

NATIONAL SECURITY UNBOUND: U.S. INVESTMENT SCREENING FROM INBOUND TO OUTBOUND

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ABSTRACT

This Article addresses the evolving concept of national security within the framework of U.S. foreign economic policy, with a specific focus on the introduction of the National Critical Capabilities Defense Act (NCCDA) of 2023. The problem it tackles is the increasing risk to national security posed by outbound investments. This risk is especially significant in light of technological advancements and economic interdependence, which have not been adequately addressed by traditional national security measures that are focused primarily on inbound investment screening. This issue is significant and novel because it represents a conceptual reorientation in the legal approach to national security, expanding its scope to include economic and technological dimensions that are crucial in the context of global geopolitical tensions, particularly with China. The inauguration of President Donald Trump in 2025 underscores the enduring significance of this transformation, as the new administration continues to prioritize national security in foreign economic policy. This Article demonstrates how the NCCDA and subsequent legislative and executive actions mark a strategic pivot in U.S. policy, aiming to prevent outbound investments from enhancing the technological and military capabilities of potential adversaries. This doctrinal evolution is shown to blur the lines between economic policy

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and national security, introducing a preventive approach to national security threats. The importance of this Article to national security scholarship lies in its detailed analysis of how the United States is redefining national security to include the safeguarding of economic prowess and technological edge. This redefinition has significant implications for the norms governing both domestic and international economic activities, challenging traditional tenets of globalization and necessitating a reassessment of international economic cooperation mechanisms. The Article argues that this approach sets a precedent that could reshape global norms and practices around investment and trade, underscoring the interdependence of economic strength and national security in contemporary geopolitical strategy.

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I. INTRODUCTION

The intersection of national security and international investment has become a paramount concern in global economic governance. Historically, nations have conducted national security reviews on foreign investments to safeguard sensitive industries and technologies.¹ Since 1995, almost thirty-seven countries have introduced a regulatory framework for the screening of inward investments on national security grounds.² This trend accelerated after the global economic crisis, peaking during the COVID-19 pandemic when surrounded by heightened concerns regarding potential foreign takeovers in sensitive sectors.³ The number of developing countries that have implemented outward foreign direct investment (FDI) promotion mechanisms has expanded

1. This Article centers on the conventional meaning of “national security,” which relates to a country’s defensive stance and protective reaction to external dangers. According to Robert Jackson’s work, “The Global Covenant: Human Conduct in a World of States,” national security denotes a state’s efforts to safeguard its territorial integrity, citizens, and sovereignty from outside threats. National security is a crucial component of a nation’s foreign and domestic policy. It entails measures taken by the government to ensure the country’s safety, stability, and prosperity. It is a broad concept that encompasses various elements, including military strength, economic development, political stability, and social harmony. National security has been defined and redefined over time, depending on the changing security environment and the state’s priorities. In essence, national security is an all-encompassing approach to protecting a nation’s interests and ensuring its survival. It is a fundamental responsibility of every government to safeguard its citizens and territory from potential harm, whether from external or internal sources. Achieving and maintaining national security requires a coordinated and multi-faceted approach that involves various agencies and stakeholders, including the military, intelligence community, law enforcement, and private sector entities. See ROBERT JACKSON, *THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES* 186 (2003).

2. U.N. Conf. on Trade & Dev (UNCTAD), *The Evolution of FDI Screening Mechanisms: Key Trends and Features*, 25 INV. POL’Y Monitor 1 (2023).

3. *Id.*

commensurately with their growing role as sources of investment.⁴ While several Asian countries, particularly capital-exporting nations such as China and India, were early adopters of these promotion schemes, a number of African countries also followed suit in the 2010s.⁵ With the initiation of the “Going Global” or “Go Out Policy,” which encouraged domestic companies to invest abroad, China has, since the late 1990s, progressively implemented norms and regulations governing investments overseas.⁶ On the other hand, in India, the Export-Import Bank and the Export Credit Guarantee Corporation of India provide financing solutions and advisory services, along with overseas investment insurance covering political risks for Indian investments abroad.⁷ In China, domestic enterprises are expressly prohibited from engaging in outward FDI endeavors that present or potentially pose a threat to national interests or security.⁸

India, recognizing the pivotal role of outward FDI as a significant driver of foreign trade and technology transfers, has established two distinct routes: the automatic route and the approval route.⁹ Investments targeting specific sectors or specific geographical locations necessitate approval from either the Reserve Bank of India or the Central Government.¹⁰ Countries such as the United States deem national security to encompass national defense, foreign intelligence and counterintelligence, international and internal security, and foreign relations.¹¹ Albeit initially perceived as protection against military attacks, the term “national security” is presently recognized to include non-military

4. See KARL P. SAUVANT & PADMA MALLAMPALLY, STRENGTHENING INVESTMENT PROMOTION REGIMES FOR FOREIGN DIRECT INVESTMENT IN THE LEAST DEVELOPED COUNTRIES 8 (2015), https://www.un.org/ohrlls/sites/www.un.org.ohrlls/files/strengthen_invest_promotion_regimes_fdi_ldcs.pdf.

5. UNCTAD, WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW CARBON ECONOMY 78 (2010).

6. UNCTAD, *supra* note 2. See also Juan Du & Xueliang Ji, *Assessing the Outward Foreign Investment Regulatory Regime in China: A Unified Outward Foreign Investment Law on the Horizon?*, 33 ASIA PAC. L. REV. 125 (2024).

7. See *Export-Import Bank of India (EXIM Bank)*, GOV'T OF INDIA: DEP'T OF FIN. SERVS. (Sept. 20, 2023), <https://financialservices.gov.in/beta/en/page/export-import-bank-india-exim-bank>. See also *Export Credit Guarantee Corporation of India*, EXP. EXPERTS GLOB., <https://expertsglobal.com/export-credit-guarantee-corporation-of-india/> (last visited Jan. 17, 2025).

8. UNCTAD, *Outward FDI Policies: Promotion and Facilitation – Regulation and Screening*, 27 INV. POL'Y Monitor 1, 14 (Feb. 29, 2024).

9. *Foreign Direct Investment*, MAKE IN INDIA, <https://www.makeinindia.com/policy/foreign-direct-investment> (last visited Jan. 17, 2025).

10. UNCTAD, *supra* note 8, at 14.

11. U.S. Dep't of Just., Just. Manual § 9-90.010 (2016).

aspects.¹² While the term national security has evolved, its fundamental rendition continues to be an umbrella term referring to collectivized efforts ensuring a nation that is safe, secure, and resilient against terrorism.¹³ The wide ambit attributed to the term henceforth includes systematic preparation against threats including countering acts of terrorism; combating espionage and economic espionage conducted for the benefit of any foreign government, foreign instrumentality, or foreign agent; enforcing export controls and sanctions; and disrupting cyber threats.¹⁴ However, in recent years, this issue has gained unprecedented significance.¹⁵ As globalization deepens and supply chains become increasingly interconnected, nations face the challenge of balancing economic openness with security imperatives.¹⁶ Consequently, there has been a surge in legislative and regulatory changes aimed at enhancing scrutiny of inbound and outbound investments, particularly those involving critical technologies and infrastructure.¹⁷ The significance of these measures is further underscored by the return of President Donald Trump to the White House in 2025. His administration has reaffirmed a commitment to strengthening outbound investment controls, signaling that national security considerations will continue to reshape U.S. economic policy. As legislative efforts gain momentum, outbound investment screening is poised to become a permanent fixture of U.S. national security doctrine.

Against the backdrop of escalating U.S.-China economic tensions, the United States is taking decisive measures to address national security concerns through legislative and executive actions, indicating the

12. Christian Fjäder, *The Nation-State, National Security and Resilience in the Age of Globalisation*, 2 RESILIENCE: INT'L POLICIES, PRACS, & DISCOURSE 114, 117 (2014).

13. *Id.*

14. *National Security Defined*, EPA (July 2, 2024), <https://www.epa.gov/national-security/national-security-defined>.

15. Peter Navarro, *Why Economic Security Is National Security*, THE WHITE HOUSE (Dec. 10, 2018), <https://trumpwhitehouse.archives.gov/articles/economic-security-national-security/>.

16. See Henry Farrell & Abraham Newman, *The New Interdependence Approach: Theoretical Development and Empirical Demonstration*, 23 REV. INT'L POL. ECON. 713, 714 (2016). See also Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793 (2020). Also, the increasing deployment of domestic trade barrier procedures in the U.S., EU, and China illustrates how economic governance is being recalibrated toward unilateral control, prioritizing national security over multilateralism. See Julien Chaisse & Xueji Su, *Normative Realignment in Domestic Trade Barriers Procedures: Driving Unilateralism in the EU, US, and China*, WORLD TRADE REV., (2025), at 1–26.

17. Laura Black et al., *The Road Ahead for Private Equity: Inbound & Outbound Investment Regulatory Risks: CFIUS & FDI*, AKIN GUMP (Mar. 12, 2024), <https://www.akingump.com/en/insights/articles/the-road-ahead-for-private-equity-reflections-and-predictions-Inbound-outbound-investment-CFIUS-FDI>.

urgency of regulating outbound investments.¹⁸ Key developments, such as the passage of the Consolidated Appropriations Act of 2023 and the reintroduction of a newly-expanded National Critical Capabilities Defense Act (NCCDA), underscore the growing importance of scrutiny of outbound investment in safeguarding the United States' essential technological sectors, infrastructure, and strategic assets.¹⁹ On August 9, 2023, President Joe Biden, via Executive Order 14105 (EO 14105), established an Outbound Investment Program (OIP) restricting certain outbound investments from the United States to China (including Hong Kong and Macau) within specific technology sectors pertinent to military, intelligence, surveillance, or cyber-enabled capabilities.²⁰ Codifying key aspects of EO 14105, the Preventing Adversaries from Developing Critical Capabilities Act would prohibit or require notification for certain activities of U.S. persons involving covered sectors in countries of concern.²¹

The 2023 NCCDA represents a significant step towards implementing a comprehensive evaluation mechanism for investments in countries that pose potential threats, particularly China.²² Building upon

18. Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELS. (Mar. 1, 2022), <https://www.cfr.org/backgrounders/contentious-us-china-trade-relationship>. See generally Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 179 (2018).

19. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2023); National Critical Capabilities Defense Act of 2023, H.R. 3136, 118th Cong. (2023). Upon the passage of the Consolidated Appropriations Act of 2023, the Department of the Treasury, in conjunction with the Department of Commerce and other federal agencies, was required to submit a report to Congress detailing a potential outbound investment review mechanism. The same was rendered on March 7, 2023, with the departments respectively releasing two reports to the Congress on the status of their work. The reports were anticipated to encompass a prospective outbound investment Executive Order. Consequently, the Executive Order was passed in August 2023. See also Andrew Duehren, *U.S. Prepares New Rules on Investment in China*, WALL ST. J. (Mar. 3, 2023), <https://www.wsj.com/articles/u-s-prepares-new-rules-on-investment-in-technology-abroad-a451e035>.

20. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 11, 2023); Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024).

21. CATHLEEN D. CIMINO-ISAACS & KAREN M. SUTTER, CONG. RSCH. SERV., IF12629, REGULATE U.S. OUTBOUND INVESTMENTS TO CHINA I (2024).

22. As of the time of writing, multiple versions of the NCCDA have been introduced in Congress, with the latest being in 2023. See H.R. 3136, 118th Cong. (2023). It should also be noted, however, that the original text of the NCCDA, after failing to gain traction when it was first introduced to Congress in 2021, was then incorporated into the trade title of the America COMPETES Act of 2022 bill. The America COMPETES Act of 2022 bill was introduced in the One-Hundred Seventeenth Congress, received widespread bipartisan support, and subsequently passed both the House and Senate. It was eventually signed into law under the name of "CHIPS

prior proposals within the Senate's U.S. Innovation and Competition Act (USICA) of 2021 and the Houses America Creating Opportunities for Manufacturing Pre-Eminence in Technology and Economic Strength (America COMPETES) Act, this legislative initiative aims to establish an interagency committee, the National Critical Capabilities Committee (NCCC).²³ Empowered by the NCCDA, the NCCC would assess and potentially limit the outbound financial activities that jeopardize national security.²⁴ This legislative framework grants the presidential authority to halt or disallow transactions deemed hazardous to essential U.S. capabilities, offering a means to scrutinize U.S. investments abroad, particularly in China.²⁵ With Trump's administration expected to expand restrictions on outbound investment, the scope of U.S. foreign economic policy is set to undergo another transformation, reinforcing unilateral approaches to economic security.

This Article submits that the crystallization of the turning point in U.S. law regarding outbound investment screening notably occurs with the iteration of the revised NCCDA of 2023. The discourse regarding an outbound investment review mechanism initially surfaced during the congressional deliberations concerning the Export Control Reform Act (ECRA) and the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018.²⁶ Experts consider FIRRMA to be the most significant expansion of the agency's powers since 1988.²⁷ FIRRMA

and Science Act" on August 9, 2022, although the NCCDA was removed from the final version of the legislation. The purpose of the CHIPS and Science Act was to bolster the United States' technological capabilities and competitiveness by providing funding for research and development, as well as establishing measures to protect national security interests. *See* America COMPETES Act of 2022, H.R. 4521, 117th Cong. (2021); United States Innovation and Competition Act of 2021, S. 1260, 117th Cong. (2021); CHIPS and Science Act, Pub. L. 117-167, 136 Stat. 1366 (2022).

23. *See* H.R. 3136, 118th Cong § 1002 (2023).

24. Scott M. Flicker et al., *Despite Setbacks, Strong Support Remains for "Outbound CFIUS" Legislation in the U.S.*, LEXOLOGY (July 28, 2022), <https://www.lexology.com/library/detail.aspx?g=aeaca96d-f161-4ae2-a27e-6d2781abe5ce>.

25. While the bill does not specifically define "national critical capabilities," a non-exhaustive list of what constitutes a "national critical capabilities sector," including semiconductor manufacturing, critical minerals, and artificial intelligence, is prescribed. Additionally, the NCCC is empowered to ban and legislate certain activities that are covered in the bill in national critical capabilities sectors. *See* H.R. 3136 §§ 1001(3), (5), 1003.

26. Emily Benson et al., *Transatlantic Approaches to Outbound Investment Screening*, CTR. FOR STRATEGIC INT'L STUD. (Jan. 17, 2023), <https://www.csis.org/analysis/transatlantic-approaches-outbound-investment-screening>.

27. *See, e.g.*, Jayden R. Barrington, *CFIUS Reform: Fear and FIRRMA, an Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 TRANSACTIONS: TENN. J. BUS. L. 77 (2019); Heath P. Tarbert, *Modernizing CFIUS*, 88 GEO. WASH. L. REV. 1477 (2020); Evan J. Zimmerman, *The*

authorizes the Committee on Foreign Investment in the United States (CFIUS) to review a broader range of transactions, including any “non-passive” investment in U.S. firms involved in critical technology or other sensitive sectors.²⁸ It also extends the review period, grants CFIUS greater authority to suspend transactions, increases funding and staffing for the agency, and mandates a separate process for reviewing the export of sensitive U.S. technologies.²⁹ The growing recognition of the risks posed by outbound investments in critical sectors—where U.S. investments abroad could inadvertently strengthen foreign competitors or adversaries—necessitated a new legislative framework.³⁰ This Article further conceptualizes that the emergence of outbound investment screening in U.S. law epitomizes a pattern of “national security unilateralism,”³¹ prioritizing protectionist measures over permissive policies to align investments with national security interests. As the U.S. government screens outbound investments, it safeguards critical technologies and infrastructure crucial for economic and national security. However, ramifications extend beyond national borders and impact

Foreign Risk Review Modernization Act: How CFIUS Became a Tech Office, 34 BERKELEY TECH. L.J. 1267 (2019).

28. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1703(a)(4), 132 Stat. 1636, 2177-2179 (2018) (codified as amended at 50 U.S.C. § 4565(a)(4)).

29. Jonathan Masters et al., *What Happens When Foreign Investment Becomes a Security Risk?*, COUNCIL ON FOREIGN RELS. (Jan. 3, 2023), <https://www.cfr.org/background/what-happens-when-foreign-investment-becomes-security-risk>.

30. Subsequent executive orders in 2023, focusing on specific technology sectors such as semiconductors, artificial intelligence, and quantum computing, illustrate the ongoing evolution of this policy area.

31. The concept of unilateralism in the domain of international economic law has been a long-standing feature of modern foreign trade. Experts in the field have identified four distinct types of unilateralism that have been employed by states, namely classical unilateralism, embedded unilateralism, sustainability unilateralism, and “national security unilateralism.” Julien Chaisse & Georgios Dimitropoulos, *Special Economic Zones in International Economic Law: Towards Unilateral Economic Law*, 24 J. INT’L ECON. L. 229 (2021). The Trump administration’s foreign trade policy ushered in a new era of trade wars. It was characterized by imposing a series of tariff increases on many of its WTO trade partners, flouting the prescribed processes set forth in the GATT and other WTO agreements. This type of unilateralism was legitimized by invoking the need to safeguard the national security interests of the United States. Several other countries have also developed similar doctrines that are primarily influenced by national security unilateralism. In addition, domestic laws have been amended to tighten entry rules for foreign investment and broaden the grounds for investment screening mechanisms and other foreign investment control procedures. Several foreign takeovers have reportedly been abandoned for reasons of national security. In summary, the exception of national security has been utilized to circumvent the disciplines of international economic law, both in trade and investment, both domestically and internationally.

China's global economic dynamics.³² Limiting foreign investment inflows could impede China's economic growth and prompt similar measures globally, fostering protectionism and unilateralism.³³ Moreover, conflicts may arise as nations seek to safeguard their security interests amid foreign investment activities.

This Article significantly advances scholarship by offering a compelling analysis of how the 2023 NCCDA fundamentally redefines legal contours. This structural redefinition carries significant legal ramifications. The inclusion of outbound investments in the national security calculus broadens the legal definition of what constitutes a threat. This recognizes that economic tools and technological advancements are as pivotal to national security as military capabilities. By scrutinizing outbound investments, the law now adopts a preventive approach to national security, aiming to thwart potential threats before they materialize. This is a significant departure from reactive security measures, indicating a strategic foresight. Moreover, the NCCDA blurs the lines between economic policy and national security, indicating that laws governing economic activities are now being designed with security implications. This convergence may redefine regulatory priorities and

32. The trend towards domesticating the foreign investment ecosystem is gaining momentum, and it is being regulated by three primary types of domestic instruments and institutions. See Julien Chaisse & Georgios Dimitropoulos, *Domestic Investment Laws and International Economic Law in the Liberal International Order*, 22 WORLD TRADE REV. 1 (2023). These include Domestic Investment Laws, which provide the legal framework for foreign investment in a country, Investment Screening Mechanisms, which are designed to scrutinize and assess foreign investment for potential risks to national security, and Investment Promotion Agencies, which promote and facilitate foreign investment in a country. These domestic instruments and institutions have become increasingly important as countries strive to balance the economic benefits of foreign investment with national security concerns. In recent years, investment screening mechanisms have emerged as a critical tool for regulating foreign investment, with many countries implementing rigorous screening regimes to safeguard their national security interests. As a result, the regulation of foreign investment has become an important area of focus for policymakers and legal scholars alike, with many exploring the various legal frameworks and mechanisms that can be employed to manage the complex transnational legal issues arising from foreign investment. See also Julien Chaisse, "The Black Pit: Power and Pitfalls of Digital FDI and Cross-Border Data Flows," 22 WORLD TRADE REV. 73 (2023).

33. I would define protectionism as the implementation of government policies and actions designed to restrict or regulate international trade and investment in order to protect domestic industries from foreign competition and to safeguard national economic interests. This involves measures such as tariffs, quotas, subsidies, and regulatory barriers that limit imports, exports, or outbound investments. In the context of outbound investment screening, protectionism manifests as restrictions on the flow of capital, technology, and resources to foreign entities, aiming to prevent potential adversaries from gaining economic or strategic advantages.

business practices, highlighting the interdependence of economic strength and national security.

This legal shift in the United States sets a precedent that could influence global norms and practices around investment and trade. It raises the bar for what constitutes responsible economic engagement, potentially leading to a reevaluation of global economic policies through a security lens. By potentially restricting outbound investments in certain sectors or to specific countries, this approach challenges the traditional tenets of globalization. It could lead to retaliatory measures or fragmentation in global trade and investment flows, prompting a reassessment of international economic cooperation mechanisms. Finally, this shift introduces a new layer of legal and regulatory complexity for businesses globally. Compliance with outbound investment screening laws necessitates a finer understanding of the intersections between economic activities and national security, potentially affecting corporate strategies and international operations.

