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Analysis of the America First Investment Policy and Outbound Investment Rules

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At present, western countries led by the United States hope to build an international order based on their own rules and interests. In particular, the United States, with its ideology of "America First", expands its national security circle of friends through policies and regulations, and drives countries or regions such as the European Union, Canada, and Australia to build national security investment barriers. United States attempts to unite Allies and apply various domestic legal rules to impose investment restrictions on relevant countries, in order to curb the development of their manufacturing and other industries. Relevant countries, on the one hand, advocate investment openness and regard it as the cornerstone of economic policies. At the same time, they restrict foreign investment and even their own outbound investment on the grounds of national security. This trend leads to extension of national security and weaponize national security issues. Moreover, the introduction of relevant systems in the United States has further strengthened the security review of foreign investment by the United States, expanded the scope of the review, and enhanced the protection against the leakage of key technologies, reflecting the United States' concern for national security in the context of the global economic competition pattern. The core content of "America First" is to ensure that while the United States accepts foreign investment, it imposes stricter reviews and restrictions on investments from specific countries (especially China), as well as on investments from those countries by Americans, thereby safeguarding its national and economic security.

Keywords: America First Investment Policy, outbound investment rules, cross-border investment, International Economic Law

Introduction

The US government is increasingly concerning that certain technologies will be transferred to China. Also, American enterprises in China can help enhance China's capabilities through certain investments. This concern has received rare bipartisan support. On October 28, 2024, the United States Department of the Treasury officially issued Final Regulations Implementing Outbound Investment Executive Order (E.O. 14105). This rule is a response to the "Measures in Response to U.S. Investment in National Security Technologies and Products in Certain Countries of Particular Concern" (Executive Order 14105) signed by President Biden on August 9, 2023. The final rule officially came into effect on January 2, 2025. As a result, the rudimentary form of the security review system for the United States' outbound investment (also known as reverse CFIUS) has basically taken

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shape. This executive order has established a regulatory framework for the review of foreign investment, with the aim of restricting or prohibiting investment transactions involving restricted technologies and products conducted by Americans and non-US entities they control in countries of concern (such as China). Key technological fields such as semiconductors, microelectronics, quantum information technology, and artificial intelligence are included in terms of covered transaction.

On February 21, 2025, President Trump released a Policy named “America First Investment Policy”, comprehensively expressing the various actions that the US government plans to carry out in the field of investment and the “America First” concept. It clearly states that restrictions will be imposed on outbound investment from specific countries or regions such as China, with particular emphasis on the fact that American investors are investing in the future of the United States, not that of China. Furthermore, “America First Investment Policy” regards China as certain foreign adversaries. This memorandum is not a legal text, but it has extremely strong policy demonstration significance. Judging from the content of the rules, the considerations of the Trump administration and the Biden administration in restricting investment in China are generally consistent.

Analysis of the Legal System Background

The America First Investment Policy is a national security memorandum aimed at promoting foreign investment while safeguarding U.S. national security interests. It emphasizes the importance of welcoming foreign investment for economic growth and innovation, while also implementing measures to restrict investments from certain countries, particularly China, in critical sectors such as technology and infrastructure. The National Critical Capabilities Defense Act is the basis for the foreign investment review mechanism that the United States intends to establish. From the National Critical Capabilities Defense Act, the main framework for the establishment of the foreign investment review mechanism by the United States can be seen. According to the Act, the newly established interdepartmental National Critical Capabilities Committee (CNCC) will review outbound investment transactions. The committee will be composed of the heads (or their designated personnel) of 12 federal agencies, including the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Energy, the Department of Health and Human Services, the Department of Homeland Security, the Department of Justice, the Department of Labor, the Department of the Treasury, the Office of the United States Trade Representative, and the Office of Science and Technology Policy, etc. The President of the United States (or a person designated by the president) serves as the chairperson of the committee.

The definition of “National Critical Capabilities” is more specific in some aspects than previous, including semiconductor manufacturing, large-capacity batteries, pharmaceuticals, artificial intelligence, quantum technology, and many high-tech industries with ambiguous definitions, which is difficult to fully summarize in words. Any economic activity related to the mentioned above may be recognized as a national critical capability. And then it falls into the scope of covered transactions. The industries involved in “National Critical Capabilities” also include those that receive government funding. The legislative logic behind this is that the funding from the US government provides support for related technologies, and therefore such technologies cannot fall into the hands of foreigners.

