National Security Review of Foreign Mergers and Acquisitions in China: Progress and Reform

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Abstract

China has made much progress in providing a business environment conducive to foreign direct investment (FDI). The challenge now is to move towards a more transparency-based, accountability-based and proportionality-based policy framework that will attract high-quality FDI so that China can achieve its national security goals with the smallest possible impact on investment flows. This paper proposes several policy reforms for the Chinese government to consider in further developing such a framework. These include clarifying the definition of national security, improving and clarifying the control standard, improving the accountability of the security review body, better harmonizing the security review system with China’s industrial policy, and specifically stipulating the legal liability involved when market actors violate rules governing security review.

摘要

中国在提供外国直接投资的有利经营环境方面已经取得了进步，目前的挑战是如何发展吸引高质量外国直接投资的更加透明、更具有问责性和平衡性的投资政策体制，以实现保护本国安全利益的同时，继续保持投资环境开放性的政策目标。本论文结合美国等代表性国家的相关立法和实践、中国参与投资领域国际治理的实践、国际组织的研究报告以及中国国情，为建立这种投资政策体制提出了几点建议。这些建议包括进一步澄清国家安全的含义和外资控制标准、提高并购安全审查机构的问责性、有效协调并购安全审查体制同产业政策的关系以及明确规定并购交易当事人违反并购安全审查规则的法律后果。
1. Background on China's new Security Review Regime for Foreign Mergers and Acquisitions

1.1 The Impacts of Cross-border Mergers and Acquisitions (M&A) on National Security

Cross-border mergers and acquisitions (M&A’s) have brought significant positive benefits for the national security of home and host countries alike. There is nevertheless much ongoing discussion of the possible risks cross-border M&A’s pose for national security. Consider, for example, the case of when a successful local firm involved in critical technology is taken over by a foreign company. The proposed acquisition would allow the transfer of sensitive technology and other know-how to a foreign-controlled entity that might harm the home country's national interests. What is notable, however, is that the link between international investment and national security is always an issue of controversy. We expect international investment to affect national security through at least two channels that will be discussed below.

In the first place, a liberal policy toward cross-border M&A may play a constructive role in enhancing national security because of its potential macroeconomic benefits. A low standard of living and growing income inequality inherently represent threats to national security and public order. Investment liberalization may contribute to economic growth and development, which can be beneficial and constructive to national security and social stability.

Second, sector-specific commitments to cross-border investment might help promote regional or international stability as well. The European Union (EU) is believed to have played a positive role in this regard. In the early postwar period the predecessor to the EU, the European Community, created strategic interdependence in heavy industry by realizing continuous cross-border integration of the coal and steel sectors across member states. Initially, this integration did not involve a formal distinction between domestic and foreign ownership, but it created an incentive mechanism for cooperation rather than confrontation. It is not surprising that as the member nations of the European Union continue moving towards deeper economic integration, this progress is having a clearly stabilizing effect within Europe.
Third, the ownership of firms may also pave the way for closer cooperation, which can help them achieve more specific obligations in regards to national security. In terms of defense cooperation within Europe, the European Aeronautics Defense and Space Company (EADS) deserves special mention. In addition, China and the European Union have recently concluded a port security agreement that will also cover threats posed by terrorism and includes plans to establish bases in Felixstowe, Rotterdam and Shenzhen. The project was made feasible only after the acquisition of the relevant ports, and enhanced screening and monitoring technology will contribute to the improvement of cargo and container integrity.

Finally, whether or not an individual company's survival is considered important for national security may largely depend on its link to cross-border enterprises. In many smaller countries, defense suppliers (especially those of capital-intensive industries or industries with economies of scale) are committed to seeking partners from foreign companies to ensure that the supply of defense products remains secure. For example, supporters of OECD investment policies consider the air transport sector essential to preserving national security and public order. In this field, cross-border mergers and acquisitions are increasingly regarded as a strategically wise choice, as can be seen from the experiences of the EU.

1.2 Identifiable Risks from Foreign Mergers and Acquisitions

In spite of the fact that there exist no substantial discrepancies between different forms of foreign direct investment (FDI) according to economic theory, foreign acquisitions still frequently trigger panic in host countries. As a result, they are often subject to more stringent regulations. These regulations seemed to become more rigorous in the 1990s, in stark contrast to the regulatory policies governing greenfield investment. While formal restrictions of cross-border investments on foreign entry and ownership apply to a considerable number of strategic industries, the central and local governments provide a generally open environment for greenfield investment, a feature of the investment environment which has resulted from the lack of reciprocity among home and host countries.

In terms of privatization, foreign mergers and acquisitions have caused public aversion when state-owned assets have been sold to foreigners. The public has sometimes opposed foreign control of the local economy as well. Especially in the case of hostile takeovers,
foreign investors are often criticized for neglecting their social responsibility as well as local traditions. Fear of the host country of foreign mergers and acquisitions may also relate to concern over the seizing of local assets by foreign investors. Foreign M&A risks recognized by host countries can include: (a) a loss of local technological capabilities; (b) company layoffs and closure; (c) a fire sale of local assets; (d) a lack of reciprocity between host and home countries in the treatment of foreign mergers and acquisitions; (e) a restriction of market competition; (f) a reduction of exports or increase of imports; (g) foreign strategic investors taking control of local businesses.

1.3 Roles of investment policies concerning national security in protecting critical infrastructure

Recently there have been a number of changes in national investment policies. Increasingly, special attention is being accorded to critical infrastructure. The roles of investment policies concerning national security in protecting critical infrastructure can be categorized in a number of ways as will be discussed below.

1.3.1 Many countries have adopted national plans or strategies for protecting critical infrastructure. These strategies usually define critical infrastructure as tangible or intangible assets. Violation of these policies will endanger public security, social order, or the well-functioning of government. This damage can be both disastrous and uncontrollable. Risks to critical infrastructure can be natural (earthquake or flood) or man-made (terrorism or sabotage).

1.3.2 According to one recent survey, several countries protect critical infrastructure through risk management. It is helpful for the government to identify critical security assets and evaluate their risks, and prepare policies to mitigate these risks. Usually, risk management covers measures of prevention, preparation, responding and restoration. These plans often aim to improve cooperation between institutions and private sectors of critical infrastructure.

1.3.3 According to the OECD many countries have adopted more than one investment measure of those mentioned above to manage critical infrastructure risks. These investment measures can be categorized into three types: (i) a blanket limit; (ii) a
department permit; or (iii) a binding agreement (as well as cross department measures, for example investment security review procedures). In some countries, the application of these discriminatory investment policies is severely restricted. However, in some other countries, the scope for the application of these discriminatory investment policies is very wide.

1.3.4 As the inspection of the critical infrastructure policies of 11 countries in Table 1 shows, the roles of investment policies in protecting critical infrastructure are constantly changing. Countries have recognized the extra value of investment policies in protecting critical infrastructure. However, compared with other policies (such as national defense policy or law enforcement), the effect of investment policies is very small. The statutes of several countries indicate that investment policies will only be used to manage a very small number of risks related to national security when they use risk identification methods to protect critical infrastructure. This investment policy can only be used as a measure of last relief when other less restricted and nondiscriminatory measures are inadequate to mitigate the identified risk.

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United Kingdom

Critical national infrastructure “comprises those assets, services and systems that support the economic, political and social life of the UK whose importance is such that loss could: 1) cause large-scale loss of life; 2) have a serious impact on the national economy; 3) have other grave social consequences for the community; or 4) be of immediate concern to the national government.”

United States

The general definition of critical infrastructure in the overall US critical infrastructure plan is: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." For investment policy purposes, this definition is narrower: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on national security."


1.4 The purpose of China's Security Review Regime for Foreign Mergers and Acquisitions

All countries of the world are facing major challenges, such as peak oil, the deterioration of the ecological environment, keen competition in key industries and high levels of unemployment. Consequently, it is universally acknowledged that it is of great importance to establish a Security Review Regime for Foreign Mergers and Acquisitions to preserve national security. From the perspective of the development of Chinese FDI, the expansion of Chinese foreign direct investment has been especially noteworthy in accordance with China's technology strategy of "markets in exchange for technology.” Such M&A’s in key targeted industries (i.e., energy production, the manufacture of heavy equipment and financial services) are usually closely connected with government strategies. This practice has led to increased awareness of potential threats to Chinese national security. In particular, in the acquisition of existing domestic businesses, take “decapitation-type” merger and acquisition as an example,
the benefits of foreign investment must be balanced against possible risks for broader
economic security that may arise from a shift in ownership and the control of successful local
firms in key domestic industries.

In fact, current regulations are insufficient to eliminate the security threats posed by
foreign mergers and acquisitions in strategic industries. It must be noted that the situation in
China is not identical with the West, where investment liberalization is a core value of
investment policy. In fact, great changes have taken place to most liberal regimes in the
Western world in response to major challenges, such as the September 11 attack, a shortage of
strategic resources (i.e. oil) and the emergence of new foreign investors with state-backing,
particularly from emerging economies. Therefore, Western countries have implemented a
series of economic reforms in relation to the security review regime for foreign mergers and
acquisitions.

Since 2006, the United States, Canada, Germany, France, Japan, Australia, Russia, India
and several other countries have adopted legislative measures regarding the security review of
foreign acquisitions. Confronted with the local national security review, some Chinese
outward cross-border M&A efforts have failed. There are two fundamental imperatives that
have been emphasized for the Chinese Security Review Regime for Foreign Mergers and
Acquisitions: (1) to maintain the stable operations of key industries; and (2) to help these
industries adjust to new changes in the international investment environment.

2 The core of “the Investment Policy Guidelines of Recipient Countries on
National Security” by the OECD, and its influence on national security policy-making

The establishment of security review for the foreign M&A system will undoubtedly have
a restrictive effect on a country's open investment policies, while maintaining an open
investment environment is a necessary requirement of economic globalization, thus the
foreign M&A safety review system should maintain national security interests as well as
minimize the restrictive impact on investment liberalization policies to prevent investment
protectionism caused by the improper use of the review of national security measures, making
the security review of foreign acquisitions a policy tool for the protection of infant industries
behind strong industries that are supposed to be regulated by market. Implementing investment protectionism in name of national security review will lead other countries to peer retaliation. All countries are faced with the problem of properly and effectively balancing investment liberalization and national security interests when reviewing foreign acquisitions. They are also faced with the challenge of effectively establishing legal protection mechanisms for national security interests in an open economic environment.

This issue has been at the heart of in-depth OECD discussions regarding investment liberalization since 2006. In the 2006-2009 period, participating countries held ten rounds of discussions as a part of the Roundtables on Freedom of Investment, National Security and Strategic Industries. The conclusion of these discussions was that although the national security review of foreign M&A regulatory practices varies, there is no universally acceptable "national security" concept. The countries participating in these discussions agreed that good investment policy must follow four principles: (1) non-discriminatory treatment; (2) regulatory balance; (3) predictability; and (4) accountability. On the basis of this consensus, the OECD issued investment policy guidelines in 2009.

