

# China's Take on National Security and Its Implications for the Evolution of International Economic Law

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## Abstract

This article explores the concept of national security in China's legal system and the potential impact for the future of international economic law. By mapping the legal evolution of the concept, this article argues that its expansion reflects China's changing role in global politics and the global economy. When 'national security with Chinese characteristics' is unpacked, we can find multi-dimensional concerns about a stable and prosperous China. While China displays no intention to challenge the current international economic legal order, this article argues that China has created the foundation to develop a mechanism to project its concept of national security through the Belt and Road Initiative. In this alternative order parallel to the current one established with the US dominance, economic development is considered as an integral part of peace and security.

Key words: national security, China, investment screening, new international economic order, geoeconomics

## Introduction

The rapid rise of China in the global economy has posed challenges to the current international economic legal order. Xi Jinping's more proactive 'new type of international relations'<sup>1</sup> and the corresponding concerns of the US are evident in the recent trade disputes.<sup>2</sup> In responding to the worries of China's unique economic governance and industrial policies, the invocation of national security exceptions in current international trade and investment disputes has increased as never before.<sup>3</sup> While

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<sup>1</sup> Wang Yi, *Build a New Type of International Relations Featuring Win-Win Cooperation - China's Answer to the Question "Where Are the International Relations of the 21st Century Heading"*, Speech of the Minister of Foreign Affairs of the People's Republic of China, 20 June 2016, available at [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/wjbz\\_663308/2461\\_663310/t1376908.shtml](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1376908.shtml) (last visited 15/10/2020).

<sup>2</sup> See Robert E. Lighthizer, *2018 Trade Policy Agenda* (March 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> (last visited 15/10/2020)

<sup>3</sup> See Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order*, 22 J. Int'l Eco. L. 655 (2019); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 Yale L. J. 1020 (2019); and Lizzie Knight & Tania Voon, *The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China*, 21(1) J. World Invest. Trade 104 (2020).

the majority of legal writers focus on how the national security exceptions should be interpreted and applied in the current regime,<sup>4</sup> a few scholars frame the clash between national security and international economic law as a paradigm shift towards geoeconomics characterized by a great power rivalry between the United States and China and the clear use of economic tools to achieve strategic goals.<sup>5</sup> In this context, some writings further argue that China is competing with US hegemony with the intention to create a ‘new international economic order’.<sup>6</sup> In the geoeconomic competition of the 21st century, China offers an alternative model of trade integration and governance, which is built on infrastructure and private law contracts and dispute settlement mainly through its Belt and Road Initiative (BRI).<sup>7</sup> This Chinese model of the international economic legal order, it is argued by some, is based not on neoliberal ideology grounded in the current international legal order, but on a state-led, pragmatic governance model in which security is intimately connected to economic development.<sup>8</sup>

This article will take a similar approach to explore China’s take on national security and its potential impact on the future of international economic law. The first section will deconstruct the Chinese concept of national security. It will start with the evolution and legalization of national security in Chinese law. This section will map the expansion of the concept against China’s changing role in global politics and the global economy to offer a broader understanding of the concept’s evolution.

The second section will focus on the legislation related to the interaction between China’s national security and international economic law. It will first examine the national security review mechanism for foreign investment and a similar path of expansion of the national security concept. Two subsequent laws, the Provisions on Unreliable Entity List (UEL) and the Export Control Law (ECL), will also be introduced. China’s Ministry of Commerce (MOFCOM) stressed that the UEL regime is not intended

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<sup>4</sup> See Jaemin Lee, *Commercializing National Security: National Security Exceptions’ Outer Parameter under GATT Article XXI*, 13 Asian J. WTO & Int’l Health L. & Pol’y 277 (2018); Joel Slawotsky, *The National Security Exception in US-China FDI and Trade: Lessons from Delaware Corporate Law*, 6:2 Chinese J. Comp. Law 228 (2018); Tania Voon, *The Security Exception In WTO Law: Entering a New Era*, 113 AJIL Unbound 45 (2019); Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 Mich. J. Int’l L. 109 (2020);

<sup>5</sup> See Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *supra* n. 3.

