Research on the Latest Development of Investment Security Review System and Investor Relief

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Abstract. With the development of the international situation, new changes have taken place in the foreign investment security review system in many countries and economies in recent years. This paper first analyzes the concept and characteristics of the "National Foreign Investment Security Review System", Through the analysis of the development trend of the security review system for foreign investment in the past five years, it is summarized that the system has shown a trend of frequent legislation, stricter enforcement and deeper politicization. In this context, the article further analyzes the necessity and theoretical basis of the construction of corresponding investor relief channels in the national security review system, and puts forward some suggestions on the mode of investment relief mechanism, that is, to adopt an incomplete litigation mode.

Keywords: Investment Security; Investor Relief; Review System

1 Introduction

Over the past few decades, transnational investment has gradually become an important factor in promoting global economic development and has penetrated into people 's daily lives. Relevant research shows that before the outbreak of the COVID-19 pandemic, the global net FDI inflow data has reached 1.63 trillion US dollars, an increase of 48.34 times compared with 1978; [1] The "Business Survey of Chinese Enterprises in the United States in 2020" released by the General Chamber of Commerce of the United States shows that by 2019, member enterprises have invested more than 123 billion dollars in the United States, indirectly supporting more than 1 million jobs across the United States; [2] these studies and data show that transnational investment is playing a huge role in promoting the world economy.

In this context, it is significant to study the security review system of foreign investment in various countries, since successful access to local markets is a prerequisite for any foreign investment to have an economic impact. However, in recent years, many countries have gradually built a more stringent foreign capital security review system based on "national security", restricting foreign companies from investing in specific industries in their countries. At present, the host country 's security review system is

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generally vague and strict, which is not conducive to investors ' forecast and preparation, and affects their successful completion of investment. As Ji Ma pointed out in his article, security review has become the first and possibly the most critical threshold to determine whether transnational investment can enter.[3] Scholars such as Liao Fan and Christopher W. Jusuf also believe that this is a manifestation of the rise of trade protectionism.[4]

Further, since the security review system in most countries does not require the review authorities to disclose the specific reasons for vetoing investment decisions, investors often lack the opportunity to modify and are difficult to complete investment. Therefore, whether investors can bring administrative reconsideration or judicial review on the decision of security review in the host country has a significant impact on the enthusiasm of investors, and further relates to the development of global transnational investment.

Unfortunately, most of the current literature in this area has stopped at exploring recent changes in the security review system, and only a few scholars have noticed the absence investor relief channels, such as Zhao Shaokang. His article provides a detailed analysis of the current mainstream three types of investor relief models, but lacks a discussion of the legal principle basis for "establishing relief channels for investors", which is an indispensable support for improving investor relief channels.[5]

Based on this, by analyzing the connotation, characteristics and recent trends of "foreign investment security review system", this paper will focus on the necessity and feasibility of setting up investor remedy channels, and propose a possible investor remedy model in order to provide some thoughts for improving the current security review system and promoting the healthy development of transnational investment.

2 Overview and Recent Trends of National Foreign Investment Security Review System

National foreign investment security review system refers to the specific review mechanism set up by host countries for foreign investment because of the potential security problems of foreign investment on their military, political and economic aspects. A comprehensive analysis of Wang Dongguang and other scholars shows that transnational investment may threaten host country security at two aspects: first, by participating in host country politics in order to avoid risks and seek various benefits; second, by investing in sensitive areas such as energy, communications, and cutting-edge technology, forming monopolies and control over specific businesses.[6] The following paper will analyze the characteristics of this system and its recent development trend.

2.1 Characteristics of the system: high ambiguity and strong variability

In view of the above risks, some countries have established national foreign investment security review systems based on the "principle of sovereign equality of states" and with the goal of "protecting their national security". This objective determines that the national foreign investment security review system is highly politicized. However, from

a deeper analysis, the system is also characterized by high ambiguity and strong variability. These two characteristics will be discussed separately below.

Highly ambiguous.

The core concept of national foreign investment security review system is "national security", but in fact there is no uniform definition of the meaning of "national security". In practice, there is no international organization or international treaty to regulate this, and most host countries often adopt open definitions of "national security", which makes the review standard of foreign investment security review system highly ambiguous and difficult for investors to predict.

Strong variability.