The OECD guidelines made specific provisions based on the four basic principles that members should obey when conducting security reviews. According to the principle of non-discrimination, governments should enact general application measures that treat all investors equally. If these measures are not considered sufficient to protect national security, countries should view the specific national security risk circumstances arising from these investments as special measures for individual investors. The principles of transparency and predictability require that although the government should protect the confidentiality of sensitive information for the interest of investors, objectives should be as transparent as possible to increase the predictability of the application of legal statutes. Transparency is the cornerstone of a well-functioning regulatory system. In 2003, the OECD adopted a policy of transparent investment reporting. In terms of investment policy, transparency means that relevant laws and regulations can be openly amended, relevant parties will be notified in case of any law changes and there is the assurance that administrative directives and laws will be uniformly applied. It also requires providing involved parties with opportunities to make
comments on relevant laws and regulations, negotiating changes in policy objectives, setting aside time for public comments, and providing channels of communication with relevant authorities. At the international level, by defining common standards and providing multilateral monitoring, individual country efforts are bolstered and the transparency of investment policies is ensured.

The principle of proportionality requires that investment restrictions or conditions attached to the transactions should not exceed the requirements of national security. When the existing measures are sufficient and appropriate to deal with national security issues, states should also avoid the above limitations and conditions. Most investment policy does not involve national security risk management. In those countries that use investment policy to protect national security, concerns include: organized crime or terrorist infiltration of the national economy, the loss of control of key resources required for national defense, the frustrating of law enforcement efforts, and the loss of control over sensitive border regions.

The accountability principle requires that in reviewing foreign investments, government supervision, parliamentary and judicial oversight, periodic regulatory impact assessment and the requirements of high-level government decision making (including the decision to block an investment) and other procedures should all be used to ensure the accountability of enforcement agencies. Different countries use different mechanisms to ensure the achievements of foreign investment regulatory goals. Governments have adopted a wide range of mechanisms to increase accountability. One method has been to use administrative oversight mainly through the public sector management system to achieve control. This may involve the Chief Executive and relates to the internal information and reporting systems as well as job promotion and disciplinary procedures within the executive. A second method involves political oversight from legislative agencies. A third method involves judicial supervision. In addition, different types of international agreements can also create accountability mechanisms.

From this discussion of the four OECD principles we can see that it is beneficial for countries to avoid protectionism and enact strong national security-related investment

measures. Of course, the formulation of guidelines has also been in response to new IMF agreements covering the activities of sovereign wealth funds (SWF’s). In October 2008, the world’s major economies agreed to the Santiago Principles, which were designed to regulate the investment behavior of sovereign wealth Funds. The Santiago principles were the product of a contest between the home country of SWFs and target countries. The OECD Guidelines provide a detailed set of guidelines for investment recipient countries to develop national security policies. The OECD investment document acknowledges that governments have the right to take action when it seems necessary to protect vital national security interests and public order. Once the security exception is allowed, it can easily become an excuse for recipient countries to take protectionist measures. The guidelines do help countries to enact national security-related investment measures and avoid protectionism.  

3. China’s progress in foreign merger and security policy review

3.1 China has established a legal framework of national security review regarding foreign M&A and enhanced transparency. A large number of laws and directives have helped foster the emergence of this system. In 2006, China’s government released and implemented the State Council’s “Views on the Revitalization of Equipment Manufacturing Industry,” “Provisions on the Acquisition of Domestic Enterprises by Foreign Investors,” and “The Eleventh Five-Year Plan on Foreign Investment.” In 2007, the Chinese government issued the “Notice On the Transfer of State-owned Properties,” “The Industrial Guidance Catalogue on Foreign Investment,” and the Anti-Monopoly Law. More recently, the State Council issued a “Notice on the Establishment of the Security Review System on Foreign Investor Acquiring Domestic Enterprises” on February 3, 2011. On March 7, 2011, the Ministry of Commerce issued the “Safety Review System and the Provisional Regulations on the Acquisitions of Domestic Enterprises by Foreign Investors.” On August 25, 2011, the Ministry of Commerce

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issued changes to this doctrine on the basis of the aforementioned Interim Provisions. As a result of these laws and directives, China has gradually established a system of national security review governing foreign acquisitions.

3.2 China amended the previously preferential foreign investment strategy in 2006, but this revision did not change the overall pattern of Chinese investment liberalization. China has shifted its strategy from the early 1990s "market transfer for technology" to the goal of "improving the level of use of foreign capital" as proposed in the Twelfth Five-Year Plan in response to national security, environmental protection, employment and other social issues triggered by foreign M&A transactions.

3.3 China actively participates in international governance in the field of investment and has drawn on useful foreign experience to guide its own investment policies. Firstly, since 1995, China has been cooperating with the OECD investment policy research projects. As part of this research project, the OECD has released, among other studies, the 2003 “Investment Policy Review of China,” and in 2006 the “China M&A Policy Report.” Secondly, since 2006 the Chinese government has repeatedly participated in an OECD project under the rubric of the Intergovernmental Forum on the question of “investment liberalization, national security and strategic industries” (hereinafter referred to as FOI project). Furthermore, the city of Amoy, China hosted the 2010 United Nations Trade and Development World Investment Forum. China actively participated in the discussion of "International Investment and Sustainable Development Challenges and Opportunities," and showed the world that China’s Article 31 of Anti-monopoly Law, which is about national security review provisions on foreign mergers and acquisitions, did not affect the principle of the basic policy of opening-up. It is evident that China’s foreign investment environment has not deteriorated.

4. Current challenges and problems

The biggest challenge facing all policymakers around the world when dealing with the national security review of foreign M&A involves protecting the national security interests while simultaneously maintaining an open investment environment. It should be the goal of Chinese policymakers to build a more transparent, accountable and balanced investment
security review mechanism. Considering international best practice together with the special problems existing in China, it is clear that the Chinese security review of foreign M&A activity still has the following areas to improve:

4.1 Several important concepts regarding the national security review of foreign M&A have not been properly defined

Important concepts regarding security review have not been clearly defined, which can lead to review being abused as a tool of industrial policy. Given existing conflicts between sectoral interests and the lack of judicial oversight and supervision from the highest administrative organ, it is possible industrial and competition policy will not be effectively coordinated and the security review mechanism may easily be reduced to another protectionist tool of industrial policy. The concepts involved in the national security review of foreign M&A, such as what constitutes an “important” agricultural product, a “significant” energy resource, “critical” infrastructure, “important” transportation services, “key” technologies and “major” equipment manufacturers, are all too broad. Current statutes are also not explicit regarding what is meant by the effect an M&A transaction has on the “stability” of the national economy.

As the OECD guideline states, the basic security concerns of a country are autonomously determined, and each country has the sovereign right to decide on taking necessary measures to protect its national security. In order to make the decision, strict risk assessment techniques should be used which can reflect the country's investment environment, economic system and national resources. Investment restrictions and their identified relationship with national security risks should be made clear and investment restrictions should be limited to issues related to national security concerns. Although the national security of the investment policy in most countries plays an important role, few countries have tried to clarify the specific definition of what is considered national security. The ten countries supporting the OECD investment guidelines as well as China, in particular, rely on a general security screening. These countries typically solve this problem on a case by case basis. Table 4.2 lists several definitions some countries have provided about national security interests used in their investment policy. This table shows clearly that the concept of national security used in
investment policy usually involves national defense, public order, public health, public safety and other basic concepts. For example, although the United States Foreign Investment and National Security Act does not define national security, the term interpreted in Sec.2 (5) is the same as used by the Department of Homeland Security, including its applications to key infrastructure. Sec.2. (6) defines critical infrastructure as actual and virtual systems and assets that are so important that their incapacity or destruction would endanger U.S. national security. In addition, the Exxon-Florio clause and FINSA also represent factors in the U.S. security review of foreign M&A transactions. FINSA added six factors for the Committee on Foreign Investment in the United States based on the five factors mentioned in the Exxon-Florio provisions, which are additional considerations provided in FINSA Sec. 4. They are: (1) M&A transactions’ potential impact on the U.S. critical infrastructure for national security including major energy assets; (2) M&A transactions’ potential impact on U.S. critical technologies for national security including major energy assets; (3) Whether the M&A transactions are controlled by a foreign government; (4) Pay special attention to those M&A transactions that are controlled by foreign governments on the following conditions: (a) links to the nuclear non-proliferation states, including those restricting by treaties and multilateral supply guidelines; (b) the relationship between the government and the U.S. government, especially the cooperation records between the two sides in such areas including anti-terrorism; (c) the potential for the transfer of military technology by considering its national export control laws and an analysis of regulations; (d) the long-term forecasts of energy resources and raw materials the United States needs; (e) Other factors that the president or CFIUS considers appropriate. The Exxon-Florio provision establishes additional factors to be considered: (1) The requirements for domestic production for national defense; (2) Domestic industry's ability to meet national defense needs, including human resources, products, technologies, materials and other supplies and services; (3) Foreign citizens’ control of domestic industries and commercial activities, and their impact on the capacity to meet the needs of the national security of the United States; (4) M&A transactions’ potential impact on sale of military materials, equipment, technology to countries which support terrorism or the proliferation of missile technology, chemical and biological weapons; (5) M&A transactions’
potential impact on US leadership in technologies important to U.S. national security.

In the case of Germany, the exact definition of public order or national security was not given in the 2009 German security review of foreign acquisitions, the Foreign Trade and Payments Act. These definitions are also not included in amendments to the law or its implementing regulations. Instead, the review of foreign acquisitions in Germany must follow the provisions of the relevant case law interpretation of the European Court of Justice. New amendments to the explanatory memorandum are explicitly mentioned in section 46(1) and section 58(1) in the treaty establishing the European Community. Only on the basis of reasonable public order or public safety concerns may restrictions on capital movement and currency transfer be deemed appropriate. The European Court of Justice has made it clear that in a crisis, telecommunications, electricity, gas and oil supply will be considered to be related to public safety. Public safety has been understood as relating to strategic services as well as the normal operation of public institutions. Examples include protecting the country when it faces significant domestic or external threats. From the stringent requirements established in section 46(1) and section 58(1) in the Treaty establishing the European Community, we can see that only when foreign investment is a serious enough threat to fundamental social interests can the relevant authorities enact measures to restrict or prohibit investment. Additionally, these measures can only be applied in very few exceptional cases. Based on industrial policy or economic interests, common foreign investment transactions cannot be restricted or prohibited. Thus, banking, tobacco, and the automotive industry may

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3See “Explanatory Memorandum to Amendment of the Foreign Trade and Payments and the Foreign Trade and Payments Regulation”, p.2.
not be considered as related to public order or public safety.\(^7\)

Italy's national security concept is similar to the comprehensive set of risks identified in a large number of national strategies for protecting core infrastructure, for example, the interruption of energy supply and government services, epidemics, or the destruction or interfering with infrastructure. Italian law accords the Italian government special powers through the golden shares policy.

This analysis suggests it would not be difficult to find that in some cases, the review of major national security interests seems to extend beyond the traditional concept of national security. Although the concept of national security is not entirely uniform, diverse national laws still center on national security or involve areas closely related to the national economy and economic security. It is clear that some of the relevant terms in Chinese legislation need to be more clearly defined. In addition, taking into account the particularities of China’s economic system and the gap between China’s economy and level of technological development compared with developed countries, Chinese authorities should interpret "national security" based on China’s own national conditions.

