

# National Security Review of Foreign Investment in China

## Rule of Law in Ambiguity

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### Abstract

China formally adopted its national security review regime of foreign investment in 2011, which has been updated by the 'Measures for National Security Review of Foreign Investment' in 2020. The review mechanism has been developed in the context of China's attempt at, and practice of, a radical reform of its foreign direct investment (FDI) regulatory regime at large and market access liberalisation in particular, inter alia, a transition from the previous case-by-case review of all foreign investment to currently a principled national treatment in the pre-establishment phase. As a result, the regulatory system has evolved from a generic and catch-all review, to all foreign investment based on implicit and unspecified regulatory objectives, to a review only towards those foreign investment projects that may pose a threat to national security, thus showing more deference to the rule of law. However, this transformation is accompanied by residual ambiguities and vagueness in the current national security review system, some of which may seriously impede an effective enforcement of the review system or give leeway for circumvention of the review. To that end, revision proposals are provided in this article to further clarify the law in order to reduce those procedural ambiguities that go against the fundamental principles of the rule of law.

**Keywords:** China, FDI screening, foreign direct investment, national security, rule of law.

## 1 Introduction

In the past four decades, China has adopted a case-by-case approval approach to incoming foreign direct investment (FDI), including both greenfield and mergers and acquisitions (M&As). This case-by-case approval system involved multi-government level (central-local), multi-institutional and multilayered proceedings for the admission of FDI. The case-by-case approval was criticised by stakeholders, especially foreign investors and governments, as rigorous, cumbersome, and lacking

transparency and predictability.<sup>1</sup> All foreign investment projects, regardless of the sectors involved, size of the investment or shareholding ratios in a foreign-invested enterprise (FIEs), were required to obtain approval for market entry. There were no specific grounds or objectives for which the approval was conducted, the review criteria or factors to be considered during approval were not clear or known to the public, there was no prescribed review procedure or definite time frame for approval, and the authorities conducting the approval were not obliged to provide an explanation when rejecting a foreign investment proposal.

With the adoption of the Foreign Investment Law in 2019, China's FDI regulatory regime has been subject to a radical reform and drastic overhaul towards investment liberation.<sup>2</sup> The case-by-case approval was abolished and replaced by pre-established national treatment to foreign investors and their investment.<sup>3</sup> The pre-establishment national treatment guarantees that foreign and domestic investors are now subject to equal treatment in establishing a new enterprise or acquiring an existing enterprise, which only requires a registration of establishment and an information-reporting obligation thereafter.<sup>4</sup> The pre-establishment national treatment entails two exceptions reserved for foreign investors. First, foreign investors are subject to the regulation of a Negative List: investment activities to be made in the Negative List – a compilation of 31 prohibited or restricted businesses – are either prohibited or

- 1 For a detailed discussion of China's case-by-case approval for foreign investment, see T. Mahony, *Foreign Investment Law in China: Regulation, Practice and Context* (2015), at 118-45. US Chamber of Commerce, *China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency* (2012), at 10-20, [www.uschamber.com/assets/archived/images/documents/files/020021\\_China\\_InboundInvestment\\_Cvr.pdf](http://www.uschamber.com/assets/archived/images/documents/files/020021_China_InboundInvestment_Cvr.pdf) (last visited 8 December 2022). Covington and Burling LLP, *Measures and Practices Restraining Foreign Investment in China, Prepared for the European Commission Directorate-General for Trade*, 10 August 2014, [www.iberchina.org/files/2017/restrictions\\_investment\\_china.pdf](http://www.iberchina.org/files/2017/restrictions_investment_china.pdf) (last visited 8 December 2022).
- 2 中华人民共和国外商投资法 (Foreign Investment Law of China, promulgated by the National People's Congress on 15 March 2019, effective on 1 January 2020).
- 3 *Ibid.*, Art. 4.
- 4 外商投资信息报告办法 (Measures for Information Reporting of Foreign Investment, promulgated by the Ministry of Commerce and State Administration for Market Regulation on 30 December 2019, effective on 1 January 2020).

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restricted with certain conditions attached.<sup>5</sup> The Negative List downright prohibits certain foreign investments, such as tobacco, post service, legal service and news agencies, and restricts certain foreign investments, making foreign investment in certain sectors and activities subject to conditions, such as a mandatory joint venture with a Chinese partner in establishing medical institutions, educational institutions and publication businesses. And all foreign investment outside of the Negative List will enjoy treatment no less favourable than domestic investors.<sup>6</sup> Second, foreign investment that affects or may affect national security are required for clearance from a national security review before the investment can be made.

China first established its formal national security review system for foreign investment in 2011.<sup>7</sup> After the entry into effect of the Foreign Investment Law, the review was updated in 2020 by the Measures for National Security Review of Foreign Investment (hereinafter, the Measures), which came into effect in 2021.<sup>8</sup> An *ex ante* review will be imposed on foreign investment on the ground of national security. Among others, the Measures stipulate the reviewing body, transactions subject to review, subjects subject to review, review procedures, submission documents and legal liabilities.

Against this background, this article presents two arguments. To begin with, China's FDI regulatory system has evolved from the generic and catch-all case-by-case approval, to all foreign investment based on implicit and unspecified regulatory objectives, to the national security review that is only applicable to certain types of foreign investment according to prescribed written rules and pursuant to codified legal procedures. This transformation improves the legal certainty, predictability and procedural fairness of the regulatory regime, thus contributing to more deference to the rule of law. However, be that as it may, the currently effective national security review system leaves much to be desired. Criticism towards the system points out its ambiguity and vagueness in several regards, some of which are ambiguous terms in the law that are adopted deliberately in order to preserve the review agency's wide margin of apprecia-

tion in practice. And there are ambiguities that are procedural in nature, which are likely to be an unintentional outcome but may undermine the effectiveness and efficiency of the review system.

This article adds value to the existing literature in three ways. First, it provides an updated inventory of the substantive and procedural architecture of China's national security review system envisaged in the Measures that came into effect in 2021, which is a development not reflected in previous publications.<sup>9</sup> Second, this article reveals a dichotomy as the analytical framework for China's national security review mechanism and its evolution: some deference towards the rule of law is witnessed over time, on the one hand, while perennial ambiguities and obscurity remain in law and practice that alienate China from internationally prevalent or best practices in the field of FDI screening on the other. Lastly, this article proposes legislative amendments that are tailored to address the procedural ambiguities identified in an attempt to further clarify and improve the system. In addition, this article advocates the incorporation of extraterritoriality into China's national security review. The extraterritorial application of the review system would allow China to review offshore transactions that may nonetheless pose national security concerns to China. This is especially relevant when the target enterprise in a merger transaction is a global company with operations in multiple jurisdictions, including China. The remainder of this article is arranged as follows. Section 2 introduces the legal framework of China's national security review of foreign investment, including transactions subject to review, sectors under review, factors to be considered and review procedures. Section 3 compares the obsolete case-by-case approval system with the current national security review system for foreign investment and demonstrates the legislative progress towards more deference to the rule of law. Section 4 discusses some of the ambiguities in China's national security review that are either considered to be strategic ambiguities or procedural obscurity, both of which could undermine the objectives and effectiveness of the review. Section 5 discusses the lack of jurisdiction of the system over offshore transactions that may nonetheless affect national security and advocates for the introduction of extraterritoriality to the review mechanism. Section 6 provides recommendations to further clarify and improve the review system against some of its perennial ambiguities. Section 7 concludes the discussion.