The bill identifies a wide range of “covered transactions” subject to review. The definition of “covered transactions” in this Act is broader than the traditional understanding of “investment”, including the following transactions: (1) construction, development, production, manufacturing, renovation, expansion, transfer, service, management, operation, utilization, sale or transfer of “national critical capabilities” to “countries/regions of concern”; (2) share, disclose, contribute, transfer or license any design, technology, intellectual property, or proprietary technology to the “entity of concern”, including supporting, contributing, or authorizing the “Entity of Concern” or the “country/region of Concern” to obtain “national critical capabilities” through open-source technology platforms or research and development; (3) invest, provide funds, offer advice or provide any guidance to enhance the “national critical capabilities” of the “entity of concern” or the “country/region of concern” or facilitate their access to financial resources. It is worth noting that “covered transactions” are not limited to the above-mentioned actions taken by Americans, but also include foreign exchange transactions or entities whose main business locations are outside the United States. Judging from the results, the bill places more emphasis on “transactions”, and the review scope of CNCC is broader, not just limited to investment.

At the same time, the trends of legalization of technology and technologicalization of law are reflected in the fields and technologies involved in “National Critical Capabilities”, mainly including: (1) Areas that are crucial to the supply chain as stipulated in Biden Administration’s Executive Order 14017, specifically including semiconductor manufacturing and advanced packaging, large-capacity batteries, critical minerals and materials, and drugs and active pharmaceutical ingredients. (2) Technologies identified as key and emerging technologies by the Director of National Intelligence, including biotechnology, artificial intelligence, quantum information science and technology. (3) The manufacturing capacity and other capabilities required for the production of key goods and materials as well as other basic goods and materials, such as the basic supply chain. (4) Industries designated in the updated list of key and emerging technologies by the National Science and Technology Council of the United States in February 2022, such as advanced computing, advanced engineering materials, advanced manufacturing, advanced nuclear energy technology, artificial intelligence, biotechnology, Fintech, renewable energy generation and storage technology, etc. (5) Other industries, technologies and supply chains identified as national key capabilities.

The scope of “countries/regions of concern” is the same as that of the so-called “rival countries” in the US Secure and Trusted Communications Network Act of 2019, specifically including China, Russia, Iran, North Korea, Cuba and Venezuela.

“Entities of interest” specifically include: entities in the “country/region of interest” or those affected by the “country/region of interest”, which directly or indirectly own, control or hold 5% or more of the issued voting stocks; “Country of Concern” or any entity that may be affected by “Country of Concern”; Important decision-makers, significant business decisions, business interests located in “countries/regions of concern”, as well as subsidiaries, holding companies, and contract-related parties of related entities are all the subjects of the investigation. Any entity directly or indirectly registered in the “Country of Interest” (region) that receives, benefits from, transfers, authorizes or assists in obtaining trade secrets, intelligence information, national security information, controlled non-confidential information or sensitive information belonging to the United States is the subject of investigation, etc.

The bill also stipulates the exemption from review provisions, but there are still many details that need to be improved urgently. If the exceptions of the revised NCCDA include any transactions that are lower than the minimum proportion (de minimis threshold), but this minimum proportion has not been determined yet.

Combined with the previous system of foreign investment security review in the United States, it is expected that the minimum proportion will be limited to 10%, meaning that Americans' foreign minority equity investments may be exempted. At the same time, in terms of retroactive effect, it is stipulated that transactions that occurred 180 days before the effective date of the act can also be exempted from review. It should be noted that, given the continuous tightening of the United States' determination of whether it endangers national security, although the CNCC may not retrospectively review transactions that occurred 180 days before the effective date of the act, it still has the right to review transaction activities that were ongoing before but after the act took effect.

The revised NCCDA also excludes ordinary business transactions from its jurisdiction. "Ordinary business transactions" include the sale, transfer, licensing, or provision of certain goods and services, and these transactions usually do not result in foreigners obtaining key technologies. However, "ordinary business transactions" are also ambiguous, and this term is usually ambiguous. Furthermore, the licensing exclusion for licenses is relatively narrow. The licenses covering transactions include those involving "design, technology, intellectual property or know-how, as well as open-source technology platforms." The exclusion in the exemption clause only includes "the license of a finished item". The interpretation right of what constitutes a finished item belongs to CNCC. Therefore, there is also ambiguity in the definition and interpretation, because when a "finished item" may contain multiple components, they themselves can constitute a "completed" project.