In assessing the implications of the proposed Act, it becomes evident that, while addressing critical security concerns, it may also entail far-reaching ramifications beyond national security. Leveraging security concerns to expand regulatory mechanisms for investments involving China underscores the intricate, political, and controversial nature of the bill. This Article advocates for a nuanced understanding of the emergence of outbound investment screening in U.S. law and policy, emphasizing its implications for international economic relations and broader international economic law and policy.

II. DISENTANGLING THE COMPLEXITIES OF THE U.S.-CHINA ECONOMIC RELATIONSHIP: TENSIONS AND IMPLICATIONS

The interdependence of the world's two largest economies, the United States and China, has been gradual and culminated in the unraveling of their once-cordial ties. The subsequent period since their establishment of diplomatic relations in 1979 saw a dramatic surge in trade between 1980 and 2004.³⁴ However, this growing interdependence became a challenge. The first sign of friction emerged when the two countries grappled with issues concerning intellectual property, trade imbalances, and other economic factors.³⁵ The legal and policy spheres expressed concern regarding the escalating economic tension

34. *Timeline: US-China Relations*, COUNCIL ON FOREIGN RELS. (June 4, 2024), <https://www.cfr.org/timeline/us-china-relations>.

35. Nzube A. Chukwuma et al., *The US-China Trade War: Interrogating Globalisation of Technology*, 10 COGENT SOC. SCIS. 1, 1 (2024).

between the United States and China, given the potential for significant repercussions. Both countries then engaged in retaliatory measures, with the United States placing tariffs on Chinese goods and China responding in kind.³⁶ This tit-for-tat approach to trade policy led to a war of attrition with no clear end in sight. While resolution of this conflict will require deft legal and diplomatic maneuvering to engage in constructive dialogue, the U.S.-China trade war has now been a defining feature of the bilateral relationship in recent years.

The genesis and escalation of the trade conflict, along with its ramifications for the international economic framework, has sparked widespread discussion. Shifts in U.S. political leadership have led to adjustments in the economic and political ties between Washington and Beijing, leaving the outcome of the persisting trade dispute ambiguous.³⁷ Indications suggest that a resolution between the two powerhouses could be on the horizon;³⁸ however, the future trajectory of their relationship remains fraught with uncertainty. The evolving dynamics marked by escalating tensions and the root causes of the trade conflict significantly influence the ongoing scenario.

*A. Origins of the U.S.-China Economic and Political Relationship:
A Historical Analysis*

The U.S.-China economic and political relationship is currently one of the most significant issues. To fully understand its dynamics, it is essential to examine the origins of this complex relationship. This Article provides a concise historical analysis, tracing its roots back to the 1980s and examining the key events and factors that have shaped this significant partnership (see Table One).

36. Pablo Fajgelbaum et al., *The US-China Trade War and Global Reallocations 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29562, 2023), https://www.nber.org/system/files/working_papers/w29562/w29562.pdf.

37. Siripurapu & Berman, *supra* note 18.

38. Janis Mackey Frayer & Jennifer Jett, *Lessons Learned from Trying to Thaw Icy Relations Between Rivals U.S. and China*, NBC NEWS (Jan. 11, 2025), <https://www.nbcnews.com/news/world/lessons-learned-trying-thaw-icy-relations-rivals-us-china-rcna186514> (noting the U.S. Ambassador to China felt the two countries' relations were at their most stable point in recent years).

TABLE ONE: KEY DECISIONS AND EVENTS IN THE U.S.-CHINA ECONOMIC RELATIONSHIP (1972-2025)

| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|---|--|--|
| 1972 | Shanghai Communiqué ³⁹ (February 28, 1972) | President Nixon's visit to China culminates in the Shanghai Communiqué, marking the initiation of diplomatic relations and strategic alignment against the Soviet Union. | Established the foundation for future trade and investment by initiating diplomatic dialogue and reducing geopolitical tensions. |
| 1979 | Establishment of Diplomatic Relations ⁴⁰ (January 1, 1979) | The United States formally recognizes the People's Republic of China, leading to the opening of trade channels and investment opportunities. | Initiated modest trade growth and set the stage for expanded economic engagement. |

39. *Text of Joint Communiqué, Issued at Shanghai, February 27*, 66 DEP'T ST. BULL. 435 (1972).

40. *Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, Jan. 1, 1979*, 79 DEP'T ST. BULL., no. 2022, Jan. 1979, at 25.

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| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|---|--|---|
| 1982 | Third U.S.-China Joint Communiqué ⁴¹ (August 17, 1982) | The U.S. issues “Six Assurances” to Taiwan while signing the third joint communiqué with China, aiming to normalize relations without disrupting U.S.-Taiwan ties. | Facilitated stable political conditions conducive to increasing bilateral trade and economic cooperation. |
| 1985 | Announcement of Trade Deficit ⁴² (Date not specified) | The United States announces a trade deficit with China, bringing attention to the emerging trade imbalance. | Initiated a pattern of increasing trade deficits, laying the groundwork for future trade tensions. |

41. *U.S.-China Joint Communiqué, August 17, 1982*, 82 DEP’T ST. BULL., no. 2067, Oct. 1982, at 20.

42. Shelley Meister & Thomas A. Sherman, *Import, Export Prices Reflect Declining Dollar and Oversupply in 1985*, MONTHLY LAB. REV., Apr. 1986, at 3. See also *Trade in Goods with China*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c5700.html> (last visited Mar. 19, 2025).

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| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|---|---|---|
| 1989 | Tiananmen Square Sanctions ⁴³ (June 5, 1989) | Following the Tiananmen Square protests, the U.S. imposes sanctions on China under Executive Order 12711, leading to a temporary reduction in economic cooperation. | Short-term decrease in trade and investment flows; however, long-term economic relations resumed as pragmatism prevailed. |
| 1999 | Bilateral Trade Agreement ⁴⁴ (November 15, 1999) | The U.S. and China sign a trade agreement in Beijing, with China agreeing to lower tariffs and increase market access for U.S. goods. | Boosted U.S. exports to China, particularly in agriculture and technology sectors, and paved the way for China's WTO accession. |

43. Exec. Order No. 12711, 55 Fed. Reg. 13897 (Apr. 13, 1990).

44. See USTR, *Press Release: U.S. and China Sign Historic Trade Agreement*, U.S. DEP'T OF STATE (Nov. 15, 1999), https://1997-2001.state.gov/issues/economic/991115_ustrpress_china.html.

U.S. INVESTMENT SCREENING FROM INBOUND TO OUTBOUND

CONTINUED

| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|--|---|---|
| 2000 | Permanent Normal Trade Relations (PNTR) ⁴⁵ (October 10, 2000) | President Clinton signs the U.S.-China Relations Act of 2000, granting China PNTR status and supporting its WTO membership. | Led to exponential growth in U.S.-China trade; U.S. imports surged, contributing to a growing trade deficit. |
| 2010 | U.S.-China Joint Commission on Commerce and Trade (JCCT) ⁴⁶ (December 14–15, 2010) | The 21st JCCT meeting is held in Washington, D.C., addressing trade and investment issues between the two nations. | Fostered enhanced communication and dispute resolution mechanisms, promoting bilateral economic cooperation. |
| 2018 | Imposition of Tariffs ⁴⁷ (July 6, 2018) | The U.S. imposes tariffs on \$34 billion worth of Chinese goods; China retaliates with tariffs on U.S. goods, marking the beginning of a trade war. | Disrupted global supply chains, increased costs for manufacturers and consumers, and contributed to economic uncertainty. |

45. U.S.-China Relations Act of 2000, Pub. L. No. 106-286, 114 Stat. 880.

46. *U.S.-China Joint Commission on Commerce and Trade 2010*, OFF. OF THE U.S. TRADE REP. (Dec. 15, 2010), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/december/us-china-joint-commission-commerce-and-trade-2010>.

47. Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China-U.S., Jan. 15, 2020,

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| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|---|---|--|
| 2020 | Phase One Trade Deal ⁴⁸ (<i>Signed: January 15, 2020; Effective: February 14, 2020</i>) | The U.S. and China sign the Phase One trade agreement, with China committing to increased purchases of U.S. goods and enhanced intellectual property protections. | Temporarily eased trade tensions; U.S. exports to China rose in targeted sectors, but underlying issues remained unresolved. |
| 2021 | National Critical Capabilities Defense Act (NCCDA) Introduction ⁴⁹ (<i>January 3, 2021</i>) | The NCCDA is introduced in Congress (H.R.6329) to protect critical U.S. technologies from foreign investments, particularly from China. | Created regulatory uncertainty for Chinese investments in the U.S. technology sector and signaled increased scrutiny of foreign investments. |

https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf

48. *USTR Finalizes Tariffs on \$200 Billion of Chinese Imports in Response to China's Unfair Trade Practices*, OFF. OF THE U.S. TRADE REP. (Sept. 18, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-finalizes-tariffs-200>.

49. National Critical Capabilities Defense Act of 2021, H.R. 6329, 117th Cong. (2021).

U.S. INVESTMENT SCREENING FROM INBOUND TO OUTBOUND

CONTINUED

| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|--|--|--|
| 2022 | CFIUS Executive Order 14083 ⁵⁰ (September 15, 2022) | President Biden signs Executive Order 14083, expanding the Committee on Foreign Investment in the United States’ role to address national security risks from foreign investments in sensitive technology sectors. | Restricted Chinese investments in U.S. technology and infrastructure sectors, intensifying technological competition. |
| 2022 | Export Controls on Semi-conductors ⁵¹ (October 7, 2022) | The U.S. Department of Commerce implements new export controls on advanced computing and semiconductor manufacturing items to China. | Severely impacted China’s semiconductor industry by restricting access to critical technologies, prompting China to pursue technological self-sufficiency. |

50. Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sept. 15, 2022).

51. *Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (PRC)*, BUREAU OF IND. & SEC., U.S. DEP’T OF COM. (Oct. 7, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file>.

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| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|--|---|---|
| 2023 | Executive Order 14105 on Outbound Investments ⁵² (August 9, 2023) | President Biden issues Executive Order 14105, restricting U.S. investments in critical technologies in China, including semiconductors, quantum technologies, and AI. | Reduced U.S. capital flows into Chinese high-tech sectors and prompted companies to reassess investment strategies. |
| 2024 | Executive Order 14117 on Data Security ⁵³ (February 15, 2024) | President Biden signs Executive Order 14117, restricting transactions involving sensitive personal data with entities linked to China and other nations of concern. | Complicated cross-border data flows and digital trade with China, leading to increased data localization efforts. |

52. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 11, 2023).

53. Exec. Order No. 14117, 89 Fed. Reg. 15421 (Mar. 1, 2024)

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| Year | Key Decision | Key Event | Trade and Economic Impact |
|------|--|--|--|
| 2025 | Executive Order 14195 on Synthetic Opioids ⁵⁴ (February 1, 2025) | President Trump issues Executive Order 14195, imposing additional tariffs on Chinese imports in response to the synthetic opioid supply chain. | Potential for retaliatory measures from China, further escalating trade tensions and affecting various industries. |

In July 1982, the Reagan administration issued “Six Assurances” to Taiwan, which included promises to uphold the Taiwan Relations Act and not to mediate between Taiwan and China, and no set date for the cessation of arms sales.⁵⁵ The Taiwan Relations Act helped preserve U.S. diplomatic flexibility as China-Taiwan relations evolved.⁵⁶ In August of the same year, the Reagan administration and China signed a third joint communiqué to normalize relations, which reaffirmed the United States’ commitment to its One-China policy.⁵⁷ This helped ease tensions and provided a framework for cooperation in areas of mutual interest such as trade, diplomacy, and security.

President Bill Clinton’s decision to sign the U.S.-China Relations Act to authorize the extension of non-discriminatory treatment and to establish a framework for relations in 2000 can be seen as the second major milestone in the U.S.-China economic relationships. The Act granted China permanent normal trade relations (PNTR) status, which

54. Exec. Order No. 14195, 90 Fed. Reg. 9121 (Feb. 7, 2025).

55. Harvey Feldman, *President Reagan’s Six Assurances to Taiwan and Their Meaning Today*, THE HERITAGE FOUND. (Oct. 2, 2007), <https://www.heritage.org/asia/report/president-reagans-six-assurances-taiwan-and-their-meaning-today>.

56. Stephen Yates, *The Taiwan Relations Act After 20 Years: Keys to Past and Future Success*, THE HERITAGE FOUND. (Apr. 16, 1999), <https://www.heritage.org/asia/report/the-taiwan-relations-act-after-20-years-keys-past-and-future-success>.

57. COUNCIL ON FOREIGN RELS., *supra* note 34.

allowed China to enjoy the same low tariffs on exports to the United States as most other countries.⁵⁸ The extension of non-discriminatory treatment to China and the establishment of a framework for relations between the United States and China, which were signed into law in 2000, paved the way for China's accession to the World Trade Organization (WTO).⁵⁹ In commercially meaningful terms, China's accession to the WTO was a major U.S. trade objective during the late 1990s.⁶⁰ Accession to the WTO required China to undertake significant economic reforms, including reducing tariffs and other trade barriers and strengthening intellectual property rights.⁶¹ This led to the further opening of China's economy to foreign trade and investment and played a key role in the rapid expansion of U.S.-China economic relations in the early 21st century.⁶² By 2006, China had become the second-largest trading partner in the United States after Canada.⁶³ In September 2008, China surpassed Japan to become the largest holder of U.S. debt, with approximately USD 600 billion in holdings.⁶⁴ This shift underscored the increasing interdependence between the U.S. and Chinese economies, a relationship that became particularly significant as the global economy lamented the threat of a financial crisis.⁶⁵

Fundamentally, this integration brought new opportunities for U.S. businesses to access the Chinese market but also presented new challenges, including intellectual property theft, cybersecurity concerns, and human rights violations in China.⁶⁶ Overall, President Clinton's decision marked a major turning point in the history of the U.S.-China economic relationship and set the stage for further economic cooperation.

58. U.S.-China Relations Act of 2000, Pub. L. No. 106-286, 114 Stat. 880.

59. Nicholas R. Lardy, *Permanent Normal Trade Relations for China*, BROOKINGS (May 10, 2000), <https://www.brookings.edu/research/permanent-normal-trade-relations-for-china/>.

60. CATHLEEN D. CIMINO-ISAACS & RACHEL F. FEFER, CONG. RSCH. SERV. R45417, WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION, (2021).

61. *China's Accession to the WTO*, THE CURIOUS ECONOMIST, <https://thecurioeconomist.com/chinas-accession-to-the-wto/> (last visited Jan. 17, 2025).

62. Siqi Li & Xiaozhun Yi, *China's Role in the Multilateral Trading System*, in CHINA AND THE WTO: A TWENTY-YEAR ASSESSMENT 21, 42 (Henry Gao et al. eds., 2023).

63. Lorenzo Caliendo & Fernando Parro, *Lessons from US-China Trade Relations 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30335, 2022), https://www.nber.org/system/files/working_papers/w30335/w30335.pdf.

64. *China Tops Japan as No. 1 Holder of U.S. Treasury Debt*, L.A. TIMES (Nov. 18, 2008), <https://www.latimes.com/archives/blogs/money-company/story/2008-11-18/china-tops-japan-as-no-1-holder-of-us-treasury-debt>.

65. COUNCIL ON FOREIGN RELS., *supra* note 34.

66. CIMINO-ISAACS & FEFER, *supra* note 60, at 27.

B. *Interdependence and Frictions: The Evolution of the U.S.-China Economic Relationship*

As the two largest economies in the world, the United States and China have become increasingly interdependent, with bilateral trade and investment reaching unprecedented levels. However, this has also led to economic tension, particularly in areas such as trade imbalances, intellectual property rights, and national security. This section provides an overview of the evolution of the U.S.-China economic relationship, examining both the cooperative and frictional aspects as well as the current challenges and prospects for their relationship.

The intensifying interdependence between both economies raises concerns regarding the economic imbalances between the two nations. Of particular concern is the trade deficit, which rose considerably from USD 273.1 billion in 2010 to an all-time high of USD 295.5 billion in 2011.⁶⁷ Notably, this rise was responsible for an overwhelming three-quarter increase in the U.S. trade deficit in 2011.⁶⁸ In response to China's imposition of export restrictions on rare earth metals, the United States, the European Union, and Japan lodged a WTO request for consultations with China.⁶⁹ The grounds for this request were that China's quota system had violated established international trade rules, thereby forcing multinational corporations that use these metals to relocate to China.⁷⁰ China, on its part, denounced the action of the United States and its allies as "rash and unfair" and vowed to defend its rights in any trade dispute that may arise.⁷¹

In November 2011, President Barack Obama declared that the Trans-Pacific Partnership (TPP), a multinational free trade agreement, had been reached by the United States and eight other Pacific Rim countries: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.⁷² The TPP integrated several essential provisions with general applicability primarily aimed at China.⁷³ The economic effect of this preferential treatment was to increase trade and political cooperation among

67. COUNCIL ON FOREIGN RELS., *supra* note 34.

68. *Id.*

69. Panel Report, *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS432/R (adopted Aug. 29, 2014).

70. *Id.*

71. COUNCIL ON FOREIGN RELS., *supra* note 34.

72. *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFF. OF THE U.S. TRADE REPRESENTATIVE (USTR), <https://ustr.gov/tpp/Summary-of-US-objectives> (last visited Jan. 17, 2025).

73. Wang Yong, *The Politics of the TPP Are Plain: Target China*, 8 GLOB. ASIA 54 (2013), https://warwick.ac.uk/fac/soc/pais/research/csgreen/papers/scholarly/the_politics_of_the_tpp_are_plain_target_china_by_wang_yong_global_asia_v8n12013.pdf.

the TPP member states.⁷⁴ According to President Obama, the TPP was an opportunity for the United States to “call the shots” and “write the rules” during a period when China was negotiating a trade agreement encompassing the fastest-growing markets in the world.⁷⁵ It was imperative for the United States to establish trade rules in the Asia-Pacific region through the TPP before China could do so through a competing agreement. In 2017, however, President Donald Trump announced the United States’ withdrawal from the TPP.⁷⁶ While the ambitious objectives of the accord took a significant hit with the withdrawal of the United States, the remaining signatories reconstituted the agreement as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁷⁷

The CPTPP, effective on December 30, 2018, introduced enhanced environmental responsibilities.⁷⁸ This notably targets China, which is the world’s leading emitter of substances depleting the ozone layer. The United States expressed concerns over China’s reliance on environmentally harmful fuels, which also afford China lower production costs, thereby offering a competitive advantage.⁷⁹ This scenario prompted

74. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 52 (3d ed. 2017).

75. In a Washington Post op-ed dated May 2, 2016, President Barack Obama articulated a strong case for the Trans-Pacific Partnership (TPP), emphasizing its strategic significance in global trade leadership. President Obama argued that the TPP presented an opportunity for the United States to gain an advantage over economic rivals, notably China. He highlighted the urgency of the situation, pointing out China’s active pursuit of a trade agreement within its region, which posed a direct challenge to U.S. interests by potentially monopolizing burgeoning markets to the detriment of U.S. jobs, businesses, and products. President Obama underscored the imperative for the United States to dictate the terms of international trade, stating, “America should write the rules. America should call the shots.” He advocated for a global trade environment where other nations adhered to standards established by the United States and its allies, rather than succumbing to those set by competitors like China. President Obama’s assertion firmly placed the responsibility for crafting trade norms on the United States, reinforcing the notion that U.S. leadership should prevail in global trade discussions. Barack Obama, *President Obama: The TPP would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html.

76. *Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, U.S. DEP’T OF STATE (Jan. 23, 2017), <https://2017-2021.state.gov/us-TPP-withdrawal/>.

77. Shashank Mattoo, *Why India is Losing out on CPTPP*, OBSERVER RSCH. FOUND. (Jan. 7, 2022), <https://www.orfonline.org/research/why-india-is-losing-out-on-cptpp>.

78. Haifeng Deng & Jie (Jeanne) Huang, *What Should China Learn from the CPTPP Environmental Provisions?*, 13 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 511, 522 (2018).

79. See generally Jing-Li Fan et al., *Comparison of the LCOE Between Coal-Fired Power Plants with CCS and Main Low-Carbon Generation Technologies: Evidence from China*, 176 *ENERGY* 143 (2019).

the United States to advocate for the implementation of the TPP regulations, aimed at promoting an eco-friendly framework without compromising the competitive stance of U.S. industries and simultaneously supporting worldwide climate change mitigation efforts.⁸⁰ The strategic incorporation of such provisions, particularly those addressing China's environmental policies, was crucial to aligning with the United States' broader geopolitical, economic, and ecological goals, marking a deliberate effort to tailor the TPP's stipulations with a specific focus on China.

