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Analysis of the Identification and Application of "National Security" Provisions in Foreign Investment

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Abstract: China and the United States, as significant entities in global outward investment, consider factors that extend beyond the economic sphere, delving into the political realm to a considerable extent. The proposed foreign investment review system by the United States fundamentally aims to curb the advancement of Chinese technology, using "national security" as a pretext to restrict American investments in China. This move contradicts the essence of economic globalization and poses obstacles for Chinese enterprises seeking to invest in the United States. Therefore, it is imperative to refine the criteria for determining "national security" and optimize the application of "national security" provisions. This will enable China's high-tech industries to better leverage national security clauses in foreign investments, avoid potential risks, and propose effective mechanisms and pathways to mitigate risks in outward investments from a "national security" perspective. To a certain extent, this can also inject new momentum into the sustainable development of international legal frameworks governing foreign investments.

Keywords: Foreign Investment Review; Foreign Investment Security Review; National Security; Foreign-Related Legal Governance

1. The Presentation of the Issue

With the continuous improvement of China's economic development level and the acceleration of its integration into globalization, China's participation in international cooperation and exchanges has increasingly elevated. Under the guidance of the government's "Going Out" strategy, China's overseas investment activities have shown a trend of rapid development, adding new momentum to China's economic growth. Among these, technology-seeking foreign direct investment has developed particularly swiftly, manifesting in the form of establishing enterprises or undertaking mergers and acquisitions in developed countries, or engaging in joint research and development with technologically advanced enterprises, thereby quickly utilizing foreign advanced technology to drive technological upgrading and progress in China [1]. In overseas investment activities, national security issues have always been of paramount importance. How to conduct overseas investment while maintaining national security and adhering to international legal norms depends on the dual role of domestic and international law.

However, as the form of trade friction between China and the United States becomes increasingly complex and severe, the technical trade barriers imposed by the United States on China are becoming more serious. Even as China's foreign direct investment gradually develops, due to the restrictions of U.S. technical trade barriers and the introduction of new U.S. regulations on investment in China, its overseas investment review system is more of a political contest, aimed at prohibiting U.S. investors from helping China develop industries with advanced technology, under the guise of maintaining U.S. "national security." Therefore, the scope of U.S. enterprises investing in China will be greatly limited by this policy, posing new challenges to the development of China's advanced technology sector. Faced with the tense situation of geopolitics, the issue of "national security" has also become a concern for countries around the world, becoming a major factor in adjusting the international order across the international community, with the anxiety of sovereign states over national security increasingly spreading, and national security evolving into a pretext for government intervention in the

economy [2].
Some countries adopt an overprotective strategy in terms of national security, in pursuit of an "absolutely safe state" [3], hence proposing more restrictive foreign investment systems to pursue a broader scope of national security. In the context of economic and legal globalization, foreign investment and trade continue to expand, emerging industries and technologies continue to develop, and technology has become an important force in foreign investment. However, due to the self-judging and expansive nature of national security clauses, they have become an "umbrella" for certain countries (such as the United States) to suppress overseas investment in other countries, leading to a very vague interpretation and application of this clause in practice, and thus the phenomenon of "national security" generalization [4]. The academic community has already noticed these issues, with most scholars discussing the generalization of "national security" from the perspective of domestic law, including the improvement of overseas investment legal systems [5]. From the perspective of international law, although some scholars have conducted detailed analyses of the development trends of "national security" clauses [6], and raised concerns about the security dilemma faced at the level of international economic law [7], few scholars have proposed how to reasonably interpret and apply national security clauses in foreign investment and how to correctly use national security clauses to regulate ideological competition in international investment. In fact, the issue of national security determination has always been subject to generalized interpretation and even abuse, especially against the backdrop of rapid technological development. The United States uses national security to restrict Americans from investing in chip and semiconductor-related activities in China, to restrict China's advanced technology development, which to some extent also reflects a generalized interpretation of national security clauses, essentially lacking a fundamental understanding of the clause and insufficient understanding of the functional positioning of national security clauses. Therefore, it is necessary to specifically analyze the national security determination and application issues in the foreign investment review system from an institutional perspective, compare and analyze the institutional differences between China and the United States and the differences in the application of national security, and combine the development background of international law to enable high-tech industries to better use national security clauses for regulation in foreign investment, thereby avoiding potential risks, and proposing mechanisms and pathways to effectively prevent overseas investment risks in future foreign investment activities from the perspective of "national security."
In this regard, this paper focuses on the overseas investment review system, based on the practical issues of the "national security" clause therein. Since China and the United States are two major economies in the world economic development, playing a pivotal role in the development of the world economy, the formulation and implementation of their foreign investment review systems also have important reference and reference roles for the foreign investment systems of other countries, as well as reference value for the construction of an international legal system for overseas investment. Therefore, this paper takes the systems of China and the United States as examples for analysis, starting from the institutional level for comparison, to explore the determination and application issues of national security clauses, with the aim of deriving optimizations and recommendations for their determination and application based on the current status of national security clauses.