5 外商投资准入特别管理措施(负面清单)2021年版(Special Administrative Measures for Market Access of Foreign Investment (The Negative List) 2021, promulgated by the National Development and Reform Commission and Ministry of Commerce on 18 September 2021, effective on 1 January 2022).

6 For a detailed discussion of the Negative List in Chinese law, see Y. Li and C. Bian, *China's Foreign Investment Legal Regime: Progress and Limitations* (2022), at 58 *et seq.*

7 国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知(Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, promulgated by the General Office of the State Council on 3 February 2011, effective on promulgation). 商务部实施外国投资者并购境内企业安全审查制度的规定(Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, promulgated by the Ministry of Commerce on 25 August 2011, effective on 1 September 2011).

8 外商投资安全审查办法(Measures for the National Security Review of Foreign Investment, promulgated by the NDRC and MOFCOM on 19 December 2020, effective on 18 January 2021).

9 See, for example, C. Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity', 22 *Journal of World Investment & Trade* 561 (2021); Q. Kong and C. K. Chen, 'Foreign Investment Screening in China', in S. Hindelang and A. Moberg (eds.), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (2021) 403; and J. Ma, 'National Security Review for Foreign Investment in China: A Transnational Evolution', in J. Chaisse, J. Górski & D. Seiko (eds.), *Regulation of State-Controlled Enterprises: An Interdisciplinary and Comparative Examination* (2022) 419. None of these addressed the currently effective Measures, above n. 8.

## 2 The Legal Framework of National Security Review of Foreign Investment in China

The Foreign Investment Law stipulates that ‘China establishes a national security review for foreign investment which affects or may affect national security’.<sup>10</sup> Acting as the implementing rules of this provision, the Measures substantiate the review system by providing a streamlined review process.

### 2.1 Legal Objectives

As the name suggests, protecting national security is the only objective to which the review system purports. There is no further definition or reference to other laws in the Measures to comprehend the concept of national security. To search for a reference in China’s legal system, China adopted National Security Law in 2015, which holistically defines national security as to include ‘political security, sovereign security, military security, economic security, cultural security, societal security, technological security, information security, ecological security, resource security and nuclear security’.<sup>11</sup> Pursuant to this definition, national security in the foreign investment context can be interpreted as a broad and far-reaching objective of the review mechanism. It is argued that China’s concept of national security in the FDI context also include economic security or cultural nationalism.<sup>12</sup>

### 2.2 Sectors Subject to Review

Sectors that are subject to review include two categories. The first category concerns the military sector, including the military industry, industries ancillary to the military industry and investments to be made in the physical vicinity of military-industrial installations.<sup>13</sup> The second category comprises sensitive civil sectors, including ‘important agricultural products, important energy and resources, critical equipment manufacturing, important infrastructure, important transportation, important cultural products and services, important IT and Internet products and services, important financial services, key technologies, and other important sectors’.<sup>14</sup> The difference between the two categories is that foreign investments in the first category are subject to review regardless of the size or significance, while foreign investments in the second category only warrant a review when control of the acquired target is sought after by the foreign investor.

At first glance, the list of sectors subject to review is exhaustive, giving exemption to sectors not enumerated in the list from a national security review. A closer examination, however, may suggest otherwise. Several terms remain elusive and are not followed by further rules for interpretation, such as ‘in the vicinity’, ‘important’, ‘critical’, or ‘infrastructure’, which is presumably so because the government wishes to retain a considerable level of discretion and manoeuvre in the review process to capture a wide range of sectors.<sup>15</sup> For example, ‘key technologies’ are a listed sector subject to review, but there is no further definition or guidance regarding its meaning and scope, leading to potentially expansive and capricious enforcement in practice. This is in addition to a catch-all term ‘other important sectors’ at the end of the list, practically extending the sectors subject to review infinitely. As a result, the list of sectors subject to review is more indicative rather than exhaustive.

### 2.3 Transactions Subject to Review

Foreign investment, both direct and indirect, is subject to review and includes (1) foreign investors establishing new enterprises or investing in new projects in China, either independently or jointly with other investors; (2) foreign investors acquiring equity or assets of an enterprise in China by M&As; and (3) other means of investment.<sup>16</sup> Compared with FDI screening rules in other major economies that in principle apply only to foreign takeovers, the Chinese counterpart applies to both greenfield investment and foreign takeovers.<sup>17</sup> In the listed civil-sensitive sectors, only transactions that result in foreign control of a Chinese target company warrant a national security review. The status of ‘foreign control’ is defined as follows:

- (1) the foreign investor holds more than (and including) 50% of shares in the target Chinese company;
- (2) the foreign investor holds less than 50% of shares in the target Chinese company but its voting rights have a material influence on the resolutions of the board of directors or of the shareholders meeting; and
- (3) other ways in which the foreign investor is able to impose a material influence on the business decision-making, personnel, finance, technology and so on, of the target Chinese company.<sup>18</sup>

### 2.4 Review Procedure

An official review body has been established, namely the ‘Working Mechanism’, an inter-ministerial agency co-

10 Foreign Investment Law of China, above n. 2, Art. 35.

11 中华人民共和国国家安全法 (National Security Law of China, promulgated by the National People’s Congress on 1 July 2015, effective on promulgation).

12 G. Dimitropoulos, ‘National Security: The Role of Investment Screening Mechanisms’, in J. Chaisse, L. Choukroune & S. Jusoh (eds.), *Handbook of International Investment Law and Policy* (2021) 507, at 537.

13 The Measures, above n. 8, Art. 4.

14 *Ibid.*

15 Li and Bian (2022), above n. 6, at 111.

16 The Measures, above n. 8, Art. 2.

17 For example, the EU Regulation establishing a framework for the screening of foreign direct investments into the Union defines FDI as ‘an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State...’ This definition suggests that only takeovers of an EU entity are subject to FDI screening. See Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 791, 21 March 2019, Art. 2(1).