In terms of extraterritorial jurisdiction, it is stipulated that any transaction involving Americans, foreigners, and their affiliated institutions worldwide will be subject to mandatory review as long as it involves transactions that threaten the critical basic capabilities of the United States. This means that foreign subsidiaries of US companies conducting business in sanctioned countries or regions, or even third-party entities of Allies conducting business in the relevant countries, will all fall within the scope of review. This extraterritorial jurisdiction provision indicates the latest development of the long-arm jurisdiction system in the United States. On the one hand, the United States has expanded the interpretation of the rule of personal jurisdiction in international law, expanding the interpretation of human beings and including any goods and technologies originated from the United States in the category of human beings. At the same time, it has also expanded the principle of territorial jurisdiction in international law. This expansion originated from the "Restatement of the Law on Foreign Relations" revised by the United States in 1987, which proposed the "principle of objective territorial jurisdiction", emphasizing that within any territory, as long as a certain person or event has a substantial impact on the United States and such substantial impact is direct and foreseeable, the United States enjoys jurisdiction. The long-arm jurisdiction has extended to the field of cross-border investment by Americans on a global scale. The United States can interfere in cross-border capital flows through domestic laws and trample on the international legal system. This is essentially a manifestation of American power politics and bullying.

Besides, the pace at which the European Union has issued restrictions on outbound investment is almost in step with that of the United States. On Jan. 15, 2025, European Commission published a recommendation calling to review outbound investments of their companies into non-EU countries. The recommendation applies to three technology areas, including semiconductors, artificial intelligence, and quantum technologies. Moreover, European Commission also calls on Member States to assess risks to economic security potentially arising from such transactions. According to White Paper on Outbound Investment released by European Commission, it recognises that potential security risks could arise when sensitive technologies and investments leave the EU in a way that can threaten international peace and security. In particular, it refers to the risks of technology and know-how leakage as a result of outbound investments. Thus, developing a response to concerns regarding outbound investments presents a number of considerations: (1) determine the scope of potential concerns, (2) understand the extent and nature of EU outbound investments by collecting relevant data and evidence, and (3) assess whether such investments create or aggravate clearly identifiable risks to security. In a second step, the EU and its Member States should assess the need for proportionate and targeted responses to mitigate identified risks either through existing tools or new mitigating action at national and/or EU level. The ultimate goal of the European Commission is to ensure that key and proprietary technologies do not fall into "the Wrong Hands" and to prevent the negative impact of the EU's foreign investment on the economic security of the EU. Here, the term "the Wrong Hands" is exactly the same as the "Foreign Adversaries" proposed by the United States, both targeting specific countries such as China.

European Commission also claims that Member States should monitor investments of "any kind" by natural or legal persons resident or established in the EU aimed at carrying out an economic activity outside the EU. Such investments include: the acquisition of a company or a stake in a company that enables an effective participation in the management or control of the company (acquisition); the absorption by one company of one or more other companies or the combination of two or more companies to form a new company (merger); the transfer of tangible or intangible assets, including intellectual property or specific know-how and technology process, necessary for establishing or maintaining an conomic activity (asset transfer); the first-time establishment of a business, including the creation of a subsidiary, a branch or similar ventures (greenfield investment); the establishment of a venture to combine resources to achieve a joint entrepreneurial goal with another person (joint venture), and the provision of capital to develop a sensitive technology, linked to certain intangible benefits like managerial assistance, access to investment and talent networks, market access and enhanced access to additional financing (venture capital).

From the above analysis, it is not difficult to see that the United States and European have reached a consensus on gradually strengthening restrictions on investment from or in China. Perhaps the possibility of establishing a relatively independent review mechanism in short term remains to be seen, but it is highly likely that lawmakers will urge the administration to issue targeted executive orders, thereby promoting the establishment of a regular review mechanism for both inbound and outbound investment.