### Table 2: The Concept of Essential Security Articulated in Various National Statutes

<table>
<thead>
<tr>
<th>Country</th>
<th>Concepts of Security, Vulnerability or Threats used in Investment Policies (e.g. investment review procedures, golden share arrangements)</th>
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<tbody>
<tr>
<td>Finland</td>
<td>National interest involves a) safeguarding the national defense b) preventing serious and probably permanent economical, social or environmental difficulties on a sectoral or regional level and c) securing public order, citizens’ security and health.</td>
</tr>
<tr>
<td>France</td>
<td>Risk evaluation takes account of sectors of activity. Activities considered to be risky are those that, even if only occasionally, participate in the exercise of public authority or that have the following characteristics:  · activities that might undermine public order, public security or national defense;  · activities involving the research, production or commercialization of arms, munitions, powders and explosive substances.</td>
</tr>
</tbody>
</table>

\(^7\) Dr. Florian Stork, “A Practical Approach to the New German Foreign Investment Regime – Lessons to be Learned from Merger Control,” p.270.
Italy
The “special powers” foreseen by Italy’s “golden share” legislation can be exercised in the following circumstances:
- grave and real danger of scarcity in the national supply of oil and energy products; in the supply of related services and, in general, of raw materials and essential goods for the community; in a minimum supply of telecommunications and transport supply
- grave and real danger to public service infrastructures and networks
- grave and real danger to national defense, military security, public order and public security, as well as sanitary emergencies.

Poland
Investment in real estate is permitted if it does not “result in a threat to national defense, state security or public order and if it is not against the nation’s social and health policies and if the foreigner demonstrates circumstances proving his/her relations with Poland.”

Spain
“The Spanish Council of Ministers can suspend, with justified reasons, the application of deregulation rules of RD 664/19999 for investments that, because of their nature, form or conditions to which they are subject, affect or may, even if only occasionally, activities relating to the exercise of governmental power or activities that affect or could affect public order, security or health.”

In addition, as just mentioned above, the legislation of some countries on security review of foreign acquisitions provides a definition of critical infrastructure, presented in Table 3. As Table 3 indicates, critical infrastructure is broadly defined in national legislation. “Critical” is defined as relating to infrastructure whose disruption or destruction would lead to disastrous and uncontrollable losses. "Infrastructure" refers to tangible and intangible assets, production systems and networks. As is evident from Table(4), the range of infrastructure sectors has been getting wider in this context.

### Table 3: National Definitions of Critical Infrastructure

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Table 4: The Coverage of Critical Infrastructure Plans by Sector

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<thead>
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<th>Canada</th>
<th>Netherlands</th>
<th>UK</th>
<th>US</th>
<th>EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy (including nuclear)</td>
<td>x</td>
<td>X</td>
<td>x</td>
<td>x</td>
<td>X</td>
<td>x</td>
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<tr>
<td>Finance</td>
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<td>x</td>
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<tr>
<td>Health care</td>
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<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Food</td>
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4.2 Lack of proper operability and vague criteria for identifying criteria on foreign investors as the actual controller.

When it comes to the security review of foreign M&A legislation in United States, Germany, Russia and other countries, foreign M&A is controlled to a high degree. For example, in the United States, the security review includes but is not limited to issues of: (1) how to express corporate control arrangements in the deal when mergers and acquisition transactions lead or may lead to foreign control of U.S. business. Such deals are the most common type subject to CFIUS review; (2) Foreign M&A transactions consist of an alien transferring control of a U.S. company to a foreigner. For example, in the case of Dubai Ports World acquisition of British shipping, the latter took over the ownership of six major ports in the United States in the M&A transaction; (3) M&A transactions may lead to assets of U.S. companies being controlled by foreigners; and (4) The composition of the joint venture is based on contract or other similar arrangements. Joint ventures are a new addition to the 2008 statute related to the content of regulations. China’s new security review of foreign M&A legislation also makes it clear that “only when a foreign investor in an M&A declares specific ranges and areas of the domestic enterprises and industries while obtaining the actual control, a security review may be required." Therefore, control is the core of the security review of foreign M&A and it is the real standard to determine whether the conduct of foreign investors
in mergers and acquisitions leads to national security risks.

Judging from the changes in representative national security review of foreign M&A legislation, the standard of "foreign control" has expanded, breaking the traditional standards of foreign ownership and using comprehensive criteria. For example, the 2008 United States Regulation § 800.203 says that "control" means an enterprise has direct or indirect power over important issues by owning the majority or dominant minority of shares, the board seats, proxy voting, a special share, contractual arrangements, formal or informal arrangements, concerted actions or whether that power is directly or indirectly exercised or not. The new regulations also claimed that only when the purpose of foreign ownership is determined to be purely passive investment does the Foreign Investment Committee needs to consider the 10% threshold when reviewing foreign investment.\(^8\) This shows that when CFIUS is analyzing if the specific foreign M&A transaction leads to foreign control its focus is on the side of whether the foreign M&A has dominant influence on decision power on major issues of U.S. companies. The standard of control is not directly linked to the proportion of foreign ownership but a comprehensive and factual measure. If the foreign party has the right to appoint board members or can freely modify the company's budget, no matter how many shares it holds, the status will be regarded as 'control' and is thus subject to be reviewed. The Strategic Company Operating Law of Foreign investment in the Russian Federation on the Protection of the Russian Defense and Procedural of National Security, which came into effect on May 7, 2008, has similar provisions.

The expansion of the foreign control standard has mostly resulted because of the changes in the economy and the way investors control business has changed dramatically. Particularly, as the abuse of legal entities and financial instruments makes the real business owners or controllers hide and thus difficult to identify. In addition, the process of national security review on foreign investment also focused on the concept of actual control. The government can require foreign investors to submit the information in order to outline the entire

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\(^8\) Ownership interests are held or acquired solely for the purpose of passive investment if the person holding or acquiring such interests does not plan or intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with holding or acquiring such interests solely for the purpose of passive investment. Such passive investment is also referred to as solely passive investment. See 31 CFR §800.223(2008)
organizational structure of targeted company after acquisition, and accordingly conclude the real controller and make the right national security risk assessment. For example, in the United States, regulations state the related information parties on a voluntary declaration submitted to the CFIUS review of agency concerning M&A transactions should include the final actual owner's name, registration, nationality and address. This is the prerequisite for meeting the safety review standard. According to New Regulations of Foreign Acquisitions from the Perspective of China’s National Security, which was enacted by the State Council in 2011, foreign investors who become the controlling shareholder or obtain the actual controller status through acquisition of domestic enterprises can be regarded as the actual controller of domestic enterprises. The regulation also lists the cases of foreign investors obtaining the controlling shareholder status of domestic enterprises through mergers and acquisitions. This only refers to the cases that "lead to decision-making within the business, financial, personnel and technology fields as the actual control right is transferred to foreign investors.”

In addition, China’s “Requirements for the Implementation of Security Review System when a Foreign Investor Acquires a Domestic Enterprise,” issued by the Ministry of Commerce on August 25, 2011, stipulates that for "acquisition of domestic enterprises by foreign investors, we should determine whether it is within the scope of M&A safety review by the nature of the transaction and the actual impact of mergers and acquisitions; foreign investors are not allowed to avoid the real security review of acquisition by any means which include but are not limited to trusts, multi-level-reinvestment, leasing, loans, protocol control, foreign trade, and so forth." Obviously, as an effective regulation, the Ministry of Commerce explains the form of actual control to some extent; however, the concept of basic forms of actual control is still not clear and it is not easy to determine the actual controller precisely in practice.

Second, the above new rule denoting the concept of actual control is not in perfect accord with the regulations in the Company Law, Securities Law and other laws. For example, China’s Company Law and Securities Law use "control" instead of “actual control” which are the same in the relevant provisions in other countries. And judging from the above new requirements, "actual control" is actually the same as "control" in both the Company Law and
the Securities Law, as it does not introduce any new content. It almost follows the concepts in Provisions on the Acquisition of Domestic Enterprises by Foreign Investors. Furthermore, the legislation of security review of foreign acquisitions in other countries did not introduce the concept either. Therefore, the introduction of the concept is not necessary because it may cause confusion.

4.3 The lack of accountability mechanisms in reviewing bodies

The OECD Official Guide notes that internal supervision, congressional supervision, judicial review, regular appraisal of supervision impact, and procedures regulating important decisions by senior government officials (including discouraging an investment) should be taken into consideration during the process of security review on foreign investment to ensure the integrity of the accountability system. Accountability can also be developed through different types of international agreements, multilateral cooperation or arbitration procedures. Of course, different countries employ different mechanisms to ensure the supervision of foreign investment. For example, in the US, FINSA requires certification by the Department of the Treasury and senior officials. These officials must certify that no national security problems are affected and mitigation agreements have resolved all the questionable aspects of the merger or acquisition according to the review by CFIUS based on Article 721 of the Defense Production Act. If the conclusion by CFIUS is reached during the review stage, the certification should be made by at least an assistant secretary. If the conclusion is reached during the investigation stage, the certification should be made by at least an undersecretary. If the conclusion is reached by the President based on Article 721 of the Defense Production Act, it must be announced publicly.

Except for the review certification, FINSA also requires that CFIUS should submit annual reports to the US Congress. After receiving the announcement and report, the

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9 According to Chapter 2 of Article 12, with respect to a foreign investor's M&A of a domestic enterprise, in which case the foreign investor has obtained the actual right of control, if the M&A involves any key industry or any factor that causes or is likely to cause impact on the economic security of the State, or if the M&A causes the transfer of the actual right of control over a domestic enterprise that owns any well-known trademark or China's time-honored brands, the party concerned shall declare the same to the Ministry of Commerce.

10 The report includes: a. All M&A transactions reviewed or coordinated by CFIUS in the past 12 months; b. Analysis on foreign direct investment and critical technologies; c. Reports on direct investment from specific countries to the US. After receiving notices or reports, inquiries can be made on the implementation situations of
Congress can make an inquiry into the implementation situation of M&A dealings or mitigation agreements. The greatest challenge for this kind of accountability system is to adopt an effective way of supervision that ensures impartiality and objectivity of the review process. That is to say, the government hopes to ensure political accountability during the policy implementation process based on democratic governance requirements, and avoid excessive administrative intervention at the same time. The US Congress is not supposed to try to influence the application outcome of legislation in particular cases. Infringement on the autonomy of regulatory organizations carries the risks of partiality and may reduce the effectiveness of the oversight process. Peer supervision and other international accountability system may contribute to excessive intervention and a politicization of the national security review process.

Germany allows investors to question the correctness of all decisions made by the review organization during review process in Berlin administrative court. This allows them to safeguard their legitimate rights and interests. Problems exist in this kind of accountability system that relate to the use of confidential information. Under such circumstances, the requirements to ensure national security may either have great adverse impact on frustrating appeals, for example, by reducing the rights of plaintiff to subpoena and verify critical evidence. It may also prevent particular court procedures and the effective use of special courts established for protecting the confidentiality of government sensitive information. Similarly, concerns resulting in certain measures may also require confidentiality of information, thus making legal relief difficult or impractical. Finally, the constitution of some countries can impose restrictions on plaintiffs’ rights to use the courts.