The issue of labor rights in China has been a longstanding concern for the international community, particularly with the country's disregard for the health and safety of workers, extended working hours, and the presence of forced labor and slavery.⁸¹ In addition, these practices have been viewed as a threat to international economic competition, as China's labor costs remain significantly lower than those of the United States.⁸² The TPP sought to address these issues by implementing measures to regulate labor practices and improve working conditions.⁸³

C. *Escalation of U.S.-China Trade Tensions: A Legal and Policy Analysis*

Trade tensions have escalated in recent years, leading to significant economic and geopolitical implications. This section provides a comprehensive analysis of the escalation of trade tensions between the United States and China, exploring the historical context of the trade relationship, factors contributing to the escalation, and the legal and policy implications of the ongoing trade war. By analyzing the various dimensions, this section seeks to offer insights into the potential ramifications of trade tensions for both nations and the global economy.

The Trump administration has consistently expressed concerns regarding China's alleged forceful tactics that compel U.S. companies

80. Bureau of Oceans & Int'l Env't & Sci. Affs., *The Trans-Pacific Partnership: Preserving a Free and Open Internet*, U.S. DEP'T OF STATE (Nov. 5, 2015), <https://2009-2017.state.gov/e/oes/rls/remarks/2015/249273.htm>. See also USTR, *THE TRANS-PACIFIC PARTNERSHIP: PRESERVING THE ENVIRONMENT* (2015), <https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf>.

81. See e.g., Alwyn Scott, *Foxconn Says Investigating Labor Conditions at China Factory Used for Amazon*, REUTERS (June 10, 2018), <https://www.reuters.com/article/us-amazon-chinalabor/foxconn-says-investigating-labor-conditions-at-china-factory-used-for-amazon-idUSKBN1J610V>.

82. Daniel C.K. Chow et al., *How the United States Withdrawal from The Trans-Pacific Partnership Benefits China*, 4 U. PA. J. L. & PUB. AFFS. 37, 57 (2018).

83. *Id.* See generally *International Comparisons of Hourly Compensation Costs in Manufacturing, 2012*, U.S. BUREAU OF LAB. STAT. (Aug. 9, 2012), <https://www.bls.gov/fls/ichcc.pdf>.

to relinquish their intellectual property rights.⁸⁴ These issues generally emerge when a multinational corporation based in the United States aims to create a fully owned subsidiary within China to engage in manufacturing or offer services to both the Chinese and global markets.⁸⁵ Owing to China's regulatory constraints, multinational corporations are often prohibited from establishing entirely owned business entities within China.⁸⁶ This restriction is notably prevalent in sectors, such as telecommunications, where foreign investments are allowed only through joint ventures between multinational corporations and Chinese entities.⁸⁷ Given that these investments fall outside the WTO's purview, except in a limited context, in the absence of a bilateral investment treaty (BIT) between the United States and China, China has the latitude to enforce foreign investment restrictions as per its national laws.⁸⁸

In this scenario, China has often compelled international businesses to establish joint ventures with local entities, including state-owned enterprises (SOEs).⁸⁹ When seeking regulatory approvals within China, these multinational corporations encountered substantial pressure from Chinese authorities to share their advanced technology with their joint venture partners, a process that might occur at the initial approval

84. Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13099 (Mar. 27, 2018).

85. The Chinese government developed the "Catalogue of Industries for Guiding Foreign Investment" in order to stimulate and guide foreign investments into certain sectors that are necessary for the country's economic and social development. However, for a U.S. company to be able to enter the Chinese market via the creation of a fully owned subsidiary, technology transfer may be mandated through de jure and de facto requirements and policies. See Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalogue of Industries for Guiding Foreign Investment] (promulgated by the St. Planning Comm'n, the St. Econ. & Trade Comm'n and the Ministry of Foreign Trade & Econ. Coop., Jun. 7, 1995, effective Jun. 20, 1995; rev'd by the Nat'l Dev. & Reform Comm'n and the Ministry of Com.) St. Council Gaz., No. 10, 2017, https://www.gov.cn/gongbao/content/2017/content_5237697.htm (China). See also Dan Prud'homme, *Reform of China's "Forced" Technology Transfer Policies*, U. OX. FAC. L. BLOGS (Jul. 22, 2019), <https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/07/reform-chinas-forced-technology-transfer-policies> (explaining concerns that foreign companies have had regarding China's "forced" technology transfers).

86. See David A. Rood, *China to Relax Joint Venture Requirements for Manufacturing*, NAT'L L. REV. (Apr. 19, 2018), <https://www.natlawreview.com/article/china-to-relax-joint-venture-requirements-manufacturing>.

87. Leontine D. Chuang, *Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China*, 20 NW. J. INT'L L. & BUS. 509, 518 (2000).

88. USTR, 2020 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 32 (2021), <https://ustr.gov/sites/default/files/files/reports/2020/2020USTRReportCongressChinaWTOCompliance.pdf>.

89. See Rood, *supra* note 86.

stage or during subsequent regulatory review and licensing phases.⁹⁰ The rationale from the Chinese standpoint is that the viability and success of these joint ventures depend significantly on Chinese partners having access to sophisticated technologies, such as patents, trademarks, copyrights, trade secrets, and proprietary know-how.⁹¹

The dynamic between multinational corporations and Chinese business practices involving joint ventures illuminates a critical tension in international trade law. China continues to present a relatively restrictive environment for foreign investors, attributable in part to prohibitions on investment in critical sectors and the unpredictability of regulatory enforcement.⁹² These regulations effectively necessitate the sharing of technology with Chinese entities as part of the joint venture agreement. Although this transfer is not a formal legal requirement for market access, the practical effects are stark. Companies that do not comply often face significant barriers to entry into China's vast market, effectively coercing them into relinquishing their intellectual property to either Chinese corporations or the government directly.⁹³

This situation posed a significant legal and strategic challenge for U.S.-based companies, highlighting their vulnerability to losing proprietary technology, which could weaken their international competitiveness. The TPP had once provided a platform for the United States to challenge these practices by establishing legal norms against the compulsory surrender of technology as a market entry requirement,⁹⁴ and aimed to protect the intellectual property rights of U.S. companies and strengthen their position in the global market.

However, the withdrawal from the TPP, initiated by President Trump on his first day in office during his first term, marked a significant turn in U.S. trade policy.⁹⁵ This move was justified by the administration as a transition toward favoring BITs based on the belief that the TPP had disadvantaged U.S. interests.⁹⁶ Without the protections that the TPP offered, U.S. companies might find themselves at a greater risk of

90. William Ridley et al., *Joint Ventures and Technology Transfer: New evidence from China*, CEPR (Apr. 15, 2018), <https://cepr.org/voxeu/columns/joint-ventures-and-technology-transfer-new-evidence-china>.

91. *Id.*

92. Bureau of Econ. & Bus. Affs., *2023 Investment Climate Statements: China*, U.S. DEPT. OF STATE (July 7, 2023), <https://www.state.gov/reports/2023-investment-climate-statements/china>.

93. *Id.*

94. Chow et al., *supra* note 82, at 63.

95. U.S. DEPT OF STATE, *supra* note 76.

96. Lauren Mandell, *The Trump Administration's Impact on U.S. Investment Policy*, 35 ICSID REV. 345, 345-56 (2020).

involuntary technology transfers, impacting their strategic positions in global markets. The development of economic nationalism and protectionism, as encapsulated in President Trump's "America First" trade policy, was identified as the central factor heightening the risk of technology transfer from the United States to China.⁹⁷ This policy is underpinned by the conviction that international trade operates as a zero-sum game, wherein the United States has been disadvantaged by "unfair" trade agreements that benefit its trading partners at its expense.⁹⁸

The United States Trade Representative (USTR), as the principal trade policy officer, issued the 2017 National Trade Policy Agenda, which outlined the policies advocated by the Trump administration.⁹⁹ In addition to emphasizing reindustrialization and national defense, it emphasized making trade "freer and fairer" for all Americans.¹⁰⁰ Despite encouraging a resuscitation of the U.S. economy, this approach has been criticized for its propensity toward protectionism.¹⁰¹ This tendency is incompatible with the objectives of international trade laws. Moreover, detractors believe that protectionist policies may result in retaliation from trade partners, which is detrimental to both the U.S. economy and the rest of the world.¹⁰²

The One Hundred Sixteenth Congress (2019–2021) addressed numerous trade policy issues, including the North American Free Trade Agreement (NAFTA) renegotiation and its replacement, the U.S.-Mexico-Canada Agreement (USMCA).¹⁰³ While many of the USTR's negotiating objectives were consistent with the Trade Promotion Authority program (TPA), the USTR, among other specific objectives, sought to reduce the U.S. trade deficit with NAFTA member

97. See Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. INT'L L.J. 1 (2019).

98. Chow et al., *supra* note 82, at 38-39.

99. USTR, THE PRESIDENT'S 2017 TRADE POLICY AGENDA (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>.

100. *Id.* at 1.

101. Geoffrey Gertz, *Did Trump's Tariffs Benefit American Workers and National Security?*, BROOKINGS (Sept. 10, 2020), <https://www.brookings.edu/articles/did-trumps-tariffs-benefit-american-workers-and-national-security/>.

102. David Smith, *Trump Risks Global Trade War if He Restricts Imports of Steel and Aluminum*, THE GUARDIAN (Feb. 9, 2018), <https://www.theguardian.com/us-news/2017/jul/01/trump-global-trade-war-steel-aluminum-imports>. See also Joel Mokyr, *How "America First" Could Become America Last*, PBS NEWS (Jun. 12, 2017), <https://www.pbs.org/newshour/economy/column-america-first-become-america-last>.

103. See M. ANGELES VILLARREAL & IAN F. FERGUSON, CONG. RSCH. SERV., R44981, NAFTA RENEGOTIATION AND THE PROPOSED UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) (2020).

countries.¹⁰⁴ As a reiteration of President Trump's claims that NAFTA had been a "disaster" and the "worst agreement ever negotiated," it appeared that the United States' objectives were to "rebalance the benefits" of the agreement.¹⁰⁵

The U.S.-China trade conflict has been a source of global concern. Upon assuming office in 2017, the Trump administration implemented tariffs on Chinese imports to counter China's economic strategies and bolster the U.S. economy. This marked a significant departure from the well-established doctrine of economic liberalism, giving way to a protectionist policy. This, in turn, resulted in a trade war with China, which retaliated through its measures.

The trade and technology dispute between the United States and China officially commenced in 2018, sparked by allegations that trade was disproportionately benefiting China.¹⁰⁶ On July 6, 2018, President Trump initiated the conflict by imposing a twenty-five percent tariff on Chinese imports worth around USD 34 billion, with further tariffs in 2018 and 2019.¹⁰⁷ These actions were rooted in accusations against China for engaging in "unfair trade practices" and "intellectual property theft."¹⁰⁸ As an act of retaliation, China levied tariffs on a wide range of products.¹⁰⁹ Between July and December of the same year, the resulting tariff war continued to increase in severity.¹¹⁰ Throughout his presidency, President Trump consistently highlighted China's trade surplus and its purportedly unjust trade practices, committing to a firm stance against what he deemed currency manipulation, export subsidies, and theft of intellectual property.¹¹¹ Trump's foreign policy emphasized U.S. nationalism, protectionism, and unilateral actions, aiming to win large corporations with tax reductions and bolster U.S.

104. *Id.* at 12.

105. *Id.* at 1.

106. Dorcas Wong & Alexander C. Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Aug. 25, 2020), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/>.

107. Chad P. Bown, *Four Years into the Trade War, are the U.S. and China Decoupling?*, PETERSON INST. FOR INT'L ECON. (Oct. 20, 2022), <https://www.piie.com/blogs/realtime-economics/four-years-trade-war-are-us-and-china-decoupling>.

108. *President Donald J. Trump is Confronting China's Unfair Trade Policies*, THE WHITE HOUSE (May 29, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-confronting-chinas-unfair-trade-policies/>.

109. Andrew Mullen, *US-China Trade War Timeline: Key Dates and Events Since July 2018*, S. CHINA MORNING POST (May. 16, 2022), <https://www.scmp.com/economy/china-economy/article/3146489/us-china-trade-war-timeline-key-dates-and-events-july-2018>.

110. *Id.*

111. THE WHITE HOUSE, *supra* note 108.

manufacturing and agricultural sectors through job creation.¹¹² However, some analysts cautioned that China's retaliation could have more severe repercussions for the U.S. economy than the practices being contested.¹¹³ Additionally, the United States International Trade Commission's report, *Economic Impact of Section 232 and 301 Tariffs on U.S. Industries*, dated May 2023, highlighted that the costs of the tariffs were passed on to U.S. importers.¹¹⁴

During a contentious debate over several months, the Trump administration ultimately decided to boost the tariffs on USD 200 billion worth of Chinese imports from ten to twenty-five percent during the summer of 2019.¹¹⁵ The battle persisted even after President Trump was succeeded by President Biden, with the conflict taking on a technical component that may have been the driving force for the conflict from the beginning.¹¹⁶ Even if the trade war is resolved by some accommodation in the future, it is quite improbable that the United States will reduce or abolish the higher import duties. The worst-case scenario is that the dispute would be held for a lengthy period, reaching a détente between the United States and China. Though there have only been a handful of occasions where countries have maintained peace with one another, a détente or cold peace between the United States and China is still a realistic possibility.¹¹⁷

According to the Trump administration, Chinese trade policies, including technology transfer requirements, contributed to the trade deficit between the United States and China.¹¹⁸ The Chinese government responded by accusing the Trump administration of nationalist

112. See Gertz, *supra* note 101.

113. Max Ehrenfreud, *The U.S. Cities with the Most to Lose if Donald Trump Starts a Trade War*, WASH. POST (Sept. 21, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/09/21/the-u-s-cities-with-the-most-to-lose-if-donald-trump-starts-a-trade-war/>; Christina Pazzanese, *How China Tariffs Could Backfire on U.S.*, HARV. GAZETTE (Dec. 3, 2024), <https://news.harvard.edu/gazette/story/2024/12/how-china-tariffs-could-backfire-on-u-s/>.

114. U.S. INT'L TRADE COMM'N, *ECONOMIC IMPACT OF SECTION 232 AND 301 TARIFFS ON U.S. INDUSTRIES* 144-45 (2023).

115. Mullen, *supra* note 109.

116. Guoyou Song, *China-US Economic and Trade Relations: Trump and Beyond*, 2 E. ASIAN AFFS. 1 (2022).

117. Suisheng Zhang & Dan Guo, *A New Cold War? Causes and Future of the Emerging U.S.-China Rivalry*, 19 VESTNIK RUDN. INT'L RELS. 9, 17 (2019).

118. See USTR, *FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974* 4 (2018).

protectionism and punitive actions.¹¹⁹ In the aftermath of the conflict intensification by 2019, the parties embarked on negotiations to reach a Phase One agreement in January 2020.¹²⁰ Regrettably, the initial accord lapsed by December 2021, with China failing to fulfill its commitments to purchase goods and services from the United States as per the agreement.¹²¹ This non-compliance has had considerable implications, necessitating a renewed dialogue to redress grievances and sustain an equitable and mutually beneficial trade relationship.¹²² Both sides suffered economic losses as a result of the war, which led to trade flows diverting from the United States and China.¹²³ In recent years, Trump's executive actions have led to one of the most significant tax hikes on trade.¹²⁴

D. *Back to the Future: Are We Nearly There Yet?*

During President Biden's term in office from January 20, 2021, to January 20, 2025, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) implemented over sixty distinct measures targeting more than twenty-six countries, reflecting the administration's proactive approach to safeguarding the United States and allied security, with shared democratic principles.¹²⁵ On June 3, 2021, President Biden enacted an Executive Order, Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China (EO 14032), aimed at bolstering the efforts previously initiated to mitigate the threats posed by China's military-industrial

119. *Guanyu Zhong Mei Jingmao Moca De Shi Shi Yu Zhongfang Lichang* (关于中美经贸摩擦的事实与中方立场) [*The Facts and China's Position on China-US Trade Friction*], XINHUA (Sept. 24, 2018), http://www.xinhuanet.com/politics/2018-09/24/c_1123475272.htm.

120. See USTR, FACT SHEET, ECONOMY AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF CHINA (2020), https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/US_China_Agreement_Fact_Sheet.pdf.

121. David Lawder & Andrea Shalal, *U.S. Trade Official Says China Failed to Meet "Phase 1" Commitments*, REUTERS (Feb. 2, 2022), <https://www.reuters.com/world/us/us-trade-official-says-china-failed-meet-phase-1-commitments-2022-02-01/>.

122. See Josh Zumbrun, *Beijing Fell Short on Trade Deal Promises, Creating Dilemma for Biden*, WALL ST. J. (Dec. 31, 2021), <https://www.wsj.com/articles/beijing-fell-short-on-trade-deal-promises-creating-dilemma-for-biden-11640946782>.

123. *Trade War Leaves Both U.S. and China Worse Off*, UNCTAD (Nov. 6, 2019), <https://unctad.org/news/trade-war-leaves-both-us-and-china-worse>.

124. Heather Long, *Was Trump's China Trade War Worth It?*, WASH. POST (Jan. 15, 2020), <https://www.washingtonpost.com/business/2020/01/15/was-trumps-china-trade-war-worth-it/>.

125. Deanna Clark & Alexander Jeffery, *OFAC Sanctions Trends Under the New Biden Administration*, 16 GLOB. TRADE & CUSTOMS J. 623, 623 (2021).

sector.¹²⁶ This order built upon and amended Executive Order 13959, Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies (EO 13959).¹²⁷ EO 14032 specifically banned investments in Chinese enterprises that were seen as jeopardizing U.S. security and the values that underpin its democracy.¹²⁸

It is crucial to acknowledge that the actions undertaken by OFAC and the issuance of executive orders drew legitimacy from the International Emergency Economic Powers Act (IEEPA). This empowers the President to regulate international commerce in times of declared national emergencies that pose threats to the security of the United States. The IEEPA provides a foundational structure for imposing economic sanctions and implementing strategies associated with specific foreign entities.¹²⁹ Additionally, the legal regulation overseeing international investment law and arbitration is continually adapting, and the measures taken by OFAC, alongside President Biden's executive orders, are indicative of changes, pivotal in assessing a government's approach.¹³⁰ Concurrently, the Biden administration evaluated and implemented measures to limit U.S. investments in Chinese startups and tech enterprises, broadening the reach of existing restrictions that had previously targeted a select group of companies linked to the Chinese military.¹³¹ In October 2024, the administration also finalized rules restricting investments by U.S. individuals and companies in advanced Chinese technologies, including semiconductors, quantum computing, and artificial intelligence.¹³² These measures aimed to prevent American capital and expertise from aiding China's development of critical technologies that could provide Beijing with a military advantage.¹³³ It has been, and continues to be, imperative for international

126. FAQ 898, *Chinese Military Companies Sanctions*, DEP'T OF TREASURY: OFF. OF FOREIGN ASSETS CONTROL (June 3, 2021), <https://ofac.treasury.gov/faqs/898>.

127. *Id.*

128. Clark & Jeffery, *supra* note 125, at 623.

129. CHRISTOPHER A. CASEY & JENNIFER K. ELSEA., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION AND USE 1, 2 (2024).

130. See Jason Chipman & Marik String, *New Regime for Outbound U.S. Investment Would Be First of Its Kind*, BLOOMBERG L. (Feb. 24, 2022), <https://news.bloomberglaw.com/banking-law/new-regime-for-outbound-u-s-investment-would-be-first-of-its-kind>.

131. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 11, 2023).

132. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024).

133. See Juliana Liu, *US Adds Chinese Tech Giants to List of Companies Allegedly Working with China's Military*, CNN (Jan. 7, 2025), <https://www.cnn.com/2025/01/07/tech/tencent-catl-us-list-china-military-companies-intl-hnk>.

investors and their legal representatives to stay informed about evolving legal requirements and to implement robust risk management strategies to protect their investments while actively participating in ongoing discussions.¹³⁴

Contemporarily, President Biden formally introduced the U.S. president economic framework during his first Asia tour, which was launched as the Indo-Pacific Economic Framework for Prosperity (IPEF).¹³⁵ Negotiations between the United States and twelve other countries kicked off in May 2022, with the intention to conclude them within 18–24 months.¹³⁶ By November 2023, significant progress had been made on three of the four primary pillars: supply chain resilience, clean energy and decarbonization, and tax and anti-corruption. However, the trade pillar faced challenges, leading to a suspension of plans for its inclusion during the Asia-Pacific Economic Cooperation (APEC) forum in November 2023.