18 The Measures, above n. 8, Art. 4.



led by the National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) and that involves other ministries on a case-by-case basis.<sup>19</sup> Many have questioned the necessity of the dual leadership in the Working Mechanism. For instance, two leading ministries in parallel may create two decision makers in conflicts and ‘unnecessary complications and inefficiency’ when opinions are at odds.<sup>20</sup>

A review can be initiated in two ways. Foreign investors are obligated to file a request for review when their transactions fall within the remit of the review.<sup>21</sup> On receiving the investor’s full set of application documents, the Working Mechanism will decide whether a review shall be commenced within 15 working days.<sup>22</sup> Alternatively, the Working Mechanism may initiate a review when deemed necessary, either *ex officio* or on the suggestions of third parties from other government agencies, businesses, organisations or individuals.<sup>23</sup> The Working Mechanism’s power to open a review is retrospective and not subject to statute of limitations: a review can be instigated any time prior to or after the establishment of the foreign investment, as long as the Working Mechanism considers that the investment poses a menace to national security.

After initiation of the review, the Working Mechanism will conduct a general review within 30 working days.<sup>24</sup> If a decision has not been made, a special review will ensue that lasts for an additional 60 working days.<sup>25</sup> The special review is subject to extension in exceptional circumstances. A final review decision will be delivered that results in approval or approval with conditions or rejection.<sup>26</sup> In theory, the whole review process can last as long as 105 working days since the date on which an investor submits an application for review. However, this process is not strictly time limited because the Working Mechanism can order the suspension of an ongoing review, requesting the investor to submit supplementary documents or making inquiries with the investor.<sup>27</sup> This suspension does not have a specified time limitation and can be ordered multiple times in a single review process. An ongoing review may also be subject to recount when the Working Mechanism requests the investor to modify the terms of the transaction, in which case the investor will have to submit a review application anew.<sup>28</sup> Eventually, a review may take much longer to complete in practice.

Several caveats may be raised regarding the review procedure. First, the time frame for the whole process is not definite but uncertain. Second, the review process and

decisions made are clearly excluded from any administrative or judicial redress.<sup>29</sup> Third, there is no requirement for the review authority to give reasons when a negative review decision is rendered. Domestic FDI screening mechanisms may conflict with obligations in international investment agreements (IIAs) to which a state is a contracting party. Specifically, the fair and equitable treatment (FET) provision in IIAs requires compliance with due process concerning domestic FDI screening laws and measures, *inter alia*, transparency of the screening procedure, disclosure of reasons for rejection of an investment and no denial of justice, including the possibility of judicial recourse.<sup>30</sup> It appears that China’s national security review procedure would raise noncompliance with the due process requirement in FET, giving rise to investor-state arbitration claims against China in breach of FET, especially considering that China has the world’s second largest bilateral investment treaty (BIT) programme.<sup>31</sup>

### 3 From the Case-by-Case Approval to National Security Review: A Pathway to the Rule of Law

#### 3.1 The Case-by-Case Approval System

Since 1979, when China adopted its reform and opening-up strategy, foreign investment has been a key component of economic growth. For four decades, the FDI regulatory policy was characterised by a mixture of incentives and preferential treatments that attract foreign investment and advanced technology, on the one hand, and rigorous control of foreign investment projects, on the other.<sup>32</sup> In terms of control, in the pre-establishment phase, all foreign investment projects, despite their size, sectors involved or significance of foreign involvement, were required to undergo a case-by-case approval system that pertained to multiple procedures and government institutions at the central and local levels.

First, depending on the size of the investment, the NDRC or local Development and Reform Commissions would have to review and approve the proposed investment project. In order to submit a request for this NDRC approval, foreign investors were required to obtain a host of approvals from other ministries or local governments as essential documents prior to the NDRC ap-

19 *Ibid.*, Art. 3.

20 X. Li, ‘National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices’, 13 *Berkeley Business Law Journal* 255, at 301 (2016).

21 The Measures, above n. 8, Art. 7.

22 *Ibid.*

23 *Ibid.*, Art. 15.

24 *Ibid.*, Art. 8.

25 *Ibid.*, Art. 9.

26 *Ibid.*, Art. 12.

27 *Ibid.*, Art. 10.

28 *Ibid.*, Art. 11.

29 Foreign Investment Law of China, above n. 2, Art. 35.

30 T. Voon and D. Merriman, ‘Incoming: How International Investment Law Constrains Foreign Investment Screening’, 24 *Journal of World Investment & Trade* 75, at 99-103 (2023).

31 China has signed 138 BITs, 126 of which are in force, putting China second only to Germany in terms of the number of BITs concluded. Y. Li and C. Bian, ‘China’s Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options’, 67 *Netherlands International Law Review* 503, at 504 (2020).

32 L. Yuan and T. Tsai, ‘Foreign Direct Investment Policy in China’, 2000 *China Review* 223, at 237 (2000).

proval, which usually involved land use rights approval, environmental impact assessment, zoning approval and so on.<sup>33</sup> In addition, also depending on the size of the proposed investment project, MOFCOM or local Bureaus of Commerce would have to approve the proposed investment, concerning the contracts for the establishment of the FIE, Articles of Association of the FIE, corporate forms of the FIE, among other things.<sup>34</sup> Moreover, the State Administration for Industry and Commerce or local Administrations for Industry and Commerce would have to approve the name of the company of the newly proposed investment, as well as the registration of establishment.<sup>35</sup> Above all, if the proposed investment was to be made in special sectors such as the financial sector, additional approval or licensing was required from the sectoral regulators.<sup>36</sup>

The case-by-case approval system was long considered by foreign stakeholders as unpredictable, generic, non-transparent and lacking in fairness of procedure.<sup>37</sup> The regulatory objectives of the review were not clearly stated, which means the government might consider a number of factors during the review, such as competition concerns, security-related concerns, industrial priorities, protection of domestic champions against foreign competition and national economic interests.<sup>38</sup> There was no reason-giving requirement for the review authorities, meaning that investors were not informed about the grounds on which their investment project was reviewed or rejected. The approval consisted of multiple processes conducted by various government branches and was applied to all inward foreign investment, adding up significant public resources of the government and compliance costs for the investors. Furthermore, the review procedure was murky, done behind closed doors and lacked accountability. '[T]he approval procedure is the significant room for discretion – and thus arbitrariness – left to the approval authority, caused by the opacity and vagueness of the applicable rules.'<sup>39</sup>

As a result, foreign governments and investors often voiced their complaints for being unfairly treated and discriminated against. According to the US Chamber of Commerce, 'opacity in these approval processes facilitates the favouring of domestic competitors over foreign investors' in the following three ways:

1. 'Limited market access for potential foreign investors by applying rules that are often vaguely written or unpublished in ways that restrict or unreasonably delay market entry by qualified foreign companies.'<sup>40</sup>

For example, foreign insurance companies expected a longer approval period to establish a branch compared with Chinese insurance companies in practice, even though the written rules did not distinguish between foreign and domestic companies in terms of review periods for the establishment of new branches.

