From CFIUS to Outbound Investment Screening: Paradigm Shift and Legal Challenges of the U.S. Investment Screening Regime

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Abstract: Amid the expanding purview of national security and transforming international economic governance, the United States' outbound investment security review mechanism is undergoing a profound transformation—from a traditional territorially defensive paradigm centered on the Committee on Foreign Investment in the United States (CFIUS) to a new, extraterritorially proactive paradigm characterized by outbound investment screening. Through a systematic examination of the evolutionary trajectory and underlying legal logic of this paradigm shift, this article analyzes the legal foundations, core elements, and procedural features of the U.S. outbound investment security review mechanism. It further explores the multiple challenges that this transformation poses to both domestic and international legal orders. The study aims to provide theoretical support and strategic guidance for China's responses from the perspectives of enhancing the resilience of the rule of law and advancing institution-based openness.

Keywords: CFIUS; Outbound Investment Screening; Paradigm Shift

1. Introduction

Under the macro-level backdrop of deglobalization and shifting great-power geopolitical competition, the international investment legal framework is undergoing the most profound paradigm transformation since the end of the Second World War. Since the establishment of the Bretton Woods system, this framework has long upheld the core principles of liberal access and non-discrimination, aiming to facilitate the global allocation of capital through the reduction of administrative intervention. However, with the deep restructuring of the geopolitical landscape, this logic now faces unprecedented challenges. The expansion and instrumentalization of the concept of national security are prompting sovereign states to extend their regulatory reach from traditional border-based trade controls and foreign investment screening to the cross-border outflow of domestic capital.

As a principal source of global capital flows and a key rule-maker, the institutional evolution of the United States carries significant signaling effects. For a long time, the review mechanism centered on CFIUS has constructed a unidirectional defensive system aimed at keeping threats outside national borders. However, with the implementation of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and the recent formal establishment of an outbound investment screening mechanism, the regulatory logic of the United States has undergone a fundamental shift. This transformation is not merely reflected in the expansion of the scope of review from inbound to outbound investment; it also embodies a deeper paradigm evolution—from defensive security protection to proactive decoupling of industrial chains and technological containment.[1]

Examining this paradigm shift carries both theoretical and practical significance. At the theoretical level, it engages with the interpretative boundaries of the "security exception" in international investment law and raises fundamental jurisprudential debates concerning the limits of administrative power expansion, the broadening of national security, and its tensions with multilateral economic and trade rules. At the practical level, this institutional innovation in the United States is likely to trigger legislative convergence among its allies, thereby reshaping the global investment and financing landscape of high-technology industries. For China, which is in the process of advancing high-level opening-up, a thorough analysis of the legal logic and operational mechanisms of this regime is not

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only an urgent necessity for addressing external legal risks, but also an essential pathway for improving its national security legal system and safeguarding its development interests.[2]

2. Paradigm Shifts in U.S. Outbound Investment Screening Regime

Building on the foregoing analysis, it is necessary to further examine the institutional evolution of the U.S. national security review regime in order to more precisely understand the underlying logic behind the emergence of outbound investment screening.

2.1 The Traditional Paradigm: CFIUS-Centered Inbound Investment Screening

When tracing the evolution of the U.S. national security review regime, inbound investment screening centered on CFIUS represents the traditional paradigm that dominated for roughly half a century. Jurisprudentially, this paradigm is grounded in the sovereign authority of the state to regulate economic activities within its territory. Its core rationale is to prevent foreign capital from acquiring control over domestic firms in ways that may generate systemic risks to national security. Since the Committee was established by the Ford Administration in 1975, its statutory authority has been expanded through successive legislative developments, from the Exon–Florio Amendment to the Foreign Investment and National Security Act (FINSA), and later to the Foreign Investment Risk Review Modernization Act (FIRRMA). Yet despite these changes, its basic orientation toward territorially bounded regulation has remained intact.[3]

