

2019

China as a "National Strategic Buyer": Toward a Multilateral Regime for Cross-Border M&A

Jeffrey N. Gordon
Columbia Law School, jgordon@law.columbia.edu

Curtis J. Milhaupt
Stanford Law School, milhaupt@law.stanford.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Business Organizations Law Commons](#), [Commercial Law Commons](#), [European Law Commons](#), and the [Taxation-Transnational Commons](#)

Recommended Citation

Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a "National Strategic Buyer": Toward a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192 (2019).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2843

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

CHINA AS A “NATIONAL STRATEGIC BUYER”: TOWARD A MULTILATERAL REGIME FOR CROSS-BORDER M&A

Jeffrey N. Gordon* & Curtis J. Milhaupt**

Unlike the case of cross-border trade, there is no explicit international governance regime for cross-border M&A; rather, there is a shared understanding that publicly traded companies are generally for purchase by any bidder—domestic or foreign—willing to offer a sufficiently large premium over a target’s stock market price. The unspoken premise that undergirds the system is that the prospective buyer is motivated by private economic gain-seeking.

The entry of China into the global M&A market threatens the fundamental assumptions of the current permissive international regime. China has become a significant player in the cross-border M&A market, particularly as an acquirer. The central claim of the article is that the cross-border M&A regime will require a new rules-of-the-game structure to take account of China’s ascension. This is because cross-border M&A with China introduces a new dimension: what we call the “national strategic buyer” (“NSB”), whose objective is to further the

*Richard Paul Richman Professor of Law at Columbia Law School and a Fellow and Research Member of the European Corporate Governance Institute.

**Professor of Law at Stanford Law School and a Research Member of the European Corporate Governance Institute.

We benefitted from an early conversation about this project with Karl Sauvant. We thank Scott Barshay, Weitseng Chen, Ron Gilson, Joe Grundfest, Igor Kirman, Michael Klausner, Dan Puchniak, Chief Justice Leo Strine, Alan Sykes, and participants at a Columbia Law School Blue Sky workshop, a lecture at the National University of Singapore, the Law, Accounting and Business Workshop at the University of California, Berkeley, and a conference at Trinity College Dublin for helpful comments. Maddy Berg (Columbia Law School) and Andres Rovira (Columbia College) provided excellent research assistance. Milhaupt gratefully acknowledges support and funding from the National University of Singapore Centre for Asian Legal Studies.

interests of a nation-state in the pursuit of industrial policy or out of national security concerns. Thus, China presents a problem of asymmetric motives in the global M&A market: sellers to Chinese firms have private motives for pursuing transactions, while at least some Chinese acquirers have non-economic motivations. Yet distinguishing commercial and financial motives from national strategic motives in Chinese firms is difficult.

To date, the only mechanisms for addressing the NSB problem are national security review mechanisms such as the CFIUS process in the United States, as recently expanded through legislative amendment. The EU is moving forward on a screening regulation with a similar objective that contemplates activity both by the European Commission and the Member States. Whether suitably tailored or not, these approaches fail to take on the long-term concern of fully assimilating China as a normal actor in the global economic system.

To address the NSB problem, we propose the adoption of a multilateral regime under which firms subject to potential government influence in their corporate decision-making must demonstrate their “eligibility” to engage in outbound M&A. For covered firms, the regime would require a commitment to exclusively commercial/financial motives in cross-border acquisitions, made credible through a corporate governance set-up featuring independent directors (selected by foreign investors) who publicly verify adherence and disclose the source of acquisition financing. Enforcement would consist of a secretariat that can evaluate eligibility and monitor post-acquisition conduct, and national legislation that would permit rejection of an acquisition of a local target by an acquirer that does not meet the eligibility criteria.

I.	Introduction	194
II.	China’s Rise as a Player in Global M&A.....	207
III.	China as a National Strategic Buyer.....	212
	A. SOE Ownership Structure and Governance.....	213
	1. Policy Channeling.....	218
	2. Blurred SOE-POE Dichotomy	219

3. Summary.....	222
B. Illustration: Made in China 2025.....	222
IV. Existing Regimes and Proposals for Reform.....	226
A. The United States.....	226
B. The European Union and Member States.....	233
C. Evaluation.....	236
V. Toward a Multilateral Regime for Cross-Border M&A.....	239
VI. Potential Objections.....	247
VII. Conclusion.....	251

I. INTRODUCTION

The current trade dispute with China, framed in terms of the United States-China balance-of-trade deficit, prompts reflection once again on the liberal global economic regime that has been the premise for the post-World War II global order. Economic theory makes it clear that the global welfare-maximizing trade regime would seek to lower trade barriers to permit the pursuit of national comparative advantage in both goods and services. National governments, however, face ongoing political and economic pressure from local losers as well as the consequences of local adjustment costs from the global trade regime. Governments may thus incline toward protectionist measures that, over time, would undo initial commitments to an open trade regime. The ongoing maintenance of this liberal global order, therefore, requires a structure that creates a binding rules-of-the-game framework to constrain national defection and a dispute resolution procedure for settling grievances. Enter the World Trade Organization (“WTO”).

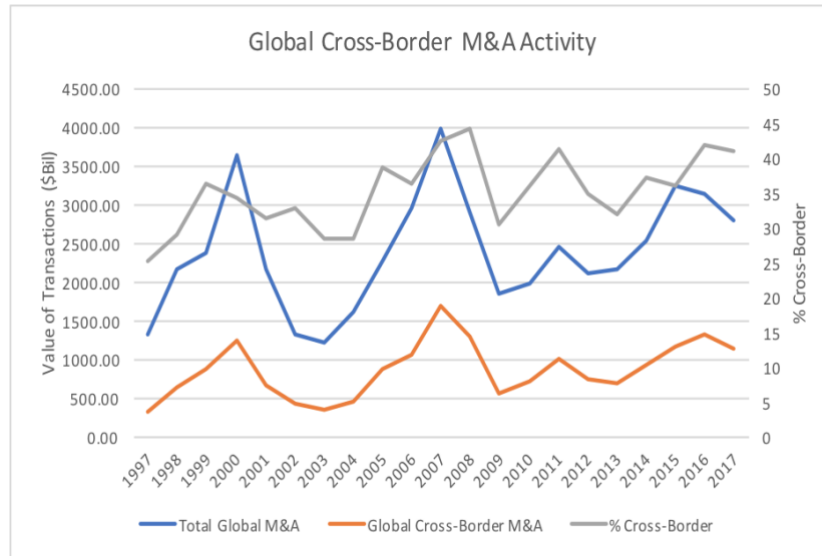
The regime for the global movement of capital is less well developed. The general framework has been permissive and facilitative. At times, nations have imposed general capital controls, either outbound—to foster in-country investment and to reduce exchange rate deterioration—or inbound—to avoid boom-and-bust economic cycles and to minimize

inflation.¹ A somewhat different question arises when global capital flows take the form of a cross-border acquisition, when an acquirer domiciled or headquartered in one country acquires a company domiciled or headquartered in another.

As Figure 1 indicates, cross-border merger and acquisition ("M&A") activity is a consequential form of global economic activity. In the post-financial-crisis recovery years (2014–2017), the annual level of cross-border M&A activity has exceeded \$1 trillion, and the cross-border share of global M&A activity has exceeded forty percent.²

¹ See generally DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 95–111 (2011); Sebastian Edwards, *How Effective Are Capital Controls?*, 13 J. ECON. PERSP. 65, 65 (1999).

² To scale this activity: Trade in merchandise exports and commercial services was approximately \$20 trillion in 2016. See WTO, WORLD TRADE STATISTICAL REVIEW 2017, 100, 104 (2017), https://www.wto.org/english/res_e/statis_e/wts2017_e/wts2017_e.pdf [<https://perma.cc/XL5C-LSQ3>]. The measures are not directly comparable, of course. Among other things, M&A reflects irreversible (or at least long-term) commitments, whereas a significant portion of trade reflects spot market transactions or short-term contracts.

Figure 1³

Unlike the case of cross-border trade, there is no explicit international governance regime for cross-border M&A; rather, there is a shared understanding that publicly traded companies are generally available for purchase to any bidder—domestic or foreign—willing to offer a sufficiently large premium over a target's stock market price. This expectation is, of course, limited by the shifting boundaries of host-country protectionism and the prevailing patterns of corporate ownership in different countries. But the unspoken premise that undergirds the system is that the prospective buyer is motivated by private economic gain-seeking. Some buyers may be strategic, seeking economies of scale or scope, and others may be financial, looking to maximize immediate cash flows. These differences, which may elicit different target- and host-country responses, are nevertheless similar

³ *Deals*, THOMSON REUTERS, <https://developers.thomsonreuters.com/content/deals-mergers-acquisitions-and-new-issues> [https://perma.cc/R924-L4Z5] (last visited Sept. 5, 2018).

in their overarching *private* objectives: Firms and management teams are seeking to advance the economic interests of their private owners.

One particular aspect of the implicit assumptions supporting the cross-border M&A regime bears emphasis. It is assumed that the state enters the picture on the target side only, the sell side. In other words, it is assumed that the laissez-faire system is subject to state-level decisions that a particular target is not for sale, perhaps because (i) the follow-on business strategy is anticipated to cost jobs in the target's home country, (ii) the target provides strategic infrastructure (like a port or public utility), or (iii) the target is important for national security reasons. By contrast, it is assumed that the state does not play a directive role in the acquirer's decision-making, the buy side. Protectionism and other forms of mercantilism have entered as *constraints* on the pecuniary motives of target shareholders, not as *industrial policy imperatives* that outweigh the pecuniary motives of the acquirers.⁴ The relatively bounded nature of state action has meant that the permissive international cross-border M&A regime could survive and even thrive without the law-making and enforcement apparatus of a multilateral regime like the WTO.

China's entry into the global M&A market threatens the fundamental assumptions of the current permissive international regime. The rise of China-related M&A reflects not only consolidation in China's domestic economy but, most importantly, China's increasing share of cross-border transactions. In 2016, for example, China accounted for \$92 billion of net purchases in cross-border acquisitions, over ten percent of the worldwide total and more than the United States, with \$78 billion.⁵ A significant fraction of these transactions related to critical technology such as

⁴ See generally I. Serdar Dinc & Isil Erel, *Economic Nationalism in Mergers and Acquisitions*, 68 J. FIN. 2471 (2013).

⁵ U.N. Conference on Trade and Development, *World Investment Report 2017*, at 230–231 (2017).

semiconductors,⁶ domains of an articulated Chinese state objective to become a world leader.⁷

The central claim of this Article is that the cross-border M&A regime will require a new rules-of-the-game structure to take account of China's ascension. This is because cross-border M&A with a Chinese acquirer adds a new dimension: what this Article will call the "national strategic buyer" ("NSB"), whose objective is to further the interests of a nation-state in the pursuit of national industrial policy or perhaps national security concerns. Thus, China presents a problem of asymmetric motives in the global M&A market: Sellers to Chinese firms have private motives for pursuing transactions, while at least some Chinese acquirers have non-economic motivations. These acquirers are NSBs. Yet distinguishing commercial and financial motives from national strategic motives with a given Chinese acquirer is difficult. High levels of state ownership, the murkiness of corporate ownership in many cases, and the Communist Party's extensive levers of influence over all firms, whether state-owned ("SOE") or privately owned ("POE"), creates the potential for national strategic motives to be involved in many transactions. Moreover, the Chinese government's recent clampdown on outbound M&A to stem capital flight⁸ demonstrates that the government perceives outbound M&A as closely linked to its overall economic strategy and views the administrative procedures associated with outbound M&A as an important tool of governmental economic control.

A comparison with France may be useful in illustrating the dilemma raised by an NSB. While it may be difficult for a foreign acquirer to gain control of a French firm due to the relatively statist orientation of that country's economy, the

⁶ See THILO HANEMANN, DANIEL H. ROSEN & CASSIE GAO, RHODIUM GRP., NAT'L COMM. ON U.S. CHINA RELATIONS, TWO-WAY STREET: 2018 UPDATE US-CHINA DIRECT INVESTMENT TRENDS 30–34 (Apr. 2018).

⁷ See *infra* text accompanying notes 78–80.

⁸ See Don Weinland, *China Capital Crackdown Threatens Wave of Overseas Buyouts*, FIN. TIMES (Feb. 27, 2017), <https://www.ft.com/content/091677dc-f8ec-11e6-bd4e-68d53499ed71> (on file with the *Columbia Business Law Review*).

French government is not pursuing a national industrial strategy of targeting foreign firms in order to obtain advanced technologies⁹ or regulating the volume of outbound deal flow in service of national economic policy.

The existence of NSBs in the cross-border M&A market benefits target company shareholders, who are essentially overcompensated for sale of control to the foreign acquirer (because a portion of the premium paid for their shares reflects the perceived industrial policy benefit to the NSB's home country government). Yet, this may cause distortions in the market itself and negative welfare consequences in the target company's home country. These problems are elaborated on below,¹⁰ but of particular concern is the potential loss of long-term innovative capacity and growth potential of the United States economy. Transfer of control over leading-edge technologies to NSBs may occur on a scale that diminishes "agglomeration economies"¹¹ in places like Silicon Valley and that shifts the center of innovative gravity from the United States to China.