2. Mandatory joint venture requirements with a local Chinese partner, which created 'numerous circumstances where investment approval authorities are able to work in [a] nontransparent way with the local partner to ensure that valuable intellectual property, market channels, and other assets of the foreign investor are made available to the joint venture – often on extremely favorable commercial terms for the local partner'.<sup>41</sup>

Most importantly, foreign investors often complained about the forced transfer of technology to the Chinese partner in the joint venture as unwritten rules and preconditions for the approval of market access.<sup>42</sup>

3. Lack of effective recourse for foreign investors when their investment is rejected or unreasonably distorted to accommodate to conditions imposed by the approval authorities.<sup>43</sup>

Although, legally considered, foreign investors were entitled to resort to administrative litigation to challenge certain specific government acts and decisions, such recourse proved to be ineffective because of the lack of 'an explicit affirmative duty for approval authorities to approve applications submitted to them', and the '[d]ifficulty in producing solid evidence of inappropriate conduct, since approval authorities generally rely on oral communications to convey specific conditions of approval', among others.<sup>44</sup>

### 3.2 National Security Review: More Deference to the Rule of Law

The definition of the rule of law is believed to be contextual and lacks a universal consensus. According to Bedner, the rule of law can be understood to contain three rudimentary elements: procedural elements, substantive elements and controlling mechanisms.<sup>45</sup> Procedural elements include 'rule by law' (codified rules, non-discrimination, legal certainty, clarity and stability), 'state actions subject to law' (legal basis for every government act, government bound by its own rules), 'formal legality (law must be clear and certain in its content, accessible

33 US Chamber of Commerce, above n. 1, at 13.

34 *Ibid.*, at 16.

35 *Ibid.*, at 17.

36 *Ibid.*, at 17.

37 Kong and Chen, above n. 9, at 414.

38 C. Bian, *National Security Review of Foreign Investment: A Comparative Legal Analysis of China, the United States and the European Union* (2020), at 65.

39 Y. Zheng, 'China's New Foreign Investment Law and Its Contribution Towards the Country's Development Goals', 22 *Journal of World Investment & Trade* 388, at 392 (2021).

40 US Chamber of Commerce, above n. 1, at 36-7.

41 *Ibid.*, at 38.

42 For a detailed discussion on forced transfer of technology in China, see D. Prud'homme, et al., "'Forced Technology Transfer' Policies: Workings in China and Strategic Implications', 134 *Technological Forecasting & Social Change* 150 (2018). J. Lee, 'Forced Technology Transfer in the Case of China', 26 *Boston University Journal of Science and Technology Law* 324 (2020).

43 US Chamber of Commerce, above n. 1, at 40.

44 *Ibid.*

45 A. Bedner, 'An Elementary Approach to the Rule of Law', 2 *Hague Journal of the Rule of Law* 48, at 56-70 (2010).

and predictable for the subject, and general in its application), and ‘democracy (consent determines or influences the content of the law and legal actions)’.<sup>46</sup> In addition, the rule of law consists of ‘the process by which the courts enforce compliance by public authorities with the law’, i.e. judicial review, which ‘emphasizes that the judges are reviewing the lawfulness of administrative action’.<sup>47</sup>

China’s evolution from the case-by-case approval system to the national security review for the governance of market access to foreign investment represents a shift to the rule of law, *inter alia*, its procedural elements.

First, the national security review complies more with the principle of rule by law, while the case-by-case approval falls more into the exposure of ‘rule by men’, which carries ‘the connotation of arbitrariness’.<sup>48</sup> To begin with, the national security review is delineated by a single legal instrument adopted at the ministerial level that prescribes relatively clear criteria and procedure that the reviewing agency should adhere to when conducting a review, as opposed to the case-by-case approval system, which was governed by multiple legal documents adopted by several levels of government at different times, which often produced inconsistent or even self-contradictory effects. In addition, this also means that foreign investors may only be subject to a singular *ex ante* review process by a single government agency instead of a battery of approval procedures by different government agencies, which significantly limits the chance of government discretion involved. Moreover, the abolition of the case-by-case approval system eliminates, or at least significantly reduces, the government’s opportunity to negotiate off the record and unfavourable terms as a bargaining leverage with foreign investors in exchange for market access such as mandatory involvement of a Chinese partner or forced transfer of technology, because the government now has little legitimate standing to not grant market access to foreign investors except for national security considerations.

Second, the replacement of the case-by-case approval with a national security review has subjected the government to the rules made by itself and kept the state’s regulatory power from running amok. National security review of foreign investment pertains to a self-explanatory regulatory objective, namely to protect national security from malicious foreign investments. This also means that other ulterior objectives, such as pure economic considerations, or protection of domestic infant industries from foreign competition, are not legitimate considerations when screening inward foreign investment. However, the case-by-case approval system had a murkier legal basis and regulatory objective. As was discussed previously, there was no explicitly stated objective, and the government might consider a number of factors during the approval, giving the approval author-

ities ample leeway in rejecting foreign investments’ market access on arbitrary or subjective grounds.

Third, the national security review embodies more procedural fairness than the case-by-case approval. As demonstrated in Section II, the national security review is defined by its regulatory objective, sectors subject to review, transactions subject to review and a delineated review process. Compared with the obsolete case-by-case approval, the national security review provides more legal certainty and predictability to both the reviewing authorities and foreign investors as applicants. As a result, the national security review shows more deference to the rule of law when compared with the case-by-case approval system, although such deference is most significant in the procedural elements of the rule of law.

One exception to the development of increased deference to the rule of law from the case-by-case approval system to the national security review is the insulation from judicial redress in the latter. Aggrieved foreign investors were at least able to resort to administrative litigation against the case-by-case approval system, although such a challenge might be onerous and unlikely to succeed. The national security review, however, has taken a step back by steering clear of judicial oversight, even on the ground of procedural fairness.

## 4 Remaining Ambiguities in the National Security Review System

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Although the national security review has shown more deference to the principle of the rule of law, indicating a positive change in the right direction, the system may still suffer from a significant measure of vagueness that militates against the foundational elements of the rule of law such as legal certainty, predictability, transparency and accountability. These ambiguities can be grouped into two categories, namely strategic and procedural ambiguities, depending on their presumed legislative intent and practical effect.