Some countries allow investors to contest regulatory decisions on procedural grounds. According to legal tradition, this kind of challenge to procedures can be conducted through an administrative court or arbitration tribunal or through judicial review by a conventional court system (for example, common law system). Challenges conducted through the above procedures usually occur when procedures or rules were misused. The scope of judicial review varies from country to country. However, in most cases, if plaintiffs win a lawsuit, the
lawsuit will lead to de novo legal review, rather than overturning the original decision.

In China, there are neither regulations on the supervision of legislative organizations nor relief mechanisms for protecting investor rights. Instead, current statues aim to provide internal supervision within the government. However, the current supervision mechanism of the State Council monitoring organizations lacks standardization. However, this mechanism can be regarded as a new attempt to improve the accountability of China’s review organizations, so that investors are allowed to contest regulatory decisions based on procedural reasons in order to prevent corruption during the M&A security review processes. This mechanism also promotes administration according to law as determined by the government.

4.4 The uncertainty regarding the relationship between foreign M&A security review measures and industrial policy measures obscures China’s balanced supervision over foreign capital M&A security review measures.

China’s national security and national interests are in part protected by national industrial policies, in particular the “Catalogue for the Guidance of Foreign-Invested Industries” (the Catalogue). For example, Article 3 of the “Provisions for the Takeover of Domestic Enterprises by Foreign Investors” specifies that in protected industries, according to the Catalogue, no sole proprietorship run by foreign investors are allowed and M&A should not result in the holding of all shares by foreign investors; companies in these protected sectors must be controlled by Chinese investors, either absolutely or comparatively, and must be controlled by Chinese investors after M&A. This same law stipulates that “foreign investors should not operate companies in industries that prohibit foreign investment through M&A.” In addition, the statute states that “the original business scope of acquired companies should meet the requirements of foreign-invested industrial policies; otherwise, adjustments should be made.”

Based on these provisions, it is reasonable to conclude that the Catalogue is the first line of defense in protecting China’s national security. Many countries have similar practices. For example, the US handles national security problems through two investment policies. The
first relates to licensing and ratification, which is conducted by government agencies assuming certain responsibilities. For example, the US Federal Communication Commission is responsible for broadcast licensing, and the Department of Homeland Security is responsible for real estate acquisition in sensitive areas. The second investment policy relates to the procedures of M&A security review. The US contends that relative measures can only be taken according to M&A security review procedures when those more specialized procedures in laws and regulations fail to solve specific national security problems.

This leads to another question, namely whether the Catalogue can be regarded as limited guidance for further defining the scope of security review. According to the newest edition of the Catalogue, which was revised in 2011, industries that prohibit foreign investors cover almost the entirety of all industries that come under the foreign capital M&A security review. Because the security review scope stipulated under current statute is so broad, it needs to be further clarified in future foreign capital M&A security review legislation whether or not the Catalogue for the Guidance of Foreign-Invested Industries can be regarded as limited guidance for further defining the scope of security review.

In some countries, such as France and Russia, the investment security review procedures are based on ministry lists. In general, this means investment in these ministries must be reviewed. The connection between these lists and major national security evaluation depends on several factors. The French government believes that the 11 ministries noted in its list are close to the scope covered in major national security legislation.11 Russia has brought 42 strategic industries under foreign capital national security review.12 Other countries have adopted relatively abstract national security standards for M&A security review, such as the US and Germany. Even among the latter countries, some provide guidance for practices through issuing other guidelines or res judicata. For example, according to the US FINSA

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11 Decree 2005-1739 issued on December 30th, 2005 stipulates that M&A cases should be ratified by French economy minister when involving sensitive departments. Sensitive departments under protection include 11 industries such as lottery industry, insurance industry, biological technology industry, antidote production department, transportation and interceptor department, information system security industry, dual craft industry (both for civil use and military use), cryptology department, and department concerning defense secrets and munitions.

12 These 42 strategic industries include the areas of special technology production and transaction, nuclear industry, military machinery and equipment, weapon, ammunition research and production enterprise, aerospace industry, mineral geology research, Russian Federation deposit exploration including continental shelf, aquatic life resource exploration, and communication.
Article (b) (2) (e), CFIUS should issue relevant guidelines and enumerate M&A transactions that involve national security concerns in order to provide guidance for M&A parties.

In November 2008, CFIUS provided an explanation of what constituted a national security concern in the Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States (the Guidance).\textsuperscript{13} According to this document, a national security concern involves M&A transactions which have a potential impact on national security such that CFIUS should take them into consideration when judging M&A transactions. More specifically, the Guidance divides M&A transactions causing national security concern into two categories based on whether it is controlled by an American enterprise or a foreign entity. In res judicata, the European Court of Justice pointed out that service involving supply in telecommunication, electricity, gas and oil fields concerns public security at a moment of crisis.\textsuperscript{14} Therefore, public security usually correlates with strategic service supply, and concerns the normal functioning of a country and its public institutions.

How to coordinate the relationship between foreign capital M&A security review and the above Catalogue in practice has been a major challenge in the implementation of new regulations concerning China’s foreign capital security review. This has directly related to the openness of China’s investment environment. Without resolving these tensions, doubts regarding China’s investment environment cannot be eliminated.

4.5 New regulations have been issued by the State Council, making it difficult to effectively stipulate legal liability provisions that are essential for laws and regulations. Additionally, as the status of this legislation is more tentative, new regulations may have uncertain standing. For example, if the foreign acquirer, domestic target, or both violate the final decision of the review authority either deliberately or mistakenly, and submit incomplete


or incorrect documents concerning M&A, the party at fault may be punished. For example, the US FINSA entitles CFIUS to impose civil penalties for actions violating Article 721 of the Defense Production Act or mitigation agreements. US regulations stipulate: (1) Anyone who provides a substantial false statement or omission in their declaration, or provide false evidence, whether intentionally or out of gross negligence, should be fined up to 250,000 US dollars according to the US Civil Penalty Regulation. The amount imposed because of violating rules should be based on the nature of behavior. (2) Anyone who violates Article 721 of the Defense Production Act or mitigation agreements, or violates restricted conditions for M&A transactions that were authorized by the US, no matter intentionally or out of gross negligence, should be fined up to 250,000 US dollars or the value of M&A transactions according to the US Civil Penalty Regulation. The penalty decision should be made by CFIUS. The punished party can submit written complaints to the standing chairman of the reviewing institution within 15 days after receiving notice of penalty, including defense, justification, and explanation for punished behaviors. CFIUS should review the complaint after receiving it and make a final judgment within 15 days. Most of the punishments to the parties aim at reminding them to obey the rules, so as to cooperate with security review by the government. In this regard, German legislation is similar to that of the US. Russian law stipulates that the major legal liability of violating national security review system is to invalidate transactions and deprive parties of their voting rights. However, current legislation in China does not cover legal liability. The main reason may be that China’s foreign capital M&A security review system is issued through administrative order by the State Council, making it difficult to effectively stipulate legal liability provisions that are essential for laws and regulations.

5. Recommendations

The 2011 Chinese regulations on M&A security review system represent a great
improvement over previous statutes. However, as the above analysis indicates, there is much that remains to be improved. To tackle the problems with China’s M&A security review regulations, changes should be made in the following areas:

1) To solve the problem that the concept of national security risk evaluation is too broad, terms such as “important infrastructure” and “critical technique” should be defined. Subsequent guidelines can then be formulated to facilitate implementation.

2) To solve the problems posed by unclear standards for identifying foreign control, the standards stipulated by the Company Law and Security Law of China should be used to overcome the deficiencies of the Company Law. The standards for determining foreign control can be adapted from exemplary countries using qualitative and quantitative criteria. At the same time, China can formulate separate guidelines for identifying foreign control in order to acquire relevant information for an anonymous system and review institutions. Additionally, the greater challenge for regulatory organizations is the emergence of large numbers of multinational corporations and investment instruments. As the OECD and others have noted, the proliferation of these instruments can complicate the confirmation of ownership and determine the ultimate beneficiary, potentially impacting security evaluations. The application of these investment instruments can also affect the relative importance of nationality as criteria for national security review. Further international cooperation is a way to overcome these complications.

3) To solve the problem of a lack of accountability in review institutions, two solutions should be adopted. The first is supervision through administrative liability, which would require the M&A security review institutions to submit annual reports to the State Council. These annual reports could include: (1) All the M&A transactions reviewed or investigated by the joint commission in the past 12 months; (2) Analysis on foreign direct investment, critical infrastructure and technologies; and (3) Reports on direct investment from specific countries. After receiving notices or reports, the State Council can inquire about the implementation situation of M&A transactions or mitigation agreements. A second solution is to allow

17 Participants discussed this issue on the basis of OECD Secretariat's document “Identification of Ultimate Beneficial Ownership and Control of a Cross-Border Direct Investor” (available for official use only).
investors to raise doubts on regulatory decisions based on procedural reasons through judicial supervision and other appeal mechanisms, so as to ensure the correctness of review institutions and protect investors’ rights.

4) To coordinate the relationship between foreign capital M&A security review and the Foreign Investment Catalogue, the new regulations should clarify that foreign capital M&A security review measures can be taken only when other measures included in the Catalogue are inadequate to ensure national security. M&A security review measures should be the last relief measures to ensure national security and not fundamentally affect the openness of China’s investment environment. In addition, further clarification of foreign capital M&A security review legislation is needed on the question of whether the Catalogue can be regarded as limited guidance for further defining the scope of security review.

5) To solve the problem of the low status of the new regulations, regulations of the State Council should be enacted to stipulate the basic legal issues for foreign capital M&A such as scope, content, standard, procedure, and legal liability under the current legal framework after the new regulations have been implemented for some time. To solve the problem posed by foreign investors who violate the regulations of foreign capital M&A security review, civil penalties should be imposed for the following situations: (1) making a substantial false statement or omitting information when foreign investors provide information to review institutions; or (2) transferring equities and assets, or other behavior required by mitigation measures ordered by Ministry of Commerce because foreign investors violate regulations, thus negatively impacting national security. Civil penalties should be imposed in these situations. It is then important to determine the value of penalties based on the damage to Chinese national security.
一、中国外资并购安全审查政策变革的背景

(一)跨境并购对国家安全产生的影响

跨境并购也会对投资者的母国和东道国的国家安全带来重大的潜在利益。目前关于跨境并购和国家安全的国际争论常常聚焦于国家安全风险，比如一国“领军”企业和敏感技术被外国人收购所带来的国家安全风险。然而，值得注意的是，国际投资和国家安全之间的联系是复杂的，并且按照两条不同的路径产生关联。

首先，对跨境并购的开放政策可能有助于国家安全的维护，因为它对宏观经济能够直接产生潜在的利益。在物质生活水平低或者地区收入差距大的国家，其国家安全和公共秩序比较容易受到破坏。通过促进经济进步和帮助创造更广泛的利益，投资自由化能够对国家安全和稳定作出重要的贡献。

其次，特定部门的跨境开放承诺，就其自身而言，也可能是区域或国际稳定化政策的组成部分。这方面被广泛引用的一个例证是欧盟的实践。在早期，欧盟项目借助跨境煤钢部门一体化，创造了各国战略重工业的相互依赖性。最开始，这种一体化不涉及跨境所有权，但它却创造了合作的激励机制而不是对抗的局面。就更近的事件而言，欧盟的单一市场更进一步地促进了经济的一体化，并且它也对整个欧洲明显地产生了稳定化的效果。