To date, the only mechanisms for addressing the NSB problem are national security review mechanisms for cross-border acquisitions of domestic targets at the level of separate nation-states. In the United States, this mechanism is the Committee on Foreign Investment in the United States

⁹ This stands in stark contrast to Chinese plans, as evidence through that country's Made in China 2025 plan. See Li Keqiang (李克强), Zhengfu Gongzuo Baogao—Erlingyiwu Nian San Yue Wu Ri Zai Di Shi'er Jie Quanguo Renmin Daibiao Dahui Di San Ci Huiyi Shang (政府工作报告——2015年3月5日在第十二届全国人民代表大会第三次会议上) [Work Report at the Third Session of China's Twelfth National People's Congress on Mar. 5, 2015], Xinhua News Agency (Mar. 16, 2015), http://www.gov.cn/guowuyuan/2015-03/16/content_2835101.htm (on file with the *Columbia Business Law Review*); see also *infra* text accompanying notes 74–80.

¹⁰ See *infra* Part VI.

¹¹ Agglomeration economies refers to "the benefits that come when firms and people locate near one another together in cities and industrial clusters." Edward L. Glaeser, *Introduction*, in AGGLOMERATION ECONOMICS 1 (Edward L. Glaeser ed., 2010).

(“CFIUS”).¹² Although the precise mechanisms differ, Australia, Canada, and a number of other countries have adopted similar screening regimes.¹³ Concern over Chinese acquisitions has prompted a recent legislative reform of the CFIUS process.¹⁴ The reform focuses particularly on the need to expand the range of transactions covered by the screening mechanism to include not simply foreign acquisitions of control, but joint ventures and other deal structures through which a foreign participant might potentially extract sensitive technology or otherwise exert influence in ways that could harm United States national interests.¹⁵ Similar concerns have produced provisional agreement on a new European Union regulation that calls for both European Commission screening of “strategic sector” transactions of “Union interest” and greater coordination of screening by individual member states.¹⁶

¹² See *infra* text accompanying notes 87–119. For the origins of the Committee on Foreign Investments in the United States in 1975 and its activities for the first thirty years, see George Stephanov Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. REG. 125 (2008).

¹³ See Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security: A Survey of Country Practices* (OECD Working Papers on Int’l. Inv., No. 2016/02, 2016), <https://www.oecd-ilibrary.org/docserver/5jlwrrf038nx-en.pdf?expires=1548013102&id=id&acname=guest&checksum=E72D2C6145B1DE0CE27E7D6E4FBF4D79> [<https://perma.cc/4CT3-UH72>] (describing practices of seventeen countries); WHITE & CASE, NATIONAL SECURITY REVIEWS 2017: A GLOBAL PERSPECTIVE (2017).

¹⁴ See *infra* text accompanying notes 112–119.

¹⁵ *Id.*

¹⁶ Franck Proust, *Screening of Foreign Direct Investment in Strategic Sectors*, EUROPEAN PARLIAMENT (Dec. 14, 2018), <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-screening-of-foreign-direct-investment-in-strategic-sectors> [<https://perma.cc/F9KD-WU53>]; see also European Commission Press Release IP/18/6467, Commission Welcomes Agreement on Foreign Investment Screening Framework (Nov. 20, 2018), http://europa.eu/rapid/press-release_IP-18-6467_en.htm [<https://perma.cc/6YPJ-SLTC>]; *infra* text accompanying notes 120–129.

This approach, legitimate in the moment, fails to take on the crucial long-term concern of assimilating China as a normal actor in the global economic system. A cross-border M&A regime featuring acquirers with asymmetric motives is not stable over the long term. As noted, amendments to the CFIUS regime and comparable initiatives at the European Union and member-state levels are one response. But the national approaches differ in their details, have gaps in coverage, and lack follow-up mechanisms to monitor the behavior of the acquirer once a deal has been cleared. Eventually, the presence of actors in the global M&A market with asymmetric motives will lead to a backlash that could disrupt global capital markets. Indeed, there are already signs of building backlash against China.¹⁷ While countries should maintain these national-level screening processes, a multilateral regime to complement the national-level mechanisms would prevent forum shopping by NSBs and would enhance the predictability and stability of the cross-border M&A market.

The problem of asymmetric motives could be eliminated through a multilateral regime of mutual contestability—i.e., a requirement that every acquirer in a cross-border deal must itself be susceptible to takeover by a foreign buyer. In such a regime, value-reducing acquisitions intended to serve national strategic objectives could elicit a hostile bid; this would serve as a check on such state insistence. Such a regime is not politically feasible, however, as demonstrated by the collapse of an effort to agree to such a regime at the European Union level almost two decades ago.¹⁸

¹⁷ See, e.g., Jonathan Stearns, *Amid China M&A Drive, EU Rushes for Investment-Screening Deal*, BLOOMBERG (Mar. 5, 2018), <https://www.bloomberg.com/news/articles/2018-03-04/amid-china-m-a-drive-eu-rushes-for-investment-screening-deal> (on file with the *Columbia Business Law Review*) (quoting a French member of the European Parliament who is leading the body's deliberations over adoption of an E.U.-wide screening mechanism, prompted by concerns over China: "It's the end of European naivete We have to have the courage to change things.").

¹⁸ See *infra* text accompanying notes 147–155 (discussing the Thirteenth Takeover Directive for the E.U.).

This Article sets forth the framework for a second-best solution, in which the problem of asymmetric motives can be mitigated through adoption of a multilateral regime under which firms (whether SOE or POE) subject to the potential for direct government influence in their corporate decision-making must demonstrate “eligibility” to engage in outbound M&A. Our proposal contemplates that SOEs, firms subject to a golden share held by a governmental body, or POEs with governing-party-based internal governance organs would commit to an “eligibility regime” before undertaking acquisitions of foreign firms. This regime would require a commitment to own-firm commercial or financial motives in cross-border acquisitions made credible through a corporate governance set-up that could verify adherence. We offer an outline for such a regime below. The elements are foreign ownership of a significant block of shares of the acquirer; selection rights lodged with such foreign investors over a number of independent directors, who are, in turn, charged with responsibility to investigate and certify the absence of government influence in the transaction; disclosure of financing; and an enforcement apparatus. These specifics are offered by way of example—other possible solutions to the credible commitment problem are conceivable.

The regime could be developed through governmental agreement, for example, as an add-on to the G20 Guiding Principles for Global Investment Policymaking, agreed to in 2016 during China’s presidency of the G20.¹⁹ Alternatively, the regime could be developed through a public-private consultative process led by the Organisation for Economic Co-

¹⁹ See *Annex III: G20 Guiding Principles for Global Investment Policymaking*, ORG. ECON. COOPERATION & DEV. [hereinafter *G20 Guiding Principles*], <http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf> [https://perma.cc/G4B5-M3PK].

operation and Development ("OECD").²⁰ The regime could be implemented on an opt-in basis at the national level, for example as a new element added to an existing cross-border screening regime in lieu of an ever-expanding definition of national security. An eligibility regime would provide incentives for governments to reduce the number of firms subject to such screening and would provide meaningful discipline against a state's efforts to advance national-strategic motives in cross-border M&A.

Part II surveys evidence of China's rise as a serious player in the global M&A market. Part III explains the role of China's firms as NSBs and illustrates the way this undermines the basic assumption of symmetric private motivations on which the global M&A market is based. Part IV examines the existing regimes at the national level for dealing with national security concerns and the proposals for reforming them. It explains why these regimes do not fully address the problem of the NSB.

Part V contains our proposal for a coordinated regime for cross-border M&A based on the concept of "eligibility," which would be applied to all firms, regardless of domicile, that are subject to potential government influence in their cross-border acquisitions. As outlined in detail in Part V, the eligibility criteria are designed to make it possible for an acquirer to make a credible commitment that its cross-border acquisition proposal is motivated by private commercial objectives rather

²⁰ See *Guidelines for Recipient Country Investment Policies Relating to National Security*, ORG. ECON. COOPERATION & DEV. (May 25, 2009), <http://www.oecd.org/daf/inv/investment-policy/43384486.pdf> [<https://perma.cc/KLN3-5K8K>]. The OECD hosts regular Freedom of Investment Roundtables that, among other things, led to the 2009 *Guidelines for Recipient Country Investment Policies Relating to National Security*, which set forth certain non-binding recommendations on the substance as well as review procedures.

than national strategic objectives.²¹ Credibility for the commitment to commercial objectives would be provided by a corporate governance mechanism featuring public certification of the commercial objectives by independent directors nominated by the acquirer's foreign shareholders. Part V also outlines an enforcement structure for the eligibility regime featuring a secretariat (for example, under

²¹ This Article proposes that a firm subject to the eligibility regime would be eligible to engage in cross-border M&A if it met the following requirements:

- (i) the company commits in its charter or other constitutive documents to undertake foreign acquisitions solely for own-firm financial or commercial objectives and not at the behest of any government;
- (ii) a significant portion, twenty-five percent, of the company's cash flow rights is available for purchase by foreign shareholders;
- (iii) the company's governance structure provides for independent directors, at least twenty-five percent of the board (but no fewer than two), who will be nominated by foreign shareholders;
- (iv) in advance of a public acquisition proposal, the independent directors are required under the acquirer's governance documents to prepare a report for subsequent public release that attests to the own-firm financial or commercial motivation and absence of government involvement in the acquisition decision; and
- (v) the company provides full disclosure of the sources of funding for the transaction before the transaction is final.

Enforcement of the regime would consist of two elements: first, a secretariat that can evaluate whether a would-be acquirer satisfies the eligibility criteria both as a general matter (the company's governance set-up) and as to the specific transaction; second, national legislation that would permit rejection of the acquisition of a local target by an acquirer that does not meet the eligibility criteria.

the auspices of the OECD) and opt-in legislation at the level of the nation states.²²

Part VI anticipates some likely objections to the proposal. First, target shareholders are likely to benefit from aggressive NSB activity through higher premiums. Second, NSB activity may simply fuel more investment in the areas of great interest to NSB acquirers. Third, restrictions on cross-border M&A are inherently protectionist; countries have the right to choose distinctive economic systems. Fourth, China will never go for this, so what's the point?²³

One response is framed in terms of the interest of long-term participants in global capital markets who will regard the explicit or implicit state support behind NSB acquisitions as distortionary of the cross-border M&A market. Another response looks to the emerging backlash of target-home governments that are becoming alarmed at the use of the cross-border M&A market to pursue national industrial policy. Indeed, this appears to be happening currently in the

²² Our scheme is novel in its effort to use a particular mechanism of private ordering—corporate governance—to serve global law-making objectives, but not unprecedented in this regard. The Basel Committee on Banking Supervision has recently promulgated corporate governance guidelines which aim to use board and other corporate governance mechanisms to constrain risk-taking by large banks in the name of the global objective to maintain financial stability. *See* KPMG, BASEL COMMITTEE ON BANKING SUPERVISION – GUIDELINES ON THE CORPORATE GOVERNANCE PRINCIPLES FOR BANKS (2015), <https://assets.kpmg/content/dam/kpmg/pdf/2016/05/Corporate-Governance-Principles.pdf> [<https://perma.cc/4UPQ-5S7G>].

²³ An objection from a different direction is that our proposal is too limited in scope, as it addresses only M&A and not foreign direct investment that may have a similar national strategic stimulus. The problems of a "national strategic investor" are ultimately less serious than those posed by a "national strategic buyer" because of the control rights that are shifted in M&A; the influence of a national strategic investor is subject to limitations imposed by the target company board and its conduct is more susceptible to monitoring by the government where the target is located through such measures as the export control regime. However, the eligibility regime contemplated by our proposal could be expanded to include strategic investments (as defined under the regime) that fall short of a change of control.

developed world in regard to Chinese investment.²⁴ This concern extends beyond a particular acquisition and identifies a systemic threat, including the loss of leading technologies to the NSB and the NSB-home country, with potentially serious ramifications for the target-home country's long-term economic capacity and military capability. In the words of a United States Department of Defense report:

While it is likely that China's investment in technology is driven in part by commercial interests, it is unlikely this is the sole reason given China's explicit technology goals. . . . The principal vehicles [to enable transfer of technology] are investments in early-stage technologies as well as acquisitions. When viewed individually, some of these practices may seem commonplace and not unlike those employed by other countries. However, when viewed in combination, and with the resources China is applying, the *composite picture illustrates the intent, design and dedication of a regime focused on technology transfer at a massive scale*.²⁵

The "eligibility regime" sustains the relatively open cross-border M&A regime that helps knit together a global economic system, rather than advancing the interests of any particular nations. Global M&A is a complement to a global trade regime, and together these global regimes serve the long-term project of peaceful national economic competition and the

²⁴ See Thilo Hanemann & Daniel H. Rosen, *Chinese FDI in the US in 2017: A Double Policy Punch*, RHODIUM GROUP (Jan. 17, 2018), <https://rhg.com/research/chinese-fdi-us-2017-double-policy-punch/> [<https://perma.cc/UCB6-55K6>] ("China epitomizes the 'countries of special concern' [pending legislation to bolster the U.S. investment screening process] is concerned with, and in expanding the types of transactions subject to screening, a significant share of the marginal growth in foreign investment in the US would be treated with suspicion.").