2. The Determination Rules of National Security in the Overseas Investment Review Systems of China and the United States

2.1 Provisions in China's Overseas Investment System

As the largest developing country, the scale and scope of China's overseas investments are extensive. Among these, the review of China's Outbound Direct Investment (ODI) is regulated by three government departments: the National Development and Reform Commission (NDRC), the Ministry of Commerce, and the State Administration of Foreign Exchange (SAFE). The authority and management responsibilities of these three institutions vary, with different government bodies formulating policies and regulations to regulate different matters. Overall, China's legal framework for overseas investment is relatively fragmented, lacking a systematic and comprehensive legal code, and is more characterized by relevant policy regulations. Table 1. shows some representative policy regulations.

Table 1. Administrative Regulatory Authorities and Relevant Policies and Regulations for Overseas Investment

Administrative Regulatory Authorities	Relevant Policies and Regulations
National Development and Reform Commission	"Measures for the Administration of Overseas Investment by Enterprises"
	"Notice on the Issuance of Supporting Format Texts for the Measures for the Administration of Overseas Investment by Enterprises (2018 Edition)"
	"Catalog of Sensitive Industries for Overseas Investment"
Ministry of Commerce	"Measures for the Administration of Overseas Investment"
	"Opinions on Strengthening the Synergy between Commerce and Finance to Support the High-Quality Development of Cross-border Trade and Investment with Greater Efforts"
State Administration of Foreign Exchange	"Regulations on Foreign Exchange Administration of the People's Republic of China"
	"Measures for the Administration of Individual Foreign Exchange"
	"Notice on Issues Concerning Foreign Exchange Administration for Domestic Residents' Overseas Investment and Financing and Round-trip Investment through Special Purpose Companies"
	"Notice of the State Administration of Foreign Exchange on Further Simplifying and Improving Foreign Exchange Administration Policies for Direct Investment"

From this, it can be seen that China's overseas investment review system imposes relatively few restrictions on enterprises themselves, primarily regulating through a filing mechanism, thereby encouraging Chinese enterprises to invest abroad. Within this framework, provisions related to national security are mainly found in the State Council's guiding document: "Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment" (hereinafter referred to as the "Opinions"), which stipulates prohibited overseas investments including: (1) investments involving the export of core technologies and products of the military industry without state approval; (2) investments utilizing technologies, processes, and products that are prohibited from export by China; (3) investments in gambling and pornography industries; (4) investments prohibited by international treaties concluded or participated in by China; and (5) other overseas investments that harm or may harm national interests and national security. For overseas investments involving sensitive countries and regions, and sensitive industries, approval management is implemented; for other types of overseas investments by enterprises, filing management is implemented, meaning that according to Article 2 of the "Measures for the Administration of Overseas Investment by Enterprises", as long as domestic enterprises' foreign investments involve direct or indirect acquisition of ownership, control rights, and other interests of overseas companies, overseas investment filing (ODI filing) is required. In practice, the principle of China's overseas investment is "filing as the main, approval as the supplement". From the catch-all clause in Article 5 of the "Opinions", it can be seen that such prohibited overseas investment industries should belong to overseas investments that harm or may harm national interests and national security, which brings up the issue of the determination and application of "national security".