The Legislative Logic of the Requirement for Reciprocal Investment

In the field of FDI, the impact of reciprocity requirements on bilateral investment between China and the United States is particularly prominent. Meanwhile, the impact of reciprocity requirements on investment is also manifested through the expansion of the foreign investment security review system. Statistics show that in 2012, the flow of direct investment from China to the United States surpassed that from the United States to China for the first time, reaching its peak in 2016. During this period, the foreign investment security review system in the United States was relatively lenient, and no requirements or expressions related to reciprocal or equivalent investment were found by searching official US documents or presidential speeches. However, after 2017, affected by the stricter security review of foreign investment in the United States, the revision of the system, and economic factors, China's direct investment in the United States has decreased significantly. Some scholars have also proposed the theory of testing the effect based on the principle of reciprocity, arguing that there are two aspects to test whether the regulatory tool of the principle of reciprocity is effective: On the one hand, look at the actual management effect of the security review carried out by China as the host country for the “introduced” foreign capital under the principle of reciprocity; On the other hand, it is necessary to see the response effect of Chinese investors going global in the face of overseas investment risks caused by security reviews in the United States, Europe, and other countries. But in fact, such tests are hard to implement. The main reason is that the fields in which Chinese enterprises go global are completely different from those in which the United States invests in China. That is, the industries themselves are not equal. Only in terms of investment restrictions are there equivalent data performances. This situation is that you restrict me and I also restrict you.

Based on the consideration of reciprocity, the United States restricted China’s investment in the US by expanding the foreign investment security review system between 2017 and 2018. Correspondingly, China’s investment in the US began to decline significantly after the expansion of the US foreign investment security review system between 2017 and 2018. It indicates that the revision of the relevant legal system has an extremely significant impact on bilateral investment between China and the United States.

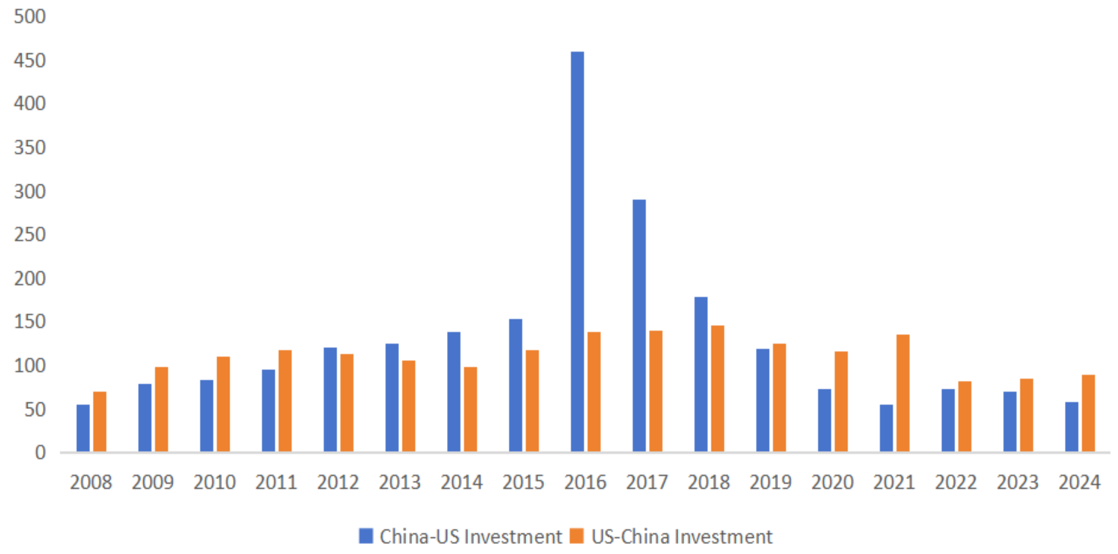

Figure 1. Changes in bilateral investment between China and the United States from 2008 to 2024 (in billions of US dollars). Source: According to the data statistics of the United States Department of Commerce and the Department of the Treasury.

As China’s investment in the United States declined, the amount of US investment in China subsequently exceeded that of China’s investment in the United States, which once again raised concerns on the US side. As a result, the US introduced investment restrictions on China from 2024 to 2025, conducting security reviews on American investment in China. The aim was to limit the transaction volume of US investment in China and significantly reduce transaction opportunities. In 2018, the “Modernization of Foreign Investment Risk Review Act” of the United States was gradually implemented. On February 21, 2025, US President Trump released the “America First Investment Policy”, clearly stating restrictions on foreign investment to specific countries such as China, and particularly emphasizing “America First”. At this point, the application of reciprocity is reflected in the foreign investment security review system and the foreign investment review system of the United States, and is constantly linked with national security issues, presenting the weaponization, extremism, and unilateralization of reciprocity requirements and legal systems.