²⁵ MICHAEL BROWN & PAVNEET SINGH, DEFENSE INNOVATION UNIT EXPERIMENTAL, CHINA'S TECHNOLOGY TRANSFER STRATEGY: HOW CHINESE INVESTMENTS IN EMERGING TECHNOLOGIES ENABLE A STRATEGIC COMPETITOR TO ACCESS THE CROWN JEWELS OF U.S. INNOVATION 5, 16 (2018), [https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_\(1\).pdf](https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_(1).pdf) [<https://perma.cc/8UNJ-LGKZ>].

spread of economic well-being. These values cannot be forgotten as nations struggle with the dislocations and the consequence of the global economic system. The "eligibility regime" uses tools from the corporate governance toolbox in the service of internationalist objectives rather than grander international law schema.

Why would China, or any other regime that imposes on its firms an NSB obligation, ever subject itself to such discipline? It is unlikely that China's political leadership would find the loss of this lever of influence over the economy attractive. But as the national security screening mechanisms in advanced western economies proliferate and tighten, it will be in China's national interest to accede to a harmonized M&A regime that minimizes the "suspicion tax" under which many Chinese firms currently operate in global markets. Moreover, at least on a rhetorical level, China's leadership has expressed support for the type of agreed-upon rules-of-the-game approach in support of global markets that this Article advocates. At the 2017 World Economic Forum in Davos, President Xi Jinping called for an open global economy and projected himself as a chief statesman on behalf of global governance.²⁶ He explained China's decision to join the WTO as reflecting "the conclusion that integration into the global economy is a historical trend. To grow its economy, China must have the courage to swim in the vast ocean of the global market."²⁷ Support for a multilateral regime that constrains mercantilist, national-strategic motivations for deals would demonstrate China's commitment to sound governance of the global market for cross-border M&A.

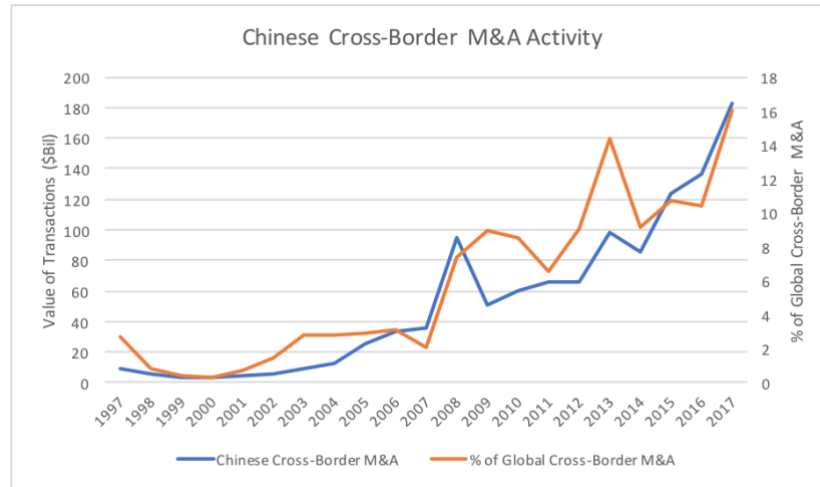
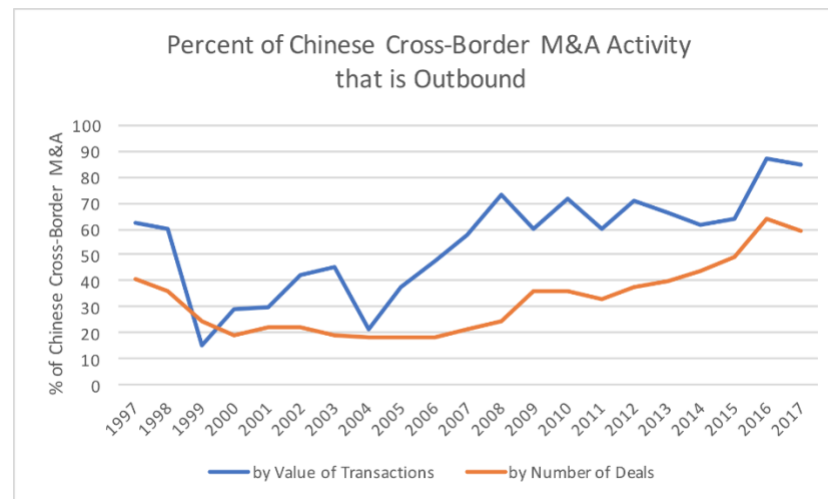
II. CHINA'S RISE AS A PLAYER IN GLOBAL M&A

As Figure 2 demonstrates, China has become an increasingly important player in cross-border M&A. Over a

²⁶ See Xi Jinping, President, People's Republic of China, President Xi's Speech to Davos (Jan. 17, 2017) (transcript available at <https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum/> [<https://perma.cc/8LML-GEDM>]).

²⁷ *Id.*

twenty-year period, there has been a steady increase in both the annual value of the cross-border transactions entered into by Chinese firms and the fraction of worldwide cross-border M&A activity that is China-related. This increase has been particularly pronounced in the post-global financial crisis period, especially from 2015–17. Perhaps more remarkable has been the shift in the composition of China-related cross-border M&A from predominantly *inbound* earlier in the period to predominantly *outbound*. Measured by value, by the time of the financial crisis, the outbound/inbound ratio reached 60/40; in recent years, it has been closer to 80/20. Measured by number of deals, the outbound/inbound ratio is 60/40, reflecting that outbound deals have been larger. *See* Figure 3.

Figure 2²⁸**Figure 3**²⁹

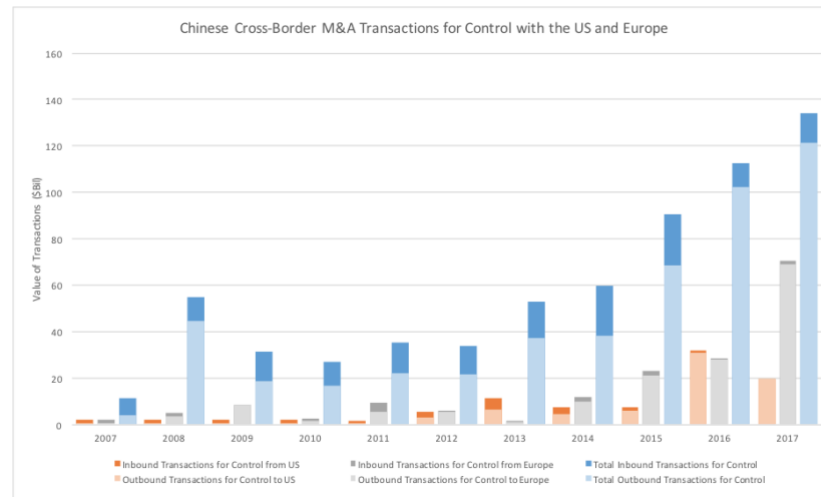
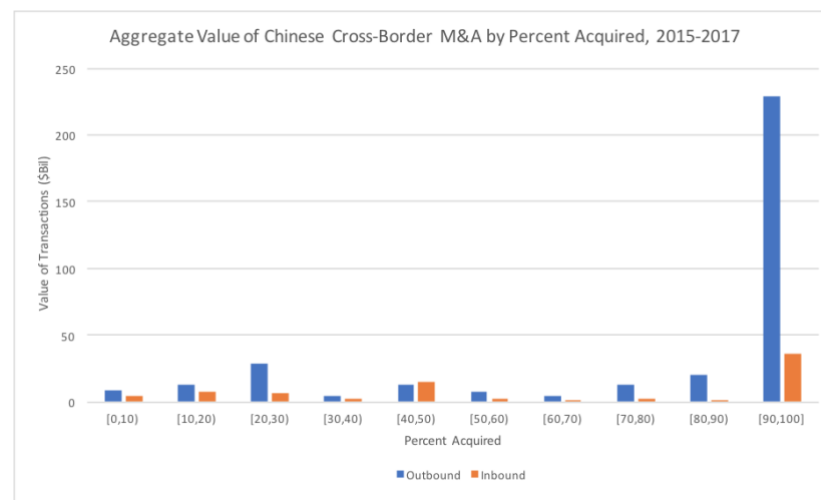
²⁸ *Deals*, THOMSON REUTERS, <https://developers.thomsonreuters.com/content/deals-mergers-acquisitions-and-new-issues> [<https://perma.cc/R924-L4Z5>] (last visited Sept. 5, 2018).

²⁹ *Id.*

The starkest comparisons show up when the definition of “M&A” is limited to transactions for control, meaning acquisitions that result in obtaining an ownership position of more than fifty percent of the target’s stock. When control is at issue, the data show a pronounced skew towards outbound transactions throughout a decade-long period (measured by value).³⁰ Inbound acquisitions for control tend to come from Hong Kong companies (which may be under the control of Chinese owners; the data do not indicate).³¹ In the case of China-related M&A activity involving the United States and Europe, Figure 4 shows that inbound transactions for control appear to be rare; the direction of deal flow for control transactions is overwhelmingly outbound. Chinese firms are acquirers in control transactions in the United States and Europe, not targets. Moreover, Figure 5 shows that over the 2015–17 period, most of the outbound acquisition value was reflected in transactions in which Chinese acquirers obtained more than ninety percent of the target’s stock.

³⁰ See *infra* Figure 4, right-hand column for each year.

³¹ See *Deals*, THOMSON REUTERS, <https://developers.thomsonreuters.com/content/deals-mergers-acquisitions-and-new-issues> [<https://perma.cc/R924-L4Z5>] (last visited Sept. 5, 2018).

Figure 4³²**Figure 5**³³³² *Id.*³³ *Id.*

III. CHINA AS A NATIONAL STRATEGIC BUYER

As demonstrated in the preceding Part, China's economic rise and growing participation in the global economy have introduced a new player in cross-border M&A—the Chinese acquirer, which overwhelmingly seeks a dominant, if not one-hundred-percent, ownership position. Outwardly familiar and cloaked in corporate form, the Chinese acquirer has qualities that defy conventional categories and make assessment of its motives difficult. This is so for several reasons rooted in the Chinese political economy. First, SOEs, which have led the surge in Chinese outbound acquisitions, have distinctive ownership structures and institutionalized linkages to the Communist Party that influence their governance in unprecedented ways.³⁴ Second, because their corporate governance is channeled through Chinese institutions of political governance, the SOEs facilitate “policy channeling”—the use of state-controlled companies (and non-controlling private shareholders' investments) as a means of implementing public policy.³⁵ If SOEs were the only Chinese firms engaged in cross-border acquisitions, the problem of asymmetric motives might find relatively straightforward policy solutions.³⁶ But large Chinese private firms are increasingly active in cross-border M&A, and they present a third conundrum for assessing a Chinese buyer's motives: the conventional dichotomy between state-owned and privately

³⁴ See generally Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013).

³⁵ See Curtis J. Milhaupt & Mariana Pargendler, *RPTs in SOEs: Tunneling, Propping, and Policy Channeling*, in THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS (Luca Enriques & Tobias Tröeger eds.) (forthcoming 2019).

³⁶ See U.S.-CHINA ECON. & SEC. REVIEW COMM'N, 2016 REPORT TO CONGRESS 507 (Nov. 2016), https://www.uscc.gov/sites/default/files/annual_reports/2016%20Annual%20Report%20to%20Congress.pdf [<https://perma.cc/77UL-2YED>] (recommending a ban on acquisitions of United States corporations by Chinese SOEs).

owned enterprises is blurred in China.³⁷ Due to heavy state intervention in the economy, party penetration of all significant organizations in society, and weak institutions to check state power, all large firms—whether SOEs, POEs, or mixed ownership enterprises—survive and prosper by remaining in the good graces of the party-state. Proximity to the party-state provides a roadmap of industrial policy goals, the pursuit of which generates rents such as subsidies, state-backed finance, and market protections. As a result, large firms in China exhibit substantial similarities in their relationship with the state in ways that do not depend on equity ownership. These distinctive Chinese corporate traits are discussed in turn.

A. SOE Ownership Structure and Governance³⁸

More than half of Chinese Fortune Global 500 companies are national-level SOEs.³⁹ These SOEs are structured as massive business groups whose formation in the 1990s was inspired by the apparent success of the Japanese *keiretsu* and South Korean *chaebol* in propelling economic development in those countries.⁴⁰ The parent (holding) company of an SOE business group has only one shareholder: an agency formed under the State Council (China's cabinet) known as the State-owned Assets Supervision and Administration Commission ("SASAC"), which acts as both an investor on behalf of the Chinese people and as a regulatory agency.⁴¹ The holding company serves as an intermediary between SASAC and the other group member firms.⁴² It coordinates strategy and resource allocation within the group, transmits policy downward from Chinese regulators to group members, and

³⁷ See Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 671 (2015).

³⁸ The account in this Section follows Lin & Milhaupt, *supra* note 34. Readers desiring more detail are directed to that publication.

³⁹ Lin & Milhaupt, *supra* note 34, at 699.

⁴⁰ *Id.* at 709–15.

⁴¹ *Id.* at 699–700, 734–45.

⁴² *Id.* at 717.

provides information upward from the group to state strategists and regulators.⁴³ The global face of a Chinese SOE, however, is not the holding company, but one or more of its publicly traded subsidiaries.⁴⁴ While the publicly traded subsidiaries have private (non-state) shareholders, ultimate control resides with the party-state through SASAC's indirect ownership of a substantial percentage of the publicly traded company's equity,⁴⁵ along with other unusual governance rights discussed below.

