

Chinese Investment in the United States and U.S. National Security Regulations 中国对美投资及美国国家安全规定

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August 2014

2014年8月

COVINGTON & BURLING LLP

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Introduction to Covington & Burling LLP

科文顿·柏灵律师事务所简介

- Firm Overview 事务所简介
 - Established in 1919; more than 850 lawyers worldwide
成立于1919年；在世界各地有850多名律师；
 - Consistently ranked among the top law firms by *U.S News-Best Lawyers*, *Chambers Global* and *Chambers Asia Pacific*
一直被《美国新闻—最佳律师》、《钱伯斯全球》和《钱伯斯亚太》杂志评为顶级律师事务所之一
 - Headquartered in Washington, D.C.; lawyers and advisors include many former officials from the State Department, Treasury Department, Commerce Department and Justice Department
总部设在华盛顿特区；我们的律师和顾问包括许多的美国国务院、财政部、商务部、司法部等部门前任官员
- CFIUS Practice 美国外国投资委员会（CFIUS）相关业务
 - Successfully handled many of the leading Chinese transactions
成功地处理过许多著名的中国对美投资交易
 - Lenovo (联想)—IBM; PC (2005) & x86 Server businesses (2014)
 - CIC (中投)—AES
 - CNOOC (中海油)—Chesapeake Energy (2011) & Nexen (2013)
 - Wanxiang(万向)—A123 Systems
 - Greenland Holdings (绿地公司)—Forest City

Trends in CFIUS Matters

CFIUS的趋势

- China accounting for more transactions than any other country 涉及中国的交易多过其他任何国家
 - Greater diversity of sectors – leading to more hard cases 更多样化的行业——导致更复杂的情况
- Very compliance and process-oriented 十分着重合规和程序
 - Longer timeframes to complete CFIUS process 完成CFIUS程序需更长的时间
 - Transition at senior levels in Administration also slowing cases 政府高层的过渡也拖慢了进程
- Principal challenging issues in recent transactions:近期交易中的主要棘手问题:
 - Cybersecurity – especially for critical infrastructure 网络安全——尤其是关键基础设施
 - “Proximity” considerations – how close are assets to sensitive U.S. government facilities (e.g., military facilities)? “邻近”考虑——资产与敏感的美国政府设施（如军事设施）有多邻近？
- Energy sector more in focus 能源行业更受关注
 - DOE more active participant and DOD takes lead in cases with proximity 能源部是更积极的参与者，国防部在邻近情形中起主导作用

Background Primer on CFIUS

CFIUS 背景介绍

- Committee on Foreign Investment in the United States created in 1975 to monitor foreign investments.
为监督外国在美投资，美国于1975年成立美国外国投资委员会。
- Exon-Florio Amendment adopted in 1988. Foreign Investment and National Security Act of 2007 (“FINSA”) was adopted July 2007. 《埃克森-弗罗里奥修正案》于1988年得以通过。《2007年外国投资与国家安全法案》于2007年7月通过。
- Authorizes President to block mergers, acquisitions and takeovers that threaten U.S. “national security” provided:
总统被授权阻止威胁美国“国家安全”的兼并、收购和接管，前提是：
 - the threat cannot be mitigated; and
威胁不能得以缓和；以及
 - provisions of law other than Exon-Florio Amendment and International Emergency Economic Powers Act of 1977 do not provide adequate and appropriate authority for the President to protect national security.
其他的法律不能为总统提供保护国家安全的充分适当权限。
- Exon-Florio *only* triggered if foreign person acquires control over a U.S. business and there is a nexus to U.S. national security.
《埃克森—弗罗里奥修正案》只有当“外国人士”对一家美国企业获得控制、而且事关美国国家安全时才会适用。

Composition of CFIUS

CFIUS的成员单位



CFIUS Process

CFIUS 的程序

- “Voluntary” joint filing
“自愿” 联合申报
- Initial 30-day review of transaction
为期30天的初始交易审查
- If all members believe that no national security threat exists, or threat has been mitigated, CFIUS decides within 30 days not to open an investigation
如果各单位都认为交易没有对国家安全构成的威胁，或威胁已经被降低，则CFIUS将在30天内做出不启动调查的决定
 - But presumption of investigation for foreign government-controlled enterprises
但是对外国政府控制的企业往往有强烈的应该展开调查的推定
- If one or more agencies perceive a threat that has not been mitigated, CFIUS conducts an investigation for an additional 45 days, followed by Presidential decision within 15 days
如果一家或多家单位认为威胁并未降低，则CFIUS将展开为期45天的调查;而美国总统将于之后的15天内做出决定

What is a Foreign Person?

