



Restricting Foreign Direct Investment: the Rule of Law argument

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Should companies based in authoritarian countries be permitted to invest in sensitive areas of another country's economy?

5G technology promises to be truly [revolutionary](#). Not only will it make data-intensive communications virtually instantaneous, but it has the potential to unlock the 'internet of things'. 5G could connect super high-speed internet, with almost no time lag, to physical objects so that they can be remotely controlled or even work autonomously. This could include anything from home appliances to robotics with potential military application such as autonomous vehicles or drones that can collaborate with each other. The technology will also control train signals, traffic lights, and power supplies. However, as the technology advances, the possibilities increase for a hostile actor with access to the network to cause severe disruption.

Recently, concerns have been expressed about companies based in China investing in critical 5G infrastructure around the world. The main fear is that Chinese companies could be compelled by the State to build backdoors into software that would allow Chinese intelligence services to access and control data for espionage and sabotage operations.

The USA is actively lobbying its allies to block Chinese companies on national security grounds, specifically Huawei and ZTE—the CIA recently shared [intelligence](#) that Huawei has received funding from Chinese State security. Australia, New Zealand and Japan have already banned Huawei from critical telecoms infrastructure. And just in April, the UK decided to [ban](#) Huawei from core parts of its 5G network.

Ambassador Robert L Strayer, US Deputy Assistant Secretary for Cyber and International Communications and Information Policy, [argues](#) that China is not a liberal democracy in which the government is restrained in the exercise of its authority by the Rule of Law. In China, so the argument goes, the government can effectively direct any company to follow its orders at any time. The company has no option but to comply as there is no independent judicial process to appeal to. In his words, companies in China are subject to the 'extrajudicial command of the Communist Party'.

A quick survey of Chinese law tells us that these Rule of Law concerns are not without merit. Under Article 7 of the [National Intelligence Law](#):

Any organisation and citizen shall, in accordance with the law, support, provide assistance, and cooperate in national intelligence work, and guard the secrecy of any national intelligence work that they are aware of.

Article 14 then emphasises that the intelligence services may [demand](#) support, assistance and cooperation. The Intelligence Law suffers from a distinct lack of clarity regarding its key terms. Most notably, there is no precise definition of 'intelligence work'. Rather, the Law [refers](#) to extremely broad activities such as 'safeguard[ing] national political power' and 'other major interests of

the State.' Additionally, the [geographic scope](#) of the Law is not defined, indicating that all subsidiaries of Chinese headquartered companies, located anywhere in the world, may fall under the Law. All Chinese citizens, wherever they reside in the world, may fall under the Law.

In short, a company based in China could, at least in theory, be compelled to assist the intelligence services with vaguely defined operations and to keep such assistance secret. There is no precedent of companies refusing to comply with the intelligence services because, as one Chinese lawyer [told](#) the Financial Times, there is no legal recourse to appeal against a request: 'China does not have such a litigation path'.

This is all in stark contrast to states benefiting from a more robust Rule of Law. For example, in the USA, tech companies have been able to [win appeals](#) against requests from the Department of Justice. Furthermore, American intelligence gathering laws define key concepts in detail and set out extensive [limitations](#) on the government's powers.

The key question that emerges from these discussions is whether certain Rule of Law deficiencies can justify restricting investment on national security grounds. While China is currently under the spotlight, similar concerns could easily arise in relation to other authoritarian regimes. Indeed, the USA adopted a similarly firm approach to a [Russian tech company](#).

The Bingham Centre for the Rule of Law recently organised an [event](#) in which a panel of experts from various jurisdictions discussed FDI screening and national security—particularly the new EU-wide FDI screening [framework](#) and the UK's [proposals](#) for its own regime. The panel underlined the importance of ensuring that FDI screening regimes are themselves compliant with Rule of Law principles and that national security is not abused as an excuse for other policy objectives, such as protectionism. Thus, restrictions should be applied in a neutral fashion that does not arbitrarily discriminate against investors from particular countries. Restrictions should only be imposed where specific security risks are identified, based on publicly available assessment criteria; restrictions should be proportionate to the identified risks; and the lawfulness of decisions should be subject to judicial review.

This author would agree that decisions to restrict FDI must be made in a way that is compatible with the Rule of Law. However, concerns over Chinese companies and 5G are not just protectionist discrimination. Legitimate national security concerns would apply to investors from any state where the government is not subject to the Rule of Law and has unconstrained authority over organisations and citizens. In such cases, the risk of permitting control over critical infrastructure is too great. As NSA cybersecurity adviser [Rob Joyce](#) put it, allowing companies under the control of authoritarian regimes to design the 5G network, is like 'asking the burglar to build your house'.

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