As a result, state-owned enterprises (SOEs) continue to play an outsized role in its economy, and most nominally privately owned enterprises

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article/us-smithfield-shuanghui-congress-idUSBRE9540YN20130605 [https://perma.cc/B72G-A3ZN].

4. *See* Joel Backaler, *What the Shuanghui-Smithfield Acquisition Means for Chinese Overseas Investment*, FORBES (Nov. 5, 2013, 7:17 AM), http://www.forbes.com/sites/joelbackaler/2013/11/05/what-the-shuanghui-smithfield-acquisition-means-for-chinese-overseas-investment/#1653d69276b6 [https://perma.cc/5KZJ-RRK6].

5. *See* Amy S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEO. MASON L. REV. 1347, 1366 (2014).

6. *See, e.g.*, Andrew Browne, *After China's Hubris, It's Trump's Turn*, WALL ST. J. (Dec. 13, 2016, 12:14 PM), http://www.wsj.com/articles/after-chinas-hubris-its-trumps-turn-1481619602 [https://perma.cc/3K7G-RRVA].

7. *See* Ralls Corp. v. CFIUS, 758 F.3d 296 (D.C. Cir. 2014); STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, 112TH CONG., INVESTIGATIVE REP. ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE (2012).

8. *See infra* Part IV.A.

9. *See* Ming Du, *When China's National Champions Go Global: Nothing to Fear but Fear Itself?*, 6 J. WORLD TRADE 1127, 1140–42 (2014). Investment by Chinese companies abroad surpassed that of foreign companies in China for the first time in 2016. *See China Spends More in the World Than the World Spends in China*, BBC (Sept. 23, 2016), http://www.bbc.com/news/business-37448573 [https://perma.cc/HN5M-RVPR].

10. *See* Du, *supra* note 9, at 1142.

11. *See* DAVID SHAMBAUGH, CHINA'S FUTURE? 98–124 (2016).

(POEs) also have substantial ties to the state.[12] Because the investment of Chinese companies abroad is plausibly an extension of state policy rather than a function of market dynamics,[13] it is unsurprising that the U.S. government is wary of Chinese corporations investing in certain industries closely linked to national security.

This Note argues that, to take into account the potential threat posed by Chinese companies, CFIUS must be required to conduct in-depth reviews and investigations into industries that have a clear impact on national security, particularly telecommunications and manufacturing. This method would help CFIUS guard against the risks posed by foreign investors subject to state capitalism and orient it toward the national security threats of the future, particularly cyberthreats. Moreover, it would do so without taking an aggressively protectionist stance on Chinese investors generally, reducing the negative economic consequences of barring much-needed investment from entering the United States.

Part I looks at the current legal framework CFIUS applies to screen foreign investment and proposed acquisitions of U.S. companies by foreign counterparts. It also examines the role Congress has historically played in attempting to expand the scope of CFIUS's investigations. Next, Part II explores the nuances of China's state-capitalist system, including the ways in which the long arm of the Chinese state gives the government significant control over all aspects of society, how SOE reform has drastically changed—and sometimes failed to change—Chinese SOEs, and how state co-option of POEs calls into question their independence. It also provides data on the growing capacity of Chinese corporations to provide much-needed investment into the United States. Then, Part III takes a look at specific cases involving Chinese corporations over the past few years. Finally, Part IV explores current proposals for reforming CFIUS, argues for an alternative, flexible way of regulating and screening Chinese investors, and concludes by calling for a new executive order refining CFIUS's review procedure to mandate investigation of transactions in sensitive industries.

I. CFIUS: LEGAL FRAMEWORK AND HISTORICAL BACKGROUND

The primary vehicle through which the United States monitors proposed foreign investment schemes is CFIUS, an interagency committee composed of the heads of sixteen departments and agencies within the executive branch.[14] The legal framework upon which the Committee was formed and operates is fairly convoluted; it was initially established in 1975 by President

12. *See* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 668 (2015).

13. *See id.* at 705–07.

14. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2016). CFIUS is currently composed of "the Secretaries of State, the Treasury, Homeland Security, Commerce, Defense, Energy, Labour and others." Du, *supra* note 9, at 1138.

Gerald Ford's promulgation of Executive Order 11858.[15] The Commitee's powers were then significantly expanded by section 5021 of the Omnibus Trade and Competitiveness Act of 1988, which gave the Committee the power to terminate a transaction pursuant to section 721 of the Defense Production Act.[16] CFIUS's powers were further altered by a provision of the National Defense Reauthorization Act of 1993[17] ("the Byrd Amendment") and then by the Foreign Investment and National Security Act of 2007[18] (FINSA).

CFIUS reviews the national security implications of proposed investment and acquisition of U.S. companies or operations by their foreign counterparts.[19] Its statutorily mandated timetable for preclearance of foreign investment deals entails an initial thirty-day review following receipt of notice, a forty-five day investigation period that only applies to deals that CFIUS determines requires further review, and an additional fifteen-day period after CFIUS relays its final report to the President, after which the President makes a decision regarding the deal.[20] CFIUS review has only resulted in a presidential order to freeze a transaction on three occasions.[21] However, hostile press coverage stemming from CFIUS review and fear of a negative outcome frequently cause foreign companies to pull out of deals voluntarily or avoid investing in the United States altogether.[22]

CFIUS has operated in "relative obscurity" over the past few decades.[23] From time to time, Congress has criticized CFIUS's opaque review process and has frequently urged the Committee to take a tougher, broader stance on foreign investment.[24] This part explores the history of CFIUS, the legal

15. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

16. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (codified as amended at 50 U.S.C. § 4565 (2012)).

17. Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (codified as amended at 50 U.S.C. § 4565). The so-called "Byrd Amendment" required CFIUS review for transactions involving parties that are controlled by a foreign government. *See infra* Part I.C.

18. Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565). FINSA formalized the stages and length of CFIUS review and allowed for informal consultations; accompanying regulations allowed for closed transactions to be reopened. *See infra* Part I.C.

19. *See* JACKSON, *supra* note 14, at 1.

20. *See* Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800 (2008); *see also* EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 35–36 (2006).

21. Notably, all three occasions pertained to Chinese companies: CATIC in 1990, Ralls in 2012, and Fujian Grand Chip in December 2016. *See* JACKSON, *supra* note 14, at 4; Diane Bartz & Matthias Inverardi, *Obama Bars China's Fujian from Buying Aixtron's U.S. Business*, REUTERS (Dec. 2, 2016, 5:32 PM), http://www.reuters.com/article/us-aixtron-m-a-fujian-idUSKBN13R0DU?il=0 [https://perma.cc/AR24-FHS6].

22. *See* Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L L. & BUS. 199, 220–22 (2013); William Mauldin, *China Investment in U.S. Economy Set for Record, but Political Concerns Grow*, WALL ST. J. (Apr. 12, 2016, 2:30 PM), http://www.wsj.com/articles/china-investment-in-u-s-economy-set-for-record-but-political-concerns-grow-1460422802 [https://perma.cc/Q6RX-N5KL].

23. *See* JACKSON, *supra* note 14, at 2.

24. *See id.* Congressional pressure has been a major driving force behind prior CFIUS reforms, which enhanced the Committee's powers. *See infra* Part I.A.

framework under which it operates, and attempts by Congress to expand the Committee's scope of review.

A. Early CFIUS

President Ford established CFIUS through an executive order in 1975 amid concerns regarding growing levels of inbound investment by the Organization of the Petroleum Exporting Countries (OPEC), whose member states are flush with oil money.[25] At the time, many in Congress feared that, in light of the oil embargo launched by OPEC two years earlier, the spurt of investment was motivated by political rather than economic considerations.[26]

The executive order establishing CFIUS set forth the basic structure of the Committee and stipulated that it would possess the "primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States . . . and for coordinating the implementation of United States policy on such investment."[27] The executive order delegated significant responsibilities to CFIUS, including (1) the collection of data regarding trends in foreign investment in the United States, (2) providing guidance with respect to coordinating with foreign governments regarding potential investment, (3) reviewing proposed transactions with implications for U.S. interests, (4) considering proposals for new legislation or regulations to enhance oversight of foreign investment as deemed necessary, and (5) coordinating the views of the executive branch and discharging its responsibilities pursuant to the Defense Production Act of 1950.[28]

CFIUS was established at a time when the United States was actively encouraging foreign corporations to invest in the country, an initiative that was largely successful given the strength of the U.S. economy.[29] The Committee was thus fairly inactive in its infancy, only meeting ten times between 1975 and 1980 and seemingly at a loss as to what it should be investigating in screening investments that had implications for "national interests"—specifically, whether political or economic aspects fell within the scope of its review.[30] This led to complaints from Congress, which urged the

25. *See* JACKSON, *supra* note 14, at 1–3; *see also* Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

26. *See* JACKSON, *supra* note 14, at 1. A Treasury Department memorandum from the time confirms that the Committee was established to placate Congress's concerns. *See id.*

27. Exec. Order No. 11,858, § 1(b), 40 Fed. Reg. at 20,263; *see also* JACKSON, *supra* note 14, at 2.

28. *See* Exec. Order No. 11,858, § 1(b), 40 Fed. Reg. at 20,263. Notably, the Committee's power to review proposed investments was essentially limitless, as it was given purview over any investment that, "in the judgment of the Committee, might have major implications for United States national interests." *Id.* § 1(b)(3), 40 Fed. Reg. at 20,263.

29. *See* GRAHAM & MARCHICK, *supra* note 20, at 33. President Reagan's 1983 announcement, the first by a U.S. President, declared that "[t]he United States believes that foreign investors should be able to make the same kinds of investment, under the same conditions, as nationals of the host country. Exceptions should be limited to areas of legitimate national security concern or related interests." *Id.*

30. *See* JACKSON, *supra* note 14, at 3.

Committee to address whether the investments were actually beneficial.[31] This tension between CFIUS taking a passive, investment-friendly approach to review and Congress advocating a more protectionist stance has been a consistent issue at every stage of the Committee's existence.[32]

B. Exon-Florio Amendment and Concerns over Japan in the 1980s

Throughout the 1980s, CFIUS mostly investigated investment deals involving Japanese corporations at the behest of the Department of Defense.[33] CFIUS undertook these investigations amid growing anxiety in the United States regarding the rapid growth of the Japanese economy, fears that U.S. companies were particularly vulnerable to foreign takeover, and a boom in acquisition of U.S. corporations by Japanese counterparts fueled by a weak dollar.[34]

One particularly contentious acquisition scheme was Fujitsu's attempt to purchase an 80 percent share of Fairchild, a California semiconductor manufacturer.[35] The implications of the Japanese takeover of a computer industry titan sparked concern both in Congress and within the business community.[36] Opponents of the proposed acquisition argued that it would damage U.S. competitiveness and harm national security by giving Japan access to vital U.S. technology and making the United States dependent on Japan for semiconductor production.[37] Although the Reagan administration worried that scrutiny of the deal would chill foreign investment and damage trade relations with Japan, it nonetheless submitted to Congress's concerns and instructed CFIUS to conduct a review.[38]

While CFIUS theoretically possessed fairly broad powers pursuant to its enabling executive order, it was ultimately an advisory body.[39] The Committee was bereft of any authority to pass regulations or take substantive action beyond recommending that the President invoke the International

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31. *See id.* ("[W]hat we really want to know about foreign investments in the United States . . . is: Is it good for the economy?").