Under this traditional paradigm, national security review was understood primarily as a gatekeeping mechanism for market entry. Its operation depended on an assessment of the background and affiliations of the acquiring party, as well as the degree of control that the transaction would confer over the target business. The legitimacy of legal intervention derived mainly from the need to protect critical technologies, infrastructure, and sensitive data located within the domestic sphere, thereby preventing actors deemed threatening to national security from penetrating strategically important sectors. At this stage, a dynamic balance was maintained between the principle of free capital movement and sovereign intervention in the name of national security, with the territorial border serving as the principal legal boundary. Regulatory scrutiny focused primarily on inbound capital, whereas outbound domestic capital was governed through alternative regulatory tools, such as export controls and sanctions, rather than through direct investment screening.[4] Such institutional self-restraint reflected, in essence, a market-based order's respect for the autonomy of private actors in allocating capital.

The enactment of FIRRMA in 2018, however, marked the point at which this traditional paradigm began to reach the limits of its underlying logic. Although FIRRMA significantly broadened CFIUS's discretion by extending review to certain non-controlling investments, it remained fundamentally a defensive and reactive mechanism. As global value chains became increasingly modularized and innovation factors more mobile, reliance on static territorial safeguards over domestic assets proved increasingly inadequate to address the risks embedded in outbound capital flows, including tacit knowledge transfer and the strengthening of foreign supply-chain capabilities. In this sense, a regulatory design rooted in territoriality revealed inherent limitations in responding to the cross-border diffusion of strategic capabilities under conditions of globalization. These limitations, in turn, provided both the practical impetus and the jurisprudential basis for the subsequent shift toward an outbound investment screening paradigm.[5]

2.2. Paradigm Shift: The Rationale for Establishing an Outbound Investment Screening Regime

The formal establishment of an outbound investment screening regime does not represent a marginal adjustment to the traditional national security review function. Rather, it reflects a profound restructuring of the legal rationale underpinning national security regulation in response to the evolving landscape of global competition and the risks associated with it. This paradigm shift begins with a recognition, grounded in regulatory practice, of the functional limitations of traditional policy instruments.[6] Under the previous regulatory framework, U.S. efforts to restrict the transfer of advanced technologies relied primarily on export controls, which regulate cross-border transfers of controlled items and technologies, and on

CFIUS review, which focuses on ownership and control over domestic entities. In the context of deeply integrated global value chains, however, the channels through which technology is transferred have become increasingly intangible.[7]

U.S. policymakers have gradually come to view outbound capital flows not merely as financial transactions, but as carriers of a broader set of strategic resources, including reputational endorsement, managerial expertise, access to global innovation networks, and follow-on financing opportunities. The capability-enhancing effects associated with such capital flows may significantly accelerate technological development in recipient states in critical sectors such as semiconductors, quantum information, and artificial intelligence, thereby weakening the effectiveness of export controls as a border-based instrument of containment. On this view, the starting premise of outbound investment screening is a shift in regulatory focus from the protection of static assets to the restraint of dynamic capability formation. By severing capital linkages, the regime seeks to impose targeted constraints on the underlying innovation ecosystems of strategic competitors.

More fundamentally, this paradigm shift reflects a significant movement in risk assessment away from a control-centered approach and toward one focused on strategic spillovers. Under the traditional paradigm, the legitimacy of legal intervention was confined to threats arising from foreign investors' acquisition of control over domestic entities. By contrast, under the logic of outbound investment screening, national security risk is redefined in terms of the capability-enhancing effects generated when U.S. capital is invested abroad. On this view, even non-controlling minority investments and early-stage venture capital may generate systemic risks, because they help identify promising projects and connect firms to broader industrial and financial networks, thereby strengthening a strategic competitor's military or dual-use technological capabilities. This increasingly anticipatory and expansive conception of risk has driven a fundamental shift in screening standards, from transaction-specific security concerns to the broader objective of preserving U.S. technological leadership.

3. The Institutional Framework of the U.S. Outbound Investment Screening Regime

In light of the preceding analysis of the evolutionary trajectory and institutional logic of the U.S. national security review regime, it is necessary to further examine the multidimensional implications arising from this transformation.