<sup>6</sup> Gregory Shaffer and Henry Gao, *A New Chinese Economic Law Order?* J. Int’l Eco. L. 1 (2020); also see Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (2019) and Heng Wang, *Selective Reshaping: China’s Paradigm Shift in International Economic Governance*, 23:3 J. Int’l Eco. L. 583 (2020).

<sup>7</sup> *Ibid.* Shaffer and Gao, also see Jiangyu Wang, *China’s Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law*, 14:5 Global Trade and Customs Journal 222 (2019).

<sup>8</sup> Lina Benabdallah, *Contesting the International Order by Integrating it: The Case of China’s Belt and Road Initiative*, 40 Third World Quarterly 92, 100 (2019); Julien Chaisse & Mitsuo Matsushita, *China’s ‘Belt And Road’ Initiative: Mapping the World Trade Normative and Strategic Implications*, 52:1 J. of World Trade 163, 184-185 (2018); Anastas Vangeli, *The Normative Foundations of the Belt and Road Initiative*, in Normative Readings of the Belt and Road Initiative: Road to New Paradigms 59 (Wenhua Shan, Kimmo Nuotio, and Kangle Zhang 2018); and William A. Callahan, *China’s “Asia Dream” The Belt Road Initiative and The New Regional Order*, 1:3 Asian J. Comp. Politics 226 (2016).

to target any particular country or entity.<sup>9</sup> However, the timing of its introduction and the emphasis on anti-boycott (i.e. prohibiting from complying with the regulations on sanction of another country) arguably aims to provide the basis for more comprehensive tit-for-tat retaliation by the Chinese government in response to a series of U.S. Executive Orders and political actions relating to Huawei, TikTok, and WeChat.<sup>10</sup> In the same vein, while the ECL enacted in October 2020 establishes China's first comprehensive framework for restricting exports, its potential to be used to limit outbound flow of goods, services and data will be analysed under the geoeconomic competition.

The last section of this article will discuss whether China's national security approach is compatible with its current international economic agreements as well as the implications for the future of international economic law. The interpretation of security exceptions in the WTO jurisprudence and international investment law will be reviewed first to lay the groundwork. Essential security exceptions in regional and bilateral trade and investment agreements involving China will also be studied. The expansive scope of China's national security concept goes beyond what is included in the security exception under the current international economic law. This article will argue, however, that China is unlikely to challenge the current application of the security exception. Instead, the impacts of China's national security concept will be on the future evolution of international economic law.

### **Evolution and Legalization of National Security in China**

National security has formed a centrepiece of China's policy-making ever since the Communist state was established in 1949. At that stage, the safety of its territory, the consolidation of the new regime and the nation's ideological unification were the main concerns in the Chinese security agenda.<sup>11</sup> Later during the Cold War, the nation's security was managed by adopting an isolationist policy of self-reliance. Economic, technological, and environmental elements, which are widely considered part of national security today, were hardly recognized in the country's official security documents.<sup>12</sup> Nevertheless, along with China's economic development domestically and internationally, the concept of national security in China today has expanded from military security (domestic and external) interests to include economic and development interests. Thus any issue that might seriously influence China's economic development, such as the supply of resources or a core technology, could be perceived as a core national security issue. China's growing overseas economic presence also adds new elements to

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<sup>9</sup> Xinhua News Agency, *China's Regulation on Unreliable Entities List Not Targeting Particular Country or Enterprise: MOC*, [http://www.xinhuanet.com/english/2020-09/24/c\\_139394186.htm](http://www.xinhuanet.com/english/2020-09/24/c_139394186.htm) (last visited 03/12/2020).

<sup>10</sup> Qingxiu Bu, *China's Blocking Mechanism: The Unreliable Entity List*, 19:3 J. Int'l Trade L. & Pol'y 159, 159 (2020).