32. *See* GRAHAM & MARCHICK, *supra* note 20, at 33–73.

33. *See* JACKSON, *supra* note 14, at 2–3. Jackson notes two attempts by Japanese corporations to acquire U.S. counterparts that manufactured metals for the U.S. military and a third by a French corporation that was resolved by reassigning the classified contracts to the U.S. parent company. *See id.*

34. *See* GRAHAM & MARCHICK, *supra* note 20, at 40–41.

35. *See* David E. Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in U.S.*, N.Y. TIMES (Mar. 17, 1987), http://www.nytimes.com/1987/03/17/business/japanese-purchase-of-chip-maker-canceled-after-objections-in-us.html [https://perma.cc/N67D-WM85].

36. *See* GRAHAM & MARCHICK, *supra* note 20, at 41.

37. *See id.* Graham and Marchick note that one observer likened the sale to "selling Mount Vernon to the Red coats," a puzzling comparison given Japan was (and still is) an ally of the United States, which we are obligated to defend. *See id.*

38. *See id.*

39. *See id.* The executive order authorized CFIUS to review any deal that "might have major implications for United States national interests" but was not given actual power to ensure its recommendations were fulfilled. *Id.* (quoting Exec. Order No. 11,858 § 1(b)(3), 40 Fed. Reg. 20,263, 20,263 (May 7, 1975)).

Emergency Economic Powers Act (IEEPA).[40] Because invoking IEEPA would have been seen as an overtly hostile act against Japan, the Reagan administration was highly unlikely to block the merger.[41] Fujitsu eventually abandoned the deal due to the bad press that resulted from Congress's opposition to the deal rather than any action taken by CFIUS or President Reagan.[42]

Although Congress's scrutiny of the Fujitsu-Fairchild merger killed the deal, the Reagan administration's reluctance to heed Congress's concerns worried many lawmakers.[43] This led to action on the part of Congress, spearheaded by Senator James Exon of Nebraska, who introduced a bill that would "grant the President discretionary authority to review and act upon foreign takeovers, mergers, [and] acquisitions . . . which threaten the national security or essential commerce of the United States."[44] The legislation's goal was to "encourage the Administration to protect the national interest" and create a legal mechanism for the President to block acquisition of U.S. companies by foreign counterparts without invoking a national emergency as required by IEEPA.[45] Senator Exon's bill, along with a similar bill introduced contemporaneously in the House of Representatives by Representative James Florio of New Jersey, gave the President the explicit power to block foreign acquisitions that he deemed harmful to U.S. national interests.[46]

These efforts culminated in the Exon-Florio Amendment of 1988, which specified the process by which CFIUS now reviews foreign investment transactions and explicitly gave the President the power to review and block such transactions without being compelled to invoke a national emergency pursuant to IEEPA.[47] The provision allows CFIUS itself to initiate review of a transaction or for parties of a covered transaction to submit their deal for review via written notice.[48] Upon conducting a review, CFIUS must

40. *See id.* at 41. IEEPA, enacted in 1977, authorizes the President to regulate commerce upon declaration of a national emergency in response to any unusual threat from a foreign source. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. § 1701 (2012)).

41. *See* GRAHAM & MARCHICK, *supra* note 20, at 41–42.

42. *See id.* at 41.

43. *See id.*

44. *Id.*

45. *See id.* Various congressmen pointed out at the time that the requirement of declaring a national emergency essentially constituted a declaration of hostilities against the government of the acquiring company, rendering the President's veto theoretical. *See id.* at 41–42.

46. *See id.* at 42; *see also* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (codified as amended at 50 U.S.C. § 4565 (2012)).

47. *See* Omnibus Trade and Competitiveness Act of 1988 § 5021, 102 Stat. at 1425. While the President no longer had to declare a national emergency under IEEPA, his or her power under this provision was curtailed by the requirement that he or she "must conclude that (1) other U.S. laws are inadequate or inappropriate to protect the national security; and (2) he must have 'credible evidence' that the foreign investment will impair the national security." JACKSON, *supra* note 14, at 3.

48. *See* Omnibus Trade and Competitiveness Act of 1988 § 5021, 102 Stat. at 1425. "Covered transaction" is defined as "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign

consider the following factors, among others: (1) the effect of the proposed acquisition on the United States's production capacity in areas relevant to national security; (2) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security; (3) the potential national-security-related effects on U.S. critical infrastructure, including major energy assets; (4) whether the covered transaction is a foreign-government-controlled transaction; (5) the state of relations between the company's country and the United States, specifically with respect to cooperating in counterterrorism efforts; (6) the long-term projection of U.S. requirements for sources of energy and other critical resources; and (7) such other factors as the President or the Committee may determine to be appropriate.[49]

As the breadth and open-ended nature of the factors illustrate, Congress wanted the term "national security" to "be read in a broad and flexible manner" to give CFIUS leeway to consider the economic effects of a proposed transaction.[50] CFIUS went on to leave "national security" undefined in the U.S. Treasury regulation implementing Exon-Florio "because [doing so] could improperly curtail the President's broad authority to protect the national security."[51] While this has led to CFIUS reviewing transactions involving industries outside of the defense industrial base, until recently CFUIS had only reviewed industries that were at least tangentially related to national security.[52]

Notably missing from the Exon-Florio factors are explicit economic interest considerations—though not for lack of trying on Congress's part.[53] Exon's original bill explicitly included economic interests as a factor in CFIUS review, including the impact on unemployment, but these proposals were met with strong opposition from the Reagan administration.[54] Congress eventually removed those provisions when it became clear the President would veto the bill if it moved beyond protean national security considerations.[55] Subsequent attempts in the 1990s and 2000s to amend the Exon-Florio Amendment to include economic interests and to shift the chair of CFIUS away from the Secretary of the Treasury to the Secretary of Commerce also proved unsuccessful.[56]

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control of any person engaged in interstate commerce in the United States." 50 U.S.C. § 4565(a)(3).

49. *See* 50 U.S.C. § 4565(f).

50. *See* GRAHAM & MARCHICK, *supra* note 20, at 38 (quoting 134 CONG. REC. S48333 (daily ed. Apr. 25, 1988) (statement of Sen. Exon)).

51. *Id.* (quoting Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800 (2008)).

52. *See id.* (noting such examples as "technology, telecommunications, energy and natural resources, manufacturing, and transportation").

53. *See id.* at 43–44.

54. *See id.*

55. *See id.*

56. *See id.* 46–49. Many in Congress saw the Treasury Secretary as being lax on foreign investment review because the nature of the position entails a strong preference to encourage such investment. *See id.* at 49.

C. The Byrd Amendment, FINSA, and Concerns over the Middle East Post-9/11

One successful attempt to amend Exon-Florio was launched in 1992 by Senator Robert Byrd of West Virginia.[57] The Byrd Amendment mandated CFIUS review for pending mergers, acquisitions, and takeovers so long as the acquirer is "controlled by or acting on behalf of a foreign government . . . or [the] takeover . . . could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."[58] The amendment seemingly forced CFIUS's hand with respect to reviewing acquisitions pursued by foreign governments or their agents.[59] However, it did not necessarily mandate that CFIUS reject such transactions upon conducting a review.[60]

CFIUS members interpreted the amendment to grant the Committee discretion with respect to conducting full forty-five-day investigations into covered transactions, while Congress interpreted the amendment to *require* a full investigation.[61] This led to tensions over the 2006 DP World acquisition, in which CFIUS declined to conduct a full forty-five-day investigation into the acquisition of a U.S. company by a U.A.E. state-owned corporation, Dubai Ports World.[62] The Committee argued, based on an extensive review it conducted prior to the company formally filing the case, that the deal did not pose a national security threat and thus did not meet the second criterion of the Byrd Amendment.[63]

Congress, tapping into widespread apprehension regarding the Middle East in the aftermath of the terrorist attacks on September 11, 2001, vociferously disagreed, leading the Bush administration to make a substantial change to how CFIUS operated.[64] In late 2006, CFIUS approved the acquisition of Lucent Technologies, Inc., by a French corporation, Alcatel SA, but *only after* requiring that Alcatel sign a Special Security Arrangement, which (1) restricted its access to sensitive work done by Lucent pertaining to the United States's communications infrastructure and (2) allowed CFIUS to reopen a review of the deal and overturn approval at any point.[65] This was a significant setback for foreign investors, who could previously rest assured that as long as they passed CFIUS review, their deal would not face further opposition from the U.S. government.[66]

57. *See* JACKSON, *supra* note 14, at 6; *see also* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (1992) (codified as amended at 50 U.S.C. § 4565 (2012)).

58. National Defense Authorization Act for Fiscal Year 1993, § 837(a)(2)(b), 106 Stat. at 2464.

59. The wording of the first clause—"controlled by or acting on behalf of a foreign government"—is vague, which could potentially cause confusion with respect to parties from countries operating under state capitalism, such as China. *See id.*; *infra* Part II.

60. *See* JACKSON, *supra* note 14, at 6.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.* at 6–7.

Congress, still not pleased, enacted FINSA,[67] which resulted in President George W. Bush's promulgation of Executive Order 13,456 on January 23, 2008.[68] FINSA formalized the current CFIUS review system, which gives the Committee thirty days to conduct an initial review, forty-five days to conduct an investigation if the review gives rise to national security concerns, and fifteen days for the President to make a final decision.[69]

FINSA also provides for the continuation of the informal review process, which had gradually developed outside of the formal three-step process.[70] The informal review, usually undertaken prior to filing a transaction with CFIUS, allows individual firms to discuss the transaction with the Committee privately.[71] This gives firms the opportunity to correct any glaring issues with covered transactions and, if such issues cannot be resolved, the opportunity to abandon the deal without incurring negative publicity.[72]

In the decade since FINSA's enactment, Congress has made further attempts to tweak CFIUS's modus operandi.[73] These have included broad reform of the CFIUS framework to require that the Committee consider the economic impact of foreign investment and takeover schemes rather than limit review to national security issues.[74] There have also been narrower proposed amendments, such as Senator Chuck Grassley's bill placing the Secretary of Agriculture on the Committee in a nod to concerns over food security.[75] Most of these attempted reforms have been aimed specifically at covered transactions involving Chinese firms.[76] Indeed, China now tops the list of nations of origin for foreign companies undergoing CFIUS review.[77] Many Chinese companies withdraw from deals before the Committee even reviews them, fearing the blowback from a high-profile rejection.[78] The next part describes the evolution of China and its companies in the past few decades and why some Americans, including members of Congress, believe they pose a special threat to U.S. national security.

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67. *See* Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565 (2012)).

68. *See* Exec. Order No. 13,456, 73 Fed. Reg. 4677 (Jan. 23, 2008).

69. *See* JACKSON, *supra* note 14, at 7.

70. *See id.*

71. *See id.* at 7–8.

72. *See id.*

73. *See* Mary Ellen Stanley, *From China with Love: Espionage in the Age of Foreign Investment*, 40 BROOK. J. INT'L L. 1033, 1058–61 (2015).

74. *See id.*

75. *See* Securing American Food Equity Act of 2016, S. 3161, 114th Cong. § 2 (2016).