A major goal of the IPEF was to reaffirm American economic leadership in “the most dynamic region in the world” and offer an alternative to China’s economic status.¹³⁷ In addition to financing regimes, such as China’s Belt and Road Initiative, the Indo-Pacific region is home to economic frameworks such as the Regional Comprehensive Economic Partnership and the CPTPP.¹³⁸ The White House differentiated IPEF from other regional economic partnerships and trade agreements by promoting a “flexible” and “inclusive” framework that emphasized four primary pillars: (1) trade, (2) supply chain resilience, (3) clean energy,

134. International investors must navigate an increasingly complex legal environment due to evolving sanctions and regulatory measures. *See* Clark & Jeffery, *supra* note 125, at 623-25 (discussing recent trends in U.S. sanctions enforcement and the implications for international investors). *See also* *Chinese Military Companies Sanctions*, DEP’T OF TREASURY: OFF. OF FOREIGN ASSETS CONTROL (June 1, 2022), <https://ofac.treasury.gov/sanctions-programs-and-country-information/chinese-military-companies-sanctions> (providing guidance on sanctions related to Chinese military companies and emphasizing the importance of compliance and risk management strategies).

135. *Fact Sheet: In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity*, THE WHITE HOUSE (May 23, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity/>.

136. Doug Strub, *United States and China Vie for Influence in Indo-Pacific*, E. ASIA F. (Aug. 11, 2022), <https://www.eastasiaforum.org/2022/08/11/united-states-and-china-vie-for-influence-in-indo-pacific/>.

137. *Fact Sheet: Indo-Pacific Strategy of the United States*, THE WHITE HOUSE (Feb. 11, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2022/02/11/fact-sheet-indo-pacific-strategy-of-the-united-states/>.

138. Mie Oba, *Japan and the Regional Comprehensive Economic Partnership (RCEP)* 2 (ERIA Discussion Paper Series No. 461, 2022), [https://www.eria.org/uploads/media/discussion-papers/FY22/Japan-and-the-Regional-Comprehensive-Economic-Partnership-\(RCEP\).pdf](https://www.eria.org/uploads/media/discussion-papers/FY22/Japan-and-the-Regional-Comprehensive-Economic-Partnership-(RCEP).pdf).

decarbonization, and infrastructure, and (4) tax and anti-corruption.¹³⁹ While the Office of the U.S. Trade Representative (USTR) led work on the trade pillar, the Department of Commerce oversaw the remaining pillars.¹⁴⁰ Despite progress in some areas, ambiguity remained regarding the form, function, benefits, and durability of the IPEF. The success of the negotiations was partially contingent on tightened policies on export controls and technology transfers to China. With the inauguration of President Trump in January 2025, the future of the IPEF is uncertain, as the new administration has not yet clarified its stance on the framework.

Analyzing the U.S.-China trade war entails dealing with the complexities of international trade law and bilateral agreements. The TPP, aimed at addressing labor standards and working conditions, highlights a particular contention with China, which is offering preferential treatment and unfair advantages to SOEs. This practice affects the competitive environment for multinational firms, leading to a rift that necessitates thoughtful deliberation.

III. THE NCCDA: AN ASSESSMENT OF ITS OBJECTIVES AND IMPLICATIONS

The NCCDA was drafted to ensure a constant examination of the safety of supply chains, domestic production facilities, and the manufacturing capacity of national critical capabilities.¹⁴¹ This Act proposes revising the Trade Act of 1974 to increase the transparency of vulnerabilities in the supply chain and prevent important industrial capacity from being relocated.¹⁴² The goal was to establish a process for reviewing outbound

139. *Statement on Indo-Pacific Economic Framework for Prosperity*, THE WHITE HOUSE (2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/>.

140. USTR, 2024 TRADE POLICY AGENDA AND 2023 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 1 (2024), <https://ustr.gov/sites/default/files/The%20Presidents%202024%20Trade%20Policy%20Agenda%20and%202023%20Annual%20Report.pdf>.

141. *DeLauro, Fitzpatrick, DeLauro, Pascrell Reintroduce Bipartisan National Critical Capabilities Defense Act*, U.S. REP. ROSA DELAURO (May 9, 2023), <https://delauro.house.gov/media-center/press-releases/delauro-fitzpatrick-pascrell-reintroduce-bipartisan-national-critical>. Barring some differences, the 2023 NCCDA does not differ much fundamentally, compared to its 2021 and 2022 (as incorporated in the America COMPETES Act bill of 2022) counterparts. For a comparison between the 2022 and 2023 version of the NCCDA, see Matthew Shapanka & Holly Fechner, *Lawmakers Introduce “New” Version of Expansive Outbound Investment Legislation*, COVINGTON (May 12, 2023), <https://www.globalpolicywatch.com/2023/05/lawmakers-introduce-new-version-of-expansive-outbound-investment-legislation/>.

142. See H.R. 3136, 118th Cong. § 2 (2023).

investments.¹⁴³ This will encompass the planned movement of production, research, manufacturing, or fabrication of national essential capabilities from the United States to foreign enemies.¹⁴⁴

The provisions of this Act constitute a unique and comprehensive policy notion that has the potential to result in far-reaching and unfavorable implications that go beyond the realm of national security. Before the implementation of this investment review system, the Trump administration had already established restrictions more narrowly tailored to prevent U.S. investments in Chinese companies based on national security concerns.¹⁴⁵ The primary objective of this Act was to prevent the United States from playing a leading role in the development of China's technical capacity. In general, this Act suggested several actions to guarantee the continued safety of the supply chain of national essential capabilities.¹⁴⁶ These actions include initiating evaluations of overseas investments and encouraging domestic production capacities.¹⁴⁷ However, because of the scope of outward investment provisions, there is potential for unanticipated and unwelcome ramifications. The NCCDA foreshadowed the current U.S. Senate actions, which incorporated an outbound investment notification regime into the annually reviewed National Defense Authorization Act (NDAA).¹⁴⁸ Therefore, it is imperative to conduct an investigation of the probable effects of this law. This part examines the objectives of the NCCDA, which aim to limit investments in Chinese firms to prevent the development of China's military and intelligence capabilities.¹⁴⁹ It then explores the geopolitics surrounding the rise of outbound investment screening in U.S. law and policy and its implications for U.S.-China trade relations. Additionally, this part discusses the multifaceted proposals related to outbound investment screening and their potential impact on the economic and political dynamics between the United

143. Jared Mondschein et al., *Securing the Microelectronics Supply Chain: Four Policy Issues for the U.S. Department of Defense to Consider*, RAND (Feb. 28, 2022), <https://www.rand.org/pubs/perspectives/PEA1394-1.html>.

144. Christian C. Davis et al., *U.S. Policy-Makers Consider Alternatives for Outbound Investment Review*, AKIN GUMP (May 5, 2022), <https://www.akingump.com/en/news-insights/us-policy-makers-consider-alternatives-for-outbound-investment-review.html>.

145. Sarah B. Danzman, *Is the U.S. Going to Screen Outbound Investment*, ATL. COUNCIL (Jan. 10, 2022), <https://www.atlanticcouncil.org/blogs/econographics/is-the-us-going-to-screen-outbound-investment/>.

146. See H.R. 3136, 118th Cong. §§ 1004-1008 (2023).

147. *Id.*

148. CIMINO-ISAACS & SUTTER, *supra* note 21.

149. U.S. REP. ROSA DELAURO, *supra* note 141.

States and China. Finally, it evaluates the approaches taken in the reauthorization of the Trade Adjustment Assistance Act (TAA) and the America COMPETES Act.

A. Normative Assessment of the NCCDA

Normative assessment refers to the process of evaluating a law, policy, or practice against a set of ethical or moral standards.¹⁵⁰ For the purpose of this Article, a normative assessment can help guide legal analysis and decision-making by providing a framework for evaluating the ethical implications of different options or courses of action. It can also help ensure that legal decisions are consistent with commonly accepted norms and values, promoting the overall well-being of society.

The NCCDA introduces four principal components aimed at safeguarding critical national capabilities. First, the NCCDA proposes the establishment of an interagency committee, the National Critical Capabilities Committee (NCCC), comprising twelve members to review outbound investment.¹⁵¹ This committee, chaired by either the U.S. President or a presidential appointee, is tasked with overseeing the review process.¹⁵² Secondly, the NCCC is responsible for examining “covered activities” that involve “countries of concern.”¹⁵³ These activities include construction, development, production, expansion, modification, management, operation, utilization, sale, or relocation of a “national critical capability” into or within a “country of concern”; or investing in or financing such a capability.¹⁵⁴ Third, the NCCDA mandates that U.S. persons or foreign entities planning to undertake a covered activity must notify the NCCC at least forty-five days before the activity.¹⁵⁵ This requirement introduces a preemptive measure to scrutinize potential investments or activities that could endanger national security. Fourth, the NCCC should find that a covered activity poses an unacceptable threat to national critical capabilities and would possess

150. This involves determining whether the law or policy aligns with commonly accepted norms or values, such as fairness, justice, or human rights.

151. H.R. 3136, 118th Cong. § 1002 (2023). *See also* Najib Zamani, *A Legal Comparative Approach Towards the Screening of Outbound FDI*, 2022 ERASMUS L. REV. 299, 299 (2022).

152. H.R. 3136, 118th Cong. §§ 1002-1003 (2023). *See also* Derrick Kyle, *Congress Contemplates Committee to Review Outbound Investment*, TORRES TRADE L. (Apr. 23, 2022), <https://www.torrestradelaw.com/posts/Congress-Contemplates-Committee-to-Review-Outbound-Investment/> 264.

153. *Id.*

154. Madison Cash, *Reversing CFIUS: Analyzing The International and Constitutional Implications of the Revised National Critical Capabilities Defense Act*, 33 DUKE J. COMP. & INT’L L. 289, 302 (2023).

155. *Id.* at 305.

the authority to recommend actions to the President or Congress aimed at mitigating such risks.¹⁵⁶ Additionally, the NCCC could engage directly with the concerned parties to negotiate mitigation agreements before any executive or legislative action is pursued.¹⁵⁷ Collectively, the measures outlined in the NCCDA aim to establish a robust framework for the proactive assessment and management of outbound investments and activities that could compromise critical capabilities, ensuring a balanced approach that weighs national security against the imperative for international economic engagement.

TABLE TWO: NCCDA FEATURES¹⁵⁸

| Feature | Measures | Intended Effects |
|--|---|--|
| Establishment of an Interagency Committee | Creation of an inter-agency National Critical Capabilities Committee (NCCC) comprising leaders from at least thirteen federal agencies, including the President of the United States as chairperson. Participating agencies include the Office of the U.S. Trade Representative and the Departments of Commerce, State, Treasury, Defense, and Justice. ¹⁵⁹ | Ensures comprehensive oversight of activities subject to review and fosters an efficient, coordinated review process by involving key stakeholders across multiple federal agencies. |

156. *Id.* at 299.
157. H.R. 3136, 118th Cong. § 1003(c) (2023).
158. Elaborated from various public sources.
159. *U.S. National Security Review for Outbound Investment: Domestic and Global Impact*, MORGAN LEWIS (May 9, 2022), <https://www.morganlewis.com/pubs/2022/05/us-national-security-review-for-outbound-investment-domestic-and-global-impact>.

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| Feature | Measures | Intended Effects |
|--|--|---|
| Review of “Covered Activities” Involving “Countries of Concern” | The NCCDA delineates a comprehensive list of “covered activities” subject to regulatory scrutiny. ¹⁶⁰ These activities include: (1) development, production, expansion, adjustment, servicing, management, operation, utilization, sale, or relocation of any “national critical capability” into or within a “country of concern”; (2) sharing or disclosing technology or intellectual property enhancing a national critical capability with an entity of concern located in a country of concern; (3) investing in or providing financial resources to a “national critical capability” benefiting an entity of concern or a country of concern. The definition of “covered activity” includes actions by both U.S. persons and foreign entities. | Establishes a broad and clear definition of covered activities, ensuring effective identification and review of operations posing risks to national critical capabilities, especially those involving countries of concern. |

160. *Revised National Critical Capabilities Defense Act of 2022 Proposes Expansive Outbound Investment Review Regime*, COVINGTON (June 16, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/06/revised-national-critical-capabilities-defense-act-of-2022-proposes-expansive-outbound-investment-review-regime>

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| Feature | Measures | Intended Effects |
|--|---|--|
| Notification Requirement and 45-Day Review Period | Entities must provide written notification to the NCCC at least forty-five calendar days before engaging in a covered activity. ¹⁶¹ If parties fail to submit the required notification, the NCCC is authorized to initiate a unilateral review. Non-compliance with notification requirements can result in civil penalties up to USD 250,000 . | Facilitates early identification of covered activities and potential risks. The unilateral review authority and penalty provisions serve as deterrents against non-compliance, enhancing enforcement mechanisms. |
| Authority to Impose Mitigation | The NCCC is empowered to negotiate mitigation agreements with involved parties to address and neutralize risks posed by covered activities deemed to threaten national critical capabilities. ¹⁶² If an agreement cannot be reached, the NCCC can recommend mitigation measures to the President or Congress, including suspension or prohibition of the activity. This proactive approach emphasizes collaborative resolution before escalating to presidential or legislative action. | Ensures flexible and responsive mitigation of risks, promoting a cooperative security approach while maintaining the authority to impose stringent measures if necessary. |

161. “Reverse CFIUS” On The Way: U.S. Government Developing Outbound Investment, WILLKIE FARR & GALLAGHER LLP (Nov. 30, 2022), <https://www.willkie.com/publications/2022/11/reverse-cfius-on-the-way-us-government-developing-outbound-investment>

162. US Government Ramps Up Scrutiny of Foreign Investments, WILMERHALE (Aug. 4, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220804-us-government-ramps-up-scrutiny-of-foreign-investments>

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| Feature | Measures | Intended Effects |
|--|---|---|
| Integration into National Defense Authorization Act (NDAA) for Fiscal Year 2025 | The NCCDA has been integrated into the NDAA for Fiscal Year 2025, which was signed into law by President Biden on December 23, 2024. ¹⁶³ This integration enhances the enforceability of the NCCDA provisions by anchoring them within broader national security legislation. | Strengthens the legal framework for regulating national critical capabilities by embedding NCCDA measures within established national defense and security legislation, ensuring cohesive implementation and enforcement. |

The importance of the NCCDA for the United States lies in its focus on consistently evaluating supply chains, production facilities, and manufacturing capacity of national critical capabilities. This effort was designed to prevent potentially risky U.S. investments in China’s technical capabilities, which could jeopardize national security. By avoiding excessive dominance in significant sectors, such as healthcare, energy, and the military, the NCCDA encourages a more equitable global regulation. In addition, the NCCDA promotes global collaboration and aligns with the concept of bolstering economic resilience and security.

B. The Objectives of the NCCDA

There are two immediate objectives of the NCCDA. The first objective is to increase U.S. scrutiny by setting up a screening mechanism to review or oversee the institutions that invest in foreign firms,¹⁶⁴ especially in sectors that may affect the national security of the United

163. National Critical Capabilities Defense Act of 2023, H.R. 3136, 118th Cong. (2023).

164. The 2023 draft explicitly mentions China as one of the “country of concern.” This is an important difference and departs from the 2021 bill’s text, which had refrained from specifying China directly within its text. *See* National Critical Capabilities Defense Act of 2021, S.1854, 117th Cong. § 1001(4) (2022); H.R. 3136, 118th Cong. § 1001(2) (2023). *See also* *Transatlantic Approaches to Outbound Investment Screening*, CTR. FOR STRATEGIC & INT’L STUD. (Jan. 17, 2023), <https://www.csis.org/analysis/transatlantic-approaches-outbound-investment-screening>

States and its people.¹⁶⁵ The second objective is the establishment of a supply chain of U.S. goods in China that would help improve U.S. economic competitiveness in the world.¹⁶⁶

There is consensus on the provision that outbound investments must be screened and potential investments that may cause a national threat to the United States and its people should be denied under the principle of sovereignty.¹⁶⁷ The provision regarding screening the supply chain of U.S. goods in China ensures that U.S. competitiveness is stronger and undermines Chinese innovation in highly technological sectors. The idea of expanding existing executive orders to increase the scrutiny of the U.S. government on actions directly related to funding Chinese firms aligned with the Chinese military is vehemently contested.¹⁶⁸ However, the need to protect the United States and its citizens from commercial theft is pressing; thus, it is acknowledged that action to screen outbound investments is necessary. Nevertheless, the question of how thoroughly this inspection should be conducted raises some concerns. Critics emphasize the importance of improving current inspection processes before a new bill is passed.¹⁶⁹

Although the proposed bill is similar in purpose to export controls, there are several key distinctions. U.S. export controls restrict or prohibit the movement of tangible and intangible items across borders or among individuals to protect national security and foreign policy.¹⁷⁰ The amended Export Administration Act of 1979 authorizes the

165. David Shepardson & Patricia Zengerle, *U.S. House Leaders Unveil Chips China Competition Bill*, REUTERS (Jan. 26, 2022), <https://www.reuters.com/business/us-house-leaders-set-unveil-chips-china-competition-bill-2022-01-25/>; Gavin Bade, *Corporate America Fights Uphill Battle Against Anti-China Push*, POLITICO (Jan. 9, 2021), <https://www.politico.com/news/2021/09/01/business-us-china-trade-508239>.

166. Shepardson & Zengerle, *supra* note 165.

167. See Kit Conklin, *A Policy Blueprint for the Trump Administration's Outbound Investment Screening Regime*, ATL. COUNCIL (Dec. 20, 2024), <https://www.atlanticcouncil.org/blogs/econographics/a-policy-blueprint-for-the-trump-administrations-outbound-investment-screening-regime/>.

168. See Gavin Bade, "We're in an Economic War:" White House, Congress Weigh New Oversight of U.S. Investments in China, POLITICO (Feb. 19, 2022), <https://www.politico.com/news/2022/02/19/china-investments-economy-us-congress-00008745>.

169. Inu Manak, *Outbound Investment Screening Would be a Mistake*, COUNCIL ON FOREIGN RELS. (June 30, 2022), [https://www.cfr.org/article/outbound-investment-screening-would-be-mistake;Outbound Investments May Spell Trouble for US National Security. Can Screening Reduce the Risk?](https://www.cfr.org/article/outbound-investment-screening-would-be-mistake;Outbound%20Investments%20May%20Spell%20Trouble%20for%20US%20National%20Security.%20Can%20Screening%20Reduce%20the%20Risk?), ATL. COUNCIL (Jan. 19, 2022), <https://www.atlanticcouncil.org/news/transcripts/outbound-investments-may-spell-trouble-for-us-national-security-can-screening-reduce-the-risk/>.

170. *Overview of Export Laws and Regulations*, U.C. DAVIS OFF. OF RSCH., <https://research.ucdavis.edu/wp-content/uploads/Export-Control-Overview-of-Regulations.pdf> (last visited Jan. 17, 2025).

Department of Commerce, in consultation with other appropriate agencies, to regulate the export of software and technology.¹⁷¹

From an economic perspective, the objectives of the NCCDA are to protect critical infrastructure, technology, and intellectual property, which may be detrimental to national security interests.¹⁷² First, the NCCDA can prevent U.S. companies from transferring critical technologies and sensitive information to Chinese companies or individuals that could be used for military or strategic purposes. Second, the NCCDA can prevent U.S. companies from indirectly supporting China's military or national security goals by investing in companies involved in activities that threaten U.S. interests. Third, the NCCDA can help protect U.S. economic interests by preventing U.S. companies from investing in sectors heavily subsidized by the Chinese government or those that benefit from unfair trade practices. It also reflects growing concerns among U.S. policymakers about China's strategic industrial policies, such as the "Made in China 2025" initiative, which aims to make China a global leader in key technologies, and its Belt and Road Initiative, to build infrastructure and extend Chinese influence worldwide.¹⁷³ From a geopolitical perspective, the NCCDA is part of a broader trend toward power competition between the United States and China, as both countries seek to exert influence and expand their spheres of influence. The United States sees China as a strategic rival and a potential threat to its global leadership, while China views the United States as a declining power seeking to contain its rise. Overall, outbound investment screening is seen as an important tool by the U.S. government to protect its interests alongside increasing competition and rivalry with China.¹⁷⁴

C. *The Politics of the NCCDA*

The unraveling of U.S.-China economic ties, outlined in Part II, has set the stage for more recent developments related to U.S. economic foreign policy. The need to implement a check on outbound investments in China and other countries of concern first emerged in EO

171. See generally ERIC L. HIRSCHHORN ET AL., U.S. EXPORT CONTROLS AND ECONOMIC SANCTIONS (4th ed., 2022). See also Export Control Reform Act of 2018, Pub. L. 115-232, §§ 1756, 1764, 132 Stat. 2217, 2232 (2018); 15 C.F.R. §§ 730-774 (2020).