“外国人士”的定义

- Foreign person means:

“外国人士”指：

- any foreign national, foreign government, or any foreign entity*; or
任何外国公民、外国政府或任何外国实体*；或者
- any entity over which control is exercised or exercisable by a foreign national, foreign government or foreign entity (i.e., U.S. subsidiaries or U.S. “controlled” companies)
任何受控于或可受控于外国公民、外国政府或外国实体的实体(即美国子公司或美国“受控”公司)

* “foreign entity” means “any branch, partnership, group, or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the U.S. or its equity securities are primarily traded on one or more foreign exchanges”

“外国实体”是指依据外国法律成立的任何分支机构、合伙公司、集团或集团下属单位、协会、遗产、信托、公司或公司部门、或组织，如果其主要经营场所在美国境外，或其股权证券主要在一个或多个外国交易所进行交易

What is a U.S. Business?

“美国企业”的定义

- Includes business unit or elements of a going concern (e.g., facilities, employees, customer lists, IP)
包括企业单位或具备持续经营要素的单位(例如设施、雇员、客户清单、知识产权)
- Includes a U.S. subsidiary of a foreign parent company
包括外国母公司在美国的子公司
- Joint ventures may be subject to review if the U.S. company contribution is a business or line of business
如果美国公司是以其业务或业务线出资时，合资企业也可能受到审查
- “Greenfield” investments are not covered
“绿地”投资不在审查的范围内

What is Control?

“控制”的定义

- Ability to “determine, direct, take, reach, or cause decisions” re: important matters
对重大事务有“确定、下达、做出、达成或促成决策”的能力
- No bright line test; definition takes into account many different factors
没有明确的界定; 考虑各种不同因素的功能化定义
 - Factors include percentage ownership, but no minimum threshold
包括所有权比例等因素, 但无最低标准
 - Voting counts more than equity
投票权比股权更重要
 - Number of directors is an important factor
董事数量也是一个重要因素
 - Nature of the transaction and identity of the parties are important
交易的性质和各方的身份很重要
- Debt, leases, contracts do not create control
债务关系、租约和合约不构成控制
 - But “debt” can be control if structured like equity
但是“债务”如被设计为类似于股权, 则可能构成控制
- Certain minority rights protected – e.g., power to prevent sale or pledge of all or substantially all assets; anti-dilution rights
某些小股东权利受到保护—例如, 阻止出售或抵押全部或实质全部资产的权利, 反稀释权等
 - CFIUS may find other minority protections to be non-controlling on a case-by-case basis
视具体案件而定, CFIUS有时也会将其他标准的小股东权利保护视作非重大因素

What is National Security?

何谓“国家安全”？

- Not precisely defined, but there are factors listed in law and regulations:
没有精确定义，但有列入法律法规的考虑因素：
 - Securing defense industrial base
保护国防工业基地的安全
 - Protecting critical technologies
保护关键技术
 - Protecting critical infrastructure (including energy assets)
保护关键基础设施（包括能源资产）
 - Assuring the government and defense supply chain
保障政府和国防供应渠道
 - Compliance with important U.S. national security policies (counter-terrorism, nonproliferation, export controls)
遵守美国重要的国家安全政策（反恐、不扩散、出口管制）
 - Government ownership
政府所有权

What is National Security? (cont'd)