76. *See* Stanley, *supra* note 73, at 1058–59. The Shuanghui-Smithfield merger and the break between Congress and CFIUS that it caused was the specific trigger of attempted CFIUS reform. *See infra* Part III.C.

77. *See* JACKSON, *supra* note 14, at 27. Jackson's data show that between 2012 and 2014, Chinese companies were involved in 68 of the 356 covered transactions reviewed by CFIUS; U.K. corporations were a distant second at 45.

78. *See* Xie Yu, *China Overtakes US as World's Largest Assets Acquirer*, S. CHINA MORNING POST (Oct. 5, 2016), http://www.scmp.com/business/banking-finance/article/2025385/china-overtakes-us-worlds-largest-assets-acquirer [https://perma.cc/9YPT-9QBR]. Yu's article notes that national security concerns prematurely kill China-related merger and acquisition deals around the world, not just in the United States. *See id.*

II. THE CHINESE CHALLENGE: THREATS AND OPPORTUNITIES POSED BY INBOUND CHINESE INVESTMENT IN THE UNITED STATES

Since embarking on an ambitious program of reform and opening up in the late 1970s, China has rapidly transformed itself from an economic basket case to the second largest economy in the world.[79] This transformation was achieved through loosening the state's control over the economic activities of its people; however, economic reforms were not matched with a dismantling of SOEs or a retreat by the Chinese Communist Party (CCP) from its pervasive presence in every aspect of society.[80] As a result, not only do SOEs continue to play a significant role in the Chinese economy, but the numerous POEs that have grown during the Reform Era have such close links with the government that the state/private ownership distinction is of questionable value.[81]

The dominance of the state in China's business sphere, blurry distinction between SOEs and POEs, and potential for state interests to control the strategic decisions of Chinese corporations operating abroad, inform U.S. suspicions of Chinese companies seeking to invest in or acquire their American counterparts. However, China's state-capitalist model has also created unprecedented economic growth, which has the potential to benefit the United States as Chinese corporations seek to invest abroad. Chinese inbound investments could mean continued jobs for U.S. workers and an influx of capital for infrastructure in addition to new and innovative projects and enterprises.

Part II.A discusses the CCP's role in contemporary Chinese society, how its ubiquitous presence allows it to assert state interests even upon POEs, and the evolution of Chinese SOEs over the past few decades. The net result is that, despite the onset of capitalism, Chinese companies remain state organs to a far greater degree than other foreign companies from capitalist economies, and, consequently, investments in the United States are plausibly acts of state, not of private actors in a market. Part II.B examines the opportunities of Chinese investment by exploring its potential scale and the effects it could have on the U.S. economy, job markets, and infrastructure growth.

A. The Long Arm of the Communist Party

This part discusses the control that the CCP holds over the Chinese government, society, and business sphere and describes how this high degree of control blurs the distinction between state and private ownership of corporations seeking to invest in the United States.

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79. *See GDP (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN (last visited Feb. 16, 2017) [https://perma.cc/RU4L-URRD].

80. *See infra* Part II.A.

81. *See* Milhaupt & Zheng, *supra* note 12, at 716–17.

1. Party Membership and Party Committees in POEs

While the CCP largely abandoned the economic aspects of communism upon launching the Reform Era in 1978, it has retained the Leninist political structure that characterizes the political system of communist nations.[82] Far from decentralizing power and loosening the party's grip on the state, the CCP has preserved its position as the paramount authority within the Chinese state apparatus.[83]

One key aspect of the CCP's strategy since embarking on market reforms—and, indeed, a key reason for its continued vitality—is its successful co-option of the growing business class.[84] For much of its history, the CCP was extremely hostile to business owners, seeing them as inherent ideological enemies and placing them directly in the crosshairs of the class struggles that came to define China under Mao Zedong.[85] After winning the civil war and solidifying its control over the country in 1949, the CCP immediately launched a violent purge of landlords.[86] Though it initially attempted to develop links with entrepreneurs that were not associated with the Nationalist regime it replaced, this period of detente was short lived.[87] By the mid-1950s, the CCP had launched a campaign against "economic crimes," which was primarily aimed at the business class.[88] For the remainder of the Maoist era, the state controlled almost every substantial aspect of economic activity, often with disastrous results, and actively persecuted anyone associated with private entrepreneurship.[89]

This attitude changed by necessity after China began reforming its economy, but the party was still closed off to entrepreneurs in the initial phase of the Reform Era.[90] The private sector was essentially restricted to street vendors and small-scale firms for most of the 1980s.[91] New businesses were limited by law to individually owned enterprises (*getihu*), which were prohibited from employing eight or more workers.[92] Moreover, many of these new businesses were run by the still-stigmatized victims of Mao-era

82. *See* RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS, at xx–xxii (2010).

83. *See id.* at 22–30. McGregor also highlights the subordinate relationship the judiciary has with the CCP, with judges instructed to "remain loyal—in order—to the Party, the state, the masses and, finally, the law." *Id.* at 24.

84. *See id.* at 194–205.

85. *See* EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 145–47 (2011). Mao saw class struggle as the "key link" to communist rule, made it central to the Cultural Revolution, and despaired at the notion that his eventual successor would repudiate the cause. *See id.*

86. *See id.* at 37.

87. *See* Bruce J. Dickson, *Integrating Wealth and Power in China: The Communist Party's Embrace of the Private Sector*, 192 CHINA Q. 827, 831 (2007).

88. *See id.*

89. *See* MCGREGOR, *supra* note 82, at 194; *see also* Dickson, *supra* note 87, at 831.

90. *See* Dickson, *supra* note 87, at 827.

91. *See id.* at 831.

92. *See id.*

political campaigns.[93] The government eased restrictions on the size of private firms in 1988, but this move was strongly contested by the party's orthodox faction, which insisted that private ownership was incompatible with Chinese-style socialism.[94] This faction cited the CCP's relaxation of restrictions on private entrepreneurs as the primary cause of the Tiananmen Square uprising in 1989 and successfully pushed for a ban on their recruitment into the party.[95]

While the role of private business within the Chinese economy and the CCP itself remained a contentious topic for much of the 1990s, the private sector boomed after Deng Xiaoping's "Southern Tour" in 1992,[96] and local party leaders increasingly circumvented the ban on recruiting private entrepreneurs.[97] This led to the formal end of the ban in 2001.[98] A year later, Deng's successor, Jiang Zemin, launched the "Three Represents" slogan, which declared that the party now also represented the growing urban social elite that was rapidly expanding as a result of economic reforms.[99] This marked the formal beginning of the CCP's attempt to co-opt private business owners.[100]

Membership in the party has exploded since, as many entrepreneurs see formal entry into the CCP as key to the success of their business given the party's dominance over all aspects of Chinese society.[101] The CCP is currently the largest political party in the world, with an estimated seventy-five million members.[102] Moreover, the party actively recruits prominent businesspeople and other leading figures in society,[103] who are more than happy to join the CCP in the hopes of receiving favorable treatment from the government.[104] Alibaba CEO Jack Ma, basketball player Yao Ming, Baidu founder Robin Li, and actor Jackie Chan are all party members who

93. *See id.* Dickson further notes, however, that these restrictions were often ignored in practice. *See id.*

94. *See id.* at 831–32. The 1980s were characterized by political struggles between the reform and orthodox factions of the CCP, with the latter engineering the campaigns against spiritual pollution (1983) and bourgeois liberalization (1987) to purge proreform enemies. *See* VOGEL, *supra* note 85, at 563–65, 585–87.

95. *See* Dickson, *supra* note 87, at 832.

96. Deng Xiaoping, still de facto ruler of China at the time, went on a tour of developing businesses in the Pearl River Delta region in 1992 to show support for their continued development. This move was seen as reaffirming support for private enterprises, which had grown prior to the Tiananmen crackdown and ended the brief period of conservative resurgence. *See* VOGEL, *supra* note 85, at 664–90.

97. *See* Dickson, *supra* note 87, at 832.

98. *See id.* at 833.

99. *See id.*

100. *See id.*

101. *See id.* at 842; *see also* Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573, 587 ("Having an association with the [CCP] is helpful because in every important political, social, or economic sector in China, the [CCP] is either directly involved or is involved not too far below the surface.").

102. *See* Chow, *supra* note 101, at 588.

103. *See* Dickson, *supra* note 87, at 837.

104. *See* Chow, *supra* note 101, at 587.

frequently attend CCP political conferences and promote the government's initiatives abroad.[105]

The prevalence of party members in positions of power throughout the private sector pose challenges for the United States in analyzing how to classify the companies these individuals run and the potential threats they pose.[106] While the Chinese government is theoretically independent of the party, in reality, the CCP controls and operates above the government.[107] The CCP has established a number of bodies that mirror government institutions.[108] For example, while the government convenes a National People's Congress, which theoretically serves as the supreme legislative body of the People's Republic of China (PRC), the CCP itself holds a National Party Congress and selects members of the Politburo, which, in reality, holds substantive lawmaking power.[109] Frequently, government and party bodies overlap entirely, particularly with respect to military institutions.[110]

The CCP asserts its control over private enterprises by welcoming their owners into its ranks; it also actively penetrates these entities through party committees—groups of party members who occupy high-level positions in the company and relay information back to the CCP.[111] Party committees are technically just one of many committees within a corporation, most of which operate under the company's board of directors.[112] In reality, however, the party committee exercises "decisive influence" over the nominal directors of the company.[113] The presence of these committees in Chinese corporations has become a major cause of concern for the U.S. government.[114] While party committees serve as an important link between the CCP and social institutions, the West sees them as unorthodox and inherently suspect signs of state penetration, and, thus, they are often downplayed to foreign audiences.[115] The president of the Bank of China, Li

105. *See* Nathan Vanderklippe, *Economic, Political Plans at Play as Ma Sells Trudeau on a Modern China*, GLOBE & MAIL (Sept. 2, 2016, 8:47 PM), http://www.theglobeandmail.com/news/world/eonomic-and-political-plans-will-be-at-play-during-trudeau-ma-meeting/article31703382/ [https://perma.cc/ZS8U-75L9].

106. *See infra* Part III.A.

107. *See* Chow, *supra* note 101, at 586.

108. *See id.*

109. *See id.*

110. *See id.* at 587.

111. Nicholas Calcina Howson, *China's Restructured Commercial Banks: Nomenklatura Accountability Serving Corporate Governance Reform?*, *in* CHINA'S EMERGING FINANCIAL MARKETS: CHALLENGES AND GLOBAL IMPACT 123, 126 (Zhu Min, Cai Jinqing & Martha Avery eds., 2009). Naturally, SOEs also contain party committees; Howson's article speaks specifically to party committees within state-owned banks. *See id.* That these committees play an equally prominent role in the management of privately held corporations evinces how meaningless ownership structure is as the key indicator of state control in China. *See* Milhaupt & Zheng, *supra* note 12, at 716–17.

112. *See* Howson, *supra* note 111, at 139.

113. *Id.*

114. *See* STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, *supra* note 7, at 22–24.