第三，跨境公司所有权也可以是相互合作的内容之一，这有助于达成促进国家安全的更加特定化的义务。比如，在欧洲内部国防合作方面，有 EADS 航空航天企业集团。最近的例子是港口安全，其中包括反恐合作，这是中国—欧洲共同承诺的一个目标。一项试验性项目关注新西兰 Rotterdam、英国 Felixstowe 和中国南部的深圳港之间的海洋集装箱运输。这个项目的可行性部分在于国际公司
对相关港口并购后的结果，并发展了审查和监测技术以确保从发货地到目的地之间集装箱运输方面印章标志物理性质的完整性。

第四，被认为对国家安全具有重要意义的单个公司的生存可能取决于同跨境企业之间的联系。在许多规模较小的国家，国防供应商们（特别是资本密集性部门或代表着重要规模经济的部门），正日益需要外国公司伙伴的合作以确保国防产品供应的保障性。航空运输部门被OECD投资文件的支持者认为是一个同国家安全和公共秩序密切相关的领域。在该领域，跨境并购也日益被看作是一个战略选择，这其中包括欧盟的实践。

（二）来自外国收购的可识别风险

尽管从经济理论上讲，外国直接投资（以下简称FDI）采取的不同投资形式对当地的影响并无实质上的不同，但是外国并购引发了东道国的恐慌，并因而常常受到更为严格地规范。与规范绿地投资的政策形成鲜明对比，对待并购的政策在二十世纪九十年代潜在地变得更为严格。绿地投资通常会受到中央和地方政府慷慨地激励，而外国并购有时则会由于国家安全或者其涉及到“战略”领域而被阻止。外国并购被阻止的原因也可能是外国投资者母国对东道国当地公司在公司控制方面缺乏互惠措施。

在私有化情形下，外国并购引起了民众对国有资产出售给外国并购者的普遍反感，或者是反对外国投资者对当地经济的控制。特别是在敌意收购的情形下，外国投资者有时由于未意识到应尽的社会责任和忽视当地的行为传统而受到批评。东道国对外国并购的恐惧还可能来自外国投资者对当地资产的剥夺。东道国所识别的外国并购风险可概括为以下几个方面：当地技术能力的丧失；公司裁员和关闭；东道国当地公司资产被贱卖；东道国和外国投资者母国在外资并购待遇
方面缺乏互惠措施；并购交易所导致的限制竞争行为；导致东道国出口减少或进口增加；外国投资者对当地战略企业的控制。

（三）与国家安全相关的投资政策在保护一国关键基础设施中的作用

最近一些国家投资政策的变化，对关键基础设施给予了特别关注，从保护关键基础设施这个更加宽泛的国家战略角度来看，与国家安全相关的投资政策在保护一国关键基础设施中的作用，主要有以下几个方面：

1. 许多国家都有保护关键基础设施的国家计划或战略，这些战略通常将“关键基础设施”界定为有形或无形的资产，其一旦遭到破坏或扰乱将会严重地危及公共安全、社会秩序和政府重要职能的履行。这种损害通常是灾难性的和无法控制的。关键基础设施的风险来源既可能是自然产生的（如地震或水灾），也可能是人为的（如恐怖主义、蓄意破坏）。

2. 经研究发现，一些国家战略通常采取风险管理的方法来保护关键基础设施。这种方法有助于政府识别关键的安全资产，评估相关的风险，进而为缓解这些风险而建立相关的战略和确立优先考虑事项。通常这种风险管理涉及下列环节：采取的措施：预防、预备、回应和恢复。这些计划致力于改善相关机构之间、关键基础设施的私人部门运作者之间在处理与关键基础设施相关风险问题上的合作能力。

3. 根据 OECD《国民待遇文件》所规定的通报制度，由自愿遵守的成员方提供的相关信息表明：这些国家都采取了一项以上的投资措施，来处理关键基础设施风险。这些投资措施可分为三种类型：A、“地毯式”限制；B、部门许可或达成限制性协议；C、跨部门措施（比如投资安全审查程序）。在有些国家，这些歧视性投资政策的适用是受到严格限制的。然而，在另外一些国家，这些限制
性投资政策的部门适用范围却是很广泛的。

4、通过对以美国为代表的11个国家关键基础设施政策的检视（见表1），不难发现，投资政策在保护关键基础设施方面的作用在不断变化，许多国家意识到投资政策措施在保护关键基础设施方面的额外价值，但相对其他政策（比如国防政策、法律实施和部门许可）而言，投资政策在这方面所起的作用是微乎其微的。另外一些国家提到，当他们采用一套广泛的风险识别方法来保护关键基础设施时，投资政策仅被用来处理范围极其窄的风险，即与国家安全相关的风险。并且，仅当其他具有更多限制和非歧视措施不能足以缓解这种被识别的风险时，这种投资措施才能被作为最后救济手段而被使用。

<table>
<thead>
<tr>
<th>Table 1: National Definitions of Critical Infrastructure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australia</strong></td>
</tr>
<tr>
<td>“Critical infrastructure is defined as those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic well-being of the nation, or affect Australia’s ability to conduct national defense and ensure national security.”</td>
</tr>
<tr>
<td><strong>Canada</strong></td>
</tr>
<tr>
<td>“Canada’s critical infrastructure consists of those physical and information technology facilities, networks, services and assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security or economic well-being of Canadians or the effective functioning of governments in Canada.”</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
</tr>
<tr>
<td>“Critical infrastructures are organizations and facilities of major importance to the community whose failure or impairment would cause a sustained shortage of supplies, significant disruptions to public order or other dramatic consequences.”</td>
</tr>
<tr>
<td><strong>Netherlands</strong></td>
</tr>
<tr>
<td>“Critical infrastructure refers to products, services and the accompanying processes that, in the event of disruption or failure, could cause major social disturbance. This could be in the form of tremendous casualties and severe economic damage.”</td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
</tr>
<tr>
<td>Critical national infrastructure “comprises those assets, services and systems that support the economic, political and social life of the UK whose importance is such that loss could: 1) cause large-scale loss of life; 2) have a serious impact on the national economy; 3) have other grave social consequences for the community; or 4) be of immediate concern to the national government.”</td>
</tr>
</tbody>
</table>
The general definition of critical infrastructure in the overall US critical infrastructure plan is: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." For investment policy purposes, this definition is narrower: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on national security."


（四）中国外资并购安全审查制度逐步建立的原因

随着以石油为代表的战略性资源供应的日趋紧张、生态环境的日益恶化、各国产业竞争的加剧和就业压力的增大，各国基于国家战略产业安全和其他重要国家利益对外资并购进行安全审查已成为外资监管的普遍实践。就中国自身而言，自20世纪90年代初以来，在以“市场换技术”作为招商引资基本战略的情况下，中国不断扩大引资规模，不仅外资并购份额日益扩大，而且涉及能源生产、机械制造、金融服务等重要领域，外资并购中的国家安全问题逐渐引起重视，特别是外资对国内行业龙头企业的“斩首式并购”交易对国内产业造成的安全隐患，引起举国上下关注。这说明现有监管规则不足以消除外资并购对国家战略产业安全带来的威胁。就中国所处国际环境而言，投资自由化一直是西方各国外资政策的核心价值，但“9．11事件”的发生、以石油为代表的战略资源供应的日趋紧张，以及源于发展中国家和新兴经济体的一批带有国有背景的新的对外投资者的出现，使得西方国家传统的开放性外资政策发生了某些变化，开始日愈关注外资并
购中的国家安全保障问题。自 2006 年以来，美、加、德、法、日、澳、俄、印等国相继就外资并购安全审查，采取立法措施。与此同时，中国一些大型企业境外并购由于遭遇当地国家安全审查而被搁浅。面对目前国内外投资环境，中国制定外资并购安全审查立法，既是维护国家战略产业安全的需要，也是应对国际投资环境变化的需要。

二、OECD《投资接受国与国家安全相关的投资政策指南》的核心内容及其对各国外资并购安全审查政策制定的影响

外资并购安全审查制度的确立无疑会对一国投资开放政策产生某种限制性影响，而保持投资环境的开放性是经济全球化的必然要求，因而外资并购安全审查制度在维护国家安全利益的同时，必须最大限度地减少对投资开放政策的限制性影响，避免由于国家安全审查措施的不当使用所引发的投资保护主义，使一国外资并购安全审查制度沦落为保护一般意义上应完全由市场调节的幼稚产业甚或落后产业的政策工具。同时以国家安全审查之名实施投资保护主义，也会招致他国的对等式报复。但如何在外资并购安全审查中实现投资开放政策和国家安全利益的恰当而有效的平衡，建立开放经济环境下国家安全利益有效维护的法律保障机制，是世界各国都面临的难题。为此，引发了 OECD 自 2006 年关于投资自由化与国家安全和战略产业安全维护关系的深入讨论。2006-2009 年参与国基于“ROUNDTABLES ON FREEDOM OF INVESTMENT, NATIONAL SECURITY AND STRATEGIC INDUSTRIES”项目（以下简称 FOI 项目）的 10 次讨论，得出这样一个结论，即虽然各国关于外资并购安全审查的监管做法不尽相同，还没有被普遍可以接受的“国家安全”的定义，但是共同原则还是存在的。FOI 项目参与国家一致认为，良好的投资政策必须遵循非歧视、监管平衡、
可预见性和问责性四项原则。在取得上述共识的基础上，OECD 以 FOI 项目讨论成果为基础，于 2009 年 5 月发布了《投资接受国与国家安全相关的投资政策指南》。

该指南对其成员方在投资领域采取国家安全审查措施所应遵循的四项基本原则——非歧视待遇原则、监管平衡性原则、透明度或可预见性原则和问责性原则，作了具体规定。根据非歧视待遇原则的要求，各国政府通常应当采用那些以相同的方式对待条件相似的投资者的普遍适用的措施。如果这些措施被认为是对于保护国家安全是不够的，那么对于个别投资采取的特殊措施，应当视这些投资所引发的国家安全风险的具体情况而采取。透明度或可预见性原则要求，虽然从投资者和政府的利益来看，应保护敏感信息的机密性，但监管的目标和做法应当尽可能的透明，以加大对法律适用结果的可预见性。透明度是监管体系运行良好的基石。2003 年 OECD 通过了关于投资政策透明度的报告。对于投资政策领域而言，透明度包括使相关法律、法规能被公开地获取、当法律改变时通知相关当事人、确保统一的行政管理和法律适用。它也涉及到给相关当事人提供评论新法律、法规的机会、交流拟议变化的政策目标、为公众评论预留时间、提供同相关当局交流的渠道。在国际层面，通过界定普遍标准和对多边同行监督及能力建设的支持，国际合作弥补了单个国家努力的不足，以确保投资政策的透明度。监管的均衡性原则要求，对投资的限制或交易中的附加条件，不应大于保护国家安全的需要。同时当现有的措施能充分且适当地处理国家安全问题时，也应当避免采用上述的限制或条件。在管理国家安全风险方面，大多数国家的投资政策几乎不承担职责。在那些确实使用投资政策保护国家安全的国家，通过投资审查关注的国家安全风险包括：有组织的犯罪或恐
怖分子对国家经济的渗透、国防所需的关键资源控制的丧失、法律实施的受阻、国家安全敏感地理位置或边界控制的丧失。问责制原则要求，在对外国投资进行安全审查时，政府内部的监督、议会监督、司法审查、定期的监管影响评估以及要求政府高层做出重要决定（包括决定阻止一项投资）等程序应当被考虑，以确保对执行机关问责制的执行。不同国家采用不同的机制来确保外国投资监管目标的实现。各国政府采取了内容广泛的三种机制来提高问责性：第一，通过行政责任（主要借助公共部门的管理体系）来实现控制和激励，这要求政府最高级别的行政长官对经过政府同意的投资政策的实施进行管理控制。其中包括领导层控制、内部信息和报告体制以及职位提升和纪律程序。第二，来自国会机构系统监测所形成的政治监督。第三，司法监督或其他诉求机制，即通过司法或行政渠道对个人决定或相关程序提出质疑。另外，通过多边合作或仲裁程序，不同类型的国际协议也能够创造问责性机制。1从这四项原则的基本要求来看，它确实有助于各国确保秉承善意而非保护主义来采取与国家安全相关的投资措施。当然，该指南的制定，也是对 2008 年 10 月 IMF 制定的旨在规范 SWFs 投资行为的自律性规则——“普遍接受的原则与做法”即“圣地亚哥原则”的回应，是 SWFs 母国与投资接受国相互较量的结果。2