It is evident that China's determination of the scope of "national security" is still confined to traditional national security-sensitive sectors, and does not include restrictions on emerging sectors such as communications, the internet, and chips. On the contrary, China's current foreign investment policy encourages enterprises to "go global". Since the reform and opening up, China has accumulated

enormous production capacity, and its economic model has shifted from a traditional export-oriented economic model to a "dual circulation" economic model that places more emphasis on domestic demand and technological upgrading, with the development of the digital economy and green economy becoming focal points. The development trend of China's overseas investment is increasing in proportion as GDP continues to rise. From an industry analysis, the service sector, especially leasing and commercial services, occupies the main share of China's foreign investment. In the industrial sector, the structure of foreign investment has gradually transitioned from being dominated by the mining industry a decade ago to being centered on manufacturing. Recently, the Ministry of Commerce, the National Bureau of Statistics, and the State Administration of Foreign Exchange jointly released the "2023 Statistical Bulletin of China's Outward Foreign Direct Investment". According to the data from the first ten months of 2023, China's outward direct investment in the manufacturing sector continues to grow, with investment hotspots mainly concentrated in key industries such as metals, electronics, components, automobiles, renewable energy, and chemicals. From China's perspective, with the development of globalization and the advancement of the fifth wave, Chinese enterprises are facing new opportunities for "going global", among which "technology going global" is the main development direction of China's overseas investment, bringing advanced technology products to the international market. It can be seen that for advanced science and technology, China has not included it in the scope of "harm or may harm national security" for foreign investment.
Taking Chinese enterprises investing in the United States as an example, the United States has a favorable business environment, a huge consumer market, global R&D centers, global technological leadership, strong intellectual property protection, a sound legal system, superior infrastructure, and a relatively stable political environment. As the world's largest economy and the most technologically advanced country, the United States has a diverse economic structure, with key industries including aircraft manufacturing, telecommunications, chemicals, electronics, and computers. When Chinese technology-seeking enterprises invest in the United States, they need to undergo ODI filing, but based on the current changes in the political and economic situation, investments in these areas do not fall under the "national security" areas defined by Chinese law. However, in the context of tense Sino-US relations, the vagueness and lack of specificity in the determination of "national security" may also pose certain obstacles to Chinese enterprises investing in the United States, potentially leading to investment failures and causing losses to the interests of enterprises and even the country.

2.2 Provisions in the Proposed Overseas Investment System by the United States

In recent years, the impact of geopolitics on commercial activities has further spread from trade to the field of investment [8]. The United States' determination of national security in its overseas investment review system is a targeted political discriminatory and restrictive rule. With the rise of Chinese enterprises in high-tech fields such as communications and electronics, developed countries like the United States have felt significant competitive pressure. On June 21, 2024, the U.S. Department of the Treasury officially announced the proposed rules under Executive Order 14105 regarding foreign investment review restrictions ("NPRM"), which significantly refined and improved the content of the Advance Notice of Proposed Rulemaking ("ANPRM") issued with Executive Order 14105 last year. The introduction of these rules listed the restricted industries and fields. According to Section 9(c) of EO 14105, the scope of restricted technologies and products is currently limited to three industries: semiconductors and microelectronics, quantum computing, and AI. The introduction of these rules fully reflects the U.S. government's efforts to seek cross-departmental unified restrictions in the control of semiconductors, quantum computing, AI, and end-use. Especially in the relevant technical indicators, it clearly reflects the unification of overseas investment review and the export control standards of the Department of Commerce. In the proposed foreign investment review mechanism by the United States, technical indicators for strategic competition with China in the field of AI were proposed for the first time. The U.S. Department of the Treasury also proposed in the NPRM that in the final rules, considering the current development status of the AI industry, the following contents might be considered for inclusion in the definition of AI-related restricted transactions: (1) specialized AI models trained on high-quality data, even if these models require lower computing power; (2) AI models from which safety features can be removed through fine-tuning or retraining; (3) specific technologies that can be used to improve AI performance, such as model scaling, Monte Carlo tree search, pruning algorithms, and chain of thought; (4) adjustments to the definitions of existing AI systems to more accurately reflect national security considerations in the development of AI systems. This means that for the AI field, restrictions may be further tightened in the final rules.