Atop the national SOE business groups is SASAC, the sole shareholder of the central SOE holding companies. SASAC has a long list of formal functions and responsibilities, including preserving and enhancing the value of state-owned assets, appointing and removing top SOE executives, setting remuneration for SOE personnel and regulating income distribution among senior SOE managers, dispatching supervisory panels to the SOEs, and drafting regulations on the management of state-owned assets.⁴⁶

The legal foundation for SASAC's role in the SOE system is the Law of the People's Republic of China on State-Owned Assets of Enterprises ("SOE Asset Law").⁴⁷ In essence, the law formally recognizes SASAC as an *investor*—a shareholder in the national SOEs, with the rights and duties of a

⁴³ *Id.*

⁴⁴ *Id.* at 711.

⁴⁵ SASAC is the sole shareholder of ninety-seven parent holding companies that in turn control 340 publicly traded subsidiaries. See Jeffrey N. Gordon & Curtis J. Milhaupt, Author Calculations Based on Publicly Available Information (on file with authors).

⁴⁶ See *What We Do*, STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION COMMISSION OF THE STATE COUNCIL (July 17, 2018), http://en.sasac.gov.cn/2018/07/17/c_7.htm [<https://perma.cc/4CPR-NRQ7>].

⁴⁷ *Zhonghua Renmin Gonghe Guo Qiye Gouyou Zichan Fa* (中华人民共和国企业国有资产法) [State-owned Enterprise Asset Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May 1, 2009). The SOE Asset Law was enacted for the purpose of "consolidating and developing the state-owned economy, strengthening the protection of state-owned assets, giving play to the leading role of the state-owned economy in the national economy, and promoting the development of the socialist market economy." *Id.* at art. 1.

shareholder.⁴⁸ But the law contains some provisions that alter the ordinary rights of a shareholder under standard corporate law principles. For example, Article 34 requires that SASAC obtain government approval before exercising its rights as a shareholder with respect to the "merger, splitting, dissolution or petition for bankruptcy of an important" SOE under its supervision.⁴⁹ Article 22 gives SASAC the power to appoint and remove senior managers in the SOEs under its supervision.⁵⁰

The corporate ownership structure just outlined, however, conveys an incomplete picture of the governance mechanics in Chinese SOEs. Equally or more important are the mechanisms by which the SOE business groups are linked with institutions of the central government and the Chinese Communist Party. For example, a number of positions in government and party bodies, such as the National People's Congress and the National People's Political Consultative Conference, are reserved for leaders of the national SOEs, and senior managers of national SOEs sometimes simultaneously hold important positions in the party, the government, or industrial associations that perform governmental functions.⁵¹

Institutionalized party penetration of the corporate form mirrors the party's parallel governance structures vis-à-vis the organs of government. There are two personnel systems in all national Chinese SOEs: the regular corporate management system and the party system.⁵² In the corporate management system, positions are similar to those found in firms elsewhere in the world, including chief executive officer ("CEO"), Vice-CEO, chief accountant, and independent board members.⁵³ Senior management appointments are made in a highly institutionalized arrangement between SASAC and the

⁴⁸ *See id.* at arts. 11–14.

⁴⁹ *See id.* at art. 34.

⁵⁰ *See id.* at art. 22.

⁵¹ *See* Lin & Milhaupt, *supra* note 34, at 727–28.

⁵² *Id.* at 737.

⁵³ *Id.*

party.⁵⁴ While appointments power formally resides with SASAC, senior appointments are made with input from various party organs and ministries regulating relevant business operations and are subject to approval by the State Council.⁵⁵ The leadership team in the parallel party system includes the secretary of the party committee, several deputy secretaries, and a secretary of an anti-corruption office called the Discipline Inspection Commission.⁵⁶ Overlaps between the two systems are rather uniform, such that a corporate manager of a given rank typically holds a position of equivalent rank in the party system.⁵⁷ The articles of association of the SOEs, for example, require the chairman of the board to concurrently serve as the secretary of the company's party committee.

The presence of the party throughout the SOE system is concretely manifest in party committees, established within SASAC and, pursuant to Chinese Company Law, within each SOE group member corporation.⁵⁸ These committees play some corporate roles, such as performing supervisory and personnel functions. But they also have political functions, such as building allegiance to party principles and disseminating campaigns announced by senior government leaders. In recent years, high-level government and party organs have issued policies seeking to reinforce the party's leadership in SOEs, and the principle of party leadership in SOEs has recently been enshrined in the Constitution of the

⁵⁴ *Id.* at 737–38.

⁵⁵ *Id.* at 738.

⁵⁶ *Id.* at 737.

⁵⁷ *Id.*

⁵⁸ *Zhonghua Gonghe Guo Gongsì Fa* (中华人民共和国公司法) [Company Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, revised Dec. 28, 2013, effective Mar. 1, 2014), art. 19.

Chinese Communist Party.⁵⁹ Guidelines issued by SASAC and the Ministry of Finance provide a template for SOEs to amend their articles of association so as to weave the principle of party leadership into their constitutive documents.⁶⁰ For companies that have adopted the provisions in the template, the party committee is now effectively superior to the board of directors with respect to material business decisions and senior management appointments.⁶¹

Thus, the party, working through SASAC and company-level party committees, is able to bypass or influence boards of directors in the appointment, removal, remuneration, and supervision of senior managers, and with respect to major business decisions. However, given that senior corporate managers simultaneously hold senior party positions within the firm, direct conflict between decisions of the party and the board is unlikely. Rather, as a consequence of the party's shadow corporate governance rights, the board's decisions are likely to anticipate and dovetail with the interests of the party.

⁵⁹ See, e.g., CONST. OF THE COMMUNIST PARTY OF CHINA, Oct. 24, 2017, art. 33 ("The leading . . . Party committees of state-owned enterprises shall play a leadership role, set the right direction . . . and discuss and *decide* on major issues of their enterprise in accordance with regulations.") (emphasis added); Cent. Comm. of the Communist Party of China & the State Council, *Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening State-Owned Enterprise Reform*, LEXIS CHINA, Aug. 24, 2015, at I.2. ("Insist on the leadership of the State-owned enterprises by the party[.]").

⁶⁰ Angela Huyue Zhang & Zhuang Liu, Ownership and Political Control: Evidence from Charter Amendments 7–8 (July 12, 2018) (unpublished manuscript) (on file with authors).

⁶¹ See Houze Song, *State-Owned Enterprise Reforms: Untangling Ownership, Control, and Corporate Governance*, MACROPOLO.ORG (Dec. 4, 2017), <https://macropolo.org/anaysis/state-owned-enterprise-reforms-untangling-ownership-control-corporate-governance/> [<https://perma.cc/6LB5-E6J8>] ("[D]ecision-makers now favor putting the Party committee atop the board as the ultimate authority in an SOE.").

1. Policy Channeling

In firms with dispersed, diversified shareholders, shareholder wealth is affected by corporate decisions only through their impact on stock price. As a result, shareholders will agree about the corporation's objective function: it should act to increase the value of the corporation's stock. But this separation theorem does not hold in a variety of contexts, including where the government acts as the controlling shareholder of an SOE with public (non-state) minority shareholders. In this case, while shareholder value maximization is the goal of the non-state shareholders, the state may use the corporation (effectively or otherwise) to serve public policy objectives—a strategy one of us in previous work has called “policy channeling.”⁶² These objectives might include maintaining employment, pursuing industrial policy goals, or securing state control over the commanding heights of the economy. States may engage in policy channeling because it is perceived as a lower-cost substitute for regulation in weak institutional environments,⁶³ for ideological reasons, or because the SOE insulates government action and distributive decisions from public scrutiny and participation.

Policy channeling can of course be found outside China—it is one of the principal theoretical explanations for state ownership of business enterprise everywhere. But the governance characteristics of Chinese SOEs described above make them unusually powerful instruments of policy channeling. Thorough party penetration of the SOEs' corporate governance structures suggests that the goal of this massive network of firms is to maximize social rather than shareholder welfare. Or to put it differently, China's leaders

⁶² Milhaupt & Pargendler, *supra* note 35, at 1.

⁶³ See *id.* For an analysis of Chinese SOEs as an efficient response to high regulatory costs in a weak institutional environment, see generally Si Zeng, *State Ownership as a Substitute for Costly Regulation: A Law and Economic Analysis of State-Owned Enterprises in China* (Feb. 14, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916985 [<https://perma.cc/8BV3-VXMT>].

view the SOEs as a means of maximizing welfare at the *country*, rather than the corporate, level.

2. Blurred SOE-POE Dichotomy

The impact of China's political economy on corporate governance and objectives extends well beyond SOEs, rendering distinctions among firms based on ownership misleading.⁶⁴ The boundary between public and private enterprise has long been blurred in China, a country with a tradition of state intervention in the economy, inchoate notions of property rights, and a history of economic reform strategies relying heavily on mixed (state and private) ownership of the means of production.⁶⁵ State-generated rents are distributed not only to SOEs, but also to POEs perceived to be furthering state objectives. The human agents managing SOEs and POEs in China respond in similar fashion to the institutional environment: fostering close personal ties to government and party organs, seeking state largesse, and remaining in the good graces of political leaders are important to the success of all firms in China. One indication of the gravitational pull of the party-state in the corporate realm is widespread membership in government and party organs by the founders of large POEs, in the same way that high-level SOE executives are affiliated with these organs.⁶⁶ Thus, functionally, SOEs and large POEs "share many similarities in the areas commonly thought to distinguish state-owned firms from privately owned firms: market access, receipt of state subsidies, proximity to state power, and execution of the

⁶⁴ See Milhaupt & Zheng, *supra* note 37, at 669.

⁶⁵ See *id.* at 671.

⁶⁶ See *id.* at 684 (finding that ninety-five out of one hundred founders or chief executives of the largest POEs in China are, or formerly were, members of party and government organs; same for eight of the top ten largest Chinese internet-based firms). Access to the finance necessary to accomplish cross-border M&A is strongly influenced by political connections of the POE principals. See Denis Schweizer, Thomas Walker & Aoran Zhang., *Cross-Border Acquisitions by Chinese Enterprises: The Benefits and Disadvantages of Political Connections*, J. CORP. FIN. (forthcoming 2019).

government's policy objectives."⁶⁷ The identity of a Chinese firm's equity owners thus provides relatively little information about the degree of autonomy the firm enjoys from the state.

Nevertheless, as Chinese cross-border M&A activity has ratcheted up, the composition of Chinese acquirers has shifted from SOEs to POEs.⁶⁸ SOE acquisitions attract heightened scrutiny under existing regulatory regimes. For POEs, the government connections and support are not as obvious and thus POE transactions are less likely to be challenged. Schweizer et al. report a pronouncement to this effect by a member of the Chinese People's Political Consultative Conference:

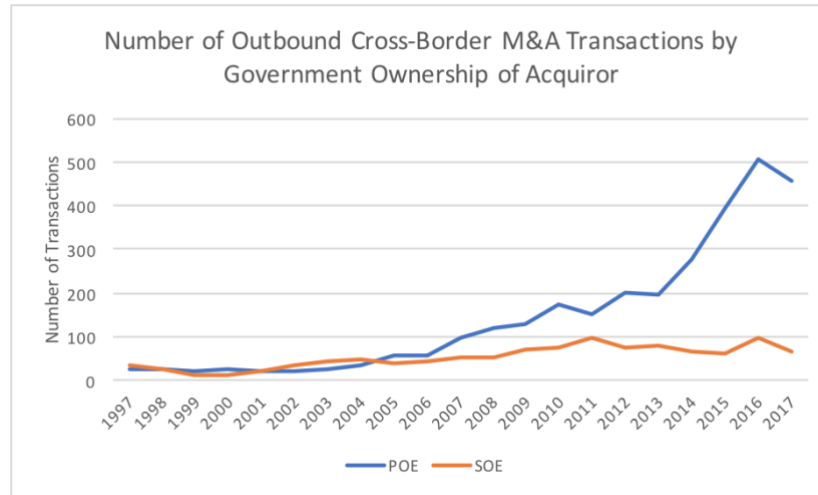
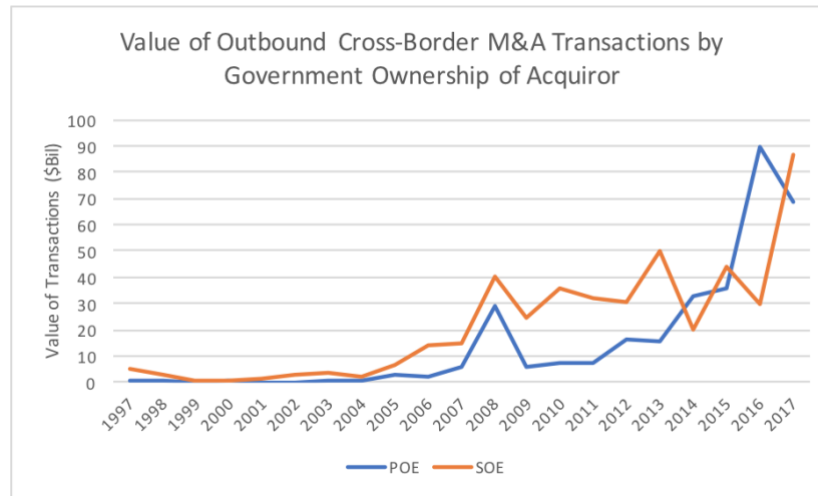
Given the fact that SOEs often experience setbacks when acquiring foreign companies in advanced economies, POEs are encouraged to acquire the high technology for the growth of China's economy. Because POEs rarely have Chinese government background, they can avoid the scrutiny from foreign governments targeting Chinese SOEs. The government should provide financing to POEs for their cross-border deals and even state-owned companies could provide funding in the background to POEs.⁶⁹

The shift from SOEs to POEs is reflected in the data. Figure 6 shows that the number of POE cross-border acquisitions now far outstrips SOE acquisitions. Figure 7 shows that, by value, POE acquisitions have become increasingly important but that SOEs undertake significant acquisitions as well.