<sup>11</sup> Wu Baiyi, *The Chinese Security Concept and Its Historical Evolution*, 10 J. Contemp China 275, 276 (2001).

<sup>12</sup> *Id.*, 277.

its evolving national security. This section will review the trajectory of the expansion of China's concept of national security.

Starting from the late 1980s, policy planners and academics started to revise China's security strategy.<sup>13</sup> The legalization of national security in China correspondingly started with the establishment of a legal drafting panel by the Ministry of State Security in 1987.<sup>14</sup> The first National Security Law (NSL 1993) was adopted in 1993. The NSL 1993 responded largely to the 'external interference' threatening China's existence. According to Jia Chunwang, the then Minister of State Security, when reporting about the legislation to the National People's Congress, China's national security was exposed to three categories of threats: (a) sabotage committed by foreign intelligence agencies that were increasingly serious; (b) anti-social Chinese individuals who sought foreign support; and (c) some Chinese individuals who sold intelligence to foreigners for money.<sup>15</sup> National security was thus limited to external interference at this stage.

Article 4 of NSL 1993 defined acts jeopardising national security as those committed by 'institutions, organizations or individuals outside the territory of the People's Republic of China, or by other persons under the instigation or financial support of the aforementioned institutions, organizations or individuals, or by organizations or individuals within the territory in collusion with institutions, organizations or individuals outside the territory.' The acts jeopardising national security included: (1) plotting to subvert the government, dismember the State or overthrow the socialist system; (2) joining an espionage organization or accepting a mission assigned by an espionage organization or by its agent; (3) stealing, secretly gathering, buying, or unlawfully providing State secrets; (4) instigating, luring or bribing a State functionary to turn traitor; and (5) committing any other act of sabotage jeopardising State security. Thus, the concept of national security under NSL 1993 addressed narrowly intelligence leaks or espionage linked to organizations or individuals outside China, while purely domestic subversive activities fall within the scope of Criminal Law.<sup>16</sup>

With the significant structural transformation in the international system and domestic economic system in the 1990s and early 2000s, China's national security faced multiple pressures. Firstly, international society entered into a unipolar stage with US hegemony. Secondly, domestic security was given a higher

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<sup>13</sup> Congyan Cai, *Enforcing a New National Security China's National Security Law and International Law*, 10 J. E. Asia & Int'l L. 65, 78 (2017).

<sup>14</sup> *Ibid.*

<sup>15</sup> The National People's Congress of the People's Republic of China, *Introduction to the National Security Law of the People's Republic of China (Draft)* (关于《中华人民共和国国家安全法(草案)》的说明) [http://www.npc.gov.cn/wxzl/gongbao/1992-12/22/content\\_1481252.htm](http://www.npc.gov.cn/wxzl/gongbao/1992-12/22/content_1481252.htm) (last visited 15/10/2019).

<sup>16</sup> H L Fu and Richard Cullen, *National Security Law in China*, 34 Colum J Transnat'l L. 449, 454 (1996); and Jacques deLisle, *Security First-Patterns and Lessons from China's Use of Law to Address National Security Threats*, 4 J. Nat'l Sec. L. & Pol'y 397, 403 (2010).

priority in China's national security, as a result of the 1989 Tiananmen protests and subsequent government crackdown, as well as a sharp rise in unemployment. Furthermore, Chinese leaders faced structural transformation on the international level, with the rise of its national power globally and the acceleration of globalization.<sup>17</sup> With China's gradual incorporation into the world economy and the internal pressure of economic reforms, Chinese scholars and policy makers started to reconceptualize the economic-security relationship and sought linkages between economic growth and national security.<sup>18</sup> In particular, China's over thirty-five years of domestic experience with strengthening security and stability through focusing on economic development has resulted in a strong belief in the necessity of economic growth to maintaining internal order.<sup>19</sup> Against this background, in 2002 Jiang Zemin introduced China's 'new national security' concept which views threats as not just military or political but also economic and development-related.<sup>20</sup>