Analysis of Specific Rules

Investment Subject Restriction Rules

The "Final Rule" issued by the Office of Investment Security of the U.S. Department of the Treasury on October 28, 2024, provides detailed regulations on the restricted subjects, scope and classification of investment restrictions, exceptional circumstances, compliance obligations of restricted subjects, and penalties for U.S. outbound equity investment activities and direct investment activities. The rules require that when Americans make foreign investments involving the subjects of "persons of a country of concern", they need to pay attention to the scope of their investments ("types of transactions subject to review restrictions") and whether the subjects of "persons of a country of concern" are engaged in restricted activities ("key restricted technologies"). Comply with the relevant regulations on investment prohibitions and declarations as required by this law.

At the same time, Section 850.229 of the Final Rules stipulates that "American" includes any U.S. citizen, legal permanent resident, entity formed under the laws of the United States federal law or the laws of any jurisdiction within the United States (including any foreign branch of such entity), or any person whose geographical location is in the United States.

In terms of the scope of "controlled foreign entities", the scope of the investment restriction obligation subject applies the penetration requirement, expanding to "controlled foreign entities" controlled by the United States, and they bear the same investment restriction or declaration requirement obligations. That is to say, Americans need to be held responsible for the acts of the "controlled foreign entities" under their control that violate the prohibitions on foreign investment or the reporting obligations. Section 850.206(a) of the Final Rules stipulates that a "controlled foreign entity" refers to any entity whose parent company is an American, registered in a country other than the United States, or otherwise incorporated under the laws of the country where it is located. Criteria for determining whether the parent company is an American when determining whether a company registered in a country other than the United States is a "controlled foreign entity" is: First of all, it is necessary to determine whether its parent company is American. According to Section 850.219 of the Final Rules, if any of the following circumstances is met, even if the American is only an intermediate entity and not the ultimate parent company, the American shall still be recognized as the parent company of a foreign entity: (1) an individual or entity that directly or indirectly holds more than 50% of the following interests is an American: (a) the outstanding voting interest of the entity; or (b) the voting power of the board of the entity; (2) the general partner, managing member, or person of equivalent status of the entity is an American; or (3) for any entity as a pooled investment fund, its investment advisor is an American. The definition of "investment advisor" can be found in the Investment Advisers Act of 1940 of the United States 15 U.S.C. 80b-2(a)(11).

Cover Transaction Restriction Rules

The Trump administration believes that specific countries, including China, are using or capable of using certain U.S. outbound investments to obtain certain technologies or capabilities, including certain intangible benefits accompanying U.S. investments. These intangible benefits include status and popularity, management methods, investment and talent networks, market access, and access to additional financing, etc. At the same time, certain U.S. outbound investments may accelerate and enhance the possibility of success in the research and development of sensitive technologies and products in countries of concern. The executive order specifically states that "these countries develop these technologies to improve their ability to counter the United States and its Allies", and explicitly includes the Chinese mainland, the Hong Kong Special Administrative Region, and the Macao Special Administrative Region in the list of countries of concern. It is evident that the Biden administration is committed to ensuring national security by comprehensively protecting key technologies, and this approach has been carried forward in the subsequent policies of the Trump administration.

In terms of specific content, the United States will utilize legal and policy tools including but not limited to the foreign investment security review system to restrict entities associated with China from investing in U.S. technology, critical infrastructure, healthcare, agriculture, energy, raw materials, or other strategic industries, while protecting farmland and real estate near sensitive facilities. Restrict foreign rivals such as China from obtaining talents and technologies in sensitive technological fields. Meanwhile, CFIUS will strengthen its supervision over "Greenfield" investments, and the scope of "emerging and underlying technologies" under its review will also be further expanded. The above content is in line with the increasingly strict trend of the foreign investment security review system in the United States. In terms of system design, the CFIUS review rules will also be continued, especially in terms of key technologies and the scope of covered transactions, which will be consistent with the Foreign Investment Risk Review Modernization Act (FIRRMA). From an industry perspective, the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018 has expanded its review scope to "emerging and fundamental technologies" (including numerous cutting-edge technologies such as semiconductors, artificial intelligence and machine learning, quantum computing technology, biotechnology and gene editing, advanced manufacturing technology, cybersecurity and data security technology, and energy technology). This is highly relevant to the targets of the United States' foreign investment.