⁶⁷ Milhaupt & Zheng, *supra* note 37, at 668.

⁶⁸ See *infra* Figure 6.

⁶⁹ Schweizer et al., *supra* note 66, at 2 (quoting *Zhang Hongwei (CPPCC) Suggests to Diversify the Methods of Overseas Investment on Energy*, SINA (Mar. 8, 2010), <http://news.sina.com.cn/c/2010-03-08/120919815889.shtml> (in Chinese) [<https://perma.cc/75QD-CJ9P>]).

Figure 6⁷⁰**Figure 7**⁷¹

⁷⁰ Deals, THOMSON REUTERS, <https://developers.thomsonreuters.com/content/deals-mergers-acquisitions-and-new-issues> [https://perma.cc/R924-L4Z5] (last visited Sept. 5, 2018).

⁷¹ *Id.*

3. Summary

Large Chinese corporations have a number of highly distinctive traits resulting from China's political and economic systems. This Article highlights these traits not to pass judgment on Chinese economic governance structures, but to underscore that the multilateral trade and investment regimes that took shape in the post-war period simply do not contemplate this type of actor.⁷² It is thus not surprising that the emergence of Chinese firms as major participants in the global economy has generated anxiety in the countries where these firms are active. To quote from a prior work:

Suspicious about foreign investments by Chinese firms, regardless of ownership, are likely to remain as long as the state retains equity interests in ostensibly private enterprises; the government routinely provides subsidies and privileged market access to state-linked firms; and it is common practice for senior executives at major firms, SOE or POE, to be affiliated with the party-state in various capacities. In short, suspicions about foreign investments by Chinese firms will linger as long as the institutional foundations of Chinese state capitalism remain intact.⁷³

B. Illustration: Made in China 2025

Made in China 2025 ("MIC 2025"), issued by the State Council in May 2015, is the Chinese government's policy response to challenges facing the country's domestic manufacturing industry.⁷⁴ While China's manufacturing

⁷² See generally Mark Wu, *The WTO and China's Unique Economic Structure*, in REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM 313 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2016).

⁷³ Milhaupt & Zheng, *supra* note 37, at 707.

⁷⁴ The first official appearance of "Made in China 2025" was the 2015 government report by Prime Minister Li Keqiang. Li Keqiang, *Zhengfu Gongzuo Baogao* (政府工作报告) [*Government Work Report*], CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 16, 2015), http://www.gov.cn/guowuyuan/2015-03/16/content_2835101.htm [<https://perma.cc/R8AH-QWWR>].

industry is huge, it has not produced a large number of indigenously developed, globally competitive products and still depends heavily on core technologies developed by foreign companies. MIC 2025 identifies ten priority sectors accounting for forty percent of China's value-added manufacturing, including next-generation information technology, aviation, new materials, and biosciences.⁷⁵ It sets domestic market share targets for various products, such as new energy vehicles, mobile phone chips, and wide-body aircraft, as well as targets for innovation, quality, digitization, and green development.⁷⁶ Among the policy tools actually or allegedly being used by the Chinese central and local governments to implement MIC 2025 are forced technology transfers in exchange for market access, government-backed investment funds, and acquisition of foreign technology through outbound investment.⁷⁷

Evidence of state-led investment tied to MIC 2025 priorities is most evident in the information technology industry, where outbound Chinese investments in the semiconductor industry skyrocketed in 2014 and 2015 after the Chinese central government promulgated guidelines on

⁷⁵ See U.S. CHAMBER OF COMMERCE, *MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS* 6, 10 (2017), https://www.uschamber.com/sites/default/files/final_made_in_china_2025_report_full.pdf [<https://perma.cc/4VJC-W23G>].

⁷⁶ See *id.* at 65–80; see also *id.* at 6 (noting that MIC 2025 “appears to provide preferential access to capital to domestic companies in order to promote their indigenous research and development capabilities, support their ability to acquire technology from abroad, and enhance their overall competitiveness . . . MIC 2025 constitutes a broader strategy to use state resources to alter and create comparative advantage in these sectors on a global scale.”).

⁷⁷ See EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA, *CHINA MANUFACTURING 2025: PUTTING INDUSTRIAL POLICY AHEAD OF MARKET FORCES* 15–16 (2017), http://docs.dpaq.de/12007-european_chamber_cm2025-en.pdf [<https://perma.cc/2PG2-WKR9>].

promotion of the national integrated circuit industry.⁷⁸ The Rhodium Group, a private firm that gathers data on Chinese investment in the United States, concluded that semiconductors are “the clearest example yet of the nexus between strategic high-tech policy and outbound investment in today’s China.”⁷⁹

As the semi-conductor example suggests, given the political economy context in which Chinese firms operate, MIC 2025 is more than a simple statement of government policy. It is a roadmap for Chinese firms in their pursuit of profitable investments. In the words of a European Union Chamber of Commerce in China report,

[T]he priorities and targets that the [MIC 2025] outlines will have sent a strong message to provincial and local governments, SOEs and private Chinese companies regarding the central government’s priorities. This will have given them a clear idea of where subsidies, other forms of support, and therefore near-term opportunities for profit, can be expected to flow.⁸⁰

The report notes a surge in Chinese investment into European firms in the wake of MIC 2025’s publication, quoting a State Council directive that “SOEs should be encouraged to carry out acquisitions and mergers with a focus on developing strategies and a goal for attaining key technologies and core resources.”⁸¹ The report asks whether MIC 2025 “amount[s] to a shopping list of technologies that the country has not been able to develop at home” and concludes,

⁷⁸ See THILO HANEMANN & DANIEL H. ROSEN, RHODIUM GRP., CHINESE INVESTMENT IN THE UNITED STATES: RECENT TRENDS AND THE POLICY AGENDA 77–78 (2016) https://rhg.com/wp-content/uploads/2016/12/Chinese_Investment_in_the_United_States_Rhodium.pdf [https://perma.cc/MA35-J2AQ].

⁷⁹ *Id.* at 81.

⁸⁰ EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA, *supra* note 77, at 13.

⁸¹ *Id.* at 19.

While it is perfectly standard for private business to make strategic acquisitions, their decisions should ultimately be informed by the profit motive. Investments made by firms in response to their government's industrial policies or strategic interests may be completely at odds with the interests of the country into which the investment is made.⁸²

A United States Chamber of Commerce report expresses similar sentiments, citing global concerns that outbound Chinese investments tied to industrial policy result in the acquisition of foreign technology.⁸³

The European Union and United States Chamber of Commerce reports might be discounted as scaremongering by China's global competitors. Some of the reports' language is reminiscent of fears expressed about Japanese industrial policy in the 1980s, which turned out to be unfounded. But several considerations suggest that the concerns raised by these bodies should be taken seriously. First, at a conceptual level, it is not unreasonable to think that cross-border M&A could be a vehicle for advancing the power of a state actor, particularly an authoritarian regime with lofty global ambitions. Second, government policy does, in fact, influence outbound deal flow and acquisition targets. A steep decline in Chinese foreign direct investment ("FDI") into the United States in 2017 was caused by Beijing's clampdown on capital outflows in order to stem a decline in foreign exchange reserves as well as its limiting of overseas deal-making by large private firms, in an effort to reduce leverage in the financial sector.⁸⁴ Third, Chinese press reports indicate that most of the cross-border deals are not profitable for the companies that enter into them,⁸⁵ suggesting that their

⁸² *Id.*

⁸³ U.S. CHAMBER OF COMMERCE, *supra* note 75, at 23–24.

⁸⁴ See Hanemann & Rosen, *supra* note 24.

⁸⁵ Schweizer et al., *supra* note 66, at 3 (citing *The Cross-Border M&A of Chinese Companies Have Been Experiencing Exponential Growth, but Only 13% of the Deals are Profitable*, SINA FINANCE (Oct. 8, 2016), <http://finance.sina.com.cn/roll/2016-10-08/doc-ifxwrhpm2611573.shtml> [<https://perma.cc/G53T-EYXW>]).

impetus comes from government direction with the implicit promise of government financial support. Fourth, independent analysts echo the concerns voiced in the European Union and United States Chamber of Commerce reports.⁸⁶ Fifth, the reaction of governments around the world to Chinese outbound investment indicates that the concerns expressed in these reports are widely shared by lawmakers and policymakers, and that a backlash is building due to the perception that China is using a liberal regime for national gain. It is to the policy reactions around the world that this Article now turns.

IV. EXISTING REGIMES AND PROPOSALS FOR REFORM

A. The United States

Concerns that foreign investors may pose a threat to host countries are of course not new. The United States has had a regime to examine the national security implications of foreign direct investment since 1975. This regime, centered in CFIUS, was created by executive order providing that CFIUS would have the “primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.”⁸⁷ CFIUS is an interagency committee chaired by the Secretary of the Treasury and comprised of the heads of numerous executive branch agencies, including the

⁸⁶ See, e.g., *Evaluating CFIUS: Challenges Posed by a Changing Global Economy: Hearing Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 115th Cong. 2–6 (2018) (statement of Scott Kennedy, Center for Strategic and International Studies); *id.* (statement of Derek Scissors, Resident Scholar, American Enterprise Institute).

⁸⁷ Exec. Order No. 11,858 § 1(b), 40 Fed. Reg. 20,263 (May 7, 1975).

Departments of State, Commerce, Justice, Defense, and Homeland Security.⁸⁸

In 1988, amidst concerns over Japanese acquisitions of United States firms, Congress approved the Exon-Florio amendment to the Defense Production Act, granting the president authority to block mergers and acquisitions that threaten national security.⁸⁹ The Exon-Florio amendment provides a statutory basis for the national security screening process undertaken by CFIUS. By executive order, President Reagan delegated his authority to administer the Exon-Florio provision to CFIUS. As a result,

CFIUS was transformed from an administrative body with limited authority to review and analyze data on foreign investment to an important component of U.S. foreign investment policy with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be suspended or blocked.⁹⁰

Until the passage of the Foreign Investment Risk Review Modernization Act ("FIRRMA") in August 2018, discussed *infra*, the CFIUS regime was governed by the Foreign Investment and National Security Act of 2007 ("FINSa"), implemented by executive order in 2008.⁹¹ FINSa codified CFIUS itself,⁹² along with various elements of the CFIUS process that had emerged since the Exon-Florio amendment, and strengthened CFIUS in various ways, such as broadening

⁸⁸ *Composition of CFIUS*, U.S. DEPT OF THE TREASURY, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> [<https://perma.cc/AL6A-PZFJ>] (last updated Dec. 1, 2010).

⁸⁹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425–26 (1988).

⁹⁰ JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 6 (2018), <https://crsreports.congress.gov/product/pdf/RL/RL33388> [<https://perma.cc/465G-KLD8>].

⁹¹ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 246, 252 (codified as amended at 50 U.S.C. § 4565 (2012)); Exec. Order No. 13,456, 73 Fed. Reg. 4,677 (Jan. 25, 2008).

⁹² Foreign Investment and National Security Act of 2007 § 3.

the definition of national security to include threats to homeland security and “critical infrastructure.”⁹³ By law, CFIUS is required to review all “covered” foreign investment transactions.⁹⁴ A covered transaction is defined as a “merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”⁹⁵ CFIUS must also review any transaction that could result in control by a “foreign government-controlled” entity.⁹⁶

Under FINSA, the CFIUS review process was comprised of three stages. The first stage was a thirty-day national security review to determine whether the investment threatened to impair national security, critical infrastructure, homeland security, or was state-backed or controlled.⁹⁷ If no risks were found or such risks were resolved, no further action was necessary and the transaction was granted a safe harbor.⁹⁸ If risks were not resolved or if a foreign state controlled the acquirer, review moved to the second stage, a national security investigation of up to forty-five days.⁹⁹ During this period, CFIUS could impose conditions, develop interim protections, or negotiate mitigation agreements.¹⁰⁰ If outstanding concerns were not resolved, CFIUS could send a negative recommendation to the President. The President had fifteen days to make a determination.¹⁰¹ At any time during

⁹³ *Id.* § 2(a)(5).

⁹⁴ *Id.* § 2(b)(1)(A).

⁹⁵ *Id.* § 2(a)(3). Purchases by a foreign person of ten percent or less of the voting securities of a United States business solely for purposes of passive investment are not “covered” transactions. Treas. Reg. § 800.302(b) (2008).

⁹⁶ Foreign Investment and National Security Act of 2007 § 2(b)(1)(B); *see also id.* § (2)(a)(4).