OECD 上述指南为投资接受国有关国家安全投资政策的制定提供了一套内


2 See International Monetary Fund, “Generally Accepted Principles and Practices (GAPP)—Santiago Principles” [R]. 2008; OECD, “The guidance on recipient country policies towards SWFs” [R], 2009; 王小琼；“评 OECD 关于对投资接受国监管主权财富基金的最新指引——兼论中国主权财富基金海外投资的应对”，《中国外资》2010 年第 12 期，第 157 页。
容详细的指引。OECD 投资文件承认，当各国政府认为有必要保护重大国家安全利益和公共秩序时，有权采取行动。但明显的是，一旦允许这种安全例外，便极易成为投资接受国采取保护主义措施的借口。该指南有助于各国确保秉承善意而非保护主义来采取与国家安全相关的投资措施。

三、中国在外资并购安全审查政策方面取得的进步


（2）中国从 2006 年开始调整引资战略，但并没有改变中国投资开放的总体格局。中国从 20 世纪 90 年代初的以“市场换技术”的招商引资战略过渡到 2010 年中国“十二五规划”提出的“提高利用外资水平”的战略上，以应对外资并购交易所引发的国家安全、环境保护、就业等社会问题。

（3）中国积极参与投资领域全球治理的国际合作，并从中汲取有益经验，指导本国投资政策的制定。自 1995 年以来中国与 OECD 一直合作开展投资政策研
究项目。作为这一研究项目的组成部分，OECD 先后发布了《2003 年中国投资政策回顾》、《2006 年中国跨国并购政策报告》等研究成果。其次，中国政府多次派代表参加自 2006 以来 OECD 组织的“投资自由化、国家安全和战略工业”项目（以下简称 FOI 项目）的政府间论坛。再者，中国厦门承办联合国贸易和发展组织 2010 年世界投资论坛，中国积极参与讨论“国际投资与可持续发展的挑战和机遇”，并向世界表明中国《反垄断法》第 31 条关于对外资并购进行国家安全审查的原则性规定，并未影响中国投资开放的基本政策，中国外国投资环境并没有恶化。

四、目前的挑战及存在的问题

如何在关注国家安全利益的同时，保持投资环境的开放性，是包括中国在内的所有国家的外资并购安全审查政策制定者所面临的最大挑战。因此，建立更加透明、更具有问责性和平衡性的投资安全审查机制，应成为中国投资政策制定者努力的目标。根据世界代表性国家外资并购安全审查的立法实践和中国外资并购安全审查面临的特殊问题，中国外资并购安全审查立法在以下几个方面还亟待完善：

（1）与国家安全风险评估相关的若干重要概念未作适当的量化界定，在外延上显得过于宽泛，并容易导致产业政策的滥用，再加上部门利益之间的较量和缺乏司法监督以及最高行政机关的监督，产业政策和竞争政策不能有效协调，很容易使安全审查沦落为落后产业的保护工具。比如，重要农产品、重要能源和资源、重要基础设施、重要运输服务、关键技术、重大装备制造企业等涉及并购安全审查范围的概念以及并购交易对国家经济稳定运行的影响因素、并购交易对社会基本生活秩序的影响因素等涉及并购安全审查内容的概念都过于宽泛。
定性的基础上，适当地进行量化。

前述OECD指南认为，一国基本的安全关注是一种自我判断，每个国家都应有权决定采取必要措施来保护其国家安全。但作出这一决定，应当使用严格的，并且能够反映该国的环境、制度和资源的风险评估技术。投资限制和可识别的国家安全风险间的关关系应当明确。投资的限制应仅限于关注涉及国家安全的问题。虽然国家安全问题在大部分国家的投资政策中起重要作用，但很少有国家去明确澄清或者试图具体定义他们所说的“国家安全”是什么。特别是，十个拥护经合组织投资文件的国家以及中国，依赖于一些一般或者涉及安全的投资筛选形式，大部分是在个案基础上解决这个问题。表2列举了几个国家提供了有关其投资政策中所使用的重大国家安全利益的概念。从表2不难发现，投资政策中所使用的一般国家安全概念通常涉及诸如国防、公共健康和安全以及公共秩序等基础概念。比如，美国《外国投资与国家安全法》(Foreign Investment and National Security Act，以下简称FINSA)没有对“国家安全”下定义。但FINSA在Sec.2.(5)中说明，“国家安全”这一术语应解释为包含与“国土安全”(homeland security)相关的情况，包括其在关键性基础设施(critical infrastructure)的应用。Sec.2.(6)给出了”关键性基础设施”的定义，指出“关键性基础设施”是指“系统(systems)和资产(assets)，不论是实际的，还是虚拟的，对美国是如此重要以至于它们丧失工作能力或毁损将会危及美国的国家安全”。另外，“埃克森-弗罗里奥”条款和FINSA都给出了美国外资并购安全审查时应考虑的因素。FINSA在“埃克森-弗罗里奥”条款规定考虑的5项因素的基础上，增加了美国外资并购安全审查机构外国投资委员会(Committee on Foreign Investment in the United States，以下简称CFIUS)在审查时所考虑的6项因素，即FINSA Sec. 4规定的“额外考虑因素”。这6项因素是：(1)
并购交易对包括主要能源资产在内的美国关键基础设施的有关国家安全的潜在影响；(2)并购交易对美国关键技术(critical technologies)的有关国家安全的潜在影响；(3)并购交易是否为外国政府所控制；(4)酌情对以下方面加以审查(特别是针对外国政府控制的并购交易)：A.交易方政府与防止核扩散管制国家的联系，包括条约以及多边供应的指导方针； B.交易方政府与美国政府的关系，特别是双方在反恐等方面的合作记录； C.有关军事技术转移的潜在可能，包括对其国家出口管制法律及规则的分析；(5)对美国所需能源资源及其他关键性资源和原材料的长期预测；(6)总统或者 CFIUS 认为合适的其他因素。而“埃克森 -弗罗里奥条款”规定安全审查时要考虑的五个因素是：(1)预期的国防要求所需要的国内生产；(2)国内产业满足国防需求的能力，包括人力资源、产品、技术、材料以及其他供应和服务的提供；(3)外国公民(citizen)对国内产业和商业活动的控制，及其对美国满足国家安全需求的能力的影响；(4)并购交易对支持恐怖主义或扩散导弹技术或生化武器的国家出售军事物质、设备、技术的潜在影响；(5)并购交易对美国国家安全领域里的技术领先地位的潜在影响。

关于“公共秩序或公共安全”这一概念的界定，2009 年德国关于外资并购安全审查的《对外贸易和支付法》及其实施条例新修正案也没有直接给出确切的解释和定义，而是规定必须参照欧洲法院相关的判例解释。新修正案解释备忘录中明确提到了《欧共体条约》(the Treaty Establishing the European Community, EC Treaty) 第 46 条第 1 款和第 58 条第 1 款的要求，只有基于对公共秩序或公共安全的合理关注，而对设业权、资本移动和货币转移的限制才被认为是恰当的。1 在已决判例中，欧盟法院明确指出，在危机时刻，电信1、电力2、

1 See “Explanatory Memorandum to Amendment of the Foreign Trade and Payments and the Foreign Trade and
Table 2: The Concept of Essential Security Articulated in Various National Statutes

<table>
<thead>
<tr>
<th>Country</th>
<th>Concepts of Security, Vulnerability or Threats used in Investment Policies (e.g. investment review procedures, golden share arrangements)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>National interest involves a) safeguarding the national defense b) preventing serious and probably permanent economical, social or environmental difficulties on a sectoral or regional level and c) securing public order, citizens’ security and health.</td>
</tr>
</tbody>
</table>

5 See “Explanatory Memorandum to Amendment of the Foreign Trade and Payments and the Foreign Trade and Payments Regulation”, p.3. 
7 Dr. Florian Stork, “A Practical Approach to the New German Foreign Investment Regime – Lessons to be Learned from Merger Control”, p.270
France
Risk evaluation takes account of sectors of activity. Activities considered to be risky are those that, even if only occasionally, participate in the exercise of public authority or that have the following characteristics:
- activities that might undermine public order, public security or national defense;
- activities involving the research, production or commercialization of arms, munitions, powders and explosive substances.

Italy
The “special powers” foreseen by Italy’s “golden share” legislation can be exercised in the following circumstances:
- grave and real danger of scarcity in the national supply of oil and energy products; in the supply of related services and, in general, of raw materials and essential goods for the community; in a minimum supply of telecommunications and transport supply
- grave and real danger to public service infrastructures and networks
- grave and real danger to national defense, military security, public order and public security, as well as sanitary emergencies.

Poland
Investment in real estate is permitted if it does not “result in a threat to national defense, state security or public order and if it is not against the nation’s social and health policies and if the foreigner demonstrates circumstances proving his/her relations with Poland.”

Spain
“The Spanish Council of Ministers can suspend, with justified reasons, the application of deregulation rules of RD 664/19999 for investments that, because of their nature, form or conditions to which they are subject, affect or may, even if only occasionally, activities relating to the exercise of governmental power or activities that affect or could affect public order, security or health.”

另外，如前所述，一些国家的外资并购安全审查立法中，都对关键基础设施进行了定义（见下表 3），表 3 揭示了在各国关键基础设施保护的国家战略中，对关键基础设施的定义较为宽泛，其中“关键”是指那些一旦受到扰乱或破坏将会导致灾难性的和无法控制的损失。“基础设施”是指有形和无形的资产、生产系统和网络。并且基础设施所覆盖的部门范围也趋向于广泛。（见表 4）

<table>
<thead>
<tr>
<th>Table 3: National Definitions of Critical Infrastructure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
</tr>
<tr>
<td>“Critical infrastructure is defined as those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic well-being of the nation, or affect Australia’s ability to conduct national defence and ensure national security.”</td>
</tr>
<tr>
<td>Canada</td>
</tr>
<tr>
<td>“Canada’s critical infrastructure consists of those physical and information technology facilities, networks, services and assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security or economic well-being of Canadians or the effective functioning of governments in Canada.”</td>
</tr>
<tr>
<td>Germany</td>
</tr>
<tr>
<td>“Critical infrastructures are organizations and facilities of major importance to the community whose failure or impairment would cause a sustained shortage of</td>
</tr>
</tbody>
</table>
supplies, significant disruptions to public order or other dramatic consequences.”