115. *See* Howson, *supra* note 111, at 139–40. Party committees are "widely discussed in Chinese writings and journalism . . . but rarely referred to in foreign language writings, journalism, or offshore listing offering[s]." *Id.*

Lihui, described the function of party committees within Chinese companies in a 2005 interview with *Caijing* magazine as follows:

> At present, some members of the board of directors, supervisory board and senior management are Party members. The Chairman [of the board] is the Party Committee Secretary, and [the] head of the Supervisory Board and the President are Vice-Secretaries of the Party Committee. The [Party] Committee is to monitor macro-policy, firm direction, Party structure, as well as the structure of the Party membership, and monitor coordination among different departments. *In China, it is very important to employ the political power of the Communist Party.* Management arrangements can solve a majority of the problems, but not all of them. *For example, if asked how to develop political ideology work* or how to increase employees' ethical standards, and so on—these issues must be studied by the Party Committee.[116]

Li's forthright description, particularly his emphasis on the political power of the party and the need to promote "ideology work," would likely do little to ease the concerns of Western governments. From their perspective, party committees appear to be agents of the Chinese state who hold the real reins of power in most corporations.[117]

2. The Evolution of Chinese SOEs in the Reform Era

Under Chairman Mao, SOEs dominated the Chinese economy and constituted over 80 percent of the country's industrial output.[118] In the wake of the reform program launched by Deng Xiaoping, SOEs have, relatively speaking, declined in importance as the government has sought to consolidate them, while POEs have proven increasingly successful in certain industries.[119] However, the state-owned sector is still a major part of the Chinese economy. It accounted for 51 percent of China's GDP as of 2015,[120] and SOEs themselves make up 950 of the 1,000 largest firms in China.[121] Moreover, the government has promoted SOEs in sectors of the economy deemed vital for policy and national security reasons, such as "banking, telecommunications, steel production and manufacturing, oil and gas exploration and refining, electricity and water supply, and train and air transport."[122]

During the Maoist era, SOEs were under total state control and operated as collective production units rather than profit-seeking corporations, with the government determining what and how much each SOE produced.[123] This proved to be a highly inefficient business model, and SOE reform was

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116. *Id.* at 142–43 (emphasis added); *see also* MCGREGOR, *supra* note 82, at 34.
117. *See* STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, *supra* note 7, at 22–24.
118. *See* Chow, *supra* note 101, at 580.
119. *See id.* at 581 ("'By 2004, SOEs accounted only for 15.3 percent' of China's industry output." (quoting DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 25 (2d ed. 2009))).
120. *See* MINXIN PEI, CHINA'S CRONY CAPITALISM 20 (2016).
121. *See* Du, *supra* note 9, at 1152.
122. Chow, *supra* note 101, at 581.
123. *See* Du, *supra* note 9, at 1152.

a major government initiative throughout the 1980s.[124] SOE reform was grounded in three major planks: (1) concentrating SOEs in critical industries and promoting their dominance of those industries over POEs, (2) the establishment of the State Assets Supervision and Administration Commission (SASAC) to coordinate and oversee SOE management, and (3) a reduction in the number of SOEs through consolidation.[125] SASAC pursued an aggressive merger policy, under which the absolute number of SOEs dropped, but the size of individual corporations increased dramatically.[126] While this consolidation has theoretically made SOEs more efficient, in practice it has resulted in bloated, poorly managed enterprises which frequently require massive loans from banks.[127] Moreover, SOEs are particularly prone to corruption and often serve as vehicles to provide jobs and payouts for the relatives of powerful party officials.[128] Overall, however, SOEs have transformed into full-fledged for-profit enterprises that make their own managerial and production decisions independent of the state.[129] Thus, they are no longer recognizable as the glorified work units they were in the Maoist era.[130]

SOEs are still distinct from POEs in certain vital respects. First, as mentioned above, SOEs are run by SASAC, which operates directly under the State Council and possesses the legal rights and duties of a controlling shareholder under the Law on State-Owned Assets of Enterprises.[131] While government officials have emphasized that SASAC should not meddle in the business operations of SOEs, it possesses an enormous amount of power over them under the State-Owned Assets law.[132] The CCP is thus, for all intents and purposes, "the real decision maker when it comes to making senior personnel decisions in Chinese SOEs."[133] This is reinforced by formal

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124. *See id.*

125. *See id.* at 1152–53.

126. *See* Nicholas R. Lardy, *China's SOE Reform—The Wrong Path*, PETERSON INST. INT'L ECON. (July 28, 2016, 1:45 PM), https://piie.com/blogs/china-economic-watch/chinas-soe-reform-wrong-path [https://perma.cc/8Z3U-FP4F]. Lardy notes that "[b]y 2014 mergers within this group of firms had reduced their number to 113. The average size of these SASAC firms rose dramatically and [many of them] . . . made their way on to the Fortune Global 500 list." *Id.*

127. *See* Keith Bradsher, *China's Grip on Economy Will Test New Leaders*, N.Y. TIMES (Nov. 9, 2012), http://www.nytimes.com/2012/11/10/world/asia/state-enterprises-pose-test-for-chinas-new-leaders.html?_r=0 [https://perma.cc/2H8W-BDT6].

128. *See id.*

129. *See* Du, *supra* note 9, at 1153.

130. *See id.* Many SOEs were in fact entire government bureaus at one point before being spun off as independent corporations. For example, the scandal-plagued Ministry of Railways was abolished and spun off as the China Railway Corp. *See China Scraps Railways Ministry in Streamlining Drive*, BBC (Mar. 10, 2013), http://www.bbc.com/news/world-asia-china-21732566 [https://perma.cc/492Z-K8RJ].

131. *See* Du, *supra* note 9, at 1153.

132. *See* Zhonghua Renmin Gongheguo Qiye Guoyou Zichan Fa (中华人民共和国企业国有资产法) [Law of the People's Republic of China on the State-Owned Assets of Enterprises] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 10, 2008, effective May 1, 2009), http://www.lawinfochina.com/display.aspx?lib=law&id=7195&CGid= [https://perma.cc/9UC2-N33J].

133. Du, *supra* note 9, at 1153.

government regulations that emphasize that the CCP possesses absolute control over SOE executives.[134]

Although Chinese SOEs are now profit-driven enterprises that are listed on numerous foreign stock exchanges and function in many respects as normal corporations, the interests of the Chinese state are paramount in decision-making processes.[135] Even advocates for more favorable treatment of Chinese SOEs abroad admit that their executives are judged first and foremost on their ability to comply with and carry out government orders and objectives.[136] SOE executives who produce profits but fail to comply with the demands of the state will likely find themselves jobless.[137] The CEO of every major Chinese SOE has a red phone in their office that solely remits calls from the CCP.[138] Moreover, in instances where the interests of the company conflict with those of the state, the state generally wins out.[139] Research indicates that financial performance is far less of a factor in the turnover of executives within Chinese SOEs than in other corporations and that political promotion is a greater motivating factor for SOE executives than financial gains.[140] There is thus a real possibility that Chinese SOEs operating abroad will face direct pressure from the state to carry out overseas operations in a manner that benefits Chinese state interests—and harms those of other states, especially powerful rivals like the United States.

B. Surge in Chinese Investment: China's Capacity to Pump Funds into the U.S. Economy

CFIUS's modus operandi has been balancing real national security concerns posed by foreign investment with the potential benefits of the same since its establishment in the 1970s. Indeed, at every stage of its existence, the Committee has faced pressure from Congress for its perceived failure to emphasize national security over the positive economic effects of increased inbound investment.[141] This tension—and the repercussions of Congress's hostile stance toward foreign investors—was explained succinctly by Clyde V. Prestowitz, a trade official during the Regan administration.[142] When interviewed during the battle over the DP World deal, Prestowitz said: "We need a net inflow of capital of $3 billion a day to keep the economy afloat . . . [y]et all of the body language here is 'go away.'"[143] While China

134. *See id.*

135. *See id.* at 1154.

136. *See id.*

137. *See id.* at 1154–55.

138. *See* MCGREGOR, *supra* note 82, at 9. A senior executive at a state bank told McGregor, "[W]hen the [red phone] rings . . . you had better make sure you answer it." *Id.* at 8.

139. *See* Du, *supra* note 9, at 1154.

140. *See id.*

141. *See supra* Part I.

142. *See* Eduardo Porter, *Dubai Deal's Collapse Prompts Fears Abroad on Trade with U.S.*, N.Y. TIMES (Mar. 10, 2006), http://www.nytimes.com/2006/03/10/business/worldbusiness/dubai-deals-collapse-promptsfears-abroad-on-trade.html [https://perma.cc/87W6-SSH8].

143. *Id.*

poses security threats that are in many ways more severe than those seen in the past, its rapid accumulation of wealth and the increasing desire of its corporations to spend that wealth abroad pose a significant opportunity to boost U.S. economic growth.[144]

As China's economy has grown over the past few decades, its companies—both SOEs and POEs—have sought to expand abroad.[145] This trend has skyrocketed since 2005, with Chinese outbound foreign direct investment (FDI) growing on average by 40 percent each year.[146] In 2015 alone, Chinese firms invested $121 billion overseas, making the country one of the top five exporters of investment in the world.[147] The Chinese Ministry of Commerce (MOFCOM) has stated that 2016 is on track to be a record-breaking year as outbound flows are up 54 percent from 2015 in the first three quarters of the year.[148] This trend is likely to continue to pick up pace in the future, even if the Chinese economy's current travails snowball into a recession. Indeed, many speculate that growing Chinese investment in Western nations is spurred by uncertainty among the Chinese business class with respect to the country's political and economic outlook.[149]

China's outbound investment was not initially directed at the United States but at other developing nations.[150] This changed rapidly after the financial crisis of 2007–2008, as the Chinese government liberalized its outbound FDI policy, the domestic Chinese market grew increasingly saturated and more expensive, and the drop in valuation of American assets in the wake of the recession created a perfect storm to drive Chinese corporations into the West.[151]

Though Chinese and U.S. government data conflict on the scale of Chinese investment in the United States, both reveal that it has grown rapidly over the past decade.[152] The Rhodium Group, which tracks Sino-U.S. direct investment in both directions, notes that Chinese investment in the United States grew from a combined value of less than $1 billion per year between 2005 to 2009 to a whopping $7 billion in 2012.[153] That number *doubled* to $14 billion in 2013, thanks in part to the Shuanghui-Smithfield merger.[154] Though the Shuanghui merger's size would indicate that 2013's record would not be surpassed anytime soon, investment barely dipped to $12.8 billion in

144. *See* THILO HANEMANN ET AL., RHODIUM GRP., TWO-WAY STREET: 25 YEARS OF US-CHINA DIRECT INVESTMENT 15 (2016), http://rhg.com/wp-content/uploads/2016/11/TwoWayStreet_FullReport_En.pdf (noting that Chinese investment accounts for 100,000 jobs in the United States) [https://perma.cc/VU98-NL58].

145. *See* Du, *supra* note 9, at 1127–28.

146. *See* HANEMANN ET AL., *supra* note 144, at 53.

147. *See id.*

148. *See id.*

149. *See* THILO HANEMANN & CASSIE GAO, RHODIUM GRP., CHINESE FDI IN THE US: TRIPLING DOWN ON AMERICA (2016), http://rhg.com/notes/chinese-fdi-in-the-us-tripling-down-on-america [https://perma.cc/8TS4-KNKK].

150. *See* HANEMANN ET AL., *supra* note 144, at 54.

151. *See id.*

152. *See id.* at 54–57.

153. *See id.* at 58.

154. *See id.*; *see also infra* Part III.C.