⁹⁷ 50 U.S.C. § 4565(b)(1) (2012).

⁹⁸ *See, e.g.,* LATHAM & WATKINS, OVERVIEW OF THE CFIUS PROCESS (2017), <https://www.lw.com/thoughtLeadership/overview-CFIUS-process>, [<https://perma.cc/94GT-ZSGR>]; MARIO MANCUSO, A DEALMAKER’S GUIDE TO CFIUS (2017).

⁹⁹ 50 U.S.C. § 4565(b)(2)(C) (2012).

¹⁰⁰ JACKSON, *supra* note 90, at 13.

¹⁰¹ 50 U.S.C. § 4565(d)(2) (2012).

this process, parties could withdraw and, if desired, re-file their notice. Prior to these formal stages, CFIUS often engaged in an informal pre-filing review of proposed transactions to identify potential issues.¹⁰² Informal review could benefit foreign acquirers, for example, by allowing them to avoid negative publicity stemming from having a proposed transaction blocked.¹⁰³

Historically, very few transactions have been blocked under the CFIUS process,¹⁰⁴ but the pace of blocked or abandoned deals appears to be on the rise. Only two transactions were blocked from the inception of CFIUS through 2012.¹⁰⁵ One reason for the low number of negative Presidential determinations is that foreign acquirers may withdraw their filing—particularly if the process moves from the first (review) stage to the second (investigatory) stage—in order to avoid potential negative consequences from having a transaction blocked.¹⁰⁶ However, three transactions involving Chinese acquirers have been blocked in the past two years, and one was abandoned.¹⁰⁷ The proposed acquisition of

¹⁰² JACKSON, *supra* note 90, at 11.

¹⁰³ *Id.* at 11–12.

¹⁰⁴ Nevertheless, FINSA's formalization of the review process has imposed costs on shareholders of potential United States targets of cross-border M&A. See David Godsell, Ugur Lel & Darius Miller, *Financial Protectionism, M&A Activity, and Shareholder Wealth* (SMU Cox School of Business Research Paper No. 18-23, 2019), <https://ssrn.com/abstract=3147404> [<https://perma.cc/5SW7-FDWM>] (finding significant decline in foreign takeovers of firms more likely to attract CFIUS scrutiny and negative shareholder returns of 4.2% of such firms, relative to a control group, upon adoption of FINSA).

¹⁰⁵ See MANCUSO, *supra* note 98, at 4, 54.

¹⁰⁶ *Id.* at 21–22 (reporting that in the 2008–15 period, four percent of transactions notified to CFIUS were withdrawn during the initial thirty-day review period and six percent were withdrawn during an investigation).

¹⁰⁷ The blocked transactions are: Fujian Grand Chip Investment Fund's proposed acquisition of Axtron, a German semiconductor firm with assets in the United States; Lattice Semiconductor's acquisition by Canyon Bridge Capital Partners, a Silicon Valley-based venture capital firm with funding from the Chinese government; and Ant Financial's proposed acquisition of MoneyGram. Huawei abandoned plans to partner with AT&T to sell smartphones in the United States.

Qualcomm, a leading United States developer of 5G technology, by Broadcom, a company in the process of transitioning from a Singapore domicile to Delaware, was blocked in 2018 on the grounds that “a weakening of Qualcomm’s position [as a result of its acquisition by a foreign buyer taking a “private equity-style” approach to reducing R&D in favor of short-term profitability] would leave an opening for China to expand its influence on the 5G standard-setting process.”¹⁰⁸ Given the level of concern in Washington about Chinese direct investment and that China was the home country of the acquirer in more CFIUS-covered transactions than any other country in the period from 2013 to 2015 (the most recent years for which data are available),¹⁰⁹ the rarity of negative presidential determinations may be a thing of the past. Alternatively, the negative climate could have a chilling effect on Chinese investment proposals so that outright rejections may remain infrequent.

Over time, a consensus emerged in the United States government and policy communities that the CFIUS process

¹⁰⁸ Letter from Aimen N. Mir, Deputy Assistant Sec’y, Inv. Sec., to Mark Plotkin, Covington & Burling L.L.P., & Theodore Kassinger, O’Melveny & Myers L.L.P. 2–3 (Mar. 5, 2018), https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm [<https://perma.cc/H6QM-QDHT>].

¹⁰⁹ COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS REPORT PERIOD CY 2015, at 16–17 (2017), [https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20\(report%20period%20CY%202015\).pdf](https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20(report%20period%20CY%202015).pdf) [<https://perma.cc/K975-BHXW>]. The unclassified version of the annual report is released with a two-year lag.

was outdated and inadequate under the FINSA regime.¹¹⁰ Chinese investments were the catalyst for these concerns, both because of the rapid increase of such investments into the United States and suspicions that some Chinese investments had been structured to circumvent CFIUS review. This situation not only posed potential threats to national security, but it also introduced a new level of regulatory uncertainty for deal planners. A January 2018 law firm memo to clients summed up these sentiments as follows:

The CFIUS process is under significant pressure. The Committee's caseload is larger than it can reasonably handle with existing resources; the government doubts its own ability to monitor rapid technological changes that could present threats to national security; and the fastest growing source of technology investment — China — is becoming the United States' strongest technology competitor but lacks the shared security alliances enjoyed by other countries. In that setting, businesses' ability to assess, accommodate and respond to CFIUS risk has become even more tenuous than in the past.¹¹¹

¹¹⁰ One analysis by a prominent think tank concluded that "[t]he CFIUS process is working" but warned that "emerging trends bear close monitoring as they could—over time—reduce the effectiveness of the [current CFIUS] system. Specifically, these include the increasing complexity of transactions, the growing role of foreign government-owned or controlled entities in mergers and acquisitions, [and] the growing number of cases filed with CFIUS[.]" ANDREW HUNTER & JOHN SCHAUS, CTR. FOR STRATEGIC & INT'L STUDIES, CSIS REVIEW OF THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 11–12 (2016), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/161207_Hunter_CFIUS_Web.pdf [<https://perma.cc/6L25-86B8>].

¹¹¹ *Trends and Updates in the CFIUS Space*, DAVIS POLK & WARDWELL LLP 5 (Jan. 16, 2018), https://www.davispolk.com/files/2018-01-16_trends_updates_in_the_cfius_space.pdf [<https://perma.cc/7XKS-NP65>].

In response to these concerns, FIRRMA was introduced in Congress in 2017 and enacted in August 2018.¹¹² The legislation, which will require detailed rulemaking by the Treasury Department in order to be fully operational, has several key features. First, it expands the scope of transactions CFIUS may consider to include non-passive but non-controlling investments in United States businesses involving sensitive personal data, critical infrastructure, or critical technology, as well as certain real estate transactions.¹¹³ Second, it changes the timeline for CFIUS review by adding fifteen days to the initial review period and permits the Secretary of the Treasury to add fifteen days at the back end of an investigation in “extraordinary circumstances.”¹¹⁴ Third, it creates a dual-track filing system: abbreviated notices of transactions that pose low national security risk, and mandatory filings for certain transactions in which foreign governments have a “substantial interest.”¹¹⁵ CFIUS is permitted to establish other categories of mandatory filings for acquisitions involving “critical technologies.”¹¹⁶ Fourth, and in the spirit of the proposal advanced in this Article, FIRRMA permits the Treasury Department to share information with foreign allied governments and requires CFIUS to establish a formal process for doing so.¹¹⁷ Proposals for more fundamental changes, such as allowing CFIUS to consider the broader economic effects of a proposed investment as part of its review process,¹¹⁸ or requiring

¹¹² Foreign Investment Risk Review Modernization Act of 2018, S. 2098, 115th Cong. (2017) (enacted); H.R. 4311, 115th Cong. (2017) (enacted); Subtitle A of Title XVII of Pub. L. 115-232 (Aug. 13, 2018). *See generally* E. Maddy Berg, Note, *A Tale of Two Statutes: Using IEEPA’s Accountability Safeguards to Inspire CFIUS Reform*, 118 COLUM. L. REV. 1763 (2018).

¹¹³ Foreign Investment Risk Review Modernization Act of 2018 § 1703.

¹¹⁴ *Id.* § 1709.

¹¹⁵ *See id.* § 1706.

¹¹⁶ *Id.* § 1703(a)(4)(B)(iii)(II). The Treasury Department has adopted a pilot program to review certain transactions involving foreign persons and critical technologies. *See* 31 C.F.R. § 801 (2018).

¹¹⁷ Foreign Investment Risk Review Modernization Act of 2018 § 1713.

¹¹⁸ *See* United States Foreign Investment Review Act of 2017, S. 1983, 115th Cong. (2017).

CFIUS to consider whether the home country of the acquirer offers reciprocity to foreign investors,¹¹⁹ were not enacted as part of FIRRMA.

B. The European Union and Member States

Currently, the European Union is in the midst of fashioning an E.U.-level process that would give the European Commission (the "Commission") the responsibility of vetting, on national security grounds, cross-border transactions of "Union interest," yet would leave the final decision to the member state that is geographically connected to the transaction.¹²⁰ This new regulation comes against the backdrop of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits restrictions on the movement of capital between member states and between member states and "third countries," except where necessary to achieve certain defined objectives, including public security.¹²¹ E.U.-level investment constraints have previously been addressed to competition concerns, with restrictions imposed only through exercise of the Commission's authority to review and block transactions on antitrust grounds.¹²²

This European Union initiative responds to calls for creation of a CFIUS-like process at the E.U.-level in light of growing concerns about Chinese investment—specifically, that China has gained access to key technologies in Europe

¹¹⁹ See True Reciprocity Investment Act of 2017, S. 1722, 115th Cong. (2017).

¹²⁰ Proust, *supra* note 16; *see also* European Commission Press Release, *supra* note 16.

¹²¹ See Consolidated Version of the Treaty on the Functioning of the European Union art. 63, Oct. 26, 2012, 2012 O.J. (C 326) 71 (allowing for free movement of capital); *id.* at art. 65 Oct. 26, 2012, 2012 O.J. (C 326) 72–73 (providing public policy and public security justification for restrictions on capital movements).

¹²² See, e.g., Commission Staff Working Document White Paper, *Towards More Effective EU Merger Control*, at 18–22, SWD (2014) 221 final (July 9, 2014), http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf [https://perma.cc/P7VM-2FEX].

while shielding its own companies from foreign takeovers through its own regulatory regime.¹²³ On September 13, 2017, the European Union set out a draft regulation proposing a framework for screening foreign investments on the grounds of “security or public order.”¹²⁴ Like FIRMA’s expansion of “covered” transactions to include non-passive but non-controlling acquisitions, the European Union proposal includes an encompassing definition of foreign direct investment, as deals involving a “foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur . . . including investments which enable effective participation in the management or control[.]”¹²⁵ The European Parliament, the European Council, and the Commission reached agreement on the proposed screening framework in November 2018¹²⁶ and anticipate approval of a final text in early 2019.

If adopted in its current form, the regulation would empower the Commission to undertake review of any foreign investment in an economic enterprise in a member state where it “considers that a foreign direct investment is likely to affect projects or programmes of [European] Union interest on grounds of security or public order.”¹²⁷ However, the proposed regulation provides that while a member state is required to take “utmost account” of the Commission’s opinion, it need only “provide an explanation to the

¹²³ See Gisela Grieger, *Foreign Direct Investment Screening: A Debate in Light of China-EU FDI Flows*, EUROPEAN PARLIAMENT 1, 4–5 (May 2017), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI\(2017\)603941_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017)603941_EN.pdf) [<https://perma.cc/9AK5-56Q4>]; David K. Lakhdhir & Anna L. Christie, *Paul Weiss Discusses Screening of Foreign Investments in EU*, CLS BLUE SKY BLOG (Oct. 6, 2017), <http://clsbluesky.law.columbia.edu/2017/10/06/paul-weiss-discusses-screening-of-foreign-investments-in-eu/> [<https://perma.cc/XQ3V-SQHM>].

¹²⁴ *Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union*, art. 1, COM (2017) 487 final (Sept. 13, 2017) [hereinafter *Proposal for Screening*].

¹²⁵ *Id.* at art. 2.

¹²⁶ See European Commission Press Release, *supra* note 16.

¹²⁷ *Proposal for Screening*, *supra* note 124, at art. 9.

Commission in case its opinion is not followed.”¹²⁸ The proposal would not require member states to adopt a screening mechanism for foreign investments; rather, it would create an enabling framework and a set of basic principles for member states that seek to establish such a mechanism. In addition, the proposal would create a cooperation mechanism whereby member states undertaking a review of a transaction would be required to notify the Commission and the other member states of such a review within five working days of its initiation.¹²⁹

Some individual European Union member states have already implemented their own national security screening mechanisms, among them Germany, France, Italy, and the United Kingdom.¹³⁰ These regimes vary in form and stringency.¹³¹ The French regime allows the government to block foreign takeovers of French companies in strategic industries.¹³² A 2014 decree expanded the list of sectors in which foreign investors must seek prior French government authorization to include energy, transportation, and telecom, among others, and extended the list of circumstances in which a transaction may be blocked.¹³³ Germany, which already permitted review of foreign takeovers for public order and security concerns, enhanced its regime in 2017.¹³⁴ Through the reform, Germany became the first European Union member state to specifically screen transactions that threaten critical infrastructure. The reform also increased notification

¹²⁸ *Id.*

¹²⁹ *Id.* at art. 8.