In terms of coverage, the Trump administration emphasized that foreign investments (including those from China) that have no impact on the decision-making, management, technology, etc. of US enterprises are still allowed in principle. This indicates that once a certain foreign investment has any impact on the decision-making, management, technology of US enterprises, it still faces rejection. It is consistent and coherent with the previous foreign investment security review system in terms of policy. It is also emphasized that US investment in China will be subject to strict review. Based on this, it can be inferred that the basis for the review of outbound investment is that investment in China has an impact on the decision-making, management, technology, etc. of US enterprises.

Furthermore, in accordance with Article 850.210 of the Final Rules, this provision stipulates six types of "Covered transactions", namely: equity acquisition, debt financing arrangements, conversion of contingent equity to equity, Greenfield investment, joint ventures, and serving as a limited partner (LP). Restricted entities that directly or indirectly participate in "covered transactions" involving or leading to the establishment of "foreigners of interest" must comply with the requirements of investment restrictions in accordance with the provisions of the Final Rules and fulfill the necessary reporting obligations or investment prohibition obligations.

From the perspective of the involved content, the areas where investment in China has been expanded to be prohibited or restricted include semiconductors, artificial intelligence, quantum technology, biotechnology, hypersonic technology, aerospace, advanced manufacturing, directed energy, and other fields related to China's military-civilian integration strategy. Meanwhile, the restricted/prohibited investment behaviors include private equity, venture capital, greenfield investment, enterprise expansion, and investment in the securities of listed companies. Restricted sources of funds include pensions, university endowment funds in the United States and other limited partnership investors, etc. The American Priority Memorandum also specifically pointed out that American universities should stop supporting foreign rivals such as China through investment decisions, just as "they should stop offering college admission opportunities to supporters of terrorism".

From the perspective of the historical process, one of the driving forces for the reform of the foreign investment security review system is the impact from other countries. This impact is highly related to economic development, technological levels, and the international relations environment, and is also influenced by the current economic situation and the national security situation. Take the United States as an example from President Reagan's statement of "welcoming foreign investment" in the United States in September 1983 to the first proposal of foreign investment in the Omnibas Trade and Competition Act of 1988, the amendment to Section 721 of the Defense Production Act of 1950 (Exon-Florio Amendment), the 1991 and 2008 editions of the "On Foreign Mergers, Acquisitions, and Takeovers The Regulations", the Byrd Amendment of 1993, and the Foreign Investment and National Security Act (FINSA) of 2007—each revision or reform during this period was due to the impact of domestic industries on the growth of investment from other countries (such as Japan, etc.), the domestic economic downturn, or the rise of terrorism. However, economic reasons were the main cause of the regulatory modifications. After 2018, countries or regions such as the United States and the European Union gradually expanded their foreign investment security review systems. The main reasons were concerns about the technological competitiveness of their own countries or regions and the impact of the rapid rise of developing countries like China.

From the perspective of industries specifically involving key technologies, this article holds that the review of future investment restrictions in the United States will mainly focus on restricting investment in key technologies in China. The main reason is that the United States has long expressed concerns about the leakage of domestic key technologies and is also worried that American investors might leak the relevant technologies through outbound investment. This concern can be clearly seen from the annual report released by the Foreign Security Review Board of the United States. Affected by the 2008 financial crisis, the number of covered transactions reviewed by CFIUS dropped sharply from 155 to 65 from 2008 to 2009, and gradually recovered after 2010. From 2010 to 2015, the numbers reached 93, 111, 114, 97, 147, and 143 respectively. It should be noted that during the period from 2006 to 2015, the number (proportion) of transactions reviewed by CFIUS involving the manufacturing industry with the highest technological content was: 51 (46%), 60 (43%), 72 (47%), 21 (32%), 36 (39%), 49 (44%), 47 (39%), 35 (36%), 69 (47%), and 68 (48), respectively; In addition, during the period from 2006 to 2023, the cumulative proportion of cases involving the manufacturing industry among all involved industries was close to 50%, ranking first in terms of quantity. The number of cases involving the manufacturing industry fully demonstrates that the United States' concerns about the rise of manufacturing industries in other countries have become an important consideration factor in foreign investment security reviews. Based on this, in recent years, the United States has been incorporating key technologies and non-public technical information into the scope of national security and expanding the covered transactions.