2014 and then set a new record of $15.3 billion in 2015.[155] 2016 is set to be another record-breaking year, as the value of Chinese FDI transactions exceeded that of the total set in 2015 within the first half of the year.[156] With $18 billion in inbound investment recorded in the first half of the year and $33 billion in announced but uncompleted deals as of June 2016, Chinese investment in the United States is now *one hundred times* the level of what it was a decade ago.[157]

The U.S. government's data is somewhat incomplete regarding the specific industries in which the Chinese investment boom has occurred because up to 38 percent of China-related transactions have not disclosed the relevant industry out of concerns for shareholders' confidentiality.[158] MOFCOM has released fuller data regarding outbound investment by Chinese corporations. As of 2014, it found that 39 percent of Chinese investment in the United States was in the finance sector, 17 percent in manufacturing, 12 percent in mining, 8 percent in real estate, 7 percent in wholesale and retail trade, 5 percent in the energy supply and production industry, 4 percent in leasing and business services, and 8 percent in other spheres.[159] Data collected by KPMG further indicates that acquisitions of U.S. corporations by their Chinese counterparts are increasingly undertaken by POEs rather than SOEs.[160] The number of SOE-related deals declined from 120 in 2010 to 117 in 2015, while the number of POE-related deals exploded from 147 to 381 in the same period.[161]

One notable aspect of Chinese investment in the United States is the manner in which it has occurred, with merger and acquisition deals consistently accounting for much of the high-profile China-related transactions.[162] This, coupled with misgivings over the motivation for the increase in Chinese investment, has helped fuel suspicions that Chinese investment is tied to a desire to plunder U.S. intellectual property or undermine U.S. economic leadership.[163] Another issue increasingly facing Chinese investors overseas, beyond the national security issues discussed here, is the lack of reciprocity from the Chinese government, which is unwilling to open up its markets to further foreign competition as the economy slows.[164]

155. *See* HANEMANN ET AL., *supra* note 144, at 58.

156. *See* HANEMANN & GAO, *supra* note 149.

157. *See* William Mauldin, *Panel Recommends Banning Chinese State Companies from U.S. Acquisitions*, WALL ST. J. (Nov. 16, 2016, 2:39 PM), http://www.wsj.com/articles/panel-recommends-banning-chinese-state-companies-from-u-s-acquisitions-1479325166 [https://perma.cc/UE4X-2UVT]; *see also* HANEMANN & GAO, *supra* note 149.

158. *See* HANEMANN ET AL., *supra* note 144, at 61.

159. *See id.* at 62.

160. *See* KPMG, CHINA OUTLOOK 2016, at 20 (2016), https://assets.kpmg.com/content/dam/kpmg/pdf/2016/03/china-outlook-2016.pdf [https://perma.cc/5262-BT4C].

161. *See id.* It is noteworthy that the total value of the SOE deals ($52.8 billion) still trumped that of the POE deals ($34.9 billion). *See id.*

162. *See* HANEMANN ET AL., *supra* note 144, at 58.

163. *See id.* at 61; *see also* Saha, *supra* note 22, at 202.

164. HANEMANN & GAO, *supra* note 149.

The U.S. government has promised its Chinese counterpart that inbound investors from Chinese corporations are welcome and that the United States "commits to maintain [an] open investment environment for various kinds of Chinese investors."[165] Part and parcel of this guarantee was the promise that CFIUS would not treat Chinese investors any differently than any other parties seeking to do business in the United States.[166] This has arguably not been true over the last decade as Chinese investment has exploded in the United States, since Congress and CFIUS have responded by applying intense pressure on Chinese investors.[167] The next part explores the reaction of CFIUS and Congress to the rapid growth of Chinese investment in the United States.

III. THE UNITED STATES'S RESPONSE TO THE ISSUES POSED BY CHINA'S STATE CAPITALISM: SIGNIFICANT ADJUDICATIONS

While Chinese corporations have become the main target of CFIUS review over the last few years,[168] they have long triggered concern because of their tight relationship with the state and the generally tense nature of Sino-U.S. relations. The first transaction to fall victim to the Exon-Florio-empowered CFIUS in 1990 involved an attempted takeover of a Seattle-based manufacturing company, MAMCO Inc., by a Chinese SOE, the China National Aero-Technology Import and Export Corporation (CATIC).[169] The only other transactions to be terminated by the President after a CFIUS investigation also involved Chinese corporations—Ralls in 2012 and Fujian Grand Chip in 2016.[170] The rise of China's economy and rapid increase in investment in the United States by Chinese corporations has spurred calls by Congress for stricter oversight of inbound foreign investment.

As Chinese corporations have increasingly shifted their attention to overseas markets, apprehension regarding the relationship that those corporations have with the Chinese state have become a major stumbling block for their attempts to go global.[171] SOEs are an obvious source of suspicion given their openly subordinate relationship with the Chinese

165. Press Release, U.S. Dep't of State, Joint U.S.-China Press Statements at the Conclusion of the Strategic & Economic Dialogue (July 10, 2014), https://2009-2017.state.gov/secretary/remarks/2014/07/228999.htm [https://perma.cc/2Q6F-FXUS].

166. *See id.*

167. *See infra* Part III.

168. *See* JACKSON, *supra* note 14, at 14–15, 27.

169. *See* Order Pursuant to Section 721 of the Defense Production Act of 1950, 55 Fed. Reg. 3935 (Feb. 6, 1990).

170. *See* Ralls Corp. v. CFIUS, 758 F.3d 296 (2014); Press Release, U.S. Dep't of the Treasury, Statement on the President's Decision Regarding the U.S. Business of Aixtron SE (Dec. 2, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0679.aspx [https://perma.cc/BBJ3-ETSH].

171. *See* Simon Montlake, *U.S. Congress Flags China's Huawei, ZTE as Security Threats*, FORBES (Oct. 8, 2012), http://www.forbes.com/sites/simonmontlake/2012/10/08/u-s-congress-flags-chinas-huawei-zte-as-security-threats/#2643917b6b19 [https://perma.cc/HZ39-FTD8].

state,[172] but many Western governments, including the U.S. government, are also hesitant to allow heavy investment by Chinese POEs given the opaque nature of these companies' ties to the PRC.[173] Unsurprisingly, China is now the primary source of covered transactions for CFIUS review, and has been for three years in a row.[174]

This part explores the approach taken by CFIUS and Congress to the issues that China's state-capitalism poses when considering potential investment by Chinese corporations in various industries, in addition to Congress's attempt to force CFIUS's hand in taking a tougher stance on Chinese corporations. Part III.A examines CFIUS & Congress's approach to the acquisition by a Chinese company of U.S. counterparts in the telecommunications industry, then Part III.B examines the same with respect to the acquisiton of wind farms, and Part III.C revisits the Shuanghui case.

A. No Way, Huawei: CFIUS and Congress Take a Stand Against Chinese Investment in the Telecommunications Industry

Soon after the passage of FINSA, Chinese corporations began to make serious efforts to expand into the United States, either by investing heavily in certain industries or attempting to acquire American corporations outright.[175] This trend was met with immediate suspicion by many, fearing that the true motivations behind these investment and acquisition schemes by Chinese corporations in the United States were political rather than economic.[176] Huawei, a telecommunications giant and one of the most successful Chinese POEs,[177] came under immediate and intense scrutiny when its U.S. subsidiary, Futurewei, purchased various assets from 3Leaf, an insolvent technology start-up in California.[178]

Huawei had already been operating in the United States for a decade when it made its bid to purchase 3Leaf in May 2010.[179] The company had been

172. Some scholars, particularly Chinese ones, note that non-Chinese SOEs often do not face the same level of scrutiny that Chinese SOEs do when attempting to invest in or acquire Western companies. *See* Du, *supra* note 9, at 1156–57. Of course, the totalitarian nature of the Chinese government, its lack of transparency, and the often tense nature of Sino-U.S. relations are likely responsible for this heightened scrutiny. *See supra* Part II.

173. *See* STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, *supra* note 7, at iv–vi; Yu, *supra* note 78.

174. *See* THILO HANENMANN & DANIEL ROSEN, RHODIUM GRP., DON'T MISREAD OLD TEALEAVES: CHINESE INVESTMENT AND CFIUS (2016), http://rhg.com/notes/dont-misread-old-tealeaves-chinese-investment-and-cfius [https://perma.cc/6NBL-HPLE].

175. *See* Mauldin, *supra* note 22.

176. *See id.*

177. *See* Ken Hu, *Huawei Open Letter*, HUAWEI (Feb. 25, 2011), http://pr.huawei.com/en/news/hw-092875-huaweiopenletter.htm#.WJqTm1UrKCh [https://perma.cc/CB44-2MKF]. Huawei was founded in 1987 and quickly became a titan in the Chinese telecommunications industry and, eventually, a global telecommunications company; by 2011, it was the second largest telecommunications equipment provider in the world. *See id.*

178. *See id.*

179. *See id.* In 2010, Huawei had over 1,000 employees in the United States, purchased $6.1 billion in products and services from American companies, and spent $62 million on research and development activities through its U.S. subsidiary. *See id.*

subject to a number of accusations and suspicions in the lead up to the 3Leaf purchase, including claims of "'close connections with the Chinese military,' 'disputes over intellectual property rights,' 'allegations of financial support from the Chinese government,' and 'threats to the national security of the United States.'"[180] While the Bureau of Industry and Security at the Department of Commerce initially permitted Huawei to purchase and export 3Leaf's technology, CFIUS immediately decided to intervene in the transaction and launched an investigation into its potential national security ramifications.[181]

Huawei complied with CFIUS's investigation and submitted a number of filings to dispel concerns about its acquisition of 3Leaf in November 2010.[182] CFIUS, however, was not convinced, and on February 11, 2011, formally recommended that Huawei drop its attempted acquisition of 3Leaf.[183] In response to CFIUS's unfavorable recommendation and the negative press that it engendered for the company, Huawei's chairman, Ken Hu, penned an open letter refuting a number of the accusations that had been levied against his company.[184] Hu concluded the op-ed by stating that he "sincerely hope[s] that the United States government will address this issue by carrying out a formal investigation of any doubts it may have about Huawei in an effort to reach a clear and accurate conclusion."[185]

Congress immediately took Huawei up on its offer and launched an investigation into the accusations levied against the company.[186] In a blistering report that blasted Huawei for its lack of transparency and consistent refusal to disclose information about its internal governance structure,[187] Congress noted that its preliminary review

> highlighted the potential security threat posed by Chinese telecommunications companies with potential ties to the Chinese government or military. In particular, to the extent these companies are influenced by the state, or provide Chinese intelligence services access to telecommunication networks, the opportunity exists for further economic and foreign espionage by a foreign nation-state already known to be a major perpetrator of cyber espionage.[188]

180. *Id.*

181. *See id.* The Bureau of Industry and Security affirmed to Huawei that no license was necessary for its acquisition of 3Leaf's technology. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* Hu refuted claims of Huawei's connection to the Chinese government, emphasized that the company is owned collectively by its employees, not the state, and gave a detailed background of Ren Zhengfei, the company's founder who allegedly had ties to the People's Liberation Army. *See id.*

185. *Id.*

186. Congress also investigated ZTE, another Chinese telecommunications POE, which was expanding its business operations in the United States at the time. It devoted significantly less of the investigation to ZTE, however, and largely came to the same findings. *See* STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, *supra* note 7, at 35–44.