¹³⁰ See Gisela Grieger, *supra* note 123, at 6 tbl.1 (showing security-related screening procedures for FDI at various member states); Wehrlé & Pohl, *supra* note 13, annex 1 (describing screening practices for seventeen countries, including Austria, France, Germany, Italy, and the United Kingdom).

¹³¹ See Wehrlé & Pohl, *supra* note 13, annex 1. China also has a screening regime for foreign investment, featuring a “negative list” of off-limits sectors and provisions defining national security in extremely broad terms. *Id.*

¹³² Lakhdir & Christie, *supra* note 123.

¹³³ *Id.*

¹³⁴ *Id.*

requirements and extended review periods.¹³⁵ The United Kingdom's review process has historically been more limited, although national security has been invoked seven times to permit the government to intervene in foreign investments.¹³⁶ In March 2018, the United Kingdom government lowered the threshold for its review of mergers that raise national security concerns, broadening its review to include "dual use" military items, computer hardware, and quantum technology.¹³⁷ This action is the first step to emerge from a consultative process launched in October 2017, which had raised the possibility of a mandatory notification regime, under which any foreign investor in any one of several specified sectors would need to obtain United Kingdom government approval before a transaction would receive legal effect.¹³⁸

C. Evaluation

Enhancing the existing national regimes in the ways recently done in the United States and currently under consideration elsewhere is sound policy. On balance and subject to a variety of concerns ranging from lack of transparency to under-inclusiveness, the CFIUS process appears to have worked reasonably well in striking a balance between maintaining openness to foreign investment while screening out transactions that pose a risk to national security. Broadening the scope of CFIUS review, mandating review of certain transactions, and fostering information sharing with other governments are sensible ways to enhance the regime's functional efficacy.

However, these reforms do not adequately address the threats posed to the global cross-border M&A regime by a NSB. As the brief review in this Section demonstrates, the

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, ENTERPRISE ACT 2002: CHANGES TO THE TURNOVER AND SHARE OF SUPPLY TESTS FOR MERGERS 5, 13 (Jun. 2018) (UK).

¹³⁸ See DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, NATIONAL SECURITY AND INFRASTRUCTURE INVESTMENT REVIEW 7, 47 (Oct. 2017) (UK).

global response to concerns about the NSB has to date been national in scope, and the intensity and contours of the review processes vary significantly by country. The fact that many of the existing national regimes are currently being re-examined for possible enhancement suggests the weakness of the current approaches in the face of China's emergence as a distinctive type of acquisitive actor in global M&A. The pending European Union proposal, if adopted, would constitute the first multi-country, coordinated approach to national security screening. But as noted, it would not require the creation of a uniform screening process at the member-state level, and the Commission's opinions as to specific transactions would not be binding on member states.

Moreover, recent developments suggest inherent limitations in the use of national security screening mechanisms in response to concerns about the motives of Chinese acquirers. For example, the United States Securities and Exchange Commission ("SEC") voted in February of 2018 to block a proposed acquisition of the Chicago Stock Exchange by a Chinese acquirer, even though the deal had been cleared by CFIUS in 2016.¹³⁹ According to media reports, the SEC rejected the deal because it "left too many unanswered questions about who would ultimately have control over big decisions at the exchange."¹⁴⁰ The SEC indicated that it did not consider the national security implications of the deal or possible links between the buyer and the Chinese government, because the proposed structure itself was problematic.¹⁴¹ A second recent illustration of the limitations of the CFIUS process is the Chinese government's takeover of Anbang Insurance Group ("Anbang"). Anbang is a private company that engaged in a debt-fueled spate of overseas acquisitions in recent years, including the purchase of the

¹³⁹ Emily Flitter, *S.E.C. Blocks Chinese Takeover of Chicago Stock Exchange*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/business/china-deal-chicago-exchange-blocked.html> [https://perma.cc/W84J-X6E6].

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Waldorf Astoria Hotel in New York.¹⁴² The Chinese government, increasingly concerned about the amount of debt being amassed in the corporate sector, took over Anbang in February 2018.¹⁴³ The case raises an additional risk associated with overseas Chinese acquisitions: that a domestic target acquired by a private Chinese buyer in a transaction cleared by CFIUS or another country's national security screening regime may ultimately wind up under the control of the Chinese government.¹⁴⁴

Similarly, the rejection of the Broadcom-Qualcomm transaction,¹⁴⁵ shows the distortion that may emerge in the effort to package all concerns about the strategic objectives of state-guided foreign actors in a national security box. In stating CFIUS's national security reasons for rejecting the proposed acquisition (which had no direct link to China), the United States Treasury was essentially forced to declare a national industrial policy of developing a 5G telecommunications network and a national corporate governance policy of disfavoring a debt-financed acquisition relative to a stock-for-stock deal because of the possible effect on long-term investment.¹⁴⁶ In other words, China's shadow as an NSB loomed over a deal that involved no Chinese participants, causing a contortion of the CFIUS process. In most cases, the governmental concern will be that an acquisition by an NSB will be in service of a foreign state's objectives, which may be hard to decipher: Is the state pursuing mercantilist goals for competitive advancement of NSB-home country firms? Or is there a geo-strategic motive in play? These types of concerns are sources of instability in a cross-border regime that features NSBs.

¹⁴² Alexandra Stevenson, *After Anbang Takeover, China's Deal Money, Already Ebbing, Could Slow Further*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/business/china-deals-anbang-takeover.html> [<https://perma.cc/A3KY-8MPD>].

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See supra* note 108 and accompanying text.

¹⁴⁶ *See Mir, supra* note 108.

As noted in Part I, there is a contrast between international trade and cross-border M&A. International trade is governed, imperfectly to be sure, by a multilateral regime of standard setting and dispute resolution. By contrast, cross-border M&A—another important source of global economic activity, equally, if not more sensitive to national interests than international trade—is regulated almost exclusively at the national level.¹⁴⁷ A global economic regime facing a problem of global dimensions calls for a global solution. We are not naïve about the prospects for a global regime of reciprocity in cross-border M&A. As described below, the failure of the Thirteenth Directive on Takeovers in the European Union demonstrates the difficulty of crafting a truly comprehensive approach. Rather, in the Part that follows, we propose an alternative solution to the problem of the NSB. Building on an existing set of principles on investment policy agreed to by the G20 in 2016, we outline a limited, but coordinated approach to cross-border M&A that would mitigate concerns over asymmetric motives.

V. TOWARD A MULTILATERAL REGIME FOR CROSS-BORDER M&A

Part V begins by acknowledging the challenges in constructing any multilateral regime that would constrain states' efforts to use cross-border M&A for strategic purposes. A first-best solution would be a regime that was self-enforcing, in which the actors' internalized motives would constrain efforts by states to push for state-focused strategic objectives. One straightforward approach is an eligibility regime of "mutual contestability" under which a firm would be eligible to undertake an acquisition of a foreign target only if the would-be acquirer were itself susceptible to takeover by a bidder domiciled outside its home country. Over time, a regime of mutual contestability could be expected to eliminate

¹⁴⁷ Almost, but not entirely, exclusively because the E.U. Takeover Directive does attempt to coordinate basic principles for the regulation of M&A among member states. But the Takeover Directive is a pale reflection of a truly coordinated multilateral approach to cross-border M&A.

the problem of the NSB. Assuming relatively efficient capital markets, if an SOE (with a public float) or a government-influenced POE were to adopt a “national” strategy that does not maximize shareholder value, the firm would be susceptible to takeover by acquirers with purely financial motives because the stock price would reflect the cost to shareholders of pursuing the national-welfare-maximizing strategy. A financially motivated buyer could purchase the SOE or government-influenced POE at a discount, eliminate the costs incurred due to policy channeling,¹⁴⁸ and benefit from the increase in stock price. Over time, the capital and control markets would eliminate NSBs. A regime of mutual contestability would also eliminate complaints about the lack of reciprocity that exacerbate frictions over Chinese foreign investment.

The European Union’s experience with its Takeover Directive demonstrates the challenges that a mutual contestability proposal would face on a global level.¹⁴⁹ In 2001, in the effort to resolve a longstanding deadlock over adoption of the Takeover Directive, the European Commission convened a High Level Group of Company Law Experts.¹⁵⁰ Seeking to overcome national barriers to cross-border acquisitions in order to facilitate growth of a “single market” while assuring a “level playing field,” the expert group proposed a mandatory board neutrality rule and a “breakthrough” rule.¹⁵¹ The breakthrough rule would permit

¹⁴⁸ See *supra* Section III.A.1.

¹⁴⁹ See Directive 2004/25/EC of the European Parliament and of the Council of 21 Apr. 2004 on Takeover Bids, 2004 O.J. (L142) 12.

¹⁵⁰ Jeffrey N. Gordon, *The International Relations Wedge in the Corporate Convergence Debate*, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 161, 202 (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

¹⁵¹ See Paul Davies, Edmund-Philipp Schuster & Emilie van de Walle de Ghelcke, *The Takeover Directive as a Protectionist Tool?* 1–3 (European Corp. Governance Inst., Working Paper No. 141/2010, 2010); see also THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS, A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE 1, 112, 128 (Nov. 4, 2002), www.ecgi.org/publications/winter.htm [https://perma.cc/4Y8E-DQ9Z]; Gordon, *supra* note 150, at 203.

the holder of a majority or required supermajority (and in no event more than seventy-five percent) of a company's cash flow rights to "break-through" takeover impediments such as dual class common stock or super-majority voting requirements.¹⁵² The member states resisted these mutual contestability provisions on local efficiency grounds—the value of dual class common structures, common in Scandinavia, for example—as well as arguments that were more directly protectionist.¹⁵³ The further objection was that the Directive's provisions were under-inclusive: they did not attack impediments such as pyramidal structures and left limitations on member states' "golden shares" to resolution by the European Court of Justice.¹⁵⁴ The final Directive permitted states to choose whether to opt in to this (partial) mutual contestability regime and further permitted states and firms to resist bids from companies and jurisdictions that had opted against mutual contestability. It is, therefore, commonly regarded as not having advanced the cause of greater economic integration in the "single market" through cross-border M&A.¹⁵⁵

A mutual contestability regime is a heavy lift because it entails a general challenge to ownership and control structures that may have deep roots and even efficiency justifications. "Breakthrough" rules are particularly ineffective where the controller has a majority stock ownership position or exercises control through a complicated group structure, both of which are common features of state and private ownership of business enterprises in China. Thus, this Article proposes a governance structure within the firm and an administrative agent to examine and certify the

¹⁵² See Gordon, *supra* note 150, at 203–04.

¹⁵³ For a subtle critique from Scandinavia, see Erik Berglöf & Mike Burkart, *European Takeover Regulation*, 18 ECON. POL'Y 171 (2003).

¹⁵⁴ Gordon, *supra* note 150, at 204 n.80.

¹⁵⁵ See Wolfgang Drobetz & Peyman Momtaz, Corporate Governance Convergence in the European M&A Market (Jan. 16, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2642487> [<https://perma.cc/YY5F-JB8C>] (finding no increase in European Union cross-border M&A after adoption of the Takeover Directive and a decline in hostile bids).

private, non-state economic motives behind a proposed cross-border M&A. The proposed structure builds an enforcement mechanism using internal governance features rather than relying on self-enforcing capital market pressures. It is designed to supplement and complement, rather than to replace, national-level screening regimes.

The starting point for our proposal is a global commitment to *commercial or financial* motivations for outbound investments by firms subject to government ownership or influence as a means of contributing to the stability of the global M&A market. There is precedent for building a coordinated investment regime from this starting point. The Santiago Principles for Sovereign Wealth Funds (“Santiago Principles”) were adopted in 2008 in response to concerns—not unlike those relating to Chinese outbound investments currently—about the possibility that sovereign wealth fund (“SWF”) investments are motivated by non-commercial objectives.¹⁵⁶

The Santiago Principles are a nonbinding statement of generally accepted principles and practices that members of an “international working group” of SWFs have implemented or aspire to implement.¹⁵⁷ They emphasize the “core principle” that “investment decisions should aim to maximize risk-adjusted financial returns . . . based on economic and financial grounds.”¹⁵⁸ Further, they call for transparency in the source of funding and operational independence of the SWF from the government owner.¹⁵⁹ These principles—financially-oriented investment decisions, funding transparency, and independence from the government in its role as investor—should also comprise the core principles of acquisitions in a cross-border M&A regime.

¹⁵⁶ See INT’L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES “SANTIAGO PRINCIPLES” (Oct. 2008) [hereinafter SANTIAGO PRINCIPLES], https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf [<https://perma.cc/9273-KBNQ>].

¹⁵⁷ See *id.* at 4–5.

¹⁵⁸ *Id.* at 22.

¹⁵⁹ See *id.* at 4–5.