3.1 Legal Foundations

The U.S. outbound investment screening regime is grounded primarily in Executive Order 14105, signed by the Biden Administration in August 2023. This Executive Order does not function as a self-standing legal instrument. Rather, its legal authority derives principally from the International Emergency Economic Powers Act (IEEPA). By invoking IEEPA, the President declared a national emergency with respect to what was characterized as an "unusual and extraordinary threat" to U.S. national security arising from the advancement of countries of concern in critical sectors such as semiconductors, quantum information technologies, and artificial intelligence. This lawmaking approach, which relies on presidential discretion in foreign affairs and national security, bypasses the need for a lengthy congressional legislative process and reflects both the emergency-oriented basis of the regime and its pronounced political character.[8]

More broadly, the legal framework of this mechanism is evolving from a primarily executive-order-based arrangement toward a more institutionalized structure. In addition to the Executive Order, the U.S. Department of the Treasury has issued a Notice of Proposed Rulemaking (NPRM), together with subsequent regulatory measures developed on that basis, which provide the operative legal framework for the regime. This combination of executive action and agency rulemaking grants regulators considerable flexibility, enabling them to adjust the scope of review in response to changing geopolitical conditions. Although members of Congress have sought to formalize the regime through legislative proposals such as the National Critical Capabilities Defense Act (NCCDA), the current framework remains anchored in an administrative regulatory system led by the Treasury Department under presidential authority. The distinctiveness of this legal foundation lies in its direct subjection of cross-border capital flows in the economic sphere to national security regulation, thereby effecting a shift from the sphere of private

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commercial transactions to that of national security governance.[9]

3.2 Core Elements

The effectiveness of the outbound investment screening regime rests on three core dimensions: jurisdictional scope, sectoral coverage, and geographic reach. First, with respect to jurisdiction, the regime adopts a personal-jurisdiction approach centered on the concept of "U.S. persons." Under the relevant rules, this term encompasses not only U.S. citizens, permanent residents, and entities organized under U.S. law, including their overseas branches, but also extends, through a logic aimed at preventing knowledge spillovers, to foreign affiliates that are owned or controlled by U.S. persons. This expansive approach to personal jurisdiction extends regulatory oversight over cross-border investment activity beyond territorial boundaries, requiring multinational investment behavior to comply with the home state's national security review requirements and thereby challenging the traditional primacy of territoriality in international law.[10]

Secondly, in terms of sectoral coverage, the regime targets three strategic sectors deemed capable of producing transformative effects: semiconductors and microelectronics, quantum information technologies, and artificial intelligence. Unlike the more broadly defined notion of sensitive assets under the traditional CFIUS framework, outbound investment screening adopts more stringent, technology-specific thresholds. In the semiconductor field, for example, the scope of review extends beyond fabrication itself to areas such as electronic design automation (EDA) software, advanced packaging, and high-end manufacturing equipment. This threshold-based approach reflects an effort to use capital restrictions to cut off pathways for technological advancement by strategic competitors.

Finally, the designation of countries of concern constitutes the geographic element of the regime. In legal terms, this single-country design exhibits a clearly discriminatory regulatory orientation and appears difficult to reconcile with the most-favored-nation principle under the World Trade Organization framework. Through this precise alignment of a specific country with specific sectors, the United States has effectively transformed outbound investment screening into a targeted geoeconomic instrument, whose core design is fully oriented toward a strategy of selective decoupling.

3.3 Procedural Features

At the level of procedural design, the outbound investment screening regime represents a fundamental departure from the traditional operation of investment review, exhibiting salient features of self-assessment and dual-track regulation.