187. *See id.* at 8–11.

188. *Id.* at iv.

Based on that conclusion, Congress made a number of recommendations, including (1) that the U.S. government "view with suspicion" the attempted penetration of its telecommunications market by Chinese companies, and that CFIUS specifically block any and all acquisitions, mergers, and takeovers involving Huawei because it poses a threat to national security;[189] (2) that private sector firms also maintain vigilance when making use of Huawei's equipment or services given it "cannot be trusted to be free of foreign state influence";[190] (3) that relevant Congressional committees and executive enforcement agencies investigate the unfair trade practices utilized by Chinese telecommunications firms;[191] (4) that Chinese companies generally become more transparent;[192] and (5) that relevant committees within Congress consider potential legislation to address the security risks posed by telecommunications firms with strong ties to nation-states.[193]

Congress's affirmation of CFIUS's order reflects its general tendency to be more hardline in its approach to screening investment.[194] Moreover, its insistence on looking beyond Huawei's corporate ownership to the function of each corporation's party committee and the party ties of its management evinces a nuanced take on what constitutes "foreign control" under the Exon-Florio Amendment and a willingness to carefully evaluate the eccentricities of Chinese corporations in light of Chinese state-capitalism.[195]

B. Blowing in the Wind: Ralls and the First Successful Challenge to an Unfavorable CFIUS Review

Huawei was not the only corporation with ties to China that came under fire from CFIUS in 2012. Ralls Corp., a company incorporated in Delaware with its principle place of business in Georgia, found itself in the Committee's crosshairs when it attempted to purchase four U.S. LLCs that were in the process of building wind farms in Oregon.[196] While Ralls itself was theoretically an American company and thus outside of CFIUS's purview, it was owned by two Chinese nationals, Dawei Duan and Jialiang Wu.[197] Duan and Wu were the CFO and vice president, respectively, of Sany Electric Company, Ltd., a Chinese POE,[198] and they set up Ralls to explore

189. *See id.* at vi.

190. *Id.* at vi–vii.

191. *See id.* at vii.

192. *See id.* Specifically, Congress demanded that they offer "more consistent review by independent third-party evaluators of their financial information and cyber-security processes, [and] comply[] with U.S. legal standards of information and evidentiary production." *Id.*

193. *See id.*

194. *See supra* Part I.A.

195. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (codified as amended at 50 U.S.C. § 4565 (2012)).

196. *See* Ralls Corp. v. CFIUS, 758 F.3d 296, 304 (D.C. Cir. 2014). The four LLCs were Pine City Windfarm, Mule Hollow Windfarm, High Plateau Windfarm, and Lower Ridge Windfarm. *See id.*

197. *See id.*

198. *See id.*

"U.S. opportunities for the construction of windfarms in which the wind turbines of Sany Electric . . . can be used."[199]

Ralls's acquisition of the four windfarm companies theoretically touched upon national security concerns because it intended to construct windfarms in the Butter Creek region of Oregon.[200] The Butter Creek projects were located to the east of a restricted airspace and bombing zone maintained by the U.S. Navy; three of the wind farm sites were located within seven miles of the restricted airspace, while the fourth, the Lower Ridge Windfarm, was located within it.[201] Ralls relocated the Lower Ridge Windfarm at the Navy's request, but it still remained within the restricted airspace.[202]

On June 28, 2012, Ralls submitted notice to CFIUS of its acquisition of the four LLCs and its plan to carry out the windfarm projects.[203] In its notice, Ralls argued that the project did not pose a threat to national security, and it later answered a number of questions posed to it by CFIUS during the initial thirty-day-review period.[204] However, Ralls contended that CFIUS at no point revealed why it was concerned with the project.[205]

CFIUS ultimately found that Ralls's acquisition of the windfarm LLCs posed a threat to national security and issued an "Order Establishing Interim Mitigation Measures" on July 25, which called on Ralls to halt construction on the windfarms within five days.[206] An additional order in August prohibited Ralls from divesting itself of the four corporations until all of its assets were removed from the Butter Creek site.[207]

Finally, on September 28, President Obama issued an order terminating the transaction on the grounds that there was "credible evidence that leads [the President] to believe that Ralls . . . might take action that threatens to impair the national security of the United States."[208] The order forced Ralls to divest its interest in the four companies within ninety days, remove all items and construction from the four sites, refrain from entering any of the sites, refrain from selling any parts for use in the sites, and refrain from selling the four companies to any third party.[209]

CFIUS at no point gave Ralls any indication of why it was suspicious of the company and its windfarm project nor did it reveal the evidence on which it based its final decision.[210] This allowed the company to make a unique legal challenge to the order, arguing that CFIUS and the President denied Ralls due process and acted outside of the scope of their authority.[211] Section

199. *Id.*
200. *See id.*
201. *See id.*
202. *See id.* at 305.
203. *See id.*
204. *See id.*
205. *See id.*
206. *See id.*
207. *See id.*
208. Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281, 60,281 (Oct. 3, 2012).
209. *See id.* at 60,281–83; *see also Ralls*, 758 F.3d at 306.
210. *See Ralls*, 758 F.3d at 306.
211. *See id.* at 306–07.

721 of the Defense Production Act, which delineates CFIUS's powers pursuant to the Exon-Florio Amendment, provides that the President's actions in the aftermath of CFIUS review are not subject to judicial review, which typically means presidential orders are final.[212] However, because Ralls brought a constitutional claim, the court examined congressional intent regarding the justiciability of such claims and found that they did not fall under the provision exempting CFIUS and the President from judicial review.[213]

Ralls ultimately prevailed, as the court held that the presidential order deprived the company of its property interests without due process.[214] CFIUS was required to provide Ralls with the unclassified evidence it used in determining that the company's windfarm projects constituted a national security threat.[215] While the court's due process finding is beyond the scope of this Note, it provides an interesting check on CFIUS's power, which has only grown since its establishment in 1975. More to the point, the case exemplifies how suspicions over Chinese involvement in investment and acquisition schemes can sometimes engender harsh outcomes, given the strained connection of the windfarms to national security, CFIUS's refusal to explain its decision, and the fact that other foreign-made or foreign-owned windfarms that were in the same area encountered no issues.[216]

C. Show Me the Bacon: Congress's Opposition to the Shuanghui-Smithfield Deal Calls into Question the Scope of National Security Concerns

Congress noted in its report on Huawei that a major aspect of its concerns was that Chinese corporations were increasingly becoming major players in the global telecommunications industry, a field which inherently touches upon national security issues.[217] It further indicated that the issues broached in the report did not relate to Chinese corporations generally but telecommunications firms in particular, noting that "[i]n another industry, this development might not be particularly concerning."[218] Congress seemingly backtracked that stance within a few months when Chinese pork supplier Shuanghui attempted to buy out its U.S. competitor Smithfield in what promised to be the largest acquisition of an American company by a Chinese counterpart in history.[219]

Shuanghui is a Hong Kong-based POE whose pork supplying business came to dominate the mainland market during the Reform Era.[220] Pork consumption accounts for over 60 percent of total meat consumption in the

212. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1426 (codified as amended at 50 U.S.C. § 4565 (2012)).
213. *See Ralls*, 758 F.3d at 307–12.
214. *See id.* at 325.
215. *See id.*
216. *See id.* at 305.
217. *See* STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, *supra* note 7, at 2.
218. *Id.*
219. *See* Backaler, *supra* note 4.
220. *See* Tao & Xie, *supra* note 1, at 146.

PRC,[221] and the country's rapidly expanding middle class has made it a valuable market for foreign pork producers seeking to export their product.[222] This made the merger between U.S. firm Smithfields, the largest hog raiser and pork producer in the world,[223] and Shuanghui, China's biggest pork supplier,[224] a desirable move for both corporations: it gave Smithfield unfettered access to the Chinese market and Shuanghui the largest supply of quality pork in the world.[225]

Shuanghui's bid to acquire Smithfield, which it eventually did for $7.1 billion,[226] was also the largest instance of foreign investment by a Chinese corporation in the United States.[227] Unsurprisingly, there was significant opposition to the deal in Congress in the wake of the Huawei investigation and the Ralls controversy.[228] Two main points of contention were raised regarding Shuanghui's bid to buyout Smithfield. The first point, that China's food safety and quality controls were subpar and thus a threat to U.S. food security, tied opposition to the merger to national security concerns.[229]

The second issue raised by Congress was the seeming irrationality of the move given that Shuanghui was actually half Smithfield's size and Smithfield was doing well financially on its own.[230] Inherent in this line of questioning were generalized suspicions of the motives behind Chinese corporations with ties to the state acquiring U.S. counterparts, as questions were again raised regarding the links between Shuanghui and the Chinese state.[231] In a hearing held in July 2013, the Senate Agriculture Committee expressed concerns that the acquisition was a covert attempt by China to control the price of pork and gain access to U.S. intellectual property.[232] Senators Debbie Stabenow of Michigan and Mike Johanns of Nebraska further noted that a U.S. corporation would be barred from this kind of investment in China, raising concerns about reciprocity.[233]

In a letter addressed to the Secretary of the Treasury, the Senate Committee on Agriculture, Nutrition, and Forestry urged CFIUS to review the merger,

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221. *See id.* at 145. Shuanghui was worth approximately $6.3 billion in 2012, less than the price for which it paid to acquire Smithfield. *See id.* at 146.

222. *See id.*

223. *See id.*

224. *See id.* at 148–49.

225. *See id.* at 155, 158–60.

226. *See id.* at 146.

227. *See* Josselyn, *supra* note 5, at 1366.

228. *See id.* at 1366–68; Stanley, *supra* note 73, at 1047–48.

229. *See* Josselyn, *supra* note 5, at 1366–67. 2013 saw a number of headline grabbing stories related to food safety and China, most notably an instance in which thousands of dead pigs washed up on the shores of the Yangtze River in Shanghai. *See* Nicola Davison, *Rivers of Blood: The Dead Pigs Rotting in China's Water Supply*, GUARDIAN (Mar. 29, 2013), https://www.theguardian.com/world/2013/mar/29/dead-pigs-china-water-supply [https://perma.cc/2BV8-BFSN].

230. *See* Josselyn, *supra* note 5, at 1367; Tao & Xie, *supra* note 1, at 146.

231. *See* Tao & Xie, *supra* note 1, at 146.

232. *See* Josselyn, *supra* note 5, at 1367.

233. *See id.* Smithfield's president and CEO attended the hearing and assured the Committee that the company would continue to comply with U.S. law regarding food safety. *See id*.

name the Department of Agriculture as a lead agency in the review,[234] and expand the scope of national security review by considering the "broader issues of food security, food safety, and biosecurity."[235] The letter argued that "our food supply is critical infrastructure that should be included in any reasonable person's definition of national security."[236]

CFIUS launched the statutorily required forty-five-day investigation of the proposed merger in a nod to Congress's concerns regarding the potential impact of the deal on food safety.[237] However, the Committee ignored Congress's calls to include the Department of Agriculture in the investigation and consider food security as "critical infrastructure" and thus a component of national security.[238] Unsurprisingly, this led to fairly quick approval of the merger, which Shuanghui and Smithfield announced in September 2013.[239]

IV. EXPLORING REFORM: CURRENT CONGRESSIONAL PROPOSALS AND BALANCING THREATS WITH OPPORTUNITIES

The inflow of Chinese investment in the United States, coupled with general anxiety over what China's rise means for the future of U.S. power in the world, has led to attempts to reform CFIUS over the past few years. In many ways, this push has mirrored past efforts which culminated in CFIUS reform, from the anti-Japanese sentiment in the 1980s that led to the Exon-Florio Amendment to the post-9/11 apprehension of the Middle East that led to FINSA.[240] While China's political system, tense relationship with the United States, and the opaque governance structure of its companies warrant concern, many of the proposals put forth both by Congress and outside groups constitute an overreach that would stymie much needed investment from flowing into the country.