### 4.1 Strategic Ambiguities

Strategic ambiguities are understood as ‘the art of making a claim using language that avoids specifics’, which ‘promote[s] unified diversity by taking advantage of diverse meanings’ from different interpreters.<sup>49</sup> Strategic ambiguity as an approach of a state has been adopted in international law and diplomatic policy, *inter alia*, the United States’ deliberate uncertainty ‘about the conditions for, or nature of, its possible intervention in a conflict’ in geopolitical dynamics.<sup>50</sup> In the drafting of the US

46 *Ibid.*, at 56.

47 T. Bingham, *The Rule of Law* (2010).

48 Bedner, above n. 45, at 57.

49 M. Martin and M. S. Pajouh, ‘Does Strategic Ambiguity Have a Place in the WTO Dispute Settlement Understanding?’ 16 *US-China Law Review* 215, at 215 (2019).

50 H.T. Boon and H.E. Sworn, ‘Strategic Ambiguity and the Trumpian Approach to China-Taiwan Relations’, 96 *International Affairs* 1487 (2020).



Constitution, many instances of apparently ambiguous language adopted were believed to be ‘deliberate – a strategic choice to sidestep disagreements that cannot be resolved without endangering the Constitution’s ratification’.<sup>51</sup> Legislators deliberately adopt terms that are semantically equivocal or explicatory, leaving ample room for interpretation and discretion when the law is enforced, in ways that the authorities enforcing the rules see as appropriate. On the other hand, while strategic ambiguity contributes to more flexibility in law enforcement, it may also create a backlash when subject to abuse. If legal rules become too vague and broad in the meaning, the authorities may interpret and enforce them in capricious and arbitrary ways that contradict the principles of legal certainty and predictability and create opportunities for the excessive use of regulatory power.

China’s national security review does not fall short of the adoption of strategically ambiguous terms. This is well documented in the existing literature. The first and foremost criticism towards its strategic ambiguity is that the term ‘national security’ is not defined, leaving it to be determined on a case-by-case basis.<sup>52</sup> This, however, is not an isolated incident, as other major economies in the world also generalise the term ‘national security’ into far-reaching concepts and avoid providing a direct definition in their FDI screening laws.<sup>53</sup>

Second, the list of sectors subject to review appear to be overreaching and over-inclusive. The Measures included ten sectors and an open-ended term (other important sectors) where investors should file a voluntary application for review if national security is at stake. However, the list of sectors subject to review ‘has little operability due to its lack of further definition of terms that are semantically difficult to fathom’, such as the meaning of ‘important’, ‘infrastructure’ or ‘key technology’.<sup>54</sup> The list of sectors subject to review essentially makes the scope of sectoral review unlimited, which is understood to encompass as much as possible a broad scope of investment under review. This, however, makes it difficult for the investor to determine whether it should file a voluntary application for review. In the event of uncertainty, investors tend to choose to file for a review prior to the closing of the transaction so as to avoid a potential *ex officio* review ordered at a later stage, which would significantly increase the workload of the reviewing authority as well as the regulatory resources that have to be allocated to the national security review scheme.<sup>55</sup>

Third, transactions subject to review include greenfield investment, M&As as well as indirect investment.<sup>56</sup> The Measures further stipulate that foreign investment that results in actual control of the target Chinese company in the civil-sensitive sectors should be subject to voluntary filing for review.<sup>57</sup> Greenfield investment does not involve a local target, and indirect investment will not result in control of the target company. Read in the context of the rules at issue, it would suggest that greenfield investment and indirect investment will not trigger a voluntary filing, but the review authority still holds the power to initiate a review over these investments when deemed necessary. This stipulation is yet another example of a broad coverage of transactions in China’s national security review, but it also raises questions over its necessity. National security concerns are believed to be raised when there is a potential transfer of ownership or control of critical resources, assets, technology or service from an established domestic entity to foreign hands.<sup>58</sup> This threat to national security can only be achieved when there is a domestic target at play, whereas greenfield investment does not involve such a domestic component and indirect investment is too insignificant to result in any transfer of control. To that end, to include greenfield investment and indirect investment under the purview of national security review would appear to be excessive and unjustified.

Strategic ambiguities are adopted by lawmakers on purpose to make the rules flexible and discretionary, so that more investment transactions can be captured to be the subject of review, thus eventually leading to an enhanced protection of national security. With that intention on the agenda, strategic ambiguities may also lead to over-inclusiveness of the review system in practice. As discussed previously, the combination of an undefined term of ‘national security’, a vague list of sectors subject to review, and extensive types of transactions subject to review makes the review system capable of capturing almost every foreign investment with few exceptions. ‘A drawback of the expansive coverage is that it does not work to effectively filter out the chunk of transactions that are unlikely to pose national security risks.’<sup>59</sup> From the point of view of foreign investors, it will be difficult to anticipate whether their investment is likely to be a menace to national security and whether a voluntary filing for review should proceed. From the point of view of the review authority, considerable time and resources have to be allotted to monitor and identify those potentially malicious foreign investment projects detrimental to national security from a host of foreign investment activities. In sum, strategic ambiguities in China’s national security review may render its process and outcome highly unpredictable.

51 R.M. Hills, Jr, ‘Strategic Ambiguity and Article VII’s Two-Stage Ratification Process: Why the Framers (Should Have) Decided Not to Decide’, *NYU Law and Economics Research Paper No. 19-43*, at 20 (2020).

52 Bian (2021), above n. 9, at 568.

53 T. Qi and D. Liu, ‘On the International Coordination of Foreign Investment National Security Review Systems’, 11 *Journal of WTO and China* 34, at 42 (2021). L. Knight and T. Voon, ‘The Evolution of National Security at the Interface between Domestic and International Investment Law and Policy: The Role of China’, 21 *The Journal of World Investment & Trade* 104, at 111 (2020).

54 Li and Bian (2022), above n. 6, at 117.

55 Bian (2020), above n. 38, at 201-2.

56 The Measures, above n. 8, Art. 2.

57 *Ibid.*, Art. 4.

58 T.H. Moran, *Three Threats: An Analytical Framework for the CFIUS Process* (2009), at 1.

59 Li (2016), above n. 20, at 290.

## 4.2 Procedural Ambiguities

Procedural ambiguities refer to vague terms and provisions in the law or the lack of provisions thereof that impede the procedural efficiency, fairness or due process of the review. It is difficult to determine the cause or intent behind procedural ambiguities. It can be a result of strategic ambiguity, for instance, the dual leadership in the Working Mechanism shared between two ministries owing to their power-grabbing duel – an example of ‘attributing ambiguity ... to the disagreement of drafters’ and ‘their consensus about shared pragmatic purposes’ in the choice of words in legislation.<sup>60</sup> In other cases, procedural ambiguities appear to be merely an undesired result of negligence or lack of consideration in the legislative process.

