

Foreign Artificial Intelligence Investments and National Security Exceptions in International Investment Law

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Abstract : Recent years have witnessed a boom of foreign investments in the field of artificial intelligence (AI). Foreign investments provide critical capital for AI development but also trigger national security concerns of host states. A notable example is an increasing number of cases in which the Committee on Foreign Investment in the United States (CFIUS) has denied Chinese acquisitions of US technology companies on national security grounds. On July 19, 2018, the Congress has reached a deal on the final draft of a new provision to strengthen CFIUS's authority to review overseas transactions involving sensitive US technology. The question is: how to reconcile the emerging tension between, on the one hand, foreign AI investors' expectations of a predictable investment environment, and on the other hand, host states' regulatory power on national security? This paper provides a methodology to reconcile this tension under international investment law. Based on an examination, the national security exception clauses in international investment treaties and the application of national security justification in investor-state arbitration jurisprudence, the paper argues that a traditional interpretation of the national security exception, based on the necessity concept in customary international law, fails to take into account new risks faced by countries, including security concerns over strategic industries such as AI. To overcome this shortage, the paper proposes to incorporate an integrated national security clause in international investment treaties, which includes a two-tier test: a 'self-judging' test in the pre-establishment period and a 'proportionality' test in the post-establishment period. At the end, the paper drafts a model national security clause for future treaty-drafting practice.

Keywords : foreign investment, artificial intelligence, international investment law, national security exception

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