In 2023, CFIUS received 109 simple declarations and 233 formal declarations submitted by the trading parties. In terms of transaction types, the industry with the largest number of official declarations in 2023 was finance, information and services, accounting for 50% of the total, reaching 115 cases, a slight decrease from 52% (149 cases) in 2022. Manufacturing ranked second, with a share of 29%, reaching 68 cases, which remained the same as in 2022. From 2021 to 2023, the CFIUS review focused on three key industries: finance, information and services, and manufacturing. The number of official applications accounted for as high as 81% of the total. Data indicate that concerns in the United States over foreign investment in financial infrastructure and manufacturing are intensifying.

Excepted Transaction Rules

The "Final Rule" stipulates "National interest exemption" in Article 850.502. Restricted transactions that wish to obtain national interest exemptions must be applied for by Americans to the Department of the Treasury. The US Secretary of the Treasury, along with the Secretary of Commerce, the Secretary of State, and the heads of other relevant agencies, determined after considering and discussing the request whether to grant written permission. The considerations include: the impact of this transaction on the demand of key supply chains in the United States; Domestic production demand in the United States in response to the expected defense requirements; The global technological leadership position of the United States in the field affecting the national security of the United States; And the possible impact of prohibiting Americans from conducting this transaction on the national security of the United States, etc.

In addition, exceptions also include investments by Americans, which fall into the following four categories: (1) Investments in publicly traded securities. (2) Invest in securities issued by an "investment company" as defined in Section 3(a)(1) of the Investment Companies Act of 1940 (15 U.S.C. 80a-53) (such as index funds, mutual funds, or exchange-traded funds), or invest in securities issued by any company that has chosen to be regulated or regulated as a business development company under Section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53). (3) Certain LP investments: Investments made by Americans as limited partners or investors of equivalent status in venture capital funds, private equity funds, funds of funds, or other collective investment funds, subject to: (a) The total committed capital of limited partners or persons of equivalent status (including any investments and co-investment vehicles of the fund) shall not exceed two million US dollars in total; or (b) the limited partner or an investor of equivalent status has obtained a binding contractual guarantee to ensure that its capital in the fund will not be used to engage in activities that would be regarded as prohibited from trading or required to report transactions if conducted by an American. (4) Invest in derivatives, provided that the relevant derivatives are not granted any rights to acquire equity, rights related to equity, or any rights belonging to the assets of the foreign entity of interest.

Analysis of Rule Influence

Abusing National Security to Create Laws at Will

National security legislation itself is a manifestation of discretionary power. The power of legislation can be completely in the hands of the ruling class and has a strong arbitrariness. Whether at the level of international law or domestic law, national security is a catch-all rule. All issues that are difficult to solve or strategic considerations can be incorporated into it. Therefore, national security has become an instrumental system for the state to formulate laws.

First of all, national security belongs to national sovereignty and provides protection for the country to formulate laws. The ruling class always needs to seek reasonable basis when formulating laws and regulations. The fundamental proposition that national security belongs to national sovereignty provides an appropriate reason to solve the legitimacy of legislation and also offers an irrefutable basis for the arbitrariness of national security laws.

Secondly, it is relatively less difficult to create laws through the national security path. As mentioned above, the current effective international law rules do not provide clear definitions or restrictions on national security. Legislators have no obstacles in international law. Therefore, legislators only need to consider those factors that they believe may threaten national security, and at the same time, they will consciously incorporate their own strategic interests into them. Furthermore, national security legislation generally does not have an impact on the public. Apart from factors such as terrorism, ordinary people seldom care about the potential impacts brought about by emerging security fields such as financial security, technological security, and biosecurity, significantly reducing the difficulty of formulating national security laws.

Meanwhile, the process of formulating national security laws was significantly faster than that of other laws during the same period. The formulation speed of laws and regulations concerning national security is significantly higher than that of other legal provisions. The legislative power of a country is usually strictly restricted, initiated through rigorous procedures, and the formulation cycle is generally long. However, from the practices of various countries, the formulation speed of legal systems related to national security far exceeds that of other laws. Take the United States as an example. In 2007, the Foreign Investment and National Security Act (FINSA) of the United States took nearly two years and six months from its proposal to its promulgation. However, after 2018, the legislative process in the United States has significantly accelerated, especially the FIRRMA Pilot Program. It took about one year from the proposal to the implementation of the “Pilot Program”. The “Regulations on Specific Investments Made by Foreigners in the United States” issued by the US Department of the Treasury took only six months, while the 2018 Export Control Reform Act of the same period took only five months. For the European Union, it took less than 11 months from the “Legislative Proposal on the Framework Regulation for the Review of Foreign Direct Investment in the EU” to the official text, while during the same period, climate-related green regulations, such as the EU Carbon Tariff Mechanism (CBAM), took more than two years.