The first procedural ambiguity pertains to the review body, namely the Working Mechanism. Two major deficiencies of the Working Mechanism have been pointed out in the existing literature: the power grab and compromise of the dual leadership between the NDRC and MOFCOM, and a lack of specification of other government agencies involved in the Working Mechanism.<sup>61</sup> In regard to the first point, it is believed that the dual leadership is a result of competition involving regulatory power and jurisdiction between the two ministries in the field of foreign investment regulation, which traced back to 2004 when the NDRC first attempted ‘to step into the regulatory regime with respect to foreign investment by unilaterally promulgating a regulation of its own...’<sup>62</sup> At that time, MOFCOM was still the principal regulator for foreign investment project approval. From 2011 onwards, MOFCOM was the agency designated to receive applications for national security review. An institutional change took place when the Measures were adopted in 2020, whereby a permanent office of the Working Mechanism is established under the NDRC to receive and process investors’ filings. This may suggest that there is a gradual shift of prevailing power from MOFCOM to NDRC in the national security review, although both ministries share dual leadership on paper. Such a shift in dynamics could be explained by the fact that the NDRC may have a stronger bargaining chip and more lobbying efforts at the State Council, China’s top administrative branch that governs all ministries and ministerial level agencies.<sup>63</sup> In regard to the second point, other agencies at the central level are welcome to be involved in the review process depending on the particularities of the case, but the ministries and agencies

are not specified.<sup>64</sup> Also unclear is the question of the extent to which these invited ministries can participate and play a role in the review process, i.e. whether their engagement is only observatory or makes a substantial impact on the review process and outcome. Again, this multi-ministerial design may be explained by institutional competition: all investment-related and security-related ministries ‘wish to retain jurisdictional power over their respective regimes and are unwilling to transfer their power to a sole institution’.<sup>65</sup> These institutional ambiguities may come at a price of inefficiency and a lack of coordination in the decision-making process of the Working Mechanism.

The second procedural uncertainty relates to the review time frame. A definite time frame for the review process is a key component of procedural fairness and predictability, as advocated by an OECD Recommendation.<sup>66</sup> At a glance, China’s review process is bound by a definite time frame, which lasts up to 105 work days (147 calendar days) since the investor first files for a review. This time frame, however, is subject to suspension and recount. According to the Measures, during a review, the counting of time frame will be suspended when the Working Mechanism makes an inquiry with the investor or invites the investor to supplement additional material.<sup>67</sup> However, the law is silent on the question of how often the suspension can be invoked or how long each suspension will last. Furthermore, the Measures allow the Working Mechanism to instruct the investor to modify the conditions of its investment proposal to address underlying national security concerns, in which case the ongoing review process will be recounted.<sup>68</sup> Again, the law does not specify how often the Working Mechanism can request a modification of the application. As a result, the potentially unlimited use of suspension or recount during an ongoing review essentially renders the process free from time restrictions. If this happens to be the case in practice, it will significantly diminish the certainty and predictability of the review procedure and create opportunities for abuse when the Working Mechanism attempts to stall the review process in the hope of deterring the investor from making the investment without issuing an official rejection decision.

Third, the review system could benefit from alleviated transparency. Since its establishment in 2011, China’s national security review has been operating under obscurity, making very little information known to the public. The government publishes neither information on the number of cases being reviewed nor details of transactions submitted or reviewed. The system was de-

60 Hills, above n. 51, at 22.

61 S.M. Colino, ‘The Internationalization of China’s Foreign Investment Laws’, 45 *Fordham International Law Journal* 275, at 308 (2021). Zheng, above n. 39, at 416-17. M. Liu, ‘The New Chinese Foreign Investment Law and Its Implication on Foreign Investors’, 38 *Northwestern Journal of International Law & Business* 285, at 301-3 (2018).

62 X. Li, ‘An Economic Analysis of Regulatory Overlap and Regulatory Competition: The Experience of Interagency Regulatory Competition in China’s Regulation of Inbound Foreign Investment’, 67 *Administrative Law Review* 685, at 703 (2015).

63 Z. Liu, ‘Security Review in the Evolution of Foreign Investment Law with Chinese Characteristics: Part I’, 41 *Business Law Review* 172, at 178 (2020).

64 Bian (2020), above n. 38, at 76.

65 Z. Liu, ‘Security Review in the Evolution of Foreign Investment Law with Chinese Characteristics: Part II’, 41 *Business Law Review* 217, at 221 (2020).

66 OECD, ‘Guidelines for Recipient Country Investment Policies Relating to National Security’, Recommendation Adopted by the OECD Council on 25 May 2009, [www.oecd.org/daf/inv/investment-policy/43384486.pdf](http://www.oecd.org/daf/inv/investment-policy/43384486.pdf) (last visited 12 January 2023).

67 The Measures, above n. 8, Art. 10.

68 *Ibid.*, Art. 11.



scribed as ‘a dormant regime’,<sup>69</sup> as it can only be assumed that it was sporadically used. The only case known to have undergone a national security review took place in 2019. Yonghui Supermarket, a foreign-invested enterprise operating in China controlled by a Hong-Kong based company, sought to acquire Zhongbai Group, a Chinese company owned by a local government (local State-Owned Assets Supervision and Administration Commission) and was invited by the review agency to submit to a national security review. Both the intending acquirer and the target operated in the retail sector (supermarket chains) and did not own other strategic assets known to the public. Soon thereafter, the acquirer announced that it had decided to abandon the transaction amid the ongoing national security review.<sup>70</sup> No other information or decisions were given by the transacting parties or the authority. This case was emblematic of the lack of transparency in China’s national security review. It remains unclear whether the deal was withdrawn owing to opposition or pressure from the reviewing authority or was merely a business decision. Questions are also raised with regard to the relevance of the sector involved in this case, namely retail, with national security, as retail was not listed as a sector subject to review in the law. It appears that China was not catching up with the trend in other jurisdictions such as the United States and the EU in publishing annual reports of their investment screening systems, which provide accumulative information on cases being reviewed, sectors involved and security implications raised on a yearly basis.<sup>71</sup>

## 5 Lack of Jurisdiction over Offshore Transactions

According to the Measures, China’s national security review applies to investment activities that take place within the Chinese borders.<sup>72</sup> This means that the Measures lack extraterritorial effect; if a takeover takes place outside of China and indirectly leads to a change of control of a company established in China and if such offshore transactions have an impact on China’s national

security, the Chinese government would have no legitimate basis on which to intervene.

Offshore transactions that implicate the national security of a third country (that is, besides the acquirer’s country of origin and the target’s base country) are likely to happen when the target company is a multinational enterprise that has established subsidiaries around the world, including the said third country. With the revival of cross-border takeover activities after the Covid-19 pandemic, more and more offshore transactions are regarded as a threat to national security. In those cases, states have proactively intervened and blocked overseas transactions raising security implications.