172. See H.R. 3136, 118th Cong. §§ 1001(3)-(5) (2023) (noting that the activities and sectors that are covered in the act concern areas such as intellectual property, quantum technology, and critical minerals). See also U.S. REP. ROSA DELAURO, *supra* note 141.

173. KAREN M. SUTTER, CONG. RSCH. SERV., IF10964, THE MADE IN CHINA 2025 INITIATIVE: ECONOMIC IMPLICATIONS FOR THE UNITED STATES 1 (2024).

174. Thilo Hanemann et al., *An Outbound Investment Screening Regime for the United States?*, RHODIUM GRP. (Jan. 2022), https://rhg.com/wp-content/uploads/2022/01/RHG_TWS_2022_US-Outbound-Investment.pdf.

13959 on November 12, 2020.¹⁷⁵ The Trump administration ordered a ban on U.S. investments in over thirty military-linked Chinese firms under the rationale that investment in such firms will provide an opportunity for China to exploit the resources and capital to develop its military, intelligence, and other security apparatuses, which can be used to directly threaten the U.S. homeland and U.S. forces overseas.¹⁷⁶

Thereafter, in the same year, the U.S. Congress authorized a directive for delisting Chinese companies from U.S. stock exchanges in the event of non-compliance with specific disclosure prerequisites on a range of financial and accounting information.¹⁷⁷ This directive was a component of a more comprehensive strategy aimed at regulating the behavior of foreign entities seeking access to U.S. capital markets.¹⁷⁸ The Congress-approved order is indicative of a growing trend towards increased regulatory scrutiny of foreign companies operating in the United States.¹⁷⁹ While distinct from outbound investment screening, this legislative action laid the groundwork for subsequent regulatory initiatives, including the current bills under consideration in Congress. The United States has consistently invoked national security concerns to justify expanding its regulatory framework for investments involving Chinese entities. This approach has evolved to encompass both inbound and outbound investment scrutiny, as evidenced by recent developments. The Holding Foreign Companies Accountable Act (HFCAA), enacted in 2020 and subsequently strengthened, exemplifies this trend.¹⁸⁰ It allows for the delisting of Chinese companies that fail to comply with U.S. auditing requirements for two consecutive years²³. This increased regulatory

175. Exec. Order No. 13959, 85 Fed. Reg. 73185 (Nov. 17, 2020).

176. Henry K. Chen, *Applying Bright Lines to the “Black Box”: Article II Powers as a Tool for Reducing Uncertainty in CFIUS Reviews*, 28 GEO. MASON L. REV. 1181 (2021); *Letter to the Speaker of the House and the President of the Senate on the Continuation of the National Emergency with Respect to the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China*, THE WHITE HOUSE (Nov. 9, 2021), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/11/09/letter-to-the-speaker-of-the-house-and-the-president-of-the-senate-on-the-continuation-of-the-national-emergency-with-respect-to-the-threat-from-securities-investments-that-finance-certain-companies-o/>.

177. Nicholas Gordon, *SEC Adds Over 80 Chinese Firms, Including JD.com, NetEase, and NIO, to List of Companies to be Booted from Wall Street*, FORTUNE (May 5, 2022), <https://fortune.com/2022/05/05/sec-china-hfcaa-delisting-jd-pinduoduo-netease-nyse-nasdaq/>.

178. Kellie Mejdich, *Congress Clears Bill to Ban Trading in Chinese Firms that Thwart U.S. Auditors*, POLITICO (Dec. 2, 2022), <https://www.politico.com/news/2020/12/02/congress-clears-bill-to-ban-trading-in-chinese-firms-that-thwart-us-auditors-442362>.

179. *Id.*

180. *Staff Statement on the Holding Foreign Companies Accountable Act and the Consolidated Appropriations Act, 2023*, U.S. SEC. & EXCH. COMM’N (Apr. 6, 2023), <https://www.sec.gov/newsroom/speeches-statements/statement-hfcaa-040623>. See also Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 198 (2022) (amending the HFCAA to shorten the non-compliance period from three to two years).

pressure has significantly impacted Chinese companies listed on U.S. exchanges, with some voluntarily delisting and others facing potential forced delisting. As of 2025, the regulatory landscape continues to evolve, with ongoing negotiations between U.S. and Chinese authorities aimed at addressing audit inspection issues and maintaining market access for compliant companies. This dynamic regulatory environment underscores the U.S. government's commitment to leveraging financial regulations as a tool to address broader national security and economic concerns related to China.

In 2021, the Biden administration revised and expanded the list of blocked military-linked Chinese firms.¹⁸¹ However, the scope of investment has remained limited.¹⁸² Another attempt before the present bill was under consideration before the House and the Senate and was passed as part of Congress' anti-China economic legislation.¹⁸³ The U.S.-China Economic and Security Review Commission was created in 2020 to exercise oversight on debates surrounding the bill.¹⁸⁴

Senators Bob Casey and John Cornyn spearheaded a bill aimed at reinforcing the regulatory scrutiny of the United States' supply chains in the People's Republic of China.¹⁸⁵ The legislation passed an amendment to the NDAA seeks to bolster the capacity of relevant agencies to oversee the operational activities of U.S. companies in China, enhance due diligence measures, and ensure compliance with the existing laws and regulations.¹⁸⁶ It is set to advance U.S. interests in safeguarding the integrity and security of American supply chains, particularly those that support critical sectors of the economy and are expected to have implications for U.S.-China trade relations.¹⁸⁷ Jeffrey Fiedler, a member of the U.S.-China Economic and Security Review Commission, stated that "it's a *fait accompli*," signifying his support for the new legislation concerning the establishment of an outward investment screening mechanism.¹⁸⁸ This multifaceted proposal, while receiving cross-party endorsement, had been

181. Exec. Order No. 14032, 86 Fed. Reg. 30145 (June 7, 2021).

182. *Id.* See also Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *China's Corporate Social Credit System and the Dawn of Surveillance State Capitalism*, 24 J. CORP. L. STUD. 187 (2024).

183. Bade, *supra* note 168.

184. *About Us*, U.S.-CHINA ECON. & SEC. REV. COMM'N, <https://www.uscc.gov/about-us> (last visited Jan. 17, 2025).

185. *Casey, Cornyn Bill to Screen U.S. Investment in China Overwhelmingly Passes Senate*, LEGISTORM (July 25, 2023), https://www.legistorm.com/stormfeed/view_rss/2271332/member/813/title/casey-cornyn-bill-to-screen-us-investment-in-china-overwhelmingly-passes-senate.html.

186. *Id.*

187. See Bade, *supra* note 168.

188. ATL. COUNCIL, *supra* note 169.

the subject of debate, particularly for its potential impact on the economic and political dynamics of the United States and China.¹⁸⁹

In May and December 2021, separate NCCDA bills were formally introduced to the Senate and the House respectively, with the aim to innovate the evaluation process of the U.S. supply chain by identifying vulnerabilities that could be exploited by national adversaries.¹⁹⁰ On June 13, 2022, a bipartisan cohort from both the Senate and the House reached a consensus on a revised version of the NCCDA, which aimed at instituting a comprehensive review system for scrutinizing investments and transactions within nations deemed as threats, notably China.¹⁹¹ This revision drew inspiration from a prior Senate proposal that was excluded from the USICA, while a related concept was incorporated into the House's America COMPETES Act.¹⁹²

The America COMPETES Act included provisions for the 2021 NCCDA bill, aimed at forming the NCCC under the jurisdiction of the Office of the USTR.¹⁹³ The envisioned committee was designed to be an interagency entity endowed with the authority to regulate outbound investments by a variety of U.S. stakeholders, particularly in areas considered to be of critical national importance.¹⁹⁴

The review would focus on investments in “countries of concern,” including “foreign adversary” and “non-market economy” nations, as well as any other transaction that could have a critical impact on national security.¹⁹⁵ The America COMPETES Act and the USICA share comparable foreign policy titles. Primarily, the House America COMPETES Act

189. See e.g. Toomey Warns Against Establishing a Flawed Outbound Investment Regime, U.S. SEN. COMM. ON BANKING, HOUS., & URB. AFFS. (Sept. 29, 2022), <https://www.banking.senate.gov/newsroom/minority/toomey-warns-against-establishing-a-flawed-outbound-investment-regime> (discussing a flawed outbound investment screening mechanism would have on the U.S.-China dynamics).

190. National Critical Capabilities Defense Act of 2021, H.R. 6329, 117th Cong. (2021); S.1854, 117th Cong. (2021).

191. *Revised National Critical Capabilities Defense Act of 2022 Proposes Expansive Outbound Investment Review Regime*, COVINGTON (June 16, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/06/revised-national-critical-capabilities-defense-act-of-2022-proposes-expansive-outbound-investment-review-regime>.

192. Christopher R. Wall et al., *Overview of the Proposed “Reverse CFIUS” Process via the National Critical Capabilities Defense Act of 2022*, GLOB. TRADE & SANCTIONS L. (June 21, 2022), <https://www.globaltradeandsanctionslaw.com/overview-of-the-proposed-reverse-cfius-process-via-the-national-critical-capabilities-defense-act-of-2022/>.

193. David Plotinsky et al., *U.S. National Security Review for Outbound Investment: Domestic And Global Impact*, MORGAN LEWIS (May 9, 2022), <https://www.morganlewis.com/pubs/2022/05/us-national-security-review-for-outbound-investment-domestic-and-global-impact>.

194. *Summary of America COMPETES Act*, BGR GROUP, <https://bgrdc.com/summary-of-america-competes-act/> (last visited Jan. 17, 2025).

195. Plotinsky et al., *supra* note 193.

accentuated diplomatic endeavors, specifically concerning intensifying engagements in the Indo-Pacific region.¹⁹⁶ Conversely, the Senate USICA bill exhibits a slightly more stringent approach, with greater emphasis on military concerns, exemplified by the inclusion of ballistic missile provisions.¹⁹⁷ Additionally, unlike the Senate and House committee-endorsed, foreign-policy bills, the America COMPETES Act encompasses provisions aimed at mitigating climate change.¹⁹⁸ This discrete inclusion of climate change within the ambit of the America COMPETES Act is of considerable importance, particularly as it continues to pose multifaceted and far-reaching implications, and its intersection with foreign policy legislation and investment laws demands a nuanced and multidimensional approach.

Analyzing this arrangement from a trade perspective, no substantial provisions overlap each other. In the event of any extension, both bills might address these issues by adopting different approaches and navigating through sensitive areas.¹⁹⁹ The TAA reauthorization, a program traditionally reauthorized in tandem with the TPA, is included in the America COMPETES Act.²⁰⁰ However, the Senate-passed USICA did not mention reauthorizing the TAA.²⁰¹ USICA also included extensive provisions to reinstate tariff exclusions that have expired, reimburse importers for these lapsed exemptions, and mandate a new application process for companies seeking future exemptions. In contrast, tariff exemptions were completely absent from the America COMPETES Act.²⁰² It was reported that over fifty percent of Democrats in the House Ways & Means Committee were supporting this bill, giving it new momentum and thus leading several policymakers and corporate leaders to conclude that this bill will be effective in a short while.²⁰³

The proposed NCCDA seeks to establish an interagency committee, the NCCC, tasked with reviewing and restricting outbound transactions

196. H.R. 4521, 117th Cong. §§ 30202, 30213, 30222 (2021).

197. S. 1260, 117th Cong. §§ 3224(10) (D), 3502(a) (3), 3502(a) (5) (2021).

198. Josh Teitelbaum et al., *America COMPETES Act v. U.S. Innovation and Competition Act—Summary of Key Differences and Takeaways*, AKIN GUMP (Feb. 14, 2022), <https://www.akingump.com/en/news-insights/america-competes-act-v-us-innovation-and-competition-acts-summary-of-key-differences-and-takeaways.html>.

199. *Id.*

200. Josh Teitelbaum et al., *Trade Policy Side-by-Side: Division K of the America COMPETES Act Versus Division G of the U.S. Innovation and Competition Act*, AKIN GUMP (Feb. 14, 2022), <https://www.akingump.com/a/web/72cjmNCey1fa64Lc6REuF/akin-gump-competes-act-and-usica-division-k-side-by-side.pdf>.

201. *Id.*

202. *Id.*

203. *Id.*

that could compromise national security.²⁰⁴ Additionally, the legislation anticipates the creation of the NCCC, empowered with the mandate to oversee and inhibit externalization, development, or manufacture of pivotal national capabilities by U.S. entities to adversarial nations.²⁰⁵ This encompasses critical sectors, such as medical supplies and medications, electrical grid infrastructure, and other domains deemed vital for national security.²⁰⁶ The NCCC would consist of officials from several federal agencies.²⁰⁷

D. *Legislative Developments and Procedural Advancements of the NCCDA*

A bipartisan group in the United States has been trying to pass the NCCDA.²⁰⁸ Previous attempts in 2021 and 2022 have failed,²⁰⁹ and supporters of the NCCDA sent a letter to President Biden in September 2022 asking for an executive order on outbound investment review.²¹⁰ However, the U.S. Senate, in August 2023, passed an amendment called the Outbound Investment Transparency Act of 2023 (OITA) as part of the NDAA.²¹¹ The outbound investment notification regime was incorporated into the NDAA through an amendment reflecting the terms of the OITA, which requires a U.S. investor to notify the Treasury at least fourteen days before taking a “covered activity.”²¹² A “covered activity” refers to outbound investments in entities operating in “covered sectors” located in “countries of concern” like China, Russia, Iran, and North Korea, involving technologies such as semiconductors, quantum information technology, and AI.²¹³ The scope of the OITA could be

204. David Mortlock et al., “Reverse CFIUS” on the Way: U.S. Government Developing Outbound Investment Review Regime Aimed At Protecting National Security, WILLKIE FARR & GALLAGHER (Nov. 30, 2022), <https://www.willkie.com/-/media/files/publications/2022/reversecfiustonthewayusgovernmentdevelopingoutbound.pdf>.

205. U.S. REP. ROSA DELAURO, *supra* note 141.

206. *Id.*

207. James Edwards, *Government Regulation Can't Secure America's Supply Chain*, REAL CLEAR MKTS. (Feb. 21, 2022), https://www.realclearmarkets.com/articles/2022/02/21/government_regulation_cant_secure_americas_supply_chain_817631.html.

208. Rob O'Brien et al., *US Government Issues Executive Order Restricting US Outbound Investment in Advanced Technologies Involving “Countries of Concern” (China)*, GLOB. SANCTIONS & EXP. CONTROLS BLOG (Aug. 11, 2023), <https://sanctionsnews.bakermckenzie.com/us-government-issues-executive-order-restricting-us-outbound-investment-in-advanced-technologies-involving-countries-of-concern-china/>.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

expanded. The differences between the Senate and House versions of the NDAA, including the OITA, are resolved.²¹⁴ The 2023 version of the NCCDA has broad definitions of the covered activities and technologies, including critical minerals, pharmaceutical ingredients, and car manufacturing.²¹⁵ As both Congress and the executive branch work on an outbound investment review system, the initial executive order sets the stage for a new regulatory approach.²¹⁶

While the OITA stops short of outright banning investments, it mandates that U.S. corporations report any investments they undertake in specified sectors within the Chinese industry to the government.²¹⁷ This requirement was part of an envisioned framework under the NCCDA of 2021, aimed at creating an interagency system to scrutinize investments in China.²¹⁸ This system was intended to cover essential supply chains and key technological areas showing significant growth. However, this provision was ultimately removed from the final CHIPS and Science Act.

Additionally, the OTIA amendment extends the reporting requirement to cover joint ventures and subsidiaries formed in China for activities such as production, design, testing, manufacturing, fabrication, and research related to one or more sectors of national critical capabilities.²¹⁹ This also encompasses the need to report equity investments, highlighting a comprehensive approach for monitoring and regulating sensitive investments and technological exchanges with China.²²⁰

Overall, before the pandemic, an attempt was made to evaluate U.S. investments in China.²²¹ In 2018, lawmakers suggested extending supply chain control, but the plan was shelved.²²² Since then, House Democrats have stepped up to the plate, tying the outbound investment law to their NDAA.²²³ Objections have come from corporate stakeholders who want to avoid an economic war with China and

214. *Id.*

215. *Id.*

216. *Id.* See also Liz Carey, Fitzpatrick, *Colleagues Introduce National Critical Capabilities Defense Act*, PENN. BUS. REP. (Dec. 30, 2021), <https://pennbizreport.com/news/21974-fitzpatrick-colleagues-introduce-national-critical-capabilities-defense-act/>.

217. Giovanna M. Cinelli et al., *Outbound Investment Review: Little Immediate Effect, but More is Coming*, MORGAN LEWIS (Aug. 11, 2023), <https://www.morganlewis.com/pubs/2023/08/outbound-investment-review-little-immediate-effect-but-more-is-coming>.

218. Mortlock et al., *supra* note 204.

219. Cinelli et al., *supra* note 217.

220. See Outbound Investment Transparency Act of 2023, S. 2678, 118th Cong. §§ 801(3)(A) (i), 803 (2023).

221. O'Brien et al., *supra* note 208.

222. *Id.*

223. See *id.*

believe that the NCCDA would restrict U.S. competitiveness in foreign countries,²²⁴ as it limits or restricts the scope of investment by American companies.²²⁵ With the transition to the Trump administration in January 2025, there has been a notable shift in policy direction. President Trump has articulated a firm stance on economic engagements with China, emphasizing the protection of national security interests. In February 2025, he issued the “America First Investment Policy” memorandum, directing the CFIUS to tighten restrictions on Chinese investments in strategic sectors.²²⁶ This policy also proposes further limitations on U.S. outbound investments to China, particularly in sensitive technologies such as semiconductors, artificial intelligence, and quantum computing. Moreover, the administration is considering restricting investments from entities like pension funds and university endowments into Chinese markets, aiming to prevent U.S. capital from supporting China’s military and technological advancements.²²⁷ Given these developments, it is anticipated that the Trump administration will support the enactment of the NCCDA, integrating its provisions into the broader framework of the “America First Investment Policy.” This approach underscores a commitment to safeguarding national critical capabilities and reducing economic dependencies on China.

E. Legislative Analysis of the Executive Order to Restrict U.S. Outbound Investment in Certain Tech Sectors in China

As discussed earlier, on August 9, 2023, President Biden enacted EO 14105, marking the Biden administration’s inaugural step toward

224. See Yukon Huang, *The U.S.-China Trade War Has Become a Cold War*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Sept. 16, 2021), <https://carnegieendowment.org/2021/09/16/u.s.-china-trade-war-has-become-cold-war-pub-85352>. See generally *Coalition Letter on the National Critical Capabilities Defense Act*, U.S. CHAMBER OF COM. (Jun. 23, 2022), <https://www.uschamber.com/international/coalition-letter-on-the-national-critical-capabilities-defense-act>;

225. See generally Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 581-82 (2023); Jonas Fechter, *New-Level Screening? The Case of Outbound Investment Screening*, in *WEAPONISING INVESTMENTS* 85-88 (Jens H. Pohl et al. eds, 2024) (noting that under certain circumstances as prescribed under the NCCDA, the CNCC would be able to screen outbound investments, thus restraining U.S. companies’ investment scope).

226. *Trump Administration Directs CFIUS to Tighten Restrictions on Investment From Certain Countries While Easing National Security Reviews of Investments From Allies and Partners*, K&L GATES LLP (Feb. 26, 2025), <https://www.klgates.com/Trump-Administration-Directs-CFIUS-to-Tighten-Restrictions-on-Investment-From-Certain-Countries-While-Easing-National-Security-Reviews-of-Investments-From-Allies-and-Partners-2-26-2025>.