However, addressing concerns about national strategic motives in the SWF realm is considerably less complex than in the case of cross-border M&A. This is because SWF investments are *portfolio* investments that do not implicate changes in control of the target or the composition of its core governance organs. A parsimonious solution to the problem of asymmetric motives in SWF investments is readily available: the voting rights of equity acquired by a foreign-government-controlled portfolio investor could be suspended (or voted in proportion to the votes of non-SWF shareholders) until the shares are sold to a non-government-affiliated investor.¹⁶⁰ The Santiago Principles do not adopt this approach, instead emphasizing the importance of *ex ante* disclosure of whether and how SWFs plan to vote in order to "dispel concerns about potential noneconomic or nonfinancial objectives."¹⁶¹ Voting suspension is obviously an untenable proposition in an acquisition of control or of any significant stake by a buyer seeking to influence the target. *Ex ante* disclosure of financial motives is useful, but it is not credible as a signaling device because governments can (and often do) say one thing but do another. Thus, a commitment to financial investment motives is only a starting point, but one that could readily be added to the G20 Guiding Principles for Global Investment Policymaking, adopted in 2016 when China held the presidency of the G20.¹⁶² Borrowing from the Santiago Principles, the multilateral regime should contemplate the creation of a standing group of peer-monitoring and information-sharing to evaluate on-going compliance.

¹⁶⁰ See Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345 (2008).

¹⁶¹ SANTIAGO PRINCIPLES, *supra* note 156, at 23.

¹⁶² *G20 Guiding Principles*, *supra* note 19. These are non-binding principles whose objectives are to foster an open and transparent environment for investment, to promote "coherence in national and international investment policymaking," and to encourage sustainable development. *Id.* at 1. As such, a commitment to financially oriented investment, funding transparency, and independence from the government is highly consistent with the G20 Guiding Principles.

As an alternative to a G20 engagement, the cross-border eligibility regime could be fashioned under the auspices of OECD, an organization of thirty-five developed countries that also works with emerging economies like China. The OECD could organize a consultative process, the end point of which should be: first, articulating a commitment to own-firm financial, commercial objectives in outbound M&A, not at the behest of a government; second, crafting an “eligibility regime” to monitor adherence to this commitment for firms where government involvement raises difficult verification questions; and third, establishing a secretariat that would evaluate initial and continuing compliance with the eligibility regime. This set-up would not require governments to agree to forgo state ownership or policy channeling, but would rather allow firms that engage in cross-border M&A to opt into a regime designed to assure that outbound acquisitions adhere exclusively to own-firm financial, commercial objectives.

The eligibility regime would be triggered for any firm whose governance is subject to intervention by a political party or government, through (a) state ownership of the firm’s equity, (b) mandatory representation by members of a political party or government in the corporation’s governance organs such as its board of directors or other committees, or (c) a government-held golden share or equivalent veto rights over major corporate decisions.¹⁶³ Importantly, this eligibility regime would be a threshold set of requirements that must be met before a firm can make a cross-border acquisition. It is emphatically not a blanket prohibition against cross-border acquisitions by all SOEs. The eligibility criteria are designed to make it possible for an acquirer to make a credible commitment that its cross-border acquisition proposal is

¹⁶³ The secretariat would also have to be vested with a certain amount of discretion to trigger the eligibility regime where a firm does not meet any of the formal triggers but nonetheless appears susceptible to government influence in its cross-border M&A activity. Factors that might be considered in the exercise of this discretion could include the amount of government contracts and government-linked financing the firm receives and the backgrounds of its principal investors and top managers.

motivated by private commercial objectives rather than national strategic objectives.

A firm subject to the eligibility regime would be eligible to engage in cross-border M&A if it met the following requirements:

- (i) the company commits in its charter or other constitutive documents to undertake foreign acquisitions solely for own-firm financial or commercial objectives and not at the behest of any government;
- (ii) a significant portion, twenty-five percent, of the company's cash flow rights are available for purchase by foreign shareholders;
- (iii) the company's governance structure provides for independent directors comprising at least twenty-five percent of the board (but not fewer than two) who will be nominated by foreign shareholders;
- (iv) in advance of a public acquisition proposal, the independent directors are required under the acquirer's governance documents to prepare a report for subsequent public release that attests to the own-firm financial or commercial motivation and absence of government involvement in the acquisition decision; and
- (v) the company provides full disclosure of the sources of funding for the transaction before the transaction is final.

A few clarifications are in order. First, we envision a twenty-five percent free float requirement, with the free float available for purchase by foreign or domestic investors, as a weak form of mutual contestability. Foreign investors would not necessarily have to own twenty-five percent of the shares. Rather, the substantial free float would effectively serve as a signal of openness by the firm to investment by a significant block of shareholders not affiliated with the relevant government. Second, our proposal vests authority to nominate the independent directors with the foreign investors on the theory that (a) these investors are likely to be sophisticated institutional investors, such as BlackRock, and (b) the reputational and other interests of such investors will cause

them to be objective in their analysis of the commercial, financial aims of a proposed transaction rather than simply backing management and the foreign government in favor of the acquisition. Third, a firm's consideration of general licensure, tax, and other incentive-shaping schemes commonly employed by governments would not necessarily mean that an acquisition was at the government's "behest." The question would be the tightness of fit between the governmental scheme, the national strategic objective, and the specific action of the firm. Of course, in any particular case, the question may be a close one.

Enforcement of the regime would consist of two elements: first, a secretariat that can evaluate whether a would-be acquirer satisfies the eligibility criteria both as a general matter in its governance set-up and as to the specific transaction; and second, national legislation that would permit rejection of a local target's acquisition by an acquirer that does not meet the eligibility criteria.

These eligibility criteria are chosen to reinforce one another. The availability of a twenty-five percent foreign float provides an opening for institutional investors, who have a major stake in preserving a flexible cross-border M&A regime because of the value thereby created. These minority shareholders are empowered to nominate—effectively to select—at least two independent directors. The independent directors have special fiduciary duties to assess the firm's acquisition objectives and to verify both the commercial, financial motivation and the absence of government involvement in the particular acquisition decision. The acquirer is also separately obligated to disclose its funding sources for the acquisition, which should provide another occasion for critical scrutiny of a possible hidden governmental hand.

Compliance with the eligibility regime could be woven into national cross-border merger review schemes through local law. In addition to specific national security concerns, a country could: (i) debar an acquirer that fails the eligibility criteria, (ii) reject specific transactions that fail the verification scheme, or (iii) debar an acquirer that initially

satisfied or appeared to satisfy the eligibility regime with respect to a transaction where facts emerge that indicate otherwise. The eligibility regime gains its force from its consequences in the national review process.

VI. POTENTIAL OBJECTIONS

There are several possible objections to our proposal that merit response. The first is a general "welfarist" objection: what is the actual concern raised by a national strategic buyer? Target shareholders get higher prices and more investment flows into favored sectors, which should spur more innovation and risk-taking (much like the flood of venture capital finance). There is both a private and public answer. NSBs have a competitive advantage over conventional acquirers because of their access to lower-cost state finance and the implicit promise of state support if the acquisition is not successful in income statement terms. In other words, NSBs face soft budget constraints rather than hard budget constraints on acquisitive activity and deal pricing. NSB activity in the United States and the European Union could thus lead to distorted prices that adversely affect resource allocation in important sectors. Moreover, conventional acquirers could be deprived of access to competitively valuable technology or other resources, which would hamper their growth.

The more serious concerns are public. In critical sectors like technology, the goal of national policy is to create "agglomeration economies," that is, concentrations of expertise that build on one another for durable growth and innovation.¹⁶⁴ There is a geographical component, reflected in an "industrial district" like Silicon Valley,¹⁶⁵ but also a harder-to-specify human network that supplies energy and

¹⁶⁴ See generally Glaeser, *supra* note 11.

¹⁶⁵ See generally ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1996); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).

cross-fertilizing ingenuity. A critical feature of United States industrial policy is to foster such developments through private finance and open capital markets. The concern is that the NSB, applying a more directive industrial policy, could capture key inputs and channel them to NSB-home country advantage. More specifically, the concern is that Chinese NSBs could pursue such acquisitions on a scale that would shift the location of innovation, and thus durable economic growth, from the United States to China.¹⁶⁶

Whether these concerns are well-taken or merely scare-mongering, large-scale NSB acquisitions are perceived by other governments as threatening and as violations of the existing order in cross-border M&A. Target-home-country protectionism is grudgingly accepted as part of the M&A game, as the European Union experience demonstrates, but acquirer-home-state aid or direction is a violation; it is the difference between offense and defense in state action. Our view is that NSB activity has injected instability into the cross-border M&A regime. As the developing pattern of United States, United Kingdom, and European Union responses demonstrate, Chinese NSB acquisitions could trigger a reaction that may radically transform the cross-border M&A regime.

The vetoed Broadcom-Qualcomm matter demonstrates this possibility.¹⁶⁷ There was no threat to United States national security interests as conventionally understood. Indeed, except for its (temporary) Singaporean domicile, Broadcom was a thoroughly “American” firm, if we look to ownership by United States institutions and asset managers or the nationality of directors and senior managers. The Trump administration decided that Broadcom’s acquisition of

¹⁶⁶ See Enrico Moretti, *The Local and Aggregate Effect of Agglomeration on Innovation: Evidence from High Tech Clusters* (Working Paper, 2018), <https://eml.berkeley.edu/~moretti/clusters.pdf> [<https://perma.cc/WNL8-9U8U>] (finding that the demise of Kodak was followed by an 11.2% productivity decline of non-Kodak inventors, as measured by patent data, and that a scientist’s move to a larger technology cluster leads to notable increases in such productivity).

¹⁶⁷ See *supra* note 108 and accompanying text.

Qualcomm would undercut R&D investment in a telecommunications innovation, 5G, also pursued by Chinese rivals: "[A] shift to Chinese dominance in 5G would have substantial negative national security consequences for the United States."¹⁶⁸ The same objection could have been raised in the case of a United Kingdom or Swiss acquirer. Under the cover of Chinese NSB activity in the technology space, the United States government has opened the door to a national industrial policy screen for all cross-border M&A. Thus, it will be in the interests of all long-term players in the cross-border M&A market—all institutional investors, asset managers, sovereign wealth funds, and intermediaries—to work together to fashion a regime that will visibly constrain the pursuit of national strategic objectives by cross-country acquirers, especially China. This is what our eligibility regime aims to do.

What is novel in the eligibility regime is the use of a corporate governance strategy to solve a problem of international relations. Over the past forty years, private and governmental actors have increasingly looked to the board of directors to address difficult regulatory matters and have enhanced the demands for director independence and engagement. Perhaps the most successful uses have been in the control of accounting fraud and in the sale of the firm. The Sarbanes-Oxley regime—which includes audit committee oversight of outside accounting experts—helped ensure there was no significant accounting fraud among large financial players during the 2008 Financial Crisis, despite the enormous financial stress and the incentives for book-

¹⁶⁸ Mir, *supra* note 108.

cooking.¹⁶⁹ The special committee process allows the independent directors to marshal significant outside expertise to evaluate competing bids for the target and can produce the simulacrum of arm's length bargaining even in conflict cases. These examples lead us to the belief that an eligibility regime employing independent director investigation and certification can credibly evaluate an acquirer's motives for a transaction.

The final issue is whether China in particular would subject its firms to an "eligibility regime" for cross-border M&A. The proposal would not require China to give up its pattern of state ownership or state-guided industrial policy, but it would limit China's ability to use cross-border M&A as a mechanism for the pursuit of state strategy. The proposal would not require China to accede to an international agreement, but merely to acquiescence to the willingness of SOEs and POEs to submit to the eligibility regime, which would not affect the ownership and governance of those firms. Obviously, such a regime would not be the first choice of Chinese leadership. But to emphasize what we wrote earlier: without some type of intervention along the lines we suggest, the present cross-border M&A regime may unravel. President Xi has spoken forcefully in favor of openness in trade and investment, emphasizing that "[t]o grow its economy, China must have the courage to swim in the vast ocean of the global market."¹⁷⁰ Support for a multilateral regime that constrains mercantilist, national-strategic motivations for deals would

¹⁶⁹ There is some evidence that Lehman Brothers engaged in aggressive accounting to dress up quarterly reports to divert attention from its highly leveraged balance sheet. See Report of Examiner Anton R. Valukas at 962, *In re Lehman Brothers Holdings Inc., et al.*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010) (No. 08-13555), (discussing Repo 105 transactions). But significant accounting fraud in large banks and investment banks was not among the crisis causes explored in depth by, e.g., the Financial Crisis Inquiry Commission. See generally FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011), <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [perma.cc/E7EZ-LE6A].

¹⁷⁰ Xi, *supra* note 26.

demonstrate China's commitment to sound governance of the global market for cross-border M&A.

VII. CONCLUSION

This Article has highlighted a problem in the cross-border M&A regime, the national strategic buyer, whose motives for engaging in an acquisition violate an implicit assumption upon which this global market operates: that both selling shareholders and foreign acquirers act in pursuit of commercial and financial, rather than industrial policy, objectives. It has offered a proposed multilateral response to this problem drawn from corporate governance best practices that operationalizes principles of international investment already agreed to by the G20.

Reasonable people may disagree about the workability of our proposal, and we welcome a debate about alternative approaches. However, given the current depth and scope of concern over Chinese acquisitions in the United States, Europe, and elsewhere, it is prudent to consider ways in which the operation of this important global market can be adjusted to take account of China's emergence as a major player. We believe that a multilateral approach is preferable to continued tightening of national security screening regimes at the national level. At a minimum, we hope to have demonstrated that the current bilateral, transactional approach to inbound-investment screening on the basis of national security is not the only, or necessarily the best, way to alleviate concerns over the NSB.