**Netherlands**
“Critical infrastructure refers to products, services and the accompanying processes that, in the event of disruption or failure, could cause major social disturbance. This could be in the form of tremendous casualties and severe economic damage.”

**United Kingdom**
Critical National Infrastructure “comprises those assets, services and systems that support the economic, political and social life of the UK whose importance is such that loss could: 1) cause large-scale loss of life; 2) have a serious impact on the national economy; 3) have other grave social consequences for the community; or 4) be of immediate concern to the national government.”

**United States**
The general definition of critical infrastructure in the overall US critical infrastructure plan is: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." For investment policy purposes, this definition is narrower: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on national security."


### Table 4: The Coverage of Critical Infrastructure Plans by Sector

<table>
<thead>
<tr>
<th>Sector</th>
<th>Australia</th>
<th>Canada</th>
<th>Netherlands</th>
<th>UK</th>
<th>US</th>
<th>EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy (including nuclear)</td>
<td>x</td>
<td>X</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>ICT</td>
<td>x</td>
<td>X</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Finance</td>
<td>x</td>
<td>X</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Health care</td>
<td>x</td>
<td>X</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Food</td>
<td>x</td>
<td>x</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Water</td>
<td>x</td>
<td>x</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Transport</td>
<td>x</td>
<td>x</td>
<td>X</td>
<td>x</td>
<td>X</td>
<td>x</td>
</tr>
<tr>
<td>Safety</td>
<td>Emergency services</td>
<td>x</td>
<td>X</td>
<td>Emergency services</td>
<td>Emergency services</td>
<td>x</td>
</tr>
</tbody>
</table>
以上分析表明，尽管国家安全的概念并不完全统一，但仍然以国防安全为中心，同时扩展到与国计民生紧密联系的经济安全领域。中国立法需要对相关的术语做一些更为清晰的界定。另外，考虑到中国市场经济制度的发展程度以及经济和技术发展水平与发达国家之间的差距，中国应当立足本国国情全面理解“国家安全”的重要性和内涵，但同时应防止国家安全问题的泛化。

（2）关于外国投资者作为实际控制人的身份识别标准过于模糊，缺乏应有的可操作性。

考察美国、德国、俄罗斯等世界代表性国家外资并购安全审查立法，发现这些国家都将“外国投资者能够对本国企业实施一定程度的控制”作为外资并购安全审查的重要实质标准。比如，美国根据2008年《外国人合并、收购、接管条例》（以下简称2008年《条例》）第800.301节规定，“受管辖的并购交易”包括但不限于：(1)无论并购交易条款对公司控制权安排如何表述，任何导致或可能导致外国人(foreign person)控制美国企业(U.S. business)的并购交易。这类并
购交易是需经 CFIUS 审查的最常见的类型。⑴ 某外国人将其对一家美国公司的控制权转让给另一个外国人的并购交易。比如，迪拜港口世界收购英国航运公司，接手后者在美国六个主要港口经营权的并购交易即属此类。⑵ 并购交易造成或可能造成构成美国企业的资产（assets）被外国人控制。⑶ 在合同或其他类似安排基础上组成的合资企业，包括协议建立一个新的实体，而合资其中一方投入合资企业内的资产是一个美国企业；外国人通过这个合资企业会控制该美国企业。

“合资企业”的相关内容是 2008 年《条例》新增加的内容。据此，如果“合资企业”导致外国人控制美国企业，那么，该合资企业的成立就属于“受管辖的并购交易”。中国新外资并购安全审查立法也明确规定，“外国投资者只有并购特定范围行业的境内企业，且取得实际控制权的，才需要进行安全审查。”因此，“控制权”概念在外资并购安全审查制度中处于核心地位，是判断外国投资者并购行为是否导致国家安全风险的实质标准。

综观世界代表性国家外资并购安全审查立法的变革，关于外资并购安全审查的“外资控制”标准，已出现扩张的趋势，突破了传统的外资股权比例标准，采用综合性判断标准。比如，美国 2008 年《条例》 §800.203 规定，“控制”是指通过拥有一个企业的多数股或占支配地位的少数股、在董事会中占有席位、代理投票、特殊股份、合同安排、正式或非正式的协同行动安排或其他方式，而拥有直接或间接决定有关公司重要事项的权力（power），无论该权力为直接或间接行使，或是否被行使。新条例还明确规定，外国投资委员会在审查外资时，只有在确定外资入股的目的是单纯消极投资时，才需要考虑 10%的持股比例。这说明 CFIUS 在分析一项特定的并购交易是否导致外资“控制”时，其关注的焦点是该。

1单纯消极投资是指，持有或收购所有者权益的外国实体无计划或意图实施控制。不抱有除投资外的任何目的，且没有采取任何有悖于仅出于投资目的而收购或持有此种权益的行为。See 31 CFR §800.223(2008)
外国并购方是否具有决定有关影响美国企业重大事项的一种影响力或者主导力，所采用的“控制”标准并不和外方持股比例直接挂钩，而是一种综合的、事实性的衡量。如果外方有权任命企业的董事会成员，或者可以随意修改公司的预算，那么无论股份多少，都可能被视为“控制”该公司，进而受到审查。2008 年 5 月 7 日正式生效的《俄罗斯联邦有关外资进入对保障俄罗斯国防和国家安全具有战略意义的经营公司的程序法》（以下简称“《外资进入程序法》”），也有类似的规定。

“外资控制”标准扩张趋势的出现，在很大程度上是由于投资者控制企业的方式，随着经济发展和法律的变迁，发生了巨大变化。特别是法人实体形式和金融工具的滥用，使企业的真正受益所有人或控制人得以隐匿，难以识别。另外，在各国的外国投资安全审查程序中，也表达了对“实际控制人”概念的关注，特别是在政府收集的信息中，要求外国投资者勾画出并购后目标企业整个组织结构，并据此断定并购后目标企业的最终控制人，从而作出正确的国家安全风险评估。比如，美国 2008 年《条例》规定，当事人在自愿申报中向审查机构 CFIUS 提交的相关并购交易信息就包括并购方最终实际所有人的名字/称、注册地/国籍和地址。因此，外国投资者作为实际控制人的身份识别是外资并购安全审查实质标准适用的基础和前提条件。

根据 2011 年中国国务院办公厅关于外资并购安全审查的新规定，外国投资者通过并购获得境内企业控股股东身份和实际控制人身份，视为外国投资者获得境内企业的实际控制权，并重点列举了外国投资者通过并购获得境内企业控股股东身份的情形。但对外国投资者通过并购获得境内企业实际控制人身份的情形，则仅规定“其他导致境内企业的经营决策、财务、人事、技术等实际控制权
转移给外国投资者的情形”。另外，2011 年 8 月 25 日商务部发布的《实施外国投资者并购境内企业安全审查制度的规定》提到，“对于外国投资者并购境内企业，应从交易的实质内容和实际影响来判断并购交易是否属于并购安全审查的范围；外国投资者不得以任何方式实质规避并购安全审查，包括但不限于代持、信托、多层次再投资、租赁、贷款、协议控制、境外交易等方式。”显然，作为实施条例，商务部的上述规定在一定程度上解释了实际控制的基本形式，但这些实际控制基本形式的涵义仍然不清晰，不便于实践中准确认定实际控制人。

其次，中国前述新规定中的“实际控制权”概念未能很好地与公司法、证券法等其他法律法规进行衔接。比如，中国公司法、证券法中未使用“实际控制权”这个概念，而是采用“控制权”概念，这与各国公司法和证券法的相关规定是一致的。并且从前述新规定来看，其所使用的“实际控制权”概念与公司法、证券法中的“控制权”概念是一致的，并没有引入新的内容。它似乎沿用了《关于外国投资者并购境内企业的规定》（2006 年）的相关概念。再者，其他国家外资并购安全审查立法也没有引入这一概念。因此，这一概念的引入是不必要的，反而引起理解上的混淆。

（3）审查机构问责性机制的缺失。中国 2011 年出台的关于外资并购安全审查的《通知》和《规定》对该问题涉及较少。在特别审查程序中，仅当有关部门之间所作出的并购交易安全评估意见存在重大分歧的，才由联席会议报请国务院决定。

正如 OECD《指南》所指出的那样，在对外国投资进行安全审查时，政府内

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1 该规章第十二条规定，“外国投资者并购境内企业并取得实际控制权，涉及重点行业、存在影响国家经济安全因素或者导致拥有驰名商标或者中华老字号的境内企业实际控制权转移的，当事人应就由此向商务部进行申报。”
部的监督、议会监督、司法审查、定期的监管影响评估以及要求政府高层做出重要决定（包括决定阻止一项投资）等程序应当被考虑，以确保对执行机关问责制的执行。另外，通过多边合作或仲裁程序，不同类型的国际协议也能够创造问责性机制。当然不同国家采用不同的机制来确保外国投资监管目标的实现。比如，美国 FINSA 要求财政部和牵头部门的高级官员向国会保证（certify），CFIUS 根据《国防生产法》第 721 节规定审查过的所有受管辖的并购交易已经没有未解决的国家安全问题，或者保证减缓协议已经解决了所有疑点。如果 CFIUS 结论是在审查(review)阶段得出的，那么，证明需由部长助理或更高级别的官员做出；如果结论是在调查阶段得出的，那么，证明需由副部长（Under Secretary）或更高级别官员做出。如果总统依据《国防生产法》第 721 节做出了决定，那么，必须公开宣布其决定。除了上述审查后的证明，FINSA 还要求 CFIUS 向国会提交年度工作报告。国会收到通知和报告后，可以对相关并购交易或减缓协议的实施情况进行质询。美国国会对并购安全审查的监督，属于行政和政治性问责机制。这种问责性机制所面临的最重大的挑战是确保采用一种不损害审查程序的公正性和客观性的监督——政府希望既确保基于民主治理所要求的政策实施的问责性又希望尽力避免过度的政治干预。立法权最好不要试图去影响立法在特定案件的适用结果，侵犯监管机构的自治性将可能对监管程序的公正性和有效性带来风险。同行监督和其他国际责任机制可能有助于政治行为对国家安全相关的投资政策实施过程的过分介入。而德国允许投资者对审查机构在安全审查中作出的所有决定，在柏

1该报告的内容须包括：(1) 在过去 12 个月中 CFIUS 审查或调查的所有并购交易；(2) 关于外国直接投资和关键性技术（critical technologies）的分析；(3) 特定国家对美国直接投资的报告。国会收到通知和报告后，可以对相关并购交易或减缓协议的实施情况进行质询。
林行政法庭上质疑该项决定的正确性，以维护投资者的合法权益。这种问责性机制所存在的问题同以机密信息为基础作出的有法律拘束力的决定有关。在这种情况，保护国家安全的需要要么可能对完全阻止法律上的质疑有巨大的不利影响（比如减少原告传讯和核实关键证据的权利），要么阻止了基于保护政府敏感信息的机密性而设立的特定法院程序或专门化法庭。同样的，导致某项措施采取的关切也可能需要对投资者提供信息保密，因而，使得法律上的救济变得困难或不现实。并且，通过分配国家安全方面的权力，一些国家的宪法可以限制法院的权力范围。