何谓“国家安全”？（续）

- **Additional factors in practice:**

实践中考虑的其他因素：

- **USG customers and/or access to USG systems**
美国政府是否为其用户和/或是否能进入美国政府电脑系统
- **Classified contracts**
保密合同
- **Industry and assets (e.g., critical infrastructure)**
行业及资产（例如：关键的基础设施）
- **Supply chain security**
供应链安全
- **Information assurance/cyber security**
信息保证/信息安全
- **Law enforcement interests (e.g., in data or telecom networks)**
执法利益（如：数据或电信网络）
- **Competition (other sources of supply)**
竞争（其它可获得的供应渠道）
- **Compliance record of U.S. company**
美国公司的合规记录
- **Reputation of home country**
所在国的声誉
- **Investor's reputation, including for compliance**
投资者的信誉，包括合规记录
- **Management, including current or past ties to foreign military**
管理层现在或以前与外国军方的关系
- **Commitment/ties to U.S. market**
对美国市场的承诺/与美国市场的联系
- **Business in other countries (e.g., Iran)**
与其他国家的生意往来（例如：伊朗）
- **Financing**
融资

Categories of Real Estate Investments – Covered Transaction? 房地产投资类别——管制的交易？

- Categories of investments:
投资类别:
 1. Investment in real estate fund
房地产基金投资 → Low (no control)
低（无管制）
 2. Development-stage opportunities
开发阶段的机会 → Low (no existing business)
低（无现有企业）
– But see Greenland – Forest City
但参见Greenland-Forest City案例
 3. Acquisition of a mature property
成熟房地产收购 → High
高
- Likelihood covered by CFIUS:
受CFIUS管制的可能性:

**But decision to file will be based on existence of national security issues.
但申报的决定将基于国家安全问题的存在。*

Conditions for CFIUS Approval: Mitigation Agreements

获得CFIUS批准的条件：缓解协议

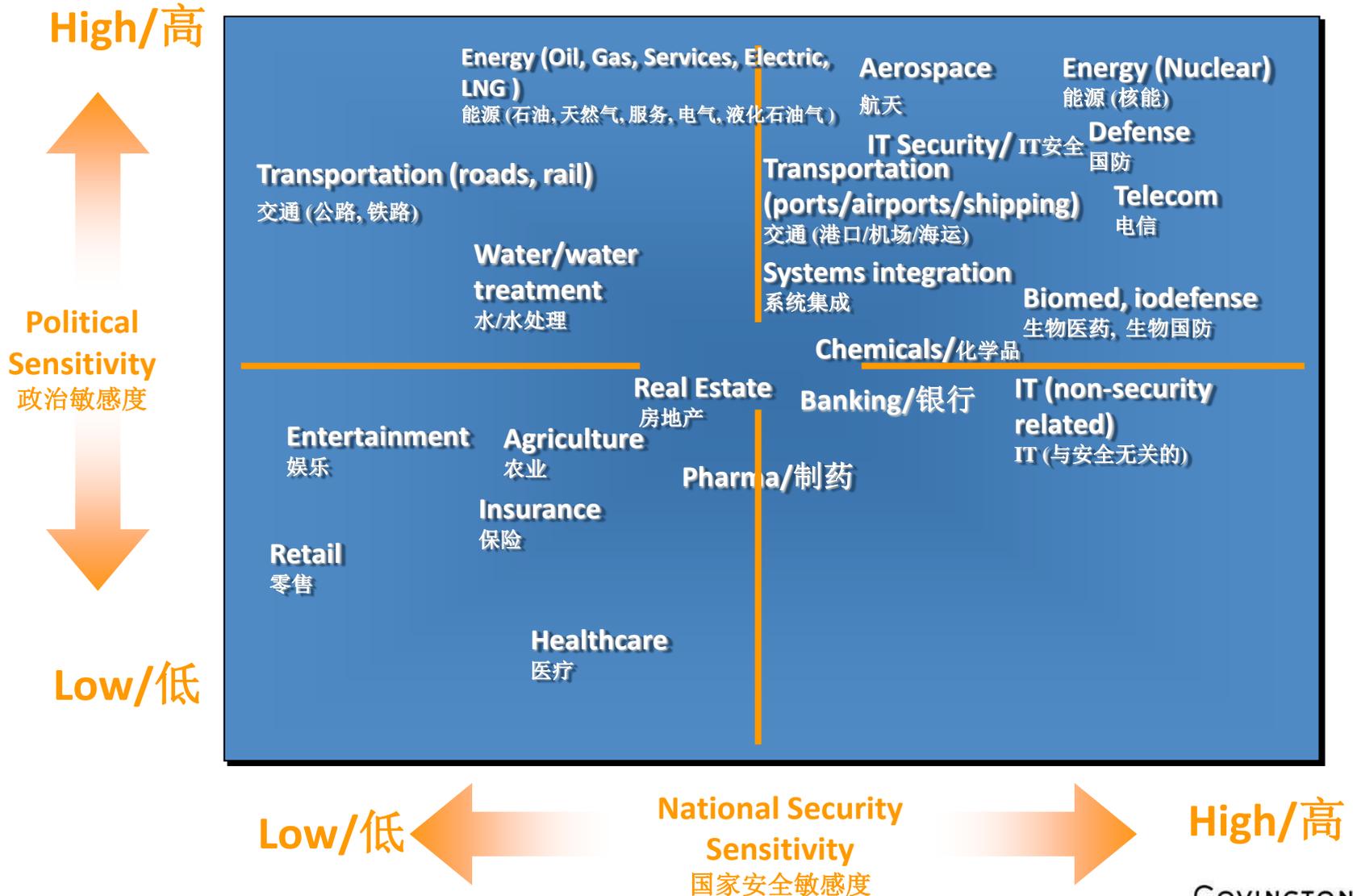
- If CFIUS concludes there is a threat to national security, it considers whether threat can be mitigated through agreement with the parties (from one-page letters to 50-page contracts)
如果CFIUS认定存在国家安全威胁，则会考虑能否通过与当事方的协议来缓解威胁（有短达一页的信函，也有长达50页的合同）
- Potential elements / 潜在要素：
 - Governance requirements – e.g., U.S. citizen officers or directors; appointment of a “security officer”
治理要求 — 如，美国公民高管或董事；为公司委派一名“安全高管”
 - Security commitments – e.g., maintenance of security measures or participation in security programs
安全承诺 — 如，采取安全措施或参与安全计划
 - Administrative processes – recordkeeping and reporting obligations
行政程序 — 记录和报告义务
 - Compliance checks/monitoring – e.g., government inspection or third-party audit
合规检查/监控 — 如，政府检查或第三方审计
- Important issue in transactional negotiations: What level of mitigation must the investor accept and still be required to complete the transaction?
交易谈判中的重要问题：什么级别的缓解是投资者必须接受的，而且是完成交易所必需的？