A case in point is the opposition, in 2016, by the United States of the acquisition by Fujian Grand Chip Investment Fund LP, a Chinese company, of Aixtron SE, a multinational company based in Germany and that has a US subsidiary.<sup>73</sup> The investor, Chinese Fujian Grand Chip Investment, initially submitted a national security review request to the BMWi, the German ministry responsible for reviewing foreign investment, for its proposed acquisition of the German semiconductor manufacturer Aixtron SE, and the deal was cleared by the German government. Later, the Committee of Foreign Investment of the United States (CFIUS), the US government agency responsible for national security review in the United States, opposed the deal, which was supposed to be consummated between the Chinese investor and the German target, and claimed jurisdiction over the deal because Aixtron SE has a US subsidiary, Aixtron Inc., which is a relatively small branch of around hundred employees incorporated in California. The takeover of Aixtron SE based in Germany by the Chinese investor Fujian Grand Chip would result in the change of ownership of Aixtron Inc. from its original parent company Aixtron SE to the new buyer Chinese Fujian Grand Chip. And according to Section 721 of the Defense Production Act of 1950, the law that governs the CFIUS process, CFIUS jurisdiction covers a change of control of a US business, which is defined as an entity incorporated in the US territory, either owned or controlled by domestic or foreign shareholders.<sup>74</sup> Therefore, the change of control of Aixtron Inc. from Aixtron SE to Chinese Fujian Grand Chip falls into US jurisdiction. In December 2016, President Obama officially blocked the acquisition of Aixtron SE by Chinese Fujian Grand Chip, even though the deal took place overseas, in Germany, citing that ‘(t)here is credible evidence that ... (Chinese Fujian Grand Chip) through exercising control of the U.S. business of AIXTRON SE, a company organized under the laws of the Federal Republic of Germany (Aixtron), might take action that threatens to impair the national security of the

69 Li (2016), above n. 20, at 266.

70 D. Yi, ‘Yonghui Drops Plans to Increase Stake in Chinese Retailer after National Security Probe’, *Caixin Tech*, 17 December 2019, <https://www.caixinglobal.com/2019-12-17/yonghui-drops-plans-to-increase-stake-in-chinese-retailer-after-national-security-probe-101495178.html> (last visited 12 January 2023).

71 U.S. Department of Treasury, ‘CFIUS Reports and Tables’, various years, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables> (last visited 12 January 2023). European Commission, ‘Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union’, COM(2021) 714 final. European Commission, ‘Report from the Commission to the European Parliament and the Council – Second Annual Report on the screening of foreign direct investments into the Union’, COM(2022) 433 final.

72 The Measures, above n. 8, Art. 2.

73 E.T. Abrams, ‘CFIUS History Redux: President Obama Blocks Chinese Purchase of Aixtron, Inc.’, *Steptoe*, 5 December 2016, [www.steptoelaw.com/en/news-publications/international-compliance-blog/cfius-history-redux-president-obama-blocks-chinese-purchase-of-aixtron-inc.html](http://www.steptoelaw.com/en/news-publications/international-compliance-blog/cfius-history-redux-president-obama-blocks-chinese-purchase-of-aixtron-inc.html) (last visited on 12 January 2023).

74 Section 721 of the Defense Production Act of 1950, as amended by The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), 50 U.S.C. § 4565(a)(13).

United States'.<sup>75</sup> In light of this sudden turn of events, the German BMWi, for the first time in history, withdrew its clearance decision over the acquisition of Aixtron SE by Chinese Fujian Grand Chip and reopened a review.<sup>76</sup> The Chinese investor later abandoned the whole deal amidst the reopened German review.<sup>77</sup> It is noted that 'CFIUS review can apply to a transaction which is predominantly offshore and in which the U.S. elements are relatively small'.<sup>78</sup>

Not only Germany but also the UK, for instance, with the adoption of its National Security and Investment Act 2021, has the power to screen transactions outside of the UK. The Secretary of State may review a change of control of an entity incorporated outside of the UK, which has business activities in the UK, or even just supplies goods or services to British customers in the UK.<sup>79</sup> China, however, may not have the same jurisdictional outreach as the United States or the UK to review offshore transactions. For instance, a multinational company, A, based in a foreign country A+ that operates globally has established a subsidiary in China in the sensitive sectors listed in the Measures, and another foreign investor, B, located in a foreign country B+ proposes to take over company A. The ownership of the China subsidiary of company A will be shifted from company A to company B as a result, which will take place in the foreign country A+. The change of control of the China subsidiary of company A may raise national security concerns for China; for example, the new owner, company B, is state owned or controlled by country B+, whose interest is not aligned with that of China or who has a problematic diplomatic track record with China. However, because the takeover transaction occurs in country A+, which is outside of China, China's national security review does not have an extraterritorial effect and therefore does not apply to such an overseas transaction.

The lack of explicit jurisdiction over offshore transactions is ultimately attributed to an ambiguity in China's national security review that does not clarify whether the review has extraterritorial effect. The extraterritorial effect of laws originated from the US legal practice of 'long-arm jurisdiction' and imposes unilateral sanctions

on foreign entities and individuals, which was opposed by China as being flagrantly disrespectful of other countries' sovereignty, but, paradoxically, 'China is surreptitiously extending its domestic laws over territorial borders' to protect its defensive interest.<sup>80</sup> Since 2019, a number of Chinese laws have been equipped with extra-territorial jurisdiction. For example, the revised Anti-Monopoly Law in 2022 stipulates that 'the Law also applies to monopolistic conduct outside of China that has an effect of precluding or restricting competition on the Chinese domestic market'.<sup>81</sup> It appears that, at least in theory, China's national security review could also introduce a provision that regulates takeover transactions outside of China that affect China's interests and security in addition to its newly revised competition law.

## 6 Recommendations for Future Reform

As discussed in previous sections of this article, China's national security review suffers from certain ambiguities. These ambiguities can be grouped into two categories: strategic ambiguities and procedural ambiguities, according to the subjective intent of the lawmakers and the objective effect of the law in practice. Strategic ambiguities are presumably deliberately incorporated into legal statutes by legislators so that the legal rules can be flexible and manipulable enough in practice and so that the law can be interpreted to the benefit of the authorities enforcing the rules. These strategic ambiguities are there to give the review authority sufficient competence and ability to intervene in foreign investment whenever necessary. Unlike strategic ambiguities, procedural ambiguities are vague procedural rules that are probably undesired results of negligence or lack of meticulousness. Procedural ambiguities, as such, include institutional ambiguities of the Working Mechanism, a review time frame that is seemingly definite but subject to suspension and recount, and the absence of annual reports or other official explanations on the enforcement of the system in practice, and a lack of judicial revisit against national security review processes and outcomes. Besides the ambiguities, China's national security review also lacks extraterritorial jurisdiction over offshore transactions, a practice not only observed in other jurisdictions such as the United States but also a legal strategy that China is increasingly embracing in other domestic laws concerning foreign trade and investment. To address the ambiguities identified previously, this article makes the following recommendations to further clarify the law and promote better procedural transparency, efficiency and fairness. Strategic ambiguities will

75 The White House, 'Presidential Order -- Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH', 2 December 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/12/02/presidential-order-regarding-proposed-acquisition-controlling-interest> (last visited 12 January 2023).