一些国家允许投资者根据程序上的理由对监管决定提出质疑。根据法律传统这种质疑程序可能通过行政法庭或仲裁庭进行，或者（比如普通法系）通过常规法院系统进行司法审查。通过前述程序进行的质疑通常集中于对乱用程序或不遵守规则的指控。各国通过司法或仲裁进行审查的范围是不同的。但是，在大多数情况下，原告的胜诉将会导致重新进行法律审查，而不是改变原来的决定。

就中国而言，既没有规定立法机关的监督，也没有规定投资者的权利救济机制，而是试图寻求政府内部的监督，但目前规定的国务院对审查机构的监督机制缺乏常规化。另外，允许投资者根据程序上的理由对监管决定提出质疑，也许可以作为中国提高审查机关问责性的新尝试，以防止并购安全审查中腐败的滋生，推进政府机构依法行政。

（4）未明确外资并购安全审查措施同产业政策措施适用之间的关系，从而模糊了中国外资并购安全审查措施的监管均衡性特质。中国产业政策也承担了部分国家安全利益维护的职能，特别是《外商投资产业指导目录》（以下简称《目录》）在防止外国投资对国家安全的危害方面发挥着重要的职能。比如，《关于外
国投资者并购境内企业的规定》第三条规定，“依照《外商投资产业指导目录》
不允许外国投资者独资经营的产业，并购不得导致外国投资者持有企业的全部股
权；需由中方控股或相对控股的产业，该产业的企业被并购后，仍应由中方在企
业中占控股或相对控股地位；禁止外国投资者经营的产业，外国投资者不得并购
从事该产业的企业。被并购境内企业原有所投资企业的经营范围应符合有关外商
投资产业政策的要求；不符合要求的，应进行调整。”据此可以断定，作为外资
政策组成部分的目录规定是外资政策领域维护中国国家安全的第一道防线。其
实，有些国家也有类似的做法。比如，美国通过两种投资政策来处理国家安全关
切问题，一是执照许可和批准。通常由承担特定部门责任或职责的政府机构来处
理执照许可和批准问题。（比如，电信部门负责广播许可，国土安全部或内政部
负责敏感领域的不动产收购）。二是并购安全审查程序。美国认为只有当那些更
具专门化的程序（比如，现行的其他法律法规）不能充分地处理特定的国家安全
关切问题时，才根据其并购安全审查程序采取相应的措施。

但另外一个问题是，《外商投资产业指导目录》能否作为进一步确定安全审
查范围的有限指引？从 2011 年最新颁布的《外商投资产业指导目录》（修订征求
意见稿）来看，禁止外国投资者经营的产业，基本涵盖了外资并购安全审查的范
围，由于关于外资并购安全审查的《通知》和《规定》，对安全审查的范围规定
的过于宽泛，中国立法者是否试图将《外商投资产业指导目录》作为进一步确定
安全审查范围的有限指引，这一点需要在外资并购安全审查立法中进一步澄清。

一些国家的投资安全审查程序以部门清单为基础，比如法国、俄罗斯的投资
审查程序以部门清单为基础。这就意味着在这些清单所列部门进行的投资，一
般来讲，应接受审查。这些清单和重大安全关切国家评估之间的联系实际上取决
于某些利益。法国认为它所列的 11 个部门清单是比较接近于基础立法中所确立的重大国家安全关切概念所涵盖的范围。\(^1\)俄罗斯立法把 42 个战略性行业纳入外资国家安全审查。\(^2\)而另外一些国家则采用相对抽象的国家安全标准来进行并购安全审查，如美国、德国。但即便是后者，也有国家通过另行发布指南或已决判例，为实践提供一定程度的指引。比如，美国 FINSA(b)(2)(e) 条款要求 CFIUS 出台相关指南，列举其审查过的并且存在国家安全担忧的并购交易，以便为并购交易当事方提供指引。2008 年 11 月，CFIUS 公布了《关于外国投资委员会实施的国家安全审查的指南》（以下简称《指南》），对“国家安全担忧”做了解释。根据《指南》，所谓“国家安全担忧”是指与并购交易相关的，对国家安全有潜在影响以致 CFIUS 在判定并购交易是否对国家安全构成削弱威胁时应予以考虑的相关事实或情况。\(^3\)《指南》具体将引起国家安全担忧的并购交易分成基于被控制的美国企业的性质和控制美国企业的外国人的性质两类。在已决判例中，欧盟法院明确指出，在危机时刻，电信、电力、燃气和石油领域的服务供给保障就会涉及到公共安全问题。因而公共安全通常与战略性服务的提供具有相关性，并且关系到一个国家和其公共机构的正常运作。

\(^1\) 2005 年 12 月 30 日颁布 2005-1739 号法令，规定当并购案件涉及到敏感部门时，需得到法国经济部长的批准。受保护的敏感行业部门包括：博彩业、保险业、生物技术业、解毒药生产部门、交通和拦截装置部门、信息系统的安全行业、双重工艺行业（既可民用，也可军用）、密码学部门、涉及国防机密的部门以及军火部门等 11 个产业为受保护产业。
\(^2\) 这 42 个战略性行业涵盖特种技术生产与交易、核工业、军用机械装备、武器、弹药研发和制造企业、航天航空工业、矿产地质研究、包括大陆架矿床在内的俄联邦矿床开采勘探、水生物资源开采、通讯等领域。
在实践中如何有效协调外资并购安全审查同上述《目录》之间的关系，是中国外资安全审查新规定在实施中所面临的巨大挑战，这直接关系到中国投资环境的开放性，否则无法消除外国投资者对中国投资环境收紧的疑虑。

（5）新规定采取国务院行政命令的方式发布，使法律法规必备的法律责任条款难以有效规定，并且立法位阶过低，有不稳定之嫌。比如，如果收购方（或出售方、或两者共同）故意或过失的违反审查机关的最终决定、所递交的与并购相关的文件资料不完整、不正确，则过错方应该受到行政处罚。比如，美国 FINSA 授权 CFIUS 对违反《国防生产法》第721节的行为，包括对减缓协议的违反行为施加民事处罚。2008年其《条例》对此进行了详细规定：（1）任何人，出于故意（intentionally）或重大过失（gross negligence），在申报中提交实质性的虚假陈述或信息遗漏，或对申报做出虚假证明的，按照美国民事处罚条例可处以不超过 25 万美元的罚款。对违反规定进行处罚的数额应基于违反行为的性质确定。

（2）任何人，出于故意或重大过失，违反了根据《国防生产法》第721节与美国达成的减缓协议，或违反与美国达成一致的对并购交易的限制条件，按照美国民事处罚条例可处以不超过 25 万美元或不超过并购交易价值的罚款。处罚决定必须由 CFIUS 做出。被处罚方可以在收处罚通知 15 天内向审查机构的常务主席提交书面申诉，包括对被处罚行为的辩护（defense）、辩解（justification）和解释（explanation）。CFIUS 在接到申诉申请后应进行审核，并在 15 天之内做出最终裁定。对交易方处罚的规定更多的是提醒交易方遵守相关要求，以配合政府部门的安全审查。德国在这方面立法类似于美国。
全审查制度最主要的法律责任是交易无效或剥夺投票权。但目前中国立法未曾涉及法律责任方面的条款，主要原因可能是中国外资并购安全审查制度是采取国务院行政命令的方式发布的，立法位阶过低，使法律法规必备的法律责任条款难以有效规定。

五、改进的建议

虽然 2011 年中国关于外资并购安全审查新规定的出台，标志着中国外资监管制度的重大发展，但通过以上分析，随着实践的发展，新规定在某些方面还有很大的完善空间。针对上述中国外资并购安全审查相关规定存在的问题，可考虑从以下路径进行完善：

（1）针对与国家安全风险评估相关的若干重要概念外延过于宽泛的问题，可考虑兼采定性和开放式列举的方式，对“重要基础设施”、“关键技术”等概念进行界定，或者另行制定相关实施指南，便于实践操作。

（2）针对外国投资者作为实际控制人的身份识别标准过于模糊的问题，一方面应结合中国公司法、证券法关于公司实际控制人认定标准的规定，特别要注意克服公司法在这方面规定的不足。另一方面借鉴代表性国家关于“外资控制”判断标准的规定，兼采表决权和支配性的影响力在内的定性定量判断标准。

同时，制定单独的《外国投资者作为实际控制人的身份识别指引》，对外国投资者作为实际控制人的身份认定标准、实施实际控制的法人实体类型、匿名机制和审查机构获取相关信息的方法和路径等问题作出指引性规定。

另外，对于监管机构来说，最近更大的挑战是大量跨国公司和投资工具的出

能支付最高达 50 万欧元的罚款。
现。正如经合组织其他机构工作所记录的那样，这些可能使最终受益人的所有权和控制权的确认复杂化，也对安全评估有潜在影响。并且，这些投资工具的使用也会影响到国籍作为国家安全评估主要标准的关联性。为了更好的了解所有权和控制权的性质，同时避免对不同国籍背景的不必要限制，加强国际合作可能是有益的。

（3）针对审查机构问责性机制缺失的问题，可通过以下两种路径来建立审查机构的问责性机制：一是通过行政责任来实现监督，这要求作为并购安全审查机构的联席会议向国务院提交年度报告，报告的内容可以包括：(1)在过去12个月中联席会议审查或调查的所有并购交易；(2)关于外国直接投资和关键性基础设施及关键技术（critical technologies）的分析；(3)特定国家对中国国直接投资的报告。国务院收到通知和报告后，可以对相关并购交易或减缓协议的实施情况进行质询；二是借助司法监督或其他诉求机制，即允许投资者根据程序上的理由对监管决定提出质疑，以促进审查机构正确行使公共职能和维护投资者合法权益。

（4）关于在实践中如何有效协调外资并购安全审查同前述《目录》之间的关系，应在新规定中明确声明，只有当包括《目录》在内的现有其他措施不足以恰当应对国家安全关切时，才适用外资并购安全审查措施，以表明外资并购安全审查措施是维护国家安全的最后救济措施，不会从根本上影响中国投资环境的开放性，消除外国投资者对中国投资环境收紧的疑虑。另外，对《目录》是否可以作为进一步确定安全审查范围的有限指引，这一点需要在外资并购安全审查立法中进一步澄清。

（5）针对新规定立法位阶过低的问题，可考虑在新规定试运行一段时间后，
在现有法律框架下，制定国务院法规，对外资并购安全审查的范围、内容、标准、程序和法律责任等基本法律问题作出规定，并发布配套实施规章。针对外国投资者违反外资并购安全审查规定的责任问题，主要应对以下情形加以民事处罚：一是外国投资者在向审查机构提交信息时，存在实质性不实陈述或遗漏行为。二是对外国投资者违反基于消除并购行为对国家安全威胁影响而由商务部责成其采取的转让其股权、资产或其他缓和措施要求的行为，加以民事处罚。三是对外国投资者违反前述“缓和措施”要求，基于该行为对国家安全导致的危害，在对其合理评估的基础上，确定实际损失的赔偿额。