Part IV.A discusses current proposals to reform CFIUS, and Part IV.B critiques these efforts and makes the case for an executive order that would mandate strict CFIUS review for acquisitions and investments in industries that raise national security concerns.

234. The Department of Agriculture is not on the Committee.

235. Press Release, Debbie Stabenow, U.S. Senator, Bipartisan Group of Senators Urge Appropriate Oversight of Proposed Smithfield Purchase (June 20, 2013), http://www.stabenow.senate.gov/news/bipartisan-group-of-senators-urge-appropriate-oversight-of-proposed-smithfield-purchase#sthash.OiyujdHt.dpuf [https://perma.cc/BEV9-V8X6].

236. *Id.* The Department of Homeland Security is responsible for defining the term "critical infrastructure" and has included "agriculture and food" in that definition. CFIUS, however, has not considered it in its review process. Josselyn notes that doing so would "essentially [mean] all foreign investment transactions are subject to review." Josselyn, *supra* note 5, at 1368.

237. *See* Josselyn, *supra* note 5, at 1367.

238. *See id.* at 1366–68.

239. *See id.* at 1367.

240. *See supra* Part I.

A. Current Congressional Efforts to Reform CFIUS

Congress was not pleased by CFIUS's approval of the Shuanghui merger and its seeming refusal to consider food safety a component of national security.[241] Senator Stabenow immediately released a statement, noting:

> It remains unclear what factors the committee took into account in making its decision. We still do not know if the potential impact on American food security, the transfer of taxpayer-funded innovation to a foreign competitor, or China's protectionist trade barriers were considered. It's troubling that taxpayers have received no assurances that these critical issues have been taken into account in transferring control of one of America's largest food producers to a Chinese competitor with a spotty record on food safety.[242]

Senator Stabenow later announced she was drafting legislation to "overhaul the American government's review process for foreign acquisitions"[243] to ensure that it takes into account "the impact that the purchase could have on a broad array of national priorities and interests."[244] Senator Stabenow's statements imply a drive to push CFIUS to evaluate the "economic and *cultural* ramifications"[245] of proposed foreign investment rather than the national security approach the Committee currently takes, a stark change seemingly fueled by fears of Chinese investment.

While Senator Stabenow's attempts to reform CFIUS have yet to materialize, other members of Congress have proposed two pieces of legislation in the same vein.[246] Congresswoman Rosa Delauro proposed the Foreign Investment and Economic Security Act of 2014 (FIESA) in September 2014, a bill that, if passed, would substantially broaden the scope of CFIUS review.[247] Congresswoman Delauro's legislation is aimed at expanding CFIUS review "beyond national security to include an analysis of transactions for a 'net benefit' to U.S. interests, and for 'other purposes.'"[248] The bill would thus drastically reform CFIUS's function insofar as it would essentially be carrying out an economic effects analysis on every covered transaction—which would now entail nearly *every* proposed foreign investment transaction as review would not be limited to industries related to national security.[249] The bill also directly addresses concerns regarding

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241. *See* Michael J. de la Merced, *U.S. Security Panel Clears a Chinese Takeover of Smithfield Foods*, N.Y. TIMES: DEALBOOK (Sept. 6, 2013, 6:25 PM), http://dealbook.nytimes.com/2013/09/06/national-security-panel-approves-smithfield-sale-to-chinese-company/?_r=0 [https://perma.cc/4KZ6-NBXR].

242. *Id.*

243. Christopher Brewster, *Delauro Legislation Would Broaden Reach of CFIUS Reviews*, LAW360 (Sept. 25, 2014, 10:28 AM), http://www.law360.com/articles/580422/delauro-legislation-would-broaden-reach-of-cfius-reviews [https://perma.cc/5MQC-VBEN].

244. *Id.*

245. Stanley, *supra* note 73, at 1061 (emphasis added).

246. *See id.* at 1059–60; *see also* Christopher R. Brewster et al., *Food for Thought: Food Equity Act Would Add USDA to CFIUS*, LAW360 (Aug. 22, 2016, 11:48 AM), https://www.law360.com/publicpolicy/articles/830271?utm_source=rss&utm_medium=rss&utm_campaign=section [https://perma.cc/78AU-G935].

247. H.R. 5581, 113th Cong. § 1 (2014).

248. Stanley, *supra* note 73, at 1059.

249. *See id.*

Chinese corporations and their ties to the state by mandating that the Committee consider the "governance and commercial orientation of the foreign [party]"[250] and the extent to which it is "owned, controlled or influenced by a foreign government."[251] Christopher Brewster and Mary Ellen Stanley note that the bill did not have a realistic chance of enactment given its introduction late in the term and its controversial scope; its intent was rather to "revive debate over the scope of CFIUS review, including whether, when and how to expand review to factors other than national security."[252]

Although Delauro's and Stabenow's legislation appear to have joined the ranks of other failed attempts to strengthen CFIUS, Senator Grassley of Iowa introduced the Securing American Food Equity (SAFE) Act of 2016.[253] In a nod to Congress's demands during the Shuanghui review, the bill would introduce the Secretary of Agriculture to CFIUS as a permanent member and add agricultural assets as a critical infrastructure to be analyzed by CFIUS.[254] Senator Grassley noted:

> We're seeing more and more foreign investment in our agriculture assets, and it's something we need to be very aware of. The transactions that are occurring today will shape the food industry for decades to come. We need to be thinking strategically about who will control our food supply tomorrow . . . . Food security is national security.[255]

The SAFE Act, coming in the wake of the attempted acquisition of Syngenta AG, a Swiss pesticide and seed company, by China National Chemical Corporation ("ChemChina"),[256] marks the second attempt by Congress to expand CFIUS's scope to include economic and agricultural considerations in the wake of a China-related merger and acquisition deal.[257]

While it is too early to tell whether the SAFE Act will come to fruition, concerns about food security, Chinese investment, and Chinese investment in the food industry in particular have gained ground on both sides of the aisle.[258] The bill also could potentially lead to calls to add the Secretary of

250. *Id.* at 1060 (citing H.R. 5581 § 3(o)(1)(F)(i)–(ii)).

251. *Id.* In a nod to the controversy surrounding Ralls, the bill also mandates that CFIUS consider whether the company's home country comports with SEC regulations and that the Committee automatically review any "construction of a new facility in the United States by any foreign person." *Id.*

252. *Id.* at 1059 (quoting Brewster, *supra* note 243).

253. *See* S. 3161, 114th Cong. § 2 (2016); *see also* Brewster et al., *supra* note 246.

254. *See* Brewster et al., *supra* note 246.

255. Press Release, Chuck Grassley, U.S. Senator, Grassley: Food Security Is National Security (July 12, 2016), http://www.grassley.senate.gov/news/news-releases/grassley-food-security-national-security [https://perma.cc/V4WJ-KAHB].

256. *See* Natalia Drozdiak & Jacob Bunge, *EU Opens In-Depth Probe into ChemChina's Bid for Syngenta*, WALL ST. J. (Oct. 28, 2016), http://www.wsj.com/articles/eu-opens-in-depth-probe-into-chemchinas-bid-for-syngenta-1477672393 [https://perma.cc/Y7N4-PWX2].

257. *See* Brewster et al., *supra* note 246.

258. *See id.*

Labor to CFIUS, further complicating the picture for Chinese would-be investors.[259]

Congress also seems increasingly determined to take measures aimed directly at Chinese companies. In November 2016, the U.S.-China Economic Security Review Commission, a body established by Congress in 2000 to review the national security implications of the bilateral trade and economic relationship between the United States and the PRC,[260] released its annual report on Sino-U.S. relations.[261] One of its recommendations was a complete ban on investment in the United States by Chinese SOEs.[262] The heavy measure was perhaps unsurprising given the Commission has traditionally been very critical of China generally and the executive branch's perceived lenience in dealing with the country.[263] However, the recommendation reflects increasing concern in Congress regarding the exponential increase in Chinese investment in the United States and concerns that the trend is a function of "state-directed campaigns to acquire U.S. assets that have economic or military significance."[264]

After Donald Trump's victory in the 2016 presidential election—and his almost immediate moves to rile China[265]—some commentators posited that the United States could use CFIUS as a tool against the PRC should trade tensions heat up.[266] David Dollar of the Brookings Institute argued that the only responsible way to combat China on trade was to use CFIUS review to pressure the Chinese government into opening up its economy to investment.[267]

259. *See id.*

260. *See About Us*, U.S.-CHINA ECON. & SECURITY REV. COMMISSION, http://www.uscc.gov/about (last visited Feb. 16, 2017) [https://perma.cc/FD32-UQNU].

261. *See* Mauldin, *supra* note 157.

262. *See id.*

263. *See id.*

264. *Id.*

265. *See* Chad P. Bown, *Trump Says China Is Not a Market Economy. That's a Big Deal.*, WASH. POST (Dec. 12, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/12/trump-says-china-is-not-a-market-economy-heres-why-this-is-a-big-deal/?utm_term=.7d321addbe59 [https://perma.cc/UW9S-WXLL]. Trump also made waves by making direct contact with the President of Taiwan, Tsai Ing-Wen, and linked continuance of the "one China" principle with China making trade concessions. *See* Jacob Pramuk, *Trump's Tough Talk on Taiwan Threatens China More Deeply Than You Think*, CNBC (Dec. 13, 2016, 2:48 PM), http://www.cnbc.com/2016/12/13/taiwan-trumps-tough-talk-threatens-china-deeply.html [https://perma.cc/LSH2-N43D].

266. *See Will Trump Trump China's U.S. Shopping Spree?*, BLOOMBERG (Nov. 30, 2016, 6:45 PM), https://www.bloomberg.com/news/articles/2016-11-30/will-trump-trump-china-s-u-s-shopping-spree? [https://perma.cc/U3WP-DY7A].

267. *See* David Dollar, *Playing Responsible Hardball on China's Trade and Investment*, BROOKINGS (Dec. 7, 2016), https://www.brookings.edu/blog/order-from-chaos/2016/12/07/playing-responsible-hardball-on-chinas-trade-and-investment/ [https://perma.cc/J6WQ-FVQD].

B. Proposed Resolution: Addressing Valid Concerns Without Driving Away Chinese Investors

Widespread apprehension over Chinese investment is not unfounded; not only are Chinese corporations intimately tied to the state regardless of their governance structure,[268] China is at best a rival to the United States and the interests of the two nations are often in conflict. Tensions in the South China Sea,[269] frequent hacking from military-aligned parties within China,[270] and recent news that U.S. consumers' androids relay data back to an unknown source in China[271] all show that screening of inbound investment from China is necessary. However, it is vital that the U.S. response be measured, as a politically motivated overreaction to the potential threat posed promises to dash the potential opportunities for burgeoning investment in the U.S. economy.