First, the regime adopts a dual-track structure that distinguishes between prohibited transactions and notifiable transactions. [11] Transactions that may enable countries of concern to achieve breakthrough capabilities in highly sensitive sectors are subject to outright prohibition, whereas other transactions that may pose potential security risks trigger mandatory notification obligations for investors. This differentiated regulatory approach seeks to strike a balance between the prohibitive costs of comprehensive decoupling and the systemic risks of regulatory inaction, while affording the Treasury Department procedural flexibility to calibrate intervention measures according to varying levels of risk.

Second, the regime front-loads stringent compliance obligations onto investors. Unlike the CFIUS framework, which primarily operates through a government-initiated "review-and-clearance" model, outbound investment screening more closely resembles a self-assessment system grounded in strict legal liability.[12] Prior to initiating a transaction, multinational investors are required to undertake extensive due diligence to determine whether the contemplated investment falls within restricted technological thresholds or involves covered entities. Given the significant legal indeterminacy surrounding key definitions—such as the scope of artificial intelligence—this procedural design effectively generates a chilling effect, whereby investors, in order to avoid potential administrative penalties or the risk of forced divestment, may preemptively withdraw from or abandon investment projects situated in sensitive areas.

Third, the review process is characterized by a high degree of penetrative oversight and ex post enforceability. The U.S. Department of the Treasury is endowed with broad investigative powers, including the authority to require parties to disclose underlying technical details,

ownership structures, and subsequent cooperation arrangements. Even after a transaction has been completed, regulatory authorities retain the power to impose remedial measures, including mandatory divestment, where misleading representations are identified or national security concerns are implicated. This procedural framework not only strengthens the state's capacity for real-time oversight of cross-border capital flows, but also establishes an implicit barrier to market entry through legal uncertainty, thereby reshaping the procedural boundaries of legitimacy in international investment and financing.

4. Legal Challenges Stemming from the Paradigm Shift

The paradigm shift toward outbound investment screening gives rise to a set of legal challenges that extend beyond the traditional framework of U.S. national security review. It therefore necessitates a systematic evaluation of the regime's legality, its constitutional and administrative limits, and its compatibility with international legal obligations.

4.1 Challenges to the Legality of Executive Power

The rapid implementation of the U.S. outbound investment screening regime through executive measures has demonstrated a high degree of political efficiency. At the same time, however, it raises serious questions under core principles of U.S. constitutional and administrative law.

First, the regime has triggered intense debate over the limits of executive power and the constitutional legitimacy of broad statutory delegation. The principal legal basis of Executive Order 14105 lies in the International Emergency Economic Powers Act (IEEPA), which grants the President broad authority to regulate international economic transactions during a declared national emergency. Yet transforming emergency powers—originally designed to address temporary and unexpected external threats—into a long-term and institutionalized mechanism for regulating capital allocation in specific technological sectors arguably extends IEEPA beyond its original statutory design. From the standpoint of administrative law, this use of emergency powers in place of ordinary legislation bypasses functions constitutionally assigned to Congress and thus raises concerns under the separation of powers. In particular, against the backdrop of renewed attention to the nondelegation doctrine in recent U.S. constitutional jurisprudence, extensive executive intervention in the allocation of private capital on the basis of broadly framed national security authority raises serious questions as to the regime's constitutionality.

Furthermore, the procedural design of the regime raises serious due process concerns. Due process requires regulatory standards to provide sufficient clarity and fair notice so as to guard against arbitrary administrative action. Yet within the outbound investment screening framework, key concepts—such as artificial intelligence, quantum information technologies, and entities affiliated with countries of concern—are defined in the Notice of Proposed Rulemaking (NPRM) in terms that remain notably broad and indeterminate. This elasticity in terminology grants the Treasury Department broad discretionary authority and creates a compliance dilemma for multinational investors, who cannot reliably assess the legality of contemplated transactions on the basis of clear legal standards. In this context, strong administrative intervention may materially impair private property interests, particularly decision-making autonomy over capital allocation. Moreover, given the limited availability and effectiveness of judicial review, together with the opacity of review standards, the legal order risks shifting away from rule-based governance toward one increasingly driven by administrative discretion, thereby undermining legal certainty as a foundational element of the rule of law.