During Hu Jintao's government from 2002 to 2012, new international and domestic developments impacted China's national security. On the military side, China's maritime security became another major concern.<sup>21</sup> The accession to the World Trade Organization in 2001 sped up the pace of market liberalization for China. Over the next decade, with the deeper integration within the global market, China's national identity was transforming from a regional great power into a global great power. Accordingly, China's national security strategy was also adjusted in response to these changes. The 'China's Peaceful Development' White Paper published in 2011 'advocates a new thinking on security featuring mutual trust, mutual benefit, equality and coordination, and pursues comprehensive security, common security and cooperative security.'<sup>22</sup> This new thinking of security calls for international cooperation in economic, military and development matters.

Up to this stage, the updated concept of national security was not reflected in law. As part of the broader effort to legalize national security, China established the National Security Commission in 2013, one year after Xi Jinping came into power. With Xi himself as its chair, aided by Premier Li Keqiang and Congressional President Zhang Dejiang, the National Security Commission is the country's highest authority in all key national security issues.<sup>23</sup> This reflects a critical step towards 'top-level design' and

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<sup>17</sup> Chen Ou, *The Characteristics of China's National Security*, 4 J Pol & L 84, 89 (2011).

<sup>18</sup> See Wang Zhengyi, *Conceptualizing economic security and governance: China confronts globalization*, 17 Pacific Rev. 523 (2004).

<sup>19</sup> Lina Benabdallah, *China's Peace and Security Strategies in Africa: Building Capacity is Building Peace?* 16:3-4 African Stud. Q. 17 (2016).

<sup>20</sup> Wu, *supra* n. 12, at 281.

<sup>21</sup> Chen, *supra* n. 18, at 90.

<sup>22</sup> The State Council Information Office of the People's Republic of China, *China's Peaceful Development* (September 2011), <https://www.scio.gov.cn/zxbd/nd/2011/Document/1006416/1006416.htm> (last visited 15/10/2019).

<sup>23</sup> You Ji, *China's National Security Commission: Theory, Evolution and Operations*, 25 J. Contemporary China 178, 183 (2016).

the consolidation of China's security policy-making system.<sup>24</sup> In the first Plenary Session of the Commission in 2014, Xi Jinping highlighted eleven types of national security concerns to be managed by it, which cover the fields of politics, territory, military, economy, culture, society, science and technology, information, ecology, nuclear, and natural resources.<sup>25</sup> These national security concerns form part of a new concept of the 'overall national security outlook' proposed by Xi Jinping in the same meeting.<sup>26</sup> As China faced a more complicated internal and external security environment than 'at any other time in history', Xi stressed that the Commission must take into account both domestic and external security issues, both traditional and non-traditional security issues and both development and security issues when making decisions on national security. In this context, Xi pledged 'a path with Chinese characteristics' to ensure the country's national security.<sup>27</sup>

The development of an alternative view on national security is not completely new in China. Since Jiang Zemin proposed the 'new security concept' in the late 1990s, officials and scholars have adopted a series of new phrases, including 'a new security concept,' 'common security,' 'collective security,' and 'confidence building' to describe China's own approach to security.<sup>28</sup> The expanded concept of national security proposed by Xi reflects China's expanding role and interests globally. To maintain domestic economic growth and stability, which has always been the top priority for the Chinese Communist Party (CCP), China has to meet its growing need for import of energy and raw materials.<sup>29</sup> Domestic pressures especially arise from strong concerns about meeting the expectations of how the Chinese leaders should protect and promote Chinese citizens, investments and activities abroad, and in the process show willingness to demonstrate or even use China's economic and military capabilities to shape the international environment where Chinese companies and citizens are operating.<sup>30</sup> According to Chinese Foreign Minister Wang Yi, China's growing overseas economic presence represents an emerging 'offshore China', and safeguarding such an 'offshore China', which forms an important part of overall Chinese national interests, is becoming a core task of China's foreign policy.<sup>31</sup>

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<sup>24</sup> Jian Zhang, *China's new foreign policy under Xi Jinping: towards 'Peaceful Rise 2.0'?*, 27 *Glob. Chang. Peace Secur.* 5, 11-12 (2015).