Finally, the areas involved in national security cannot be exhausted. The contents involved in national security are determined by the ruling class of a country. Therefore, the fields involved in national security reflect the will of the ruling class and present an inexhaustible characteristic, which leaves sufficient space for arbitrary law creation, such as the United Kingdom and Germany, which attach great importance to the security review of foreign capital.

Logically speaking, national security issues are related to national sovereignty and seem urgent. However, there are doubts as to whether such urgent legal-making activities can ensure national security. Furthermore, this fast-food style of legislative council has led to a one-sided situation among the ruling class, presuming in a preconceived manner that a certain behavior of a certain country has endangered national security, and its scientific nature is hard to convince the public. But for the ruling class, having a highly generalized legal and regulatory system is even more important, especially one that can accelerate the realization of its strategic goals.

Raised the Threshold for Americans to Invest in China Through Two-Way Investment Restrictions

The first issue is the time cost of foreign investment access. There is ambiguity in the substantive system of the foreign investment security review system, and the procedure itself is a substantive obstacle to foreign investment access. The review time of the regulatory authorities has been gradually extended. According to the "Modernization of Foreign Investment Risk Review Act" of the United States, the review period has been extended from the original 30 days to 45 days. It is stipulated that the investigation period is generally 45 days and can be further extended to 60 days under special circumstances. The presidential approval time remains at 15 days. So the United States has extended the investigation period, which originally totaled 90 days, from 105 to 120 days. Without considering the mitigation agreement reached by both the investor and the investor, if the assessment preparation period and the project filing period, which are approximately three to six weeks in total, are included, the entire review period will be around 160 days. Even if the pre-transaction review and communication time is taken into account, the actual review period will be as long as 12 to 24 months.

Cross-border investment itself has extremely high requirements for timeliness. On the one hand, missing key time points may lead to changes in major events such as valuation or technological changes. On the other hand, it may also miss the best opportunity for acquisition, thereby affecting the overall strategic layout of foreign investors. In addition, cross-border transactions themselves involve issues such as accounting standards, business practices, legal application, and fund settlement in the destination country. The content is rather complex and time-consuming. If the time is significantly prolonged, it will pose challenges to the timing selection, transaction uncertainty, and cost burden of cross-border mergers and acquisitions, and the time cost will increase significantly, which is unfair to investors and investment projects.

On the other hand, the increasingly strict foreign investment security review system has increased the default cost for investors, which is manifested in the generally high liquidated damages. Due to the increasingly strict foreign investment security review systems in various countries, once the acquisition targets of foreign investors involve covered transactions or key technologies in the relevant systems, the probability of being terminated by regulatory authorities due to triggering national security risks is extremely high. Therefore, in practice, investment contracts often regard national security risks as a breach of contract clause and do not exempt them. Although this default risk is caused by government regulatory agencies, it is usually agreed that if the investment fails due to foreign investment security review reasons, the investor needs to pay a certain proportion of liquidated damages. Currently, due to the influence of trade secrets, there is no literature or research report to statistically analyze the amount of such liquidated damages. However, from the search of public information, it is found that the amount of such liquidated damages is usually charged at 0.5% of the total investment, and the agreement on the amount is relatively flexible. Therefore, the tightening of the foreign investment security review system has also had a negative impact on the investment costs of foreign investors.

Meanwhile, the increasingly strict foreign investment security review system has increased the legal costs for investors. To deal with security reviews from foreign regulatory authorities, foreign investors generally hire local lawyers and accountants in the investment destination country to handle the situation. Some investors also facilitate transactions through lobbying and other means. In fact, even if local intermediary service institutions are hired, it is difficult to avoid the regulatory authorities' determination that a certain investment endangers national security. These expenses are a necessary expenditure for investors but also a cost that is relatively difficult to be effective.

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