4.2 Compatibility and Conflict with International Trade and Investment Rules

At the level of international law, the establishment of the outbound investment screening regime creates substantial tensions with both the multilateral trading system and the framework of bilateral investment treaties (BITs).

First, when assessed under the legal framework of the World Trade Organization (WTO), the regime appears difficult to reconcile with the principle of non-discrimination. By adopting an exclusionary design directed at specific countries, Executive Order 14105 and its implementing rules may raise issues under core GATS obligations, particularly those concerning market access and most-favored-nation treatment. Although the United States has sought to justify

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such measures by invoking the security exception in Article XIV bis of the GATS, the scope of that exception and the extent to which it is self-judging remain deeply contested in international legal scholarship. In recent years, WTO dispute settlement practice—most notably in Russia–Traffic in Transit—has indicated that such exceptions are not wholly immune from review, but remain subject to limited objective scrutiny, particularly with respect to good faith and certain threshold conditions. Against this backdrop, whether investment restrictions organized around geopolitical considerations can satisfy the legal standard of protecting essential security interests remains doctrinally uncertain.

Second, the regime creates significant friction with the standards of protection contained in existing international investment agreements. Key standards of protection in international investment law—most notably fair and equitable treatment (FET)—are intended to provide investors with a stable and predictable legal environment and to guard against arbitrary or discriminatory state conduct. By imposing administrative restrictions that may disrupt pre-existing investment arrangements or prospective investment plans, and by coupling such measures with onerous notification and disclosure requirements as well as possible divestment obligations, the U.S. outbound investment screening regime may substantially undermine investors' legitimate expectations. In international arbitral practice, such measures might, in particular factual settings, be characterized as indirect expropriation or as violations of the obligation to accord fair and equitable treatment.

In essence, the rise of the outbound investment screening paradigm signals a broader shift in international economic governance from a contract-based order toward one increasingly shaped by power considerations. When national security is invoked as an overarching justification capable of overriding economic commitments, the risk of structural erosion within the international investment law regime becomes increasingly pronounced. This model, through which sovereign regulation extends into transnational commercial legal relationships, contributes not only to the further fragmentation of the global investment order, but also, through its extraterritorial reach, compels other states to choose between regulatory acquiescence and sovereign countermeasures. The resulting legal turbulence extends beyond the merits of any single regime and points instead to a deeper conflict within the international legal order between security and development as competing normative commitments.

5. Global Implications and China's Strategic Responses

In light of the foregoing analysis of the associated legal challenges, it is necessary to further examine the broader global implications of this paradigm shift and its policy significance. In particular, against the backdrop of structural changes in global investment patterns and regulatory frameworks, China must explore response strategies that safeguard its development interests while remaining consistent with the principles of the rule of law and continued economic openness.

5.1 Global Implications

The emergence of the U.S. outbound investment screening regime has implications that extend well beyond the bilateral economic relationship between the United States and China. It is increasingly reshaping the regulatory environment for cross-border investment and the organization of global value chains. First, the regime has generated notable effects of institutional diffusion and policy convergence. As a central node in global capital flows, the United States' regulatory shift serves as a policy template for other advanced economies. Through platforms such as the Group of Seven (G7) and the U.S.–EU Trade and Technology Council (TTC), the United States has actively encouraged its allies to develop similar outbound investment screening frameworks. The European Union and countries such as the United Kingdom and Germany have already shown signs of policy alignment, seeking to advance coordinated "de-risking" strategies that may develop into a transnational framework for capital restrictions. This multilateral diffusion of the paradigm is pushing international investment governance in a more bloc-based and exclusionary direction, weakening the coherence and stability of the global investment regime and subjecting multinational enterprises to layered compliance obligations across multiple jurisdictions.