<sup>25</sup> Xinhua News Agency, *China to follow specific national security strategy* (习近平: 坚持总体国家安全观 走中国特色国家安全道路) (15/04/2014), [http://www.xinhuanet.com/politics/2014-04/15/c\\_1110253910.htm](http://www.xinhuanet.com/politics/2014-04/15/c_1110253910.htm) (last visit: 10/10/2019).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Hongying Wang and James Rosenau, *China and Global Governance*, 33 *Asian Perspect.* 5, 21(2009).

<sup>29</sup> Camilla Sørensen, *That Is Not Intervention; That Is Interference with Chinese Characteristics: New Concepts, Distinctions and Approaches Developing in the Chinese Debate and Foreign and Security Policy Practice*, 239 *China Q* 594, 598 (2019).

<sup>30</sup> *Ibid.*

<sup>31</sup> Jian Zhang, *China's new foreign policy under Xi Jinping: towards 'Peaceful Rise 2.0'?*, 27:1 *Global Change, Peace & Security* 5, 10 (2015).

In the context of international security, there has been a consistent pattern of emphasising collaboration and ‘partnership’ with other states.<sup>32</sup> Chinese officials and analysts often criticize Western thinking about national security characterized by geopolitical considerations, especially what they call ‘the cold war mentality.’ Instead, they argue, states must develop new approaches to address the common security of the world and they should be based on mutual trust and cooperation.<sup>33</sup> This view of international security reflects Chinese policy makers being convinced that their methods of ensuring stability and security through economic development at home should also be applicable abroad.<sup>34</sup> In essence, this understanding of security highlights that improving living standards by creating more jobs, reducing poverty, implementing more development projects is the way to prevent social unrest. As economic development can ensure security, states are encouraged to embrace the China model based on development-first policies which prioritize developmental, infrastructure, and logistics-related projects in light of the pursuit of peace and security.<sup>35</sup> In his 2015 speech to the United Nations, Xi Jinping listed capitalism’s pitfalls: proneness to crises, a lack of moral constraints, and yawning wealth gaps.<sup>36</sup> Countries can avoid capitalism’s traps by relying on, in Xi’s words, ‘both the invisible hand and the visible hand.’ China’s ‘better way’ combines markets’ ability to allocate resources efficiently with a strong role for the state in controlling key sectors, ensuring equitable social and economic outcomes, stabilizing markets, and solving largescale problems.<sup>37</sup>

To provide a legal foundation for implementation of the ‘overall national security outlook’, a new National Security Law was drafted and enacted by the National People’s Congress in 2015 (NSL 2015).<sup>38</sup> Overall, the NSL 2015 reflects China’s new strategic role in the global economy and incorporates the new national security concept. The definition of national security is provided in Article 2 which refers to ‘a situation in which the national regime, sovereignty, unity and territorial integrity, the welfare of the people, the sustained development of the economy and society and other major State interests are not in danger or under internal or external threat, as well as the capacity to ensure a sustained situation of security.’ Chapter II of the NSL 2015 specifies the eleven security concerns raised in the 2014 National Security Commission meeting mentioned above Article 15 reflects the political

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<sup>32</sup> *Ibid.*

<sup>33</sup> Liza Tobin, *Xi’s Vision for Transforming Global Governance: A Strategic Challenge for Washington and Its Allies*, Texas National Security Review (November 2018) 155.

<sup>34</sup> Benabdallah, *supra* n. 20, at 20.

<sup>35</sup> Ilaria Carrozza, *China’s Multilateral Diplomacy in Africa: Constructing the Security-Development Nexus*, in *New Perspectives