In addition to the restricted industries, the executive order also clarified that it is targeting the establishment of a special review mechanism for relevant investments involving mainland China, Hong Kong, and Macau Special Administrative Regions. It can be seen that the main purpose of the U.S. foreign investment review mechanism is to restrict the development of Chinese technology, accusing China of actively promoting its development in sensitive technology fields such as artificial intelligence through a long-term comprehensive strategy, with the aim of gaining dominance in the military field. The United States believes that in this process, American capital is at risk of being abused by China, which it considers to be an infringement on U.S. national security. This also raises the issue of how "national security" should be determined and applied.

From the executive orders issued by the U.S. government, it can be seen that its definition of "national security" is quite vague. As U.S. senators repeatedly asked corporate executives whether they were of Chinese nationality during hearings, the so-called "threat to national security" by the U.S. side is actually an excuse, with its real purpose being to contain and suppress China. The United States regards the "national security" clause as a universally applicable tool, used as a basis for discrimination. This behavior reflects typical politicization and securitization. Some U.S. politicians insist on viewing China as the primary competitor and the most significant geopolitical challenge. In their logical framework, even though the United States can make progress in advanced semiconductors, quantum technology, and artificial intelligence, if China achieves technological breakthroughs and innovations in these fields, it will be seen as a "security threat" to the United States. They believe that only when the United States maintains its leading position in its respective advantageous fields can fair competition be conducted, and the potential threat of China to its leading position constitutes a "security threat". This is undoubtedly typical hegemonic logic and double standards.

From the above factors of national security review, it can be seen that the U.S. government has not clearly defined the concept of "national security". Theoretically, national security should be easy to define. For the United States, any malicious transnational threat or rising power that directly challenges U.S. sovereignty or survival constitutes a valid national security concern. It can be seen that the United States has a generalized interpretation of the national security clause, and the aspects it involves are very extensive, which gives the U.S. review agencies great discretion in future foreign investments, and also brings a certain degree of uncertainty to "American" foreign investments. It may often occur that foreign investments are violated due to harm to "national security" or that technology restrictions are imposed on countries, including China, that have temporarily poor diplomatic relations or inconsistent foreign policies with the United States.

3. Optimization and Application of the "National Security" Clause

3.1 The Function of the "National Security" Clause

In the early stages of the development of international investment agreements, the inclusion of "national security" clauses was not common [9], but currently, "national security" clauses are gradually becoming a necessary provision in various investment agreements and foreign investment review mechanisms. Although the forms of such clauses vary, they can serve well as "exceptional circumstances" for balancing interests during overseas investment, possessing unique value and significance. By emphasizing the formulation and function of "national security" clauses, it facilitates the provision of investment strategy ideas and interpretation directions for overseas investment. From the "Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment" promulgated by the State Council of China, it can be seen that the provisions for maintaining national security are very broad, and the aspects regulated are limited to traditional national security areas. For the home country, the national security clause in overseas investment serves as a guiding treaty or a "legal method clause" for legal interpretation and application [10]. For the investing country, the national security clause actually contains considerations of the national interest and the basis for foreign investment. Firstly, in terms of judging the hierarchy of legal values, the "national security" clause clarifies the principle that national sovereignty and national interests are above all else. No matter how the concept of national security is generalized, from the perspective of the investing country, there has always been ample and reasonable space for interpretation, and in the process of foreign investment, more consideration is given to its own interests as the basis for seeking a balance between its own interests and investment returns.