There is a consensus in the academic community that national security is not a fixed concept. Scholars such as Buzan, Fairey, and Jervis argue that security is only a vague symbol, and that the definition of "security" varies with the act, occasion, era, and issue, and that any single definition is inevitably biased.[7] In fact, early national security mainly focused on military and political security, but with the development of the international situation, some other areas were also included in the scope of national security, including energy security and technological security. As scholar David Bailey points out: In order to adapt to the new security issues brought about by the changing international situation, the concept of national security is also changing.[8]

Under the influence of these two features, the public power in the national foreign investment security review system has a tendency to be unrestricted. The vague and uncertain definition of "national security" means that it is also difficult to determine whether a transnational investment falls within the scope of "possibly affecting national security". This conceptual gap gives the review authority room to make its own judgment, which may lead to the review organs abuse their authority.

2.2 Recent development trend of national foreign investment security review system

The global situation has witnessed a large number of new changes due to the aftermath of the financial crisis, geopolitical conflicts, anti-globalization thinking and the impact of the epidemic. This has led to new features of foreign investment security review systems in many countries, i.e., they have become more active at the legislative, enforcement and politicized levels. The following paper will try to discuss from the above-mentioned perspectives.

More frequent legislative activity.

In the past five years, the legislative activities of many countries and economies on foreign investment security review system are very concentrated and frequent, which reflects the increasing intervention of countries on cross-border investment, and also

shows the concern and attention of countries on how to maintain their own security when absorbing foreign investment.

Over the past five years, on the one hand, an increasing number of countries or economies have recently introduced their own security review systems. For example, the EU adopted EU Regulation No. 2019/452 establishing a review framework for FDI into the Union on April 10, 2019, formally establishing a cooperative mechanism for security review of foreign investment within the EU; China adopted the Foreign Investment Law of the People's Republic of China in March 2019 and issued the Foreign Investment Security Review Measures on December 19, 2020 Review Measures", thus forming a systematic security review system for foreign investment.

On the other hand, countries that have already established security clearance systems have recently carried out frequent activities to amend their legislation accordingly. Typical examples include the U.S., which made extensive changes to the security review system established by the FINSA Act in the past through the introduction of the FIRRMA Act in 2018, and Germany, whose federal government adopted the First Amendment to the Foreign Economic Law (Draft) by resolution in April 2020 to accommodate the requirements of the aforementioned Regulations, which was subsequently considered and adopted by the German Federal Parliament in June 2020.

More stringent enforcement activities.

At the enforcement level, there has been a recent trend of tightening the investment security review regime for investors. This is reflected in the fact that most countries have provided for more stringent elements at the enforcement level, such as the expansion of the review authority's authority, the lowering of the review initiation threshold and the extension of the review process. At the level of review agency authority, the U.S. has explicitly granted its review agency (CFIUS) more jurisdictional authority not covered in the past FINSA in the FIRRMA launched in 2018, including the power to suspend transactions and immunity;[9] For the issue of review initiation thresholds, France, for example, reduced its ownership threshold for triggering mandatory investment review for non-EU investors from 33.33% to 25% in 2019, and August 2020 lowered the ownership threshold for investments to 10%, further reducing the threshold requirement for including investments in the review;[10] As for the review process, the U.S. FIRRMA extends the original time limit for the review process from 30 days to 45 days. [11]

These new regulations at the enforcement level expand the authority and scope of review of the review authority, increasing the probability that an investment will trigger a security review. At the same time, the extended procedures have increased transaction costs for investors. Overall, the new changes at the enforcement level show a tendency to be more unfavorable to investors. Some practices argue that this trend will lead to a short-term surge in the number of foreign investment security review cases in various countries, such as Freshfields Law Firm's 2021 Foreign Investment Monitor report, which concluded that the number of filings reviewed by CFIUS in 2021 increased by approximately 40%-50% compared to 2020.[12]

Deepening politicization.

In order to achieve its purpose of "protecting the security interests of the host country," the foreign investment security review system is naturally politicized. The recent national security review activities have shown a stronger tendency of politicization, i.e., host countries pay more attention to the home country nationality of investors when reviewing foreign investment. For example, the U.S. FIRRMA Act explicitly added two new systems of "countries of particular concern" and "exemption mechanisms". Investments from "countries of particular concern" may be subject to stricter CFIUS controls once they involve key technology areas, while the investments from countries in the list of exemption mechanisms would enjoy special preferential treatment. This system in fact constructs a blacklist and whitelist system in the U.S. foreign investment security review, whether the investor's investment can successfully pass the review is no longer solely based on the nature and content of the investment, but more linked to the bilateral relationship between the investor's home country and the United States.