227. *Fact Sheet: President Donald J. Trump Encourages Foreign Investment While Protecting National Security*, THE WHITE HOUSE (Feb. 22, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-encourages-foreign-investment-while-protecting-national-security/>.

regulating specific U.S. investments in China.²²⁸ This directive mandates the Secretary of the Treasury to enforce notification demands and, in some cases, cast outright prohibitions on U.S. investments in China that concern critical sectors such as semiconductors, microelectronics, quantum information technologies, and artificial intelligence.²²⁹ EO 14105 mandates notification of notifiable transactions for other outbound investments to China within these sectors.²³⁰ This effort is to be coordinated by the Department of Commerce, among other federal bodies.²³¹ EO 14105 initiates a regulatory process that precisely outlined the terms for these restrictions and requirements.²³² The specifications of the OIP are to be delineated in regulations promulgated by the Treasury. In conjunction with this order, the Treasury issued an Advance Notice of Proposed Rulemaking (ANPRM) and a fact sheet to delineate the Treasury's approach to defining key components of the order and to solicit public input on over eighty detailed inquiries.²³³ The ANPRM comprehensively outlined the Treasury's present considerations regarding the implementation of EO 14105 and sought feedback on a broad array of issues associated with the forthcoming regulations.²³⁴ EO 14105 specifies three critical jurisdictional aspects that would be further clarified through the rule-making process.²³⁵ First, it addresses transactions involving "covered national security technologies and products," with a focus on sensitive technologies crucial for the military and security apparatus of countries of concern, a definition to be refined through rule-making.²³⁶ Second, it applies to "U.S. persons," encompassing individuals and entities within the United States, including foreign branches and entities organized under U.S. law.²³⁷ Thirdly, it defines a "covered foreign person" as someone from a country of concern, including citizens, permanent residents, entities, and the government of the concerned country, with the

228. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 11, 2023).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Timothy J. Keeler et al., *US Treasury Issues Advance Notice of Proposed Rulemaking Increasing CFIUS Enforcement Authorities*, MAYER BROWN (Apr. 12, 2024), <https://www.mayerbrown.com/en/insights/publications/2024/04/us-treasury-issues-advance-notice-of-proposed-rulemaking-increasing-cfius-enforcement-authorities>.

234. *Id.*

235. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 11, 2023).

236. *Id.*

237. *Id.*

Treasury considering extending this definition to include non-U.S. companies with significant Chinese operations and subsidiaries of Chinese companies in third countries.²³⁸

Currently, EO 14105 specifically names China, including Hong Kong and Macau, as a country of concern but allows for the inclusion of additional countries in the future.²³⁹ While EO 14105 has garnered support from several legislators, it has also faced criticism for its perceived loopholes and limited scope, with suggestions for further legislative and regulatory tightening to address investment concerns related to China more comprehensively.²⁴⁰ This implies that there will be flexibility in the NDAA Conference and that Congress may choose to codify the Senate-passed legislation, enact alternative legislation, or do nothing at all.

Although the scope of EO 14105 is limited, the broader political climate suggests the possibility of more extensive regulations through laws and administrative actions, which will likely discourage U.S. investment in China. Similar to the 2022 controls on exporting advanced chips and chip manufacturing equipment to China, the success of the OIP depends on it being part of a coordinated multinational effort.²⁴¹ This is particularly important given that U.S. investment in China is relatively small and is currently at a twenty-year low and decreasing.²⁴²

China expressed strong dissatisfaction and firmly opposed the U.S. decision to implement restrictive investment measures.²⁴³ It was alleged that the United States, under the pretext of national security, had imposed restrictions on U.S. companies in China, thereby advancing a strategy aimed at protecting U.S. hegemony and self-interests.²⁴⁴ China alleged that the order contravened the principles of market economy

238. *Id.*

239. *Id.*

240. See McHenry, *Luetkemeyer Statement on Biden Administration's Outbound Investment Executive Order*, HOUSE FIN. SERVS. COMM. (Aug. 9, 2023), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408946> (“Congress must look past ‘feel good,’ but inadequate, policies and take stronger action to confront the CCP by building on the tried and tested sanctions and export controls regimes”).

241. See Sujai Shivakumar et al., *Balancing the Ledger: Export Controls on U.S. Chip Technology to China*, CTR. FOR STRATEGIC & INT’L STUD. (Feb. 21, 2024), <https://www.csis.org/analysis/balancing-ledger-export-controls-us-chip-technology-china>.

242. Reva Goujon et al., *Big Strides in a Small Yard: The New US Outbound Investment Screening Regime*, RHODIUM GRP. 8 (Aug. 11, 2023), <https://rhg.com/wp-content/uploads/2024/02/Big-Strides-in-a-Small-Yard-The-New-US-Outbound-Investment-Screening-Regime-1-1.pdf>.

243. *Foreign Ministry Spokesperson's Reply to Press Questions on President Biden's Signing of Executive Order on Investment Restrictions on China*, MINISTRY OF FOREIGN AFFS., (Aug. 10, 2023), https://www.fmprc.gov.cn/fyrbt_673021/202308/t20230810_11124900.shtml (China).

244. *Id.*

and fair competition, severely undermining the international economic and trade order.²⁴⁵ It was further contended that this move fundamentally aimed to reverse globalization and engage in de-Sinicization.²⁴⁶ India, on the other hand, suggests the possibility of implementing a mechanism similar to those in the United States and Australia for reviewing foreign investments from certain countries.²⁴⁷ This consideration was based on statements made by industrial policy bureaucrat Rajesh Kumar Singh.²⁴⁸ However, it was also noted that this is merely a potential option under consideration, with no decision made yet, as India aims to maintain a “welcoming environment” for investments.²⁴⁹

EO 14105 represents a pivotal shift in U.S. foreign investment regulations, introducing significant changes that are initially concentrated on a select group of countries and technological sectors through the OIP. Although the scope of this order is currently narrow, there is a clear anticipation of expanded controls over outbound investments as geopolitical dynamics evolve and the program takes full effect. This adaptability is integral to EO 14105, allowing for adjustments in response to shifting international relations and technological advancements. The Department of Commerce’s ANPRM also explains that the notification process concerning Information and Communications Technology and Services (ICTS) deals, under the scope of EO 13873, is intended to provide better insights into transaction patterns, helping to inform the development of future policies.²⁵⁰ Proponents assert that the said measures are essential to preserving a market-based climate and countering the Chinese trade and investment rules that incentivize the transfer of U.S. technology and advanced capabilities to the benefit of Chinese competitors and the government.²⁵¹ On the contrary, the opponents contend that the said measures are insufficient to address national security risks.²⁵² The One Hundred Nineteenth Congress is expected to continue oversight of EO 14105’s implementation and may consider

245. *Id.*

246. *Id.*

247. Una Galani & Peter T. Larsen, *Exclusive: India Could Ease China Investment Curbs if Border Stays Calm*, REUTERS (Jan. 19, 2024), <https://www.reuters.com/world/asia-pacific/india-could-ease-china-investment-curbs-if-border-stays-calm-2024-01-18/>.

248. *Id.*

249. *Id.*

250. See 89 Fed. Reg. 15066 (proposed Mar. 1, 2024) (codified as 15 C.F.R. 7).

251. Cimino-Isaacs & Sutter, *supra* note 21, at 1.

252. *Chairman McCaul, McCaul on Executive Order Curbing US Tech Investment in China*, HOUSE FOREIGN AFFS. COMM. (Aug. 9, 2023), <https://foreignaffairs.house.gov/press-release/mccaul-on-executive-order-curbing-us-tech-investment-in-china/>.

related legislation.²⁵³ As the outbound investment screening program takes effect and its impacts become clearer, Congress is likely to assess its effectiveness and potentially propose adjustments or new measures to address evolving national security concerns related to foreign investments.

The Treasury's April 2024 ANPRM led to significant regulatory changes. On November 18, 2024, CFIUS announced the finalization of regulations enhancing its procedures and strengthening its penalty and enforcement authorities.²⁵⁴ These changes, effective December 26, 2024, include expanded information-gathering powers, broader subpoena authority, and substantially increased monetary penalties for violations. Regarding U.S. foreign investment restrictions in China, the rules were indeed completed by the end of 2024, as anticipated by former Commerce Secretary Gina Raimondo.²⁵⁵ On October 28, 2024, the U.S. Treasury Department issued final rules on investment restrictions against China, targeting sectors such as semiconductors, artificial intelligence, and quantum computing.²⁵⁶ These rules, set to take effect on January 2, 2025, aim to prevent U.S. investments from advancing technologies that could pose national security threats.

Given the interconnected nature of the global technology sector, the new stipulations, which restrict only a specific subset of transactions, necessitate meticulous due diligence and proactive regulatory planning from the parties involved. Unlike the CFIUS process, which includes a review for FDI into the United States, EO 14117 and the DOJ's corresponding ANPRM do not envisage a committee review for each notified transaction or provide a "safe harbor" exemption.²⁵⁷ Consequently, U.S. investors contemplating investments in China or Chinese-affiliated entities abroad must exercise heightened vigilance and compliance

253. LAURIE HARRIS, CONG. RSCH. SERV., R47644, *ARTIFICIAL INTELLIGENCE: OVERVIEW, RECENT ADVANCES, AND CONSIDERATIONS FOR THE 118TH CONGRESS* (2023).

254. 31 C.F.R. §§ 800, 802 (2024).

255. David Shepardson, *China Outbound Investment Rule to be Completed by End of Year – U.S. Official*, REUTERS (May 8, 2024), <https://www.reuters.com/markets/china-outbound-investment-rule-be-completed-by-end-year-us-official-2024-05-08/>.

256. Prohibitions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850). This final rule, issued by the U.S. Treasury Department on October 28, 2024, implements investment restrictions targeting China in sectors including semiconductors, artificial intelligence, and quantum computing technologies. The rule became effective on January 2, 2025.

257. *Executive Order to Protect Americans' Sensitive Personal Data*, COVINGTON (Mar. 5, 2024), <https://www.cov.com/en/news-and-insights/insights/2024/03/executive-order-to-protect-americans-sensitive-personal-data>.

diligence.²⁵⁸ This is particularly pertinent for large private equity firms and multinational corporations, which might navigate these regulations by structuring transactions across various international jurisdictions, highlighting the need for a comprehensive understanding and adherence to the evolving legal framework governing outbound investments.

F. *Legislative Development of the New Executive Order Seeking to Protect Americans' Sensitive Personal Data*

On February 28, 2024, President Biden unveiled EO 14117, a significant legislative step aimed at bolstering national security.²⁵⁹ This directive mandated the DOJ to devise regulations that restrict or prohibit certain transactions involving extensive volumes of sensitive personal data, data related to the U.S. government, countries of concern, or identified individuals. As of February 28, 2025, the Department of Justice has published a Notice of Proposed Rulemaking (NPRM) to implement EO 14117, which is currently in the public comment period.²⁶⁰ The proposed regulations extend to any entity or individual affiliated with, controlled by, or acting under the influence of designated countries of concern, especially those implicated in the indirect or direct violation of the outlined rules. The final rule is expected to be published later in 2025, pending review of public comments and any necessary revisions.

Contrary to what might be expected, the order does not necessitate data localization, nor does it blanketly apply restrictions to all transactions it governs.²⁶¹ Its primary objective is to thwart “countries of concern” from acquiring bulk sensitive information on American citizens and related government data, actions perceived as posing intolerable risks to U.S. national security.²⁶² The concerns highlighted include the potential for significant privacy breaches, counterintelligence threats, and the risk of blackmail, particularly for individuals connected to the military or national security sectors.²⁶³ To address these risks, EO 14117

258. Giulia Interesse, *US Investment Ban on China: What It Means Now that That's in Effect*, CHINA BRIEFING (Jan. 15, 2025), <https://www.china-briefing.com/news/us-investment-ban-on-china-what-it-means-now-that-its-in-effect/>.

259. Exec. Order No. 14117, 89 Fed. Reg. 15421 (Mar. 1, 2024).

260. Preventing Access to U.S. Sensitive Personal Data and Government-Related Data by Countries of Concern or Covered Persons, 90 Fed. Reg. 1536 (Jan. 8, 2025) (to be codified at 28 C.F.R. pt. 202). The final rule was published in the Federal Register on January 8, 2025, and will become effective on April 8, 2025, with certain provisions taking effect on October 6, 2025.

261. Exec. Order No. 14117, 89 Fed. Reg. 15421 (Mar. 1, 2024).

262. *Id.*

263. *Id.*

empowers the Attorney General with the authority to halt the mass dissemination of American citizens' personal data to flagged countries.²⁶⁴ It also instructs various federal departments and agencies to initiate measures to prevent the flow of "sensitive personal data" to these countries through the establishment of new regulations and guidelines.²⁶⁵

EO 14117 categorizes data such as personal identifiers, geolocation, biometric data, human 'omic data (data reflecting human biological molecules or metabolic profiles), personal health information, and financial data as "sensitive personal data."²⁶⁶

In alignment with Executive Order 13873, aimed at securing the ICTS Supply Chain, the DOJ's ANPRM considers labeling nations such as China (including Hong Kong and Macau), Russia, Cuba, Iran, Venezuela, and North Korea as "countries of concern."²⁶⁷ This designation sets the stage for a more focused regulatory approach to safeguarding sensitive U.S. data against potential security threats posed by these nations.²⁶⁸

To implement EO 14117, the DOJ considers a two-tiered approach.²⁶⁹ In the first tier, certain types of "highly sensitive data transactions" will be banned, while in the second tier, transactions will be restricted and allowed to proceed as long as they meet predetermined security requirements intended to reduce access to the data by "countries of concern."²⁷⁰ The DOJ is in the process of classifying two types of data transactions as illegal: (1) transactions involving data brokers and (2) transactions involving the transfer of human biospecimens or bulk human genetic data.²⁷¹ Three more categories of restricted data transactions are examined by the DOJ: (1) vendor agreements (which include agreements for cloud services and technological services); (2) employment agreements; and (3) investment agreements.²⁷² The Department of Homeland Security's Cybersecurity and

264. *Id.*

265. *Id.*

266. *Id.*

267. *Fact Sheet: Justice Department Will Issue Advance Notice of Proposed Rulemaking Following Forthcoming Groundbreaking Executive Order Addressing Access to Americans' Bulk Sensitive Personal Data by Countries of Concern*, U.S. DEP'T OF JUST. (Feb. 28, 2024), <https://www.justice.gov/opa/media/1340216/dl>.

268. *Id.*

269. Craig Horbus & Jarman J. Smith, *National Security of Data? U.S. Government Issues Executive Order Aimed at Protecting Americans' Personal Data: How Does New Cyber Security Executive Order Affect Your Business?*, NAT. L. REV. (Apr. 4, 2024), <https://natlawreview.com/article/national-security-data-us-government-issues-executive-order-aimed-protecting>.

270. *Id.*

271. U.S. DEP'T OF JUST., *supra* note 267.

272. *Id.*

Infrastructure Security Agency sets security rules that apply to these limited transactions.²⁷³

The policy goals of EO 14117 are described by the White House as “specific, carefully calibrated actions” to reduce the danger that “countries of concern” may pose to accessing sensitive personal data and U.S. government-related data in bulk.²⁷⁴ President Biden reiterated the need for Congress to enact federal privacy measures, with a particular emphasis on minors, and emphasized the significance of comprehensive federal privacy legislation.²⁷⁵

Significantly, it highlights that the United States is still dedicated to fostering an open international Internet, promoting cross-border data flows, and encouraging open investment while imposing no generic data-localization requirements.²⁷⁶ The Enterprise Ombudsman on potential restrictions on outbound data flows contrasts with the more focused case-by-case actions related to specific transactions through mechanisms such as CFIUS and the Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector reviews.²⁷⁷ Additionally, it fills a gap that the administration believes these previous authorities left open by focusing on risks posed by foreign technologies and services used within the United States under the Bureau of Industry and Security’s ICTS regulations.²⁷⁸

However, companies affected by the upcoming regulations might have to add these limitations on cross-border transfers of personal data to the expanding list of restrictions already placed on cross-border transfers by data privacy laws, such as the General Data Protection Regulation of the European Union, the cybersecurity data privacy laws of China, and comparable extensive privacy laws in other jurisdictions.²⁷⁹ Even though it seems that the current intention is that transactions “ordinarily incident to and part of the provision of financial services” will not be covered by the forthcoming regulations,²⁸⁰ it is

273. *Id.*

274. 89 Fed. Reg. 15421 (Mar. 1, 2024).

275. Horbus & Smith, *supra* note 269.

276. Exec. Order No. 89 Fed. Reg. 15421 (Mar. 1, 2024).

277. Mark Febrizio, *Biden’s Ambitious Executive Order Does More for Data Security than Banning TikTok*, GEO. WASH. UNIV.: REGUL. STUD. CTR. (Apr. 26, 2024), <https://regulatorystudies.columbian.gwu.edu/bidens-ambitious-executive-order-does-more-data-security-banning-tiktok>.

278. *Id.*

279. Ama A. Adams et al., *New Executive Order Would Restrict Transfer of Certain Bulk Sensitive Personal Data and United States Government-Related Data to China and Other Countries of Concern*, ROPES & GRAY (Mar. 1, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/03/new-executive-order-would-restrict-transfer-of-certain-bulk-sensitive-personal-data>.

280. *Id.*

noteworthy that the restrictions may have significant operational impacts on some international, financial, and life science companies unless appropriate regulatory exceptions are recognized.

The unraveling of China-U.S. economic ties has set the stage for more recent developments related to U.S. economic foreign policy. The need to implement a check on outbound investments in China and other countries of concern emerged first in EO 13959 on November 12, 2020, which ordered a ban on American investments in over thirty million Chinese firms.²⁸¹ The Trump administration took this step under the rationale that investment in such firms would provide China with the opportunity to exploit resources and capital to develop its military, intelligence, and other security apparatuses, which could directly threaten the U.S. homeland and forces overseas.²⁸² The Biden administration revised and expanded the scope of EO 13959 and further expanded the list of blocked military-linked Chinese firms, but the scope of funding remains limited.²⁸³ The America COMPETES Act of 2022 was then passed by the House of Representatives as a counter-proposal to the USICA passed by the Senate.²⁸⁴ As previously mentioned, the NCCC functions as an inter-agency body vested with the power to curtail outbound investments by various U.S. entities, including manufacturers and developers, in relation to certain critical national capabilities. The NCCDA proposes the implementation of a mechanism that can exercise control over outbound investments, which are likely to have an adverse impact on identified capabilities.²⁸⁵ It highlights the role of the USTR in coordinating and regulating a country's foreign trade and investment policies, including the critical areas of national interest.²⁸⁶ The review would focus on investments in "countries of concern," including "foreign adversary" and "non-market economy" nations, as well as any other transaction that could have a critical impact on the national security of the U.S.²⁸⁷

281. 85 Fed. Reg. 73185 (Nov. 17, 2020).

282. *Id.*

283. Exec. Order No. 14032, 86 Fed. Reg. 30145 (June 7, 2021).

284. H.R. 4521, 117th Cong. (2021).

285. Teitelbaum et al., *supra* note 198.

286. *Id.*

287. *Id.*

IV. SAFEGUARDING NATIONAL SECURITY AND PUBLIC ORDER: A COMPARATIVE STUDY OF INVESTMENT SCREENING MECHANISMS

The U.S. government, in light of the growing competition with China, has become increasingly worried about potential threats posed by foreign investors in sensitive sectors. The success of domestic screening mechanisms in regulating inward investments can serve as a blueprint for the development of rules for screening outward investments. This will help safeguard the country's economic and national security interests while still allowing foreign investment. By employing effective screening mechanisms, the idea has now gained traction, helping the United States ensure that its critical technologies, infrastructure, and assets remain protected from potential threats. It is a balancing act that requires careful consideration, but it is essential to ensuring a country's long-term prosperity and security.

The first section of Part IV critically reviews the procedures and congressional involvement of CFIUS in the United States as an important steppingstone to developing rules to screen outward investments. The second section takes a comprehensive look at investment screening mechanisms in the global economy, with the emergence of investment control measures that aim to reclaim control of functions delegated by the state to international agreements, such as bilateral investment treaties (BITs), and international institutions, such as investment tribunals. Almost all of the world's major economies have put procedures in place to regulate investment inflows, and among these mechanisms, foreign investment screening mechanisms have become prominent. The third section examines the effectiveness of investment screening mechanisms, analyzes the tensions and trade-offs between investment screening measures and international investment agreements, and explores the potential implications for investors, host countries, and the global economy.

A. CFIUS Procedures and Congressional Involvement: A Critical Review

CFIUS has earned a distinguished reputation as a preeminent and well-established body responsible for scrutinizing and assessing foreign investment. With a long-standing and active role, CFIUS has served as a leading example for other countries in establishing their own screening processes. Its successful track record has contributed significantly to

shaping and reinforcing international investment laws and the regulatory framework governing foreign investments.²⁸⁸

Since its existence, the role of CFIUS in the United States has concerned itself with the national security implications of foreign investment.²⁸⁹ The jurisdiction of CFIUS encompasses a variety of transactions, including the acquisition or leasing of real estate in proximity to critical U.S. government installations.²⁹⁰ Additionally, non-controlling interests in U.S. enterprises that operate in areas deemed significant, such as essential technology, key infrastructure, or sensitive personal data of U.S. residents, fall within the purview of CFIUS. Such acquisitions warrant review by CFIUS, as they have the potential to impact national security and, therefore, require scrutiny in accordance with relevant legal provisions.²⁹¹ The U.S. Congress is also actively involved in CFIUS procedures, which have been increasingly used in recent years.²⁹² CFIUS has the authority to set restrictions to minimize any detected national security risks or to propose to the president that those transactions within its jurisdiction be rejected (or, in the event of completed transactions, unwound).²⁹³ CFIUS is a voluntary body; however, the president has the power to initiate an ex-ante review of investments.²⁹⁴

CFIUS is generally seen as a regulatory success for the review of inward investments in the United States. In 2020, there were 187 notices filed, compared to 231 in 2019, and 126 declarations were

288. See e.g. David Korn et al., *Harmonizing Inbound Investment Screening*, CSIS (Aug. 16, 2024), <https://www.csis.org/analysis/harmonizing-inbound-investment-screening> (noting that most U.S. allies and key partners had now adopted some form of inbound investment screening mechanisms and the role that CFIUS had played toward effectively communicating the need for inbound investment screening to be economically secured).