3.2 As a Bridge Connecting International Rule of Law and Domestic Rule of Law

The "national security" clause of the investment agreement not only confirms the economic sovereignty of the State, but also facilitates the host country to regulate the economic activities of foreign legal and natural persons in its territory [11]. With the advent of the knowledge economy era, the boundary between military and civilian fusion technologies has become increasingly blurred. In foreign technology investments, sensitive dual-use technologies are often involved, especially against the backdrop of China's growing technology-based foreign investments, this phenomenon has become more pronounced. Therefore, delineating the boundary between military defense and civilian sectors has become more complex. Currently, China's technology-based outward direct investment mainly involves aerospace, electronics, information technology, and communication technology, among other related fields and sensitive areas. With the arrival of the information age, foreign investment in the information industry also falls under the category of critical infrastructure [12]. In this context, as the developing country with the largest volume of outward investment, China naturally requires the support and protection of policies and laws. However, the current foreign investment laws and regulations within China's domestic law do not regulate such emerging industries, still being confined to traditional national security-sensitive sectors. The author believes that the stable and orderly development of overseas investment inevitably relies on standardized legal systems and detailed regulations. In today's increasingly globalized world, besides thinking about how to better integrate into the globalization process and bring domestic advanced technologies to the world, it is also necessary to consider the protection of domestic foreign investors. In contrast, although U.S. domestic law has expanded the scope of "national security" to include advanced technologies such as semiconductors and AI, its legislative purpose is solely for political considerations, aiming to hinder China's advanced technology development and attempting to become the world's hegemonic leader, by generalizing the interpretation of national security and imposing discriminatory and targeted restrictions on foreign investment. This not only violates the principles under economic and legal globalization but also disadvantages U.S. investors who may wish to invest in China in the future, to some extent hindering the development process of U.S. foreign investment.

In summary, the function of the "national security" clause can only be applied through the optimization and interpretation of the clause. Determine whether the measure is necessary for the maintenance of the national security of the tissue based on the principle of good faith [13]. Firstly, the "national security" clause should only be applied when it is truly necessary to maintain national security, rather than being generalized and expanding the scope of national security to pave the way for hegemonism and power politics. Overall, it should still aim to promote the steady development of foreign investment and protect domestic investors, contributing to the international investment order and even international law from the perspective of domestic law, thereby ensuring the smooth operation and development of the international investment legal system. Secondly, the construction of the rule of law is one of the manifestations of social progress in every country. Efforts should be made to seek a balance between the rule of law color possessed by the "national security" clause and the political attributes of "national security". The principle of good faith has become a customary international law rule [14], thereby promoting the stability and flexibility of the international investment legal system. Finally, considering the application of the "national security" clause from a global perspective, from the perspective of international law, to allow the "national security" clause to exert its unique function on different legal systems and legal value concepts. From the perspective of domestic law, each country needs to base its foreign investment review system on its national conditions and actual situations when formulating it, paying attention to the design and legislative purpose of the clause, among other factors. Without violating the basic principles of international law and international treaties, it should avoid becoming a "panacea" clause for foreign political discrimination or deviation from international investment treaty commitments by the investing country, thereby providing more feasible support for the current turbulent and changing overseas investment order. Truly allowing the "national security" clause to play its role as a bridge connecting international rule of law and domestic rule of law.

4. Conclusion

The issue of "national security" will influence the development of overseas investment review systems for a long time to come. The reform of each country's own overseas investment system cannot exist in isolation, nor can it be simply separated from the framework of international law. The world investment system is in a state of transformation, where a single move can affect the entire situation. To further promote the steady development of overseas investment and add strong vitality to the recovery of the world economy, it is essential to identify the key challenges posed by the determination and application of "national security" to the liberalization and facilitation of overseas investment, as well as to find coping strategies. Especially when formulating domestic laws, it is appropriate to add expressions related to "objective standards", including but not limited to principles of international law such as the principle of good faith. By coordinating and unifying, the methods of determining and the norms of applying "national security" provisions can be gradually clarified, to reconcile conflicts of interest between national interests and private entities, and to provide more comprehensive and detailed protection for domestic investors' overseas investments. Such optimization schemes can also highlight the nature of the "national security" clause as a legal method clause, thereby promoting the revision of the "national security" clause and the optimization of application rules in international law, and jointly advancing the progress of the overall legal system of international investment, solidifying the foundation of the overseas investment legal system under international law and strengthening the determination for its further development.

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