Managing Political and Public Affairs

管理政治和公共事务

- Investors need strategies for both Congress and Executive Branch, as well as managing public affairs
投资者不仅需要管理公共事务的策略，还需要与国会和行政部门两者交往的策略
 - Understanding the political and public landscape, as well as the Executive Branch regulatory approval process, is critical to success
了解政治和公共领域，以及行政部门的监管批准程序，是获取成功的关键一步
- Recognize that there may be many stakeholders that can be helpful or that can stir controversy
需要认识到：可能存在许多有益的或可能激起争议的利益相关方
 - Employees – union relationships
雇员—工会关系
 - Local officials – state and local governments
当地官员—州及地方政府
 - Congressional Committees
国会委员会
 - Third parties
第三方
 - Think tanks 智囊团
 - Rivals 竞争对手
 - Other interest groups
其他利益集团

Sensitivity of Target / 并购目标的敏感度



Comparison of CNOOC-Nexen and Wanxiang America-A123 Systems 对比中海油-尼克森和万向美国-A123 案件

- Similarities:

相似点:

- Reputational risk for each buyer.
每位收购方的声誉风险
- Each deal offered patient capital and important investment to the U.S. with the potential to save or grow jobs.
每一交易均可为美国提供长期资本和重要投资，并有可能保留或增加就业机会
- Both transactions faced some opposition within DOD.
两桩交易均在一定程度上遭到国防部的反对
- CFIUS administrative challenges.
CFIUS行政挑战

Comparison of CNOOC-Nexen and Wanxiang America-A123 Systems

对比中海油-尼克森和万向美国-A123 案件

- Differences:
不同点:

- Wanxiang faced stronger political obstacles – competitive bid situation with rival actively seeking to interfere in CFIUS and in Congress; sensitivities over DOE grants
万向面临更强的政治障碍---竞争性招标，且对手公司积极努力干预CFIUS和国会决定；能源部的拨款具有敏感性
 - Nexen – modest letter-writing from small number of Congressional members.
尼克森 – 来自少数国会议员的保守意见
- Nexen faced deeper security concerns 尼克森面临更深层次的安全隐患
 - Wanxiang – sensitive assets ultimately carved out of transaction that was reviewed by CFIUS; no proximity concerns.
万向 – 经CFIUS审查，敏感资产最终从交易中剥离；不存在临近性担忧
- Wanxiang anticipated and addressed security issues in deal structure
万向能够在交易结构中预见到并处理好安全问题
 - CNOOC-Nexen deal focused largely on other jurisdiction (Canada), not U.S.
中海油-尼克森达成了着重于其他司法辖区（加拿大）的交易，而非美国

Ralls Transaction

Ralls交易

- In September, 2012, President Obama issued an Executive Order prohibiting a transaction – only the second such formal order in history
2012年9月，奥巴马总统签发了禁止交易的行政指令，这是有史以来第二个该等正式的指令
- Transaction details:
交易详情：
 - In March 2012, Ralls indirectly acquired four Oregon wind farm projects
2012年3月，Ralls间接收购了俄勒冈州四家风电厂项目的所有权
 - Wind farm was located near restricted air space at Naval Weapons Systems Training Facility
风电厂靠近美国海军武器系统训练场的禁飞区
 - Parties did not file with CFIUS and closed the transaction
双方没有向CFIUS申报，即进行了交割
- CFIUS required filing after transaction closed and ordered certain interim protections to protect national security, including prohibiting further construction and requiring demolition of existing construction
CFIUS要求在交易完成后申报，并命令采取特定临时性保护措施以保护国家安全，包括阻止进一步施工并要求拆除现有建筑

Ralls Transaction

Ralls交易

- President's order codified protections required by CFIUS and ordered divestment within 90 days
总统命令使得CFIUS要求的保护入法，并命令在90天内出售资产
- Ralls sued CFIUS and President –judicial rulings in USG's favor
Ralls起诉了CFIUS和总统-做出了有利于美国政府的司法判决
- Appeals court recently ruled in Ralls' favor
上诉法院近期作出有利于Ralls的裁决
 - Procedural rather than substantive decision
程序而非实体决定
 - Court held that Ralls was entitled to opportunity to view and rebut unclassified evidence
法院认为，Ralls有权获得察看和反驳非机密证据的机会。
 - Decision did not question President's authority to block transactions or his national security determination
裁定未质疑总统阻止交易或进行国家安全认定的权限
 - Major changes to CFIUS process unlikely; may become slightly more transparent with respect to unclassified information
CFIUS程序发生较大变动的可能性不大；就非机密信息而言可能变得比以前稍稍更加透明

Lessons from Case Studies

案例分析总结

- **Careful planning /细心规划**
 - **Anticipate and address issues – critical for parties to anticipate and solve problems**
事先预料并处理问题 - 预料到并解决好相关问题对双方均及其重要
 - **Informal briefings with key agencies to prepare CFIUS for filing and solicit potential questions**
向主要部门进行非正式汇报，让CFIUS对申报有所准备，并征询可能提出的问题
- **Proactive engagement of regulators and political actors**
主动接触监管部门及政客们
 - **Both parties must cooperate to address questions, U.S. seller can use its relationships**
买卖双方必须通力合作来应对问题，美国卖家可以利用他们的关系
- **Significant benefits of not having rival bidders**
没有竞价对手是很大优势

Additional Strategies for Managing Legal and Political Challenges

处理法律和政治问题的策略

- **Understand risks and invest strategically in commercially, legally and politically viable projects**
了解风险，有策略地对于在商业、法律和政治方面可行的项目进行投资
- **Take a long-term view and understand regulations**
着眼长远，了解法规
- **Enhance transparency; develop a strong compliance culture**
加强透明度；建立健全的合规文化
- **Consider the effect in the U.S. of business outside of the U.S.**
考虑在美国境外的业务在美国境内可能造成的影响
- **Invest in U.S. operations and develop relationships**
投资在美国的业务，发展关系
- **Develop a comprehensive strategy to manage political risks**
制订管理政治风险的全面策略

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