76 G. Chazan, 'Germany Withdraws Approval for Chinese Takeover of Tech Group', *Financial Times*, 24 October 2016, [www.ft.com/content/f1b3e52e-99b0-11e6-8f9b-70e3cabccfae](http://www.ft.com/content/f1b3e52e-99b0-11e6-8f9b-70e3cabccfae) (last visited 12 January 2023).

77 M. Sheahan, 'China's Fujian Drops Aixtron Bid After Obama Blocks Deal', *Reuters*, 8 December 2016, [www.reuters.com/article/us-aixtron-m-a-fujian-idUSKBN13X16H](http://www.reuters.com/article/us-aixtron-m-a-fujian-idUSKBN13X16H) (last visited on 12 January 2023).

78 L.G. Franceski, S.M. McNabb & K. Caine, 'President Obama Blocks Proposed Chinese Acquisition of Controlling Interest in German Chip Maker', *Norton Rose Fulbright*, [www.nortonrosefulbright.com/en/knowledge/publications/4a3ee7bd/president-obama-blocks-proposed-chinese-acquisition-of-controlling-interest-in-german-chip-maker](http://www.nortonrosefulbright.com/en/knowledge/publications/4a3ee7bd/president-obama-blocks-proposed-chinese-acquisition-of-controlling-interest-in-german-chip-maker) (last visited 12 January 2023).

79 National Security and Investment Act 2021 (2021 Chapter 25), Sec. 7(3) and 7(6).

80 Z. Huo and M. Yip, 'Extraterritoriality of Chinese Law: Myths, Realities and the Future', 9 *Chinese Journal of Comparative Law* 328, at 330 (2021).

81 中华人民共和国反垄断法 (Anti-Monopoly Law of China, promulgated by the National People's Congress on 24 June 2022, effective on 1 August 2022), Art. 2.

be left unaddressed in the recommendations, because the host country, either China or the world's other major economies, adopts strategic ambiguity deliberately as a long-term security-related policy. For example, the concept of national security is notoriously vague in FDI screening in general because the host states believe that national security is self-judging, country-specific and evolving through time and is thus difficult, if not impossible, to give a specific definition in codified law. The political will might be lacking to downright abandon strategic ambiguities in national security review mechanisms of foreign investment in domestic law. Therefore, the following recommendations will only focus on procedural ambiguities and the lack of extraterritoriality.

First, the Working Mechanism could benefit from more institutional clarity. The lead agency should be singular to avoid ministerial competition and power duelling. Since the Working Mechanism has already established a permanent office within the NDRC, it is advised that the NDRC be the sole lead ministry to work in coordination with other ministries and agencies involved. Instead of the Working Mechanism, which appears to be transitional and in progress, a 'Commission on National Security Review of Foreign Investment' can be established as a permanent agency directly under the auspices of the State Council. Other ministries and agencies that are invited to conduct a national security review on a case-by-case basis should be clarified and stipulated in law, so that their expertise and sectoral focus could be sufficiently utilised. For example, in the event of a foreign takeover in the IT industry, led by the NDRC, MOFCOM, Ministry of National Security, Ministry of Industry and Information Technology, Ministry of Science and Technology, and the Cyberspace Administration of China, among others, can be invited to participate in the deliberation process of the review. This is to ensure a comprehensive consideration and debate in every review process.

Second, the review time frame could be further streamlined. The key to ensure a definite time frame is to regulate the use of suspensions and recounts of an ongoing review. The law should clearly stipulate that suspension of a review can be used by the review agency at most twice during a review, if suspension is truly necessary for the investor to supplement new critical and material information. Each suspension should also be subject to a definite and clear time limit. The law should also clarify that, in an ongoing review, the review agency should instruct the investor to modify the conditions of its investment proposal only once in a way that adequately meets the specific national security concerns of the review agency and then re-submit its investment proposal for a national security review.

Third, China's national security review of foreign investment as a whole should be invested with more transparency. This is best achieved through periodic publications of official reports, pursuant to international best practices. For instance, the CFIUS has been pub-

lishing its annual reports since 2008,<sup>82</sup> and the EU, following suit, has published two annual reports so far.<sup>83</sup> China could consider publishing its own annual report for national security review, covering important information and guidance to future foreign investors, such as cumulative data on transactions submitted, reviewed, approved and rejected, as well as the business sectors and investors' home countries in which those reviewed transactions are involved, among others.

Fourth, China may introduce the possibility of judicial redress to the national security review process. Considering that the matter of national security involves political balancing and weighing to a significant degree, courts may not be in the best position to review or challenge decisions made by the executive branch in this regard. However, due process should be adhered to and upheld. Therefore, judicial review could limit itself to procedural matters of the national security review only, *inter alia*, if there is abuse of administrative discretion in the proceedings.

Last but not the least, China could consider introducing the extraterritorial application to the national security review. In future amendments, the Measures could incorporate a new provision with the following stipulation: 'This law also applies to takeovers outside the territory of China that result in a change of control of a business established in China that affects or may affect China's national security.'

## 7 Conclusion

The development of China's national security review of foreign investment appears to be a dichotomy. On the one hand, the relatively nascent national security review system that has been established for a decade, compared with the obsolete case-by-case approval system that preceded it for four decades, is on a par with China's continuous effort in economic reform and investment liberalisation. The transition from the case-by-case approval to the national security review for the market access of foreign investment has contributed to more transparency, predictability, procedural fairness and narrower regulatory focus and elevated expertise from the perspective of the review authority. On the other hand, this positive transition towards the rule of law also comes with lingering ambiguity, some of which may significantly hinder the appropriate functioning of the national security review mechanism. Both the positive development and room for improvement in China's decade-long lawmaking and implementation in terms of national security review of foreign investment should be recognised and weighed. The bottom line for China and, for that matter, any other jurisdiction that has adopted FDI screening in domestic law, is to maintain a balance between the apprehensive protection of its national se-

82 U.S. Department of Treasury, above n. 71.

83 European Commission, above n. 71.



curity and interests and the continuity of openness and appeal to international capital.