1. Considering Current Proposals

With that in mind, the current proposals for CFIUS reform are well intentioned but ill informed and are bogged down by political calculations that ultimately do more harm than good. Senator Stabenow's insistence on bringing the Secretary of Agriculture into the Committee and expanding the scope of its review, given fresh life by the SAFE Act, needlessly complicates CFIUS review by adding an economic factor into its analysis when the Committee should be focused on national security concerns.[272] Given that the campaign against Shuanghui and the subsequent attempts to bring food production into the scope of CFIUS has been led by Senators from the Midwest, it would appear that the impetus behind this push for reform is not entirely related to actual national security concerns. It is vital that any effort to reform the Committee be undertaken for the purpose of strengthening its ability to screen and control for national security concerns, not serve as a protectionist barrier to investment to score political points.

This is not to imply that food security is a frivolous concern—it is certainly worthy of consideration, particularly given the poor state of quality control in the food services industry in China. However, inclusion of the Secretary of Agriculture and food security issues would likely trigger more challenges for CFIUS reform, as other relatively tangential considerations would also have a reasonable case for inclusion in Committee discussions.[273] The best

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268. *See supra* Part II.A.

269. *See* Bonnie S. Glaser, *Conflict in the South China Sea: Contingency Planning Memorandum Update*, COUNCIL ON FOREIGN REL. (Apr. 2015), http://www.cfr.org/asia-and-pacific/conflict-south-china-sea/p36377 [https://perma.cc/75UR-8EX3].

270. *See* David E. Sanger et al., *Chinese Army Unit Is Seen as Tied to Hacking Against U.S.*, N.Y. TIMES (Feb. 18, 2013), http://www.nytimes.com/2013/02/19/technology/chinas-army-is-seen-as-tied-to-hacking-against-us.html [https://perma.cc/SBV3-P2CX].

271. *See* Matt Apuzzo & Michael S. Schmidt, *Secret Back Door in Some U.S. Phones Sent Data Back to China, Analysts Say*, N.Y. TIMES (Nov. 15, 2016), https://www.nytimes.com/2016/11/16/us/politics/china-phones-software-security.html [https://perma.cc/ZJU6-MTZW].

272. *See supra* Part IV.A.

273. *See* Brewster et al., *supra* note 246.

way to handle transactions that implicate food security is the current approach used by the Committee in reviewing the Shuanghui merger: screening such deals to ensure that the foreign party complies with all relevant U.S. food security regulations.[274]

For similar reasons, Representative Delauro's attempt to reshape CFIUS as a body primarily concerned with the economic effects of investment deals is shortsighted.[275] Perhaps more importantly, it would not likely change the scope of what the Committee does to the extent that its congressional critics seem to believe it will. CFIUS has been consistently less harsh on inbound foreign investment than Congress precisely because, as a Committee chaired by the Secretary of the Treasury, it places heavy consideration on the economic impact of potential investment and acquisition deals.[276] A dramatic alteration in the scope of what CFIUS does as contemplated by Representative Delauro's proposed legislation would thus have the effect of downplaying national security concerns when it is designed to do the exact opposite.

The recommendations from the U.S.-China Economic Security Review Commission to put a blanket ban on Chinese SOEs directly addresses the real concern surrounding inbound Chinese investment—the connection it inevitably has with the Chinese state. However, it too falls short. While SOEs are more obviously inextricably linked to the Chinese government by virtue of being controlled by SASAC,[277] they are not necessarily more troublesome than Chinese POEs. Indeed, the distinction between state and private ownership is of questionable utility with respect to Chinese corporations,[278] which makes the Commission's recommendation fairly shallow; it would serve as a blanket ban on SOE investment in industries and companies where no national security threat is present, while POEs face no enhanced restrictions in spite of being similarly situated. Given 84 percent of Chinese investment currently stems from POEs,[279] the ban would fail to restrict potentially troublesome sources of Chinese investment while sending a fairly negative signal to would-be investors and China generally.

Finally, the recommendation to use CFIUS as a tool in a potential trade war with China is feasible in the short term but entails far greater risks than the other suggested reforms. CFIUS could certainly be used as a means to pressure China into allowing U.S. corporations to invest in the PRC as freely as Chinese companies are permitted to in the United States. The current lack of reciprocity is a valid concern that has been raised frequently by members of Congress who have pushed for CFIUS reform, particularly Senator Stabenow.[280] However, CFIUS is not meant to be a political tool in a trade war; it exists to safeguard the country from potential national security threats.

274. *See supra* Part III.C.
275. *See supra* Part IV.A.
276. *See supra* Part I.A.
277. *See supra* Part II.A.2.
278. *See supra* Part II.A.1.
279. *See* Mauldin, *supra* note 157.
280. *See supra* Part IV.A.

Abusing its function runs the risk of damaging the economy by rejecting beneficial investment. It could easily prove counterproductive, pushing the Chinese government to take a harder stance on U.S. corporations rather than eliciting concessions. Moreover, while China's protectionist investment policies are a cause for concern, U.S. investment in China is still significantly larger than Chinese investment in the United States.[281]

2. Proposed Reform: Mandating Review in Key Industries

The current proposals to reform CFIUS may be misguided, but they are not unwarranted. While the inflow of Chinese investment promises to pour money into the U.S. economy, and investment is generally a net positive, China is a unique country and thus poses unique challenges. Any measures taken to reform CFIUS in the coming age of Chinese investment in the United States must take into account the potential threats posed by the link between Chinese corporations and the Chinese state without needlessly discouraging nonproblematic investment.

This can be done not by expanding the scope of what CFIUS reviews or instituting blanket bans on Chinese SOEs but by mandating CFIUS investigations for industries that intimately relate to national security. This must include the standard industries typically thought of in conjunction with national security concerns—manufacturing, technology, energy and natural resources, transportation, and, perhaps most critically in an age of ever-increasing technological advances, telecommunications. Though CFIUS currently has leeway in determining whether a longer, forty-five-day investigation is mandated upon reviewing a transaction,[282] the rise of Chinese investment coupled with increased cybersecurity threats means almost any investment in certain industries by a Chinese corporation will raise a red flag. The investigation into Huawei provides a good example of how CFIUS should operate with respect to Chinese corporations seeking to invest in the telecommunications industry;[283] its stringent analysis of the company's governance structure and the ties its executives had to the Chinese government looked beyond the SOE/POE distinction and focused on the actual threat posed.[284]

Congress, in its own investigation into the deals, took a similar stance and went on to stress that a major factor in the stringent review Huawei faced was the industry in which it operated.[285] This was wise insofar as it sent a clear message that national security concerns would only imperil investment deals in the United States in areas that clearly implicate national security. Unfortunately, Congress—and at times, CFIUS itself, as seen with its handling of Ralls—has largely ignored this caveat in favor of a blanket

281. *See* HANEMANN ET AL., *supra* note 144, at 15 (noting U.S. investment in China worth $70–75 billion as of 2015); *id.* at 58 (noting Chinese investment in the United States was worth $15 billion in 2015).

282. *See* Jackson, *supra* note 14, at 19.

283. *See supra* Part III.A.

284. *See supra* Part III.A.

285. *See supra* Part III.A.

apprehension of Chinese investment ridden with political and protectionist undertones.

Utilizing an industry-based method to screen investment would not be unprecedented.[286] For much of the Cold War, the United States and sixteen other nations participated in the Coordinating Committee for Multilateral Export Controls (COCOM).[287] COCOM utilized an industry-based approach to restrict trade in sensitive goods with hostile powers.[288] Utilizing a strategy from the Cold War to screen Chinese investment may at first seem like a fairly aggressive move; indeed, China was a major target of COCOM after the Korean War.[289] However, applying this industry-based approach uniformly to all nations is a far less combative—and more productive—method than blanket bans on Chinese investors.

The benefit of focusing CFIUS review on certain industries, particularly communications, is that such reform will orient the Committee toward the threats of the future without singling out Chinese investors in particular. The unprecedented degree of hacking in the 2016 presidential election[290] illustrates how vulnerable the United States is to such threats but also illustrates that China is far from the only (or even the primary) source of telecommunications-related threats to national security and the integrity of the U.S. political system.[291] Adopting an industry-based approach will thus address issues posed by the growth in Chinese investment and address more general security issues that are likely to arise in the future.

Finally, in focusing CFIUS reform by mandating investigation in sensitive industries, the core concerns surrounding Chinese investment will be addressed without actively targeting Chinese investors. This serves to reduce tensions and dispel the feeling among many in the Chinese business community that the United States is hostile to any investment by Chinese corporations, a reasonable assessment given the controversy surrounding the Shuanghui merger. CFIUS can help the United States ride the tidal wave of Chinese investment, rather than drown in it, only if it takes a nuanced approach to review that separates real threats from illusory ones.

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286. *See* TECH. & E.-W. TRADE ADVISORY PANEL, TECHNOLOGY AND EAST-WEST TRADE 154–56 (1979), https://www.princeton.edu/~ota/disk3/1979/7918/7918.PDF [https://perma.cc/DV48-JN9G].

287. *See id.*

288. *See id.* at 155–56. COCOM identified the following as sensitive industries: "1. metalworking machinery; 2. chemical and petroleum equipment; 3. electrical and power-generating equipment; 4. general industrial equipment; 5. transportation equipment; 6. electronic and precision instruments; 7. metals, minerals, and their manufacture; 8. chemicals and metalloids; 9. petroleum products; and 10. rubber and rubber products." *Id.*

289. *See id.* at 155.

290. *See* NAT'L INTELLIGENCE COUNCIL, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS, at ii–iii (2017).

291. *See* Eric Geller, *Russian Hackers Infiltrated Podesta's Email, Security Firm Says*, POLITICO (Oct. 20, 2016, 12:31 PM), http://www.politico.com/story/2016/10/russia-responsible-podesta-wikileaks-hack-230095 [https://perma.cc/YJ5E-PACW].

CONCLUSION

While China is a strategic rival to the United States, it is also a vital trading partner. The United States stands to benefit from the Chinese economy's growth as its businesses look to invest abroad. It is vital that CFIUS and the U.S. government address the legitimate security concerns raised by Chinese investments in the United States, while simultaneously maintaining an open door for investment that will lead to greater wealth for American businesses and job opportunities for workers. CFIUS can do exactly that by strictly reviewing transactions in industries inherently tied to national security concerns, while maintaining its erstwhile welcoming approach to investment in other sectors. An executive order along the lines contemplated in the following appendix that mandates CFIUS review in sensitive industries would be preferable to the various proposals currently being put forth for CFIUS reform.

APPENDIX

Executive Order of [Date]

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the Act of February 14, 1903, as amended (15 U.S.C. 1501 *et seq.*), section 10 of the Gold Reserve Act of 1934, as amended (31 U.S.C. 822a), and section 301 of title 3 of the United States Code, and as President of the United States of America, it is hereby ordered as follows:

That the Committee on Foreign Investment in the United States shall hereby be mandated to conduct full reviews and investigations in accordance with section 721 of the Defense Production Act of 1950 with respect to covered transactions in the following industries:

1. Telecommunications;
2. Manufacturing;
3. Technology;
4. Energy and Natural Resources; and
5. Transportation.

Donald J. Trump
The White House,
[Date]