289. Brandt J. C. Pasco, *United States National Security Reviews of Foreign Direct Investment: From Classified Programmes to Critical Infrastructure. This is What the Committee on Foreign Investment in the United States Cares About*, 29 ICSID REV. 350, 351 (2014).

290. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF TREAS., <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Jan. 17, 2025).

291. Foreign Investment Risk Review Modernization Act, S.2098, 115th Cong. § 3 (2018). Further, CFIUS is the agency responsible for the administration of Section 721 of the Defense Production Act, 1950. The Director of National Intelligence and the Secretary of Labor serve as ex-officio, non-voting members of the nine-member multiagency panel, which is chaired by the Secretary of the Treasury.

292. Syed Tariq Anwar, *FDI Regimes, Investment Screening Process, and Institutional Frameworks: China Versus Others in Global Business*, 46 J. WORLD TRADE 213, 239 (2012).

293. *CFIUS Overview*, U.S. DEP'T OF TREAS., <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (last visited Jan. 17, 2025).

294. 50 U.S.C. § 4565(b).

submitted, up from ninety-four in 2019.²⁹⁵ In total, 240 declarations were filed between 2018 and 2020, of which three were withdrawn.²⁹⁶ By identifying potential risks and conducting reviews of proposed investments, CFIUS helps ensure that foreign investments do not harm U.S. economic and security interests. Further, CFIUS has been effective in screening and blocking investments that could pose a threat to U.S. national security.²⁹⁷ Finally, CFIUS also plays a role in promoting U.S.

295. The public version of the 2020 CFIUS Annual Report has been issued by the U.S. Treasury Department, which contains data on the total number of notice filings and declarations issued in recent years. CFIUS, ANNUAL REPORT TO CONGRESS, CY2020 4, 17 (2021).

296. Over the years, U.S. Presidents have utilized their authority to block or mandate the divestment of foreign investments in U.S. companies due to national security concerns, especially when these investments were associated with countries viewed as potential security risks. This trend has been evident across different administrations, highlighting the bipartisan approach to safeguarding national security in the face of foreign investments. In 1990, President George H.W. Bush intervened to require the China National Aero-Technology Import and Export Corporation (CATIC), following its acquisition of MAMCO Manufacturing, to divest from the company. This action marked one of the early instances where presidential powers were exercised to counter foreign investments on national security grounds. Fast forward to 2012, President Barack Obama ordered the Ralls Corporation to divest its interests in an Oregon wind farm project due to the project's proximity to a U.S. military site, citing national security risks. In a similar vein, in 2016, President Obama blocked the Chinese company Fujian Grand Chip Investment Fund from acquiring Aixtron, a German semiconductor company with operations in the United States, further emphasizing concerns over foreign control of critical technology sectors. In 2017, the trend of scrutinizing foreign investments continued under President Donald Trump, who blocked the acquisition of Portland, Oregon-based Lattice Semiconductor Corporation by Canyon Bridge Capital Partners, a Chinese investment firm. The proposed \$1.3 billion deal was halted on national security grounds. The following year, 2018, saw President Trump preventing Broadcom, then based in Singapore, from purchasing Qualcomm for \$117 billion. The deal was scrutinized and ultimately blocked due to concerns that it would compromise Qualcomm's competitiveness in the telecommunications sector, which is vital for national security. By 2019, CFIUS raised concerns about Beijing Kunlun Company's investment in Grindr LLC, an online dating platform. The investment was flagged for potential risks related to foreign access to personally identifiable information of U.S. citizens, leading to the Chinese company divesting its stake in Grindr. These actions underscore the U.S. government's vigilance in monitoring foreign investments, particularly in sectors critical to national security. The implementation of the Foreign Investment Risk Review Modernization Act (FIRRMA) has brought about significant regulatory changes, enhancing the oversight capabilities of CFIUS. As a result, there has been an increase in the number of investigations conducted by CFIUS, reflecting a broader scrutiny over foreign investments. This heightened oversight underscores the ongoing challenge of balancing economic openness with the need to protect national security interests, prompting potential congressional oversight to assess the implications of these regulatory changes. *See generally* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (2020).

297. For example, CFIUS has blocked several high-profile deals in recent years, such as the proposed acquisition of Qualcomm by Broadcom, and the proposed acquisition of MoneyGram by Ant Financial. These deals were blocked due to concerns about the potential transfer of

economic interests. For example, CFIUS has helped facilitate foreign investment in the United States in industries, such as energy, infrastructure, and technology.²⁹⁸ This has helped create jobs and stimulate economic growth in the United States. In 2022, President Biden signed the Executive Order 14083 that explicitly outlined specific risks for CFIUS to consider along with establishing a five-prong criteria for reviewing potential transactions: (1) the impact on U.S. supply chains, including non-defense sectors; (2) the effect on U.S. leadership in advanced technologies; (3) the transaction's alignment with industry investment trends; (4) cybersecurity risks associated with the transaction; and (5) risks to the private data of individuals in the United States.²⁹⁹ In a nutshell, CFIUS has served to protect U.S. economic and national security interests while still allowing foreign investment to support economic growth.

B. *A Comprehensive Look at Investment Screening Mechanisms in the Global Economy*

The emergence of investment control measures can be categorized as isolationist attempts to restore national sovereignty.³⁰⁰ These tribunals have already begun addressing disputes concerning screening mechanisms, with one scholarly analysis finding “significant scope for investment screening to breach a range of investment obligations commonly found in IIAs.”³⁰¹

On January 4, 2022, the British government designated seventeen sensitive sectors in which investment was subject to prior clearance under the modified foreign investment screening procedure of its National Security and Investment Act.³⁰² Amid the COVID-19 pandemic, India introduced FDI screening for investments originating from neighboring countries, wherein it introduced the “government

sensitive technology and data to foreign governments, highlighting CFIUS's effectiveness in protecting U.S. national security interests.

298. David Mortlock et al. *Expanded CFIUS Jurisdiction Under FIRRMA Regulations: An Overview*, WILLKIE FARR & GALLAGHER 4 (Nov. 2020), <https://www.willkie.com/-/media/files/publications/2020/11/cfius-jurisdiction-update.pdf>.

299. Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sept. 20, 2022).

300. Georgios Dimitropoulos, *National Security: The Role of Investment Screening Mechanisms*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 507, 507 (2021).

301. Tania Voon & Dean Merriman, *Incoming: How International Investment Law Constrains Foreign Investment Screening*, 24 J. WORLD INV. & TRADE 75, 78 (2022).

302. Dep't for Bus., Energy & Indus. Strategy, *New and Improved National Security and Investment Act Set to be Up and Running*, GOV.UK (July 20, 2021), <https://www.gov.uk/government/news/new-and-improved-national-security-and-investment-act-set-to-be-up-and-running> (U.K.).

route” for investments from these countries to curb opportunistic takeovers and acquisitions of Indian companies struggling due to global public health crises.³⁰³

Almost all of the world’s major economies have implemented procedures to regulate FDI inflows. For instance, the European Union (EU) and its constituent Member States demonstrated a proclivity toward adopting a coordinated approach for regulating investments originating from third countries, that is, nations that are not affiliated with the EU.³⁰⁴ This culminated in the adoption of a robust FDI screening regime through Regulation 2019/452 of March 19, 2019, which established a comprehensive framework for the screening of FDI.³⁰⁵ This instrument seeks to ensure consistency and coherence in the screening of FDI from third countries to safeguard the essential security and public order interests of the EU and its Member States.³⁰⁶ This regulation became applicable in October 2020, complementing the fourteen Member States that have already adopted FDI screening mechanisms in national law.³⁰⁷

C. *Outward Investment Screening Mechanisms Worldwide*

A few economies have placed constraints on outward FDI, opting to facilitate such investment through a series of gradual reforms aimed at broadening the scope of outward direct investment and promoting domestic capital to finance international expansion.

An illustrative example is Taiwan’s regulatory regime, which evolved from the 1968 Regulations Governing the Screening and Handling of Outward Investment and Outward Technical Cooperation Projects, established under the Program for Strengthening Investment Screening Agencies, to the current, less stringent framework.³⁰⁸ This evolution reflects Taiwan’s ongoing efforts to modernize investment

303. DEP’T FOR PROMOTION OF IND. & INTERNAL TRADE, PRESS NOTE NO. 3 (2020 SERIES): REVIEW OF FOREIGN DIRECT INVESTMENT (FDI) POLICY FOR CURBING OPPORTUNISTIC TAKEOVERS/ACQUISITIONS OF INDIAN COMPANIES DUE TO THE CURRENT COVID-19 PANDEMIC (Apr. 17, 2020) https://dpiit.gov.in/sites/default/files/pn3_2020.pdf (India).

304. Stephan W. Schill, *The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, 46 LEGAL ISSUES OF ECON. INTEGRATION 105, 105-106 (2019).

305. *Id.*

306. *Id.*

307. Council Regulation 2019/452, Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79/I).

308. *About Us*, DEP’T OF INV. REV., https://www.moea.gov.tw/Mns/dir_e/content/Content.aspx?menu_id=42948 (last visited Jan. 15, 2025) (Taiwan).

oversight, culminating in the 2023 reorganization of the Investment Commission into the Department of Investment Review under the Ministry of Economic Affairs.³⁰⁹ Presently, the Investment Commission and the Ministry of Economic Affairs have scrutinized applications for outward investment and technical cooperation.³¹⁰ The preference for gradual reforms aimed at promoting outward investment serves as a pointer to the potential benefits of such investments in the domestic economy, including increased job creation, technology transfer, and expansion of domestic firms' operations to international markets.³¹¹ Investments in Hong Kong and Macau will not receive approval if they negatively impact Taiwan's safety.³¹² These factors include the impact that such investment may have on the overall economic development of the host state, as well as the potential for any such investment to infringe upon existing international treaties and agreements to which the host state is a party. Additionally, it is important to consider the possible implications of such investments for the host state's intellectual property rights and whether such investments may result in violations of these rights.³¹³ Insurance is provided to investors who obtain approval for outward investment.³¹⁴ In Korea, strict rules have been replaced by a 2005 policy that actively promotes outward FDI, encouraging domestic firms to invest abroad and deepening business alliances with foreign multinational enterprises operating in Korea.³¹⁵ In India,

309. *About Us*, DEP'T OF INV. REV., MOEA, https://www.moea.gov.tw/Mns/dir_e/content/Content.aspx?menu_id=42948 (last visited Feb. 28, 2025). See also Tsung-Che Wu & Chun-Yi Lee, *Buying Taiwan? The Limitations of Mainland Chinese Cross-Strait Direct Investments as a Tool of Economic Statecraft*, 255 CHINA Q. 735 (2023).

310. *Id.*

311. See Bo Liang et al., *China's Way to the U.S. Market: China's Outward Direct Investment in the United States*, in HANDBOOK ON CHINA AND GLOBALIZATION 61, 68 (Huiyao Wang & Lu Miao eds., 2019).

312. Dui Xianggang Aomen Touzi Huo Jishu Hezuo Shenhe Chuli Banfa (對香港澳門投資或技術合作審核處理辦法) [Regulations for Licensing Investment or Technical Cooperation in Hong Kong or Macau] (promulgated by the Ministry of Econ. Affs., July 1, 1997), art. 6 (Taiwan).

313. *Id.*

314. Cujin Chanye Shengji Tiaoli (促進產業升級條例) [Statute for Upgrading Industries] (promulgated by Presidential Decree, Dec. 29, 1990, effective Dec. 31, 1990), art 12, ¶ 1 (repealed 2020) (Taiwan).

315. Françoise Nicolas et al., *Lessons from Investment Policy Reform in Korea* 30 (OECD Working Paper No. 2013/12, July, 30, 2013), https://www.oecd.org/content/dam/oecd/en/publications/reports/2013/07/lessons-from-investment-policy-reform-in-korea_g17a233d/5k4376zqcpf1-en.pdf.

outward FDI has regulated the circulation of the Reserve Bank of India Master on Direct Investment by Residents in Joint Ventures.³¹⁶

In China, the laws and regulations must not be infringed upon by overseas investment, nor should they pose a threat or inflict harm on its national interests and security. Article 13 of the Extant Measures for the Administration of Overseas Investment by Enterprises stipulates that projects of a sensitive nature carried out by investors directly or indirectly through overseas enterprises under their control shall be subject to the decisions of the confirmation authority.³¹⁷ Investors engaging in outbound activities must adhere to China's legal and regulatory framework and ensure that their activities do not undermine national interests and security. Article 13 of the Extant Measures also specifically emphasizes that sensitive projects, which may have significant implications for national security, require confirmation from the relevant authority.³¹⁸ This provision safeguards China's national interests and security while ensuring that foreign investors can invest in China within the confines of the law. UNCTAD's 2020 World Investment Report states that Chinese mergers and acquisitions abroad decreased to a ten-year low, primarily due to continued restrictions on outward investment, along with other reasons such as geopolitical tensions.³¹⁹ Thus, by introducing legislation to regulate outbound foreign investment, the United States will be one of the few countries in the world that screen outward investments.

Investment screening mechanisms are rewriting the rules for both domestic and international economic activities. National laws, like the U.S. FIRRMA or the U.K. National Security and Investment Act of 2021, set specific rules for reviewing foreign investments.³²⁰ The increment in such mechanisms moves away from the traditional globalization ideal of minimal barriers to capital flow, suggesting a move toward protectionism. This calls for changes in international economic agreements to incorporate and standardize new national policies. Investors face higher operational costs and uncertainties, which might decrease cross-

316. *Master Circular on Direct Investment by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) Abroad*, RESERVE BANK OF INDIA (May 6, 2015), <https://www.rbi.org.in/commonman/Upload/English/Notification/PDFs/11MC1072011.pdf>.

317. Qiye Jingwai Touzi Guanli Banfa (企业境外投资管理办法) [Measures for the Administration of Overseas Investment of Enterprises] (promulgated by the St. Dev. & Reform Comm'n, Dec. 26, 2017, effective Mar. 1, 2018), art. 6 (China).

318. *Id.* art. 13.

319. UNCTAD, *WORLD INVESTMENT REPORT 2020: INTERNATIONAL PRODUCTION BEYOND THE PANDEMIC* 14, UNCTAD/WIR/2020, U.N. Sales No. E.20.II.D.23 (2020).

320. Masters et al., *supra* note 29.

border investment and affect global economic stability. Economic power could concentrate more in countries with effective screening mechanisms, increasing disparities between these and countries without such systems. At such a juncture, balancing national security with global economic connectivity is necessary.

V. TRANSNATIONAL LAW AND THE POTENTIAL ECONOMIC AND COMMERCIAL TENSIONS BETWEEN THE UNITED STATES AND CHINA

Amid the aforementioned tensions, concerns have surfaced regarding the position of multinational corporations operating within the intertwined economies of both nations. These entities face the dual challenge of adhering to the distinct legal and regulatory frameworks of the United States and China, complicating their global operations. This situation has sparked calls for the harmonization of transnational legal structures to streamline international trade and investment processes, emphasizing the importance of transnational law in overseeing interactions between states and multinational corporations in increasingly globalized economic governance.

The 2023 NCCDA serves as a pertinent example of U.S. federal legislation with significant transnational implications, particularly in its aim to safeguard critical infrastructure and technologies crucial to national security.³²¹ The law's international dimension arises from the United States' reliance on global trade and investment, notably with China, setting the stage for potential conflicts when measures to protect national security interests impact foreign investors and corporations. Actions taken under the NCCDA to prevent foreign acquisition of or investment in critical technologies may be perceived by other nations, such as China, as protectionist, potentially straining diplomatic relations.

Therefore, this legislation highlights the tension between domestic legal mandates, international commerce, and foreign policy, underscoring the necessity for a synchronized approach to address transnational legal challenges related to national security and critical infrastructure. This part progresses by dissecting the approaches centered on safeguarding U.S. sovereignty and national security. It delves into NCCDA's particulars, focusing on the scrutiny of American investments in Chinese enterprises and the imposition of restrictions on investments in sensitive sectors to mitigate the security threats posed by China's economic ascent. A further exploration of its compatibility with international economic law reveals its commitment to protecting

321. See Mortlock et al., *supra* note 204.

U.S. intellectual property, data privacy, and technological innovation, which are pivotal to the nation's economic strategy.

A. *Unilateralism and National Security in the NCCDA of 2023*

The NCCDA of 2023 serves as a key example of unilateral economic law,³²² underscoring U.S. sovereignty and national security concerns, particularly in relation to China and other adversarial nations. Rather than promoting investor-friendly regulations to facilitate international trade, the NCCDA includes provisions that restrict U.S. investments abroad if such investments pose a threat to U.S. national security.³²³ A prominent example of similar national security concerns arose when Swedish restrictions on Huawei's 5G rollout led to international arbitration proceedings, though this specific case does not fall under the NCCDA's purview but reflects the broader trend of national security justifications for limiting foreign investments.³²⁴ Domestically, the

322. See Chaisse & Dimitropoulos, *supra* note 31, at 238-240 (explaining that the use of national security as a basis to exempt certain actions from the principles of international economic law, both in trade and investment and across both domestic and international arenas, underscores a significant shift in policy direction. This trend toward leveraging national security reasons to regulate or restrict foreign investment marks a notable pivot toward different forms of unilateralism within the realm of international trade and investment law. Historically, the liberalization of trade and investment represented a move toward greater openness and cooperation between nations, fostering economic growth and development through the classical model of unilateral liberalization. However, the recent tilt toward what can be termed as "aggressive unilateralism," particularly in the context of national security, represents the other extreme of the liberalization continuum. This approach signifies a departure from traditional economic liberalization principles and toward a stance where individual nations adopt measures that prioritize their own national security interests, often at the expense of broader international economic law disciplines. This shift toward economic unilateralism reflects changes in global economic regulation, characterized by heightened geopolitical tensions and concerns over the protection of sensitive technologies and critical infrastructure. The emphasis on national security unilateralism highlights the need for countries to adopt proactive strategies to safeguard their national interests. These measures, while aiming to protect national security, also present challenges to the principles of free trade and investment, raising questions about the balance between securing national interests and maintaining the global economic order. In this context, the challenge for international trade and investment law is to accommodate these changes toward unilateralism while still promoting an environment that supports economic growth through foreign investment). See also Jagdish Bhagwati, *Introduction: The Unilateral Freeing of Trade Versus Reciprocity*, in *GOING ALONE: THE CASE FOR RELAXED RECIPROCITY IN FREEING TRADE* (Jagdish Bhagwati ed., 2002).

323. David Mortlock et al., *supra* note 204.

324. Lisa Bohmer, *China's Huawei Lodges ICSID Arbitration Against Sweden Over 5G Ban*, IOWA REP. (Jan. 24, 2022), <https://www.iareporter.com/articles/chinas-huawei-lodges-icsid-arbitration-against-sweden-over-5g-ban/>.

NCCDA is subject to oversight by national courts, which have previously ruled on disputes involving restrictions on Chinese investments, citing national security concerns.³²⁵ Thus, the NCCDA deviates from the goals of other unilateral economic laws that aim to attract foreign investment through domestic policy, exemplifying what can be described as “national security unilateralism.”³²⁶ This policy framework prioritizes protectionist measures, only allowing more open investment approaches when such investments align with U.S. national security interests. Finally, while the NCCDA reflects broader national security concerns, including policies from the Trump administration aimed at advancing U.S. national security, it stands out as a targeted mechanism specifically designed to scrutinize and restrict outbound investments.