Moreover, the outbound investment screening regime may inhibit innovation in global high-technology sectors. Cross-border capital flows

are not merely financial transactions; they also function as conduits for the exchange of technology, talent, and market information. By restricting early-stage investment in specific countries and sectors through executive and administrative measures, the United States may distort the allocation of resources in frontier industries such as semiconductors and artificial intelligence. At the same time, the uncertainty generated by such intervention may produce a chilling effect among investors in technology-intensive sectors. This security-driven approach to the governance of capital flows risks forcing global value chains to navigate difficult trade-offs between efficiency and security, and may contribute to the fragmentation of global innovation networks. For start-up firms that rely heavily on international financing and collaboration, such regulatory barriers may result in significantly higher innovation costs and sharply increased market uncertainty. In this sense, the phenomenon can be understood not merely as a decoupling of capital flows, but as a form of legal and regulatory fragmentation within the global innovation ecosystem.

5.2 China's Strategic Responses

In responding to the cross-border compliance barriers created by the U.S. outbound investment screening regime, China's strategy should not take the form of mere reciprocal retaliation. Rather, it should be grounded in a dual framework of strengthening the resilience of the rule of law and advancing institution-based opening-up.

With respect to its legal toolkit, China should further refine the enforcement and implementation mechanisms of existing regulatory instruments, including the Anti-Foreign Sanctions Law, the Provisions on the Unreliable Entity List, and the Rules on Counteracting Unjustified Extraterritorial Application of Foreign Laws and Measures. By more precisely identifying and responding to instances in which national security review mechanisms are used in ways that unjustifiably prejudice the legitimate rights and interests of Chinese entities, China can develop a credible legal response framework with meaningful deterrent effect. Such countermeasures should not be indiscriminate; rather, they should be implemented in a manner consistent with due process and supported by clear evidentiary standards, so that the protection of national development interests can be pursued within a rule-of-law framework and justified in international legal terms.

More fundamentally, the core of China's response should lie in strengthening domestic innovation capacity and improving the domestic capital-market environment. The rise of outbound investment screening underscores the urgency for China to accelerate progress toward greater technological self-reliance. Through coordinated fiscal, tax, and financial policies, China can foster the development of domestic venture capital (VC) and private equity (PE), thereby alleviating the funding gaps that may arise from the reduced participation of offshore funds, particularly U.S.-dollar funds. At the same time, further capital-market reform should be pursued, including stronger institutional support for platforms such as the STAR Market, in order to provide more resilient and accessible financing channels for firms operating in critical technology sectors. By offering a more stable and supportive institutional environment, China can attract non-U.S. and long-term capital, diversify its sources of investment, and reduce the constraints associated with external pressures for capital decoupling.

Finally, China should continue to advance high-level opening-up and play a more active role in shaping the evolving international investment order. In the face of increasingly restrictive investment environments, China can adopt a more open and engagement-oriented approach in multilateral and plurilateral economic governance. By making use of frameworks such as the Regional Comprehensive Economic Partnership, the EU–China Comprehensive Agreement on Investment, and other bilateral and regional arrangements, China may help promote more transparent, objective, and non-discriminatory standards for investment security review at the international level. Strategically, it is important to differentiate between bona fide commercial investment and politically motivated regulatory intervention, while continuing to improve the business environment through measures such as optimizing the negative list for foreign investment and strengthening intellectual property protection. Through these efforts, China can contribute to more integrated and mutually beneficial economic relationships, thereby responding to the challenges posed by the outbound investment screening paradigm while promoting a more stable, equitable, and rules-

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based system of global economic governance.

6. Conclusion

This study has systematically examined and critically analyzed the evolution of the U.S. national security review regime from a traditional, territorially grounded and defensive paradigm centered on CFIUS to a new, extraterritorial and proactive paradigm characterized by outbound investment screening. It has traced the underlying logic of this transformation and unpacked its institutional restructuring.

Overall, the rise of outbound investment screening can be understood as a manifestation of the transformation of globalization under the pressures of national security concerns. Looking ahead, the reconstruction of international investment rules will require the identification of a new balance within the rule of law—one that reconciles the boundaries of sovereign security with the foundational principles of free trade and contractual certainty.

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