This phenomenon of deepening politicization can also be seen in the data, using Chinese investment filings in the United States as an example. The chart below shows the number of filings CFIUS has received for investment transactions involving key U.S. technology companies. While China remains on the list of major investor source countries, the number of transaction filings received by CFIUS recently for Chinese acquisitions of key U.S. technology companies continues to decline, from 21 in 2017 to 5 in 2020.[13] The decline in the number of investment filings reflects Chinese investors' concerns that their investments will be politicized and targeted against the backdrop of recent relative trade tensions between the U.S. and China and a decline in investment incentives.

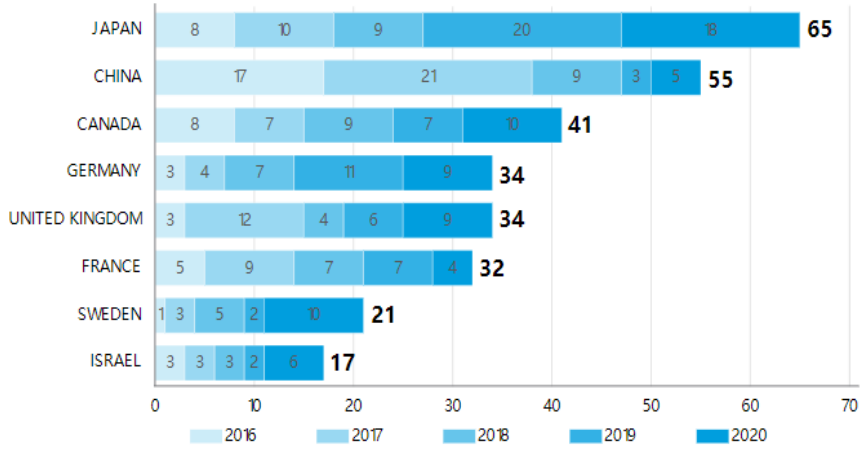

Fig. 1. Number of filings CFIUS has received for investment transactions involving key U.S. technology companies [13] The Basis of Establishing Investor Relief System

3 The Basis of Establishing Investor Relief System

As mentioned earlier, the overall tendency of the national security review system has become stricter, as evidenced by the expanded scope of the review, the extended review process, and the politicized consideration of the nationality of investors in the review. For investors, the tendency of tightening the security review system means that the risk and uncertainty of cross-border investment will increase, and investors' confidence in investment will be undermined; for the global economy, the restrictions imposed on the inflow of foreign capital will actually constitute a trade barrier, which will lead to a reduction in the efficiency of global capital flows and is not conducive to global economic recovery.

Under this premise, it is particularly meaningful to discuss the issue of investor remedy channels in the foreign investment security review system. The following article will discuss the legal principle basis for establishing investor relief channels from the following two perspectives.

3.1 The requirement of the principle of balance

In the era of irreversible economic globalization, economic investment links between countries have become indivisible, and the demand for free movement of capital is obvious. Therefore, the principle of freedom of investment has been widely recognized in the long-term national investment practice; while the highly liberalized capital flow brings development opportunities to the host country, it also brings threats to its national security, and it is necessary for the host country to protect its legitimate rights and interests by restricting foreign investment that may bring risks. Therefore, the theoretical core of the national security review system for foreign investment is to eliminate investments that may harm national security by reviewing foreign investment on the basis of the policy of investment liberalization, so as to achieve a balance between the interests of "investment liberalization" and "national security of the host country".

According to the discussion in the section "Recent Trends in National Foreign Investment Security Review Systems," the current national foreign investment security review system has become stricter overall and has significantly increased restrictions on investors. These new changes will hit the enthusiasm and confidence of investors from investing across borders, thereby undermining the mobility of global capital and the liberalization of investment. This trend will tip the scales in favor of the host country's national interests, breaking with the original institutional philosophy of the balancing principle.

Based on this, building corresponding investor relief channels in the national foreign investment security review system will help change the current unbalanced situation. Giving investors a certain channel of remedy afterwards will help limit the host country's abuse of the security review system, protect the legitimate rights and interests of investors in the process of foreign investment review, thus restoring investors' confidence in investment, promoting the development of investment liberalization and restoring the original balance of the system.

3.2 The requirements of OECD's "Accountability Principle"

The "principle of accountability" is derived from the OECD's "Guidelines on National Security-Related Investment Policies of Investment Recipient Countries" issued in May 2009. In this guide, the principle of accountability, along with the principles of non-discriminatory treatment, regulatory balance, and transparency, are listed as the four basic principles that OECD members should follow when taking national security review measures in the area of investment. In the report, the OECD states that "allowing investors to review measures restricting foreign investment through judicial proceedings can increase their accountability more directly" and that host countries "should actively participate in and support these accountability mechanisms, particularly international accountability mechanisms that can limit discriminatory policies "[14]

At the heart of the principle of accountability lies "accountability". It is argued that accountability is generally understood as the obligation of individuals or collective actors to explain and prove the legitimacy of their actions to other actors or institutions, or be punished if they do not have sufficient reasons to justify their actions.[15] From this perspective, the principle of accountability emphasizes that the state should bear the burden of proof for its security review behavior. From the perspective of legal theory, security review still has the characteristics of specific administrative acts in essence. According to the principle of "unity of power and responsibility" in administrative law, review institutions should be responsible for the administrative acts they implement. To sum up, the power of the state to conduct security review of foreign investment should have a corresponding internal supervision and accountability mechanism, that is, investors should be allowed to seek relief to ensure that security review meets the requirements of the principle of accountability.

4 Choice of Investor Remedy Model: A Procedurally Actionable Remedy Model Should be Established

Disputes arising from national security reviews are essentially international investment disputes arising between host governments and overseas investors. Here, this paper focuses on the investor remedy model based on the domestic justice of the host country.

In the aforementioned "Rationale" section, this paper has already discussed the necessity and significance of establishing a channel for investor redress in the current context. But the further question is whether the court's decision on national security review should be reviewable for both the substantive and procedural contents of the decision, or only for the procedural issues of the decision? In academic terms, the former is known as the "fully justiciable model" while the latter is the "not fully justiciable model".

This article believes that the incomplete litigation model has its unique advantages and has positive significance in both the feasibility of judicial review and the promotion of investor activism, and therefore should become a model for the corresponding relief system. The following interview discusses this.

4.1 For the judiciary: higher feasibility

In the fully justiciable model, the court has the right to review both the procedural flaws in the security review process and the substantive content of the security review decision. This model appears to provide investors with a more comprehensive remedy, but there are questions about its feasibility. In terms of substance, the foreign investment security review decision revolves around "whether the investment is likely to endanger the national security of the country", and the ultimate substantive reasons for rejecting the investment must involve specific national security matters. As a professional administrative organ, the review authority is obviously more professional in handling matters related to national security than the court. According to the "principle of mutual independence between the judiciary and the administration" of administrative law, the judiciary should maintain a certain degree of modesty and respect the professional judgment of the administrative organs for matters belonging exclusively to the administrative field; at the same time, national security matters often involve state secrets, and it is difficult for the court to really touch the substantive content of the security review decision in the process of judicial review. It is difficult to judge the substantive content, which leads to the failure of the legislative purpose of the fully indictable model.

In contrast, the incompletely actionable model avoids the potential barriers to reviewing substantive issues because the court only has the power to review procedural defects in the security clearance process. For procedural issues, there is no professional barrier for the court to judge the legality of the decision procedure, which is more feasible.

4.2 For investors: enhance predictability

The OECD has reported that settlements are often reached in national security reviews between host country government departments responsible for reviewing foreign investment access and investors, rather than requiring government departments to change their substantive decisions. This phenomenon in fact reflects that due to the vagueness of the "national security" standard, it is difficult for investors to foresee the outcome of litigation, so they do not want to spend a lot of time and energy to directly challenge the review decision at the substantive level, but to achieve their investment objectives through softer means such as communication and negotiation or changing their investment plans. Under the incomplete litigability model, investors are more likely to predict the outcome of litigation because they have a clearer idea of whether their procedural rights will be compromised. This is conducive to enhancing their foresight of the success rate of litigation and promoting their active use of the remedy system to protect their legitimate rights and interests, so that investors will remedy channels can really play a role in protecting investors' rights and interests and promoting investment liberalization.

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