B. The America COMPETES Act: Potential Economic and Commercial Tensions Between the United States and China

The draft America COMPETES Act proposed to establish a mechanism that would allow the U.S. government to screen U.S. investments that are to be made in Chinese firms. If there is a link identified between such firms and the Chinese military, then such investment shall be restricted.³²⁷ The bill does, however, employ the phrase “countries of concern,” which allows such an investment screening process to apply to any other country of concern and not just China.³²⁸ The motive for targeting China is to assert U.S. competitiveness by not allowing China to develop technologically in sectors that represent a massive potential threat to national security and its people.³²⁹

The Biden administration was perceived to harbor hostility toward China.³³⁰ It is suggested that the influence of several interest groups, including the Chamber of Commerce, the U.S.-China Business Council, and the National Retail Federation, has significantly impacted the policy direction of the current administration toward China, particularly those concerning forced labor practices.³³¹ The bill was

325. See e.g. *Ralls Corp. v. Comm. on Foreign Invs. in the U.S.*, 758 F.3d 296 (2014).

326. Chaisse & Dimitropoulos, *supra* note 31, at 238-40.

327. H.R. 4521, 117th Cong. § 104001(a) (2021).

328. *Id.* § 20202(b)

329. See generally *House Committee Chairs Statement on Unveiling of the America COMPETES Act of 2022*, COMM. ON OVERSIGHT & GOV'T REFORM: DEMOCRATS (Jan. 25, 2022), <https://oversightdemocrats.house.gov/news/press-releases/house-committee-chairs-statement-on-unveiling-of-the-america-competes-act-of>.

330. Stephen Collinson, *Biden's Dramatic Warning to China*, CNN (Feb. 8, 2023), <https://edition.cnn.com/2023/02/08/politics/china-biden-state-of-the-union/index.html>.

331. Bade, *supra* note 168.

eventually passed 220 votes to 210 votes in the House and sixty-eight votes to thirty-two votes in the Senate, and is officially known as the “U.S. Innovation and Competition Act.”³³² In Washington, it is colloquially known as the “Anti-China Bill.”³³³

Echoing President Biden’s sentiments, the U.S. Financial Services Committee’s hearing titled “Better Investment Barriers: Strengthening CCP Sanctions and Exploring Alternatives to Bureaucratic Regimes” examined potential legislations to prohibit nearly all economic interactions with Chinese firms critical to China’s defense and surveillance technology sectors and to prevent U.S. investments from supporting China’s military capabilities.³³⁴ On March 20, 2024, Representatives Victoria Spartz and Brad Sherman, co-chairs of the CPAs and Accountants caucus, introduced four new bills aimed at addressing the strategic, commercial, and national security threats that China poses to the U.S. economy and financial markets.³³⁵ This legislative package seeks to eliminate tax breaks for Chinese stocks, restrict access to U.S. capital markets for sanctioned Chinese companies, enhance transparency regarding risks to U.S. corporations, and reduce these risks for retail investors and those saving for retirement.³³⁶ Furthermore, Florida enacted a law mandating the state investment board to cease investing any of its USD 250 billion in assets in entities with more than fifty percent ownership by the Chinese government, the Chinese Communist Party, or the Chinese military.³³⁷ The Floridian law is similar to Indiana legislation prohibiting the public employee pension fund from investing in entities on federal exclusion lists or those

332. *U.S. Senate Passes Key Bill to Combat Chinese Competitiveness*, ECON. TIMES (June 9, 2021), <https://economictimes.indiatimes.com/news/international/world-news/us-senate-passes-key-bill-to-combat-chinese-competitiveness/articleshow/83362483.cms>.

333. *Id.*

334. Siqi Ji, *U.S. Congress Considers New Legislation to Further Restrict Investment in Chinese Tech Sectors*, S. CHINA MORNING POST (Jan. 31, 2024), <https://www.scmp.com/news/china/article/3250360/us-congress-considers-new-legislation-further-restrict-investment-chinese-tech-sectors>.

335. *Spartz, Sherman Introduce Four Bills to Address China Risk in the U.S. Stock Market*, CONGRESSWOMAN VICTORIA SPARTZ (March 20, 2024), <https://spartz.house.gov/media/press-releases/spartz-sherman-introduce-four-bills-address-china-risk-us-stock-market2>.

336. Lydia Beyoud & Yiqin Shen, *Mutual Funds Investments in Chinese Firms Targeted in New U.S. Bill*, BLOOMBERG (Mar. 21, 2024), <https://www.bloomberg.com/news/articles/2024-03-21/mutual-fund-investments-in-chinese-firms-targeted-in-new-us-bill>.

337. Rob Kozlowski, *Florida Legislature Passes China Divestment Bill*, PENSIONS & INVS. (Mar. 15, 2024), <https://www.pionline.com/legislation/florida-legislature-passes-bill-prohibits-state-board-administration-investing-china>.

controlled by the Chinese government or the Chinese Communist Party.³³⁸

C. *The Legitimacy of the Emergence of Outbound Investment Screening in U.S. Law from the Perspective of International Economic Law*

In terms of intellectual property, data privacy, and technical innovation, the provisions of U.S. Innovation and Competition Act—initially proposed as the America COMPETES Act—aim to safeguard U.S. ingenuity and allow the United States to compete with China and other technologically sophisticated nations. The Personal Information Protection Law (PIPL) of China was identified as a possible danger since any data created by U.S. investment in China would be held, exploited, and processed in China in accordance with this standard.³³⁹ Furthermore, cross-border data transmission is regulated by laws that require approval from the Chinese government.³⁴⁰ The key highlight of the PIPL is that it primarily regulates the transmission of personal data from China.³⁴¹ This restricts personal information stored in China from being provided to any foreign judicial authority or any entity for processing data without the approval of the Chinese government.³⁴²

Anti-China legislation comprises certain rules that will allow the United States to ascertain its dominance in international trade.³⁴³ The USICA bill restricts the import of semiconductors into the United States by providing funds for the domestic manufacturing of semiconductors so that China's supply chain for semiconductors (and other electronics) will be countered.³⁴⁴ Moreover, U.S. companies are not allowed to sell domestically produced semiconductors to Chinese firms linked to the military.³⁴⁵ The same restrictions were extended to certain consumer products to restrict the trade of U.S. technologies that could

338. Jack S. Truitt, *U.S. State Laws Take Aim at Pension Investment in China*, NIKKEI ASIA (May 30, 2024), <https://asia.nikkei.com/Politics/U.S.-state-laws-take-aim-at-pension-investment-in-China>.

339. Geren Xinxi Baohu Fa (个人信息保护法) [Personal Information Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), art. 3, 2021 Standing Comm. Nat'l People's Cong. Gaz. 1117 (China) [*hereinafter* PIPL].

340. *Id.* art. 38.

341. Peiru Cai & Li Chen, *Demystifying Data Law in China: A Unified Regime of Tomorrow*, 12 INTL. DATA PRIV. LAW 75, 77-78 (2022).

342. PIPL, *supra* note 339, art. 41.

343. Matthew Knott, *Senate Passes Anti-China Bill*, SYDNEY MORNING HERALD (June 9, 2021), <https://www.smh.com.au/world/north-america/a-competition-to-win-the-21st-century-us-senate-passes-anti-china-bill-20210609-p57zdz.html>.

344. *Id.*

345. *Id.*

be acquired by the Chinese military.³⁴⁶ The legislation requires the domestic production of certain industrial goods used for infrastructure projects, such as iron and steel, rather than federally funded projects importing the same materials from China.³⁴⁷

Additionally, the proposed legislation mandates that the U.S. Secretary of State compile a comprehensive inventory of state-owned companies or entities in China that partake in specific activities, such as coerced technology transfers or infringement of intellectual property rights to facilitate a robust screening mechanism, preventing U.S. companies from investing in the identified entities or prohibiting investments from listed entities in the United States.³⁴⁸

Investments made overseas to generate revenue that may be reinvested in the country of origin are one of the primary reasons why most nations do not regulate outbound investments beyond the imposition of targeted sanctions.³⁴⁹ However, venture capital flows between the two nations have decreased because of a decline in U.S. investment in China.³⁵⁰

International investment agreements (IIA) permit foreign investors, both individuals and corporations, to sue states for treaty violations through arbitration.³⁵¹ Investors are often not required to utilize available domestic remedies to resolve disputes before filing claims with the investor-state dispute settlement system.³⁵² While the WTO provides a mechanism for resolving disputes between states, a specialized system is necessary for private investors to make claims against states. The lack of a BIT between the United States and China is significant because it raises concerns about the potential for investment disputes between the two countries.³⁵³

To ensure that the 2023 NCCDA, if it becomes U.S. law, is deemed lawful, it is crucial to consider WTO international law. Recently, the WTO Panel passed a significant judgment on Ukraine's complaint

346. Bauerle Danzman, *supra* note 145.

347. Knott, *supra* note 343.

348. *Id.*

349. *National Security Update—The House of Representatives Proposes an Outbound Investment Review Regime as Part of the America COMPETES Act*, COVINGTON (Jan. 27, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/01/national-security-update-the-house-of-representatives-proposes-an-outbound-investment-review-regime-as-part-of-the-america-competes-act>.

350. Danzman, *supra* note 145.

351. *Primer On International Investment Treaties and Investor-State Dispute Settlement*, COLUM. CTR ON SUSTAINABLE INV. (2022), <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement>.

352. *Id.*

353. *See id.*

about Russia's transit limitations.³⁵⁴ This is the first instance in which the General Agreement on Tariffs and Trade (GATT) national security exception has undergone thorough scrutiny.³⁵⁵ According to the Panel Report *Russia—Traffic in Transit*, this exception can be invoked unilaterally, but the WTO's Dispute Settlement Body still has the authority to evaluate it.³⁵⁶ This outcome is in contrast to the United States' long-held position that the exception is entirely "self-judging," allowing members to use it without any further assessment.³⁵⁷ The WTO Panel's verdict concluded that Russia's use of the national security exception was justified during the Russo-Ukraine conflict.³⁵⁸ Amid increasingly globalized and intertwined economic regimes, like those of the WTO, maintaining dominance over China through trade policy will be difficult for the United States.³⁵⁹

The trade war has compelled U.S. buyers to reduce purchases from China, endangering the supply of COVID-19-treating pharmaceuticals. According to an analysis, between 2017 and 2019, U.S. purchases of medical products from China subject to a twenty-five percent tariff fell by sixteen percent.³⁶⁰ China agreed in 2020 to purchase an additional USD 200 billion in U.S. exports by the end of 2021, which was intended to help de-escalate trade tensions and potentially reduce U.S. tariffs on Chinese goods.³⁶¹ This move aimed to stabilize economic and political relations and enhance China's global image as a cooperative trading

354. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶7.130, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

355. Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST. (June 25, 2019), <https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade>.

356. *Id.*

357. Article XXI of the General Agreement on Tariffs and Trade (GATT), which permits members to take actions that are necessary for national security purposes, has not been invoked with great frequency. See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 712-13 (2011).

358. Lode Van Den Hende et al., *Landmark Ruling on The WTO National Security Exception*, HERBERT SMITH FREEHILLS LLP (June 7, 2019), <https://www.herbertsmithfreehills.com/latest-thinking/landmark-ruling-on-the-wto-national-security-exception>.

359. P. K. MALLICK, U.S.-CHINA TRADE WAR: ANALYSES OF DEEPER NUANCES AND WIDER IMPLICATIONS 44 (2018), <https://www.vifindia.org/sites/default/files/US-CHINA-Trade-War.pdf>.

360. Chad P. Bown, *Trump's Trade Policy is Hampering the US Fight Against COVID-19*, PETERSON INST. FOR INT'L ECON. (PIIE) (March 13, 2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-trade-policy-hampering-us-fight-against-covid-19>.

361. Chad P. Bown, *US-China Phase One Tracker: China's Purchases of US Goods*, PIIE (July 19, 2022), <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods>.

partner. It also ensured access to essential U.S.-made goods that are critical for China's domestic needs. In the end, China met only fifty-seven percent of its total commitments for 2020–21, not even enough to match its import levels prior to the trade war.³⁶² As a result, on March 28, 2022, the Biden administration reinstated 352 exemptions from the Section 301 tariffs imposed by the Trump administration.³⁶³ In accordance with an October 2021 announcement, the exclusions went into effect on October 12, 2021, and remained in place until December 31, 2022.³⁶⁴

The cross-border flow of data is governed by rules that require approval from the Chinese government.³⁶⁵ PIPL is the first Chinese law that regulates the storage, processing, transfer, and utilization of personal information. This will have an impact on data-driven businesses, as the law is not bound to Chinese residents but targets “any person,” including those outside the territorial ambit of China.³⁶⁶ Companies that possess a substantial amount of personal data or critical information infrastructure find it more challenging to transfer data from China to other countries because of the mandatory security evaluation conducted by the Cyberspace Administration of China. Currently, it is uncertain whether such an assessment, if passed, will grant a company one-time permission for data transfer or a license for a specific period. It is imperative for businesses to comply with regulations and ensure that their practices are in line with PIPL to avoid any legal consequences.³⁶⁷ This measure is an attempt to strengthen the data sovereignty of a nation,

362. *Id.*

363. David E. Bond et al., *Section 301 Tariff Exclusions Will Expire Soon, Unless Extended*, WHITE & CASE (July 24, 2023), <https://www.whitecase.com/insight-alert/section-301-tariff-exclusions-will-expire-soon-unless-extended>.

364. Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PIIE (Dec. 31, 2023), <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

365. Martin Roger et al., *China's Personal Data Law Comes into Force Accompanied by Draft Rules on Cross-border Data Transfers*, DAVIS POLK (Nov. 1, 2021), <https://www.davispolk.com/insights/client-update/chinas-personal-data-law-comes-force-accompanied-draft-rules-cross-border>.

366. PIPL, *supra* note 339, art. 2. While the first paragraph of Article 3 of the PIPL states that the law would apply to information processing that occurred in China, paragraph 2 provides three exceptions to which the PIPL will be applied extraterritorially to data processing activities that happened outside of China. These exceptions are if the goal of data processing was (i) to supply products or services to natural people in China, (ii) to examine and assess the actions of natural people in China, or (iii) the data processing was required by other legislations and administrative regulations. *See* PIPL, *supra* note 339, art. 3.

367. Yiming Ben Hu, *China's Personal Information Protection Law and its Global Impact*, THE DIPLOMAT (Aug. 31, 2021), <https://thediplomat.com/2021/08/chinas-personal-information-protection-law-and-its-global-impact/>.

similar to the ban on Chinese companies by many countries, such as the EU, the United States, and even India.³⁶⁸

The main consequence is data localization, which is a national security concern for the U.S. government. This is because such data may contain critical substances and, if acquired by Chinese authorities, could result in a potential threat to the United States.

China already has an investment review system in place, as announced by the National Development and Reform Commission, which controls foreign investments in military sectors and other sensitive sectors, such as energy, natural resources, internet technology, and financial services.³⁶⁹ These regulations were promulgated in light of growing national security concerns and efforts to reduce security risks resulting from the foreign acquisition of controlling stakes in critical sectors. Any investment given the green light of the U.S. screening mechanism would also have to go through China's review system, which also has the authority to impose restrictions or prohibitions. Like most countries, China restricts heavy investments from foreign countries in critical industries.³⁷⁰ These similar national interests, therefore, represent potential for conflicts and solutions to shared problems concerning the military, energy, and other sectors sensitive to national security and development.

The implementation of such screening mechanisms aims to identify and regulate potential risks to the national security of the United States and its citizens, particularly in sectors such as healthcare, infrastructure, and the military. This Article argues that the emergence of outbound investment screening in U.S. law and policy exemplifies entrenched "national security unilateralism,"³⁷¹ in which the state seeks to enact a protectionist policy and only allows for more liberal approaches when investments do not conflict with U.S. national security interests. This section also highlights the significant impact that the 2023 NCCDA will have on the U.S.-China economic relationship and the potential

368. *Id.*

369. Howard Hu et al. *China Enacts New Foreign Investment Security Review Measures*, BAKER MCKENZIE (Jan. 6, 2021), <https://foreigninvestment.bakermckenzie.com/2021/01/06/china-enacts-new-foreign-investment-security-review-measures/>.

370. Hanemann et al., *supra* note 174.

371. Entrenched "national security unilateralism" refers to a deeply ingrained policy stance where a state prioritizes its national security over international economic cooperation. This approach involves unilateral actions, such as restricting foreign or outbound investments, without engaging in multilateral frameworks. It reflects a protectionist strategy that places national security at the forefront of economic policy, often at the expense of global trade norms. The term "entrenched" highlights the long-term, institutionalized nature of this policy direction. Chaisse & Dimitropoulos, *supra* note 31.

commercial tensions that may arise. The NCCDA's objective of safeguarding national security, foreign policy, and multilateral non-proliferation objectives by curtailing the transfer of tangible and intangible goods across borders or among individuals is of utmost importance.

VI. CONCLUSION

This Article analyzed recent developments in U.S. foreign economic policy, particularly the implementation of outbound investment screening mechanisms exemplified by the NCCDA. The NCCDA signifies a notable expansion of the U.S. national security agenda, which now encompasses economic and technological dimensions in response to intensifying geopolitical tensions, particularly with China. It addresses vulnerabilities in critical sectors, highlighted by global disruptions such as the COVID-19 pandemic and growing interdependence with adversarial nations. The NCCDA reflects the U.S. government's acknowledgment that safeguarding technological and infrastructural assets is crucial to national defense, requiring a proactive approach to economic threats.

This policy shift redefines the U.S.-China economic relationship, expanding the traditional conception of national security to include economic interests. The NCCDA operationalizes this by restricting outbound investments that risk transferring key technologies to foreign entities considered security threats. Through this legislation, the United States seeks to reconcile its strategic imperatives with continued engagement in global economic systems, marking a transition from reactive security measures to a more anticipatory regulatory stance.

From a legal standpoint, the introduction of outbound investment screening raises important questions under both domestic and international law. Internationally, the unilateral nature of the NCCDA potentially conflicts with the non-discrimination principle under the WTO framework. Although national security exceptions under GATT Article XXI and General Agreement on Trade in Services Article XIV bis may provide justification, the broad scope of the NCCDA could lead to disputes regarding its compliance with international trade obligations. Furthermore, the NCCDA may contravene fair & equitable treatment (FET) provisions in BITs, which safeguard foreign investors from arbitrary state actions. By limiting U.S. investors' operational freedom abroad, the NCCDA may provoke retaliatory measures or legal disputes, necessitating a reassessment of the balance between national security and economic openness.

Domestically, the NCCDA must contend with constitutional protections, particularly the Fifth Amendment's Takings Clause, which

prohibits the government from appropriating private property without just compensation. Investment restrictions could be challenged as regulatory takings if they result in significant economic losses for U.S. investors. Additionally, the Due Process Clause of the Fifth and Fourteenth Amendments mandates that regulatory enforcement be transparent, predictable, and procedurally fair, allowing affected parties the opportunity to contest decisions. The NCCDA must also align with existing statutes, such as the IEEPA and the ECRA, which already regulate aspects of foreign investment and national security. Harmonizing these laws with the NCCDA is essential to establishing a cohesive and legally sound national security regime that balances economic freedoms with security requirements.

The introduction of outbound investment screening in the U.S. may have significant global consequences, potentially encouraging other jurisdictions to implement similar mechanisms. If other nations adopt comparable measures, this could usher in a new phase in FDI regulation, marked by the imposition of stricter, unilateral controls on both inward and outward investments. Such developments could foster protectionism, increasing barriers to cross-border investment and impeding global trade, complicating the international investment climate.

To ensure U.S. foreign economic policy remains consistent with both international legal standards and domestic legal principles, several integrated strategies are recommended. Strengthening international cooperation is essential to harmonize investment screening mechanisms with global norms, particularly those concerning transparency, proportionality, and non-discrimination. Engaging with multilateral forums such as the WTO and the G20 will be crucial in aligning outbound investment screening with global trade and investment standards. Moreover, providing clear guidance on the application of these mechanisms is necessary to reduce legal uncertainty for U.S. investors and foreign governments alike. Robust legal safeguards should also be embedded in the NCCDA to ensure that national security concerns do not serve as a pretext for economic protectionism. Finally, reinforcing international dispute resolution mechanisms is vital to address any conflicts arising from the NCCDA's application. Effective and impartial dispute resolution will help maintain investor confidence and mitigate the risk of retaliatory actions by foreign governments.

The NCCDA marks a notable development in the legal approach to national security, recognizing the critical role of economic and technological resources in national defense. This expanded understanding of national security merges economic policy with security strategy, reinforcing the importance of taking preventive measures to address emerging

risks. The NCCDA places new legal and regulatory demands on businesses, requiring them to adapt to a system that places greater emphasis on national security. Ultimately, the NCCDA suggests a reevaluation of global economic policies through a national defense lens, identifying technological advances abroad as potential threats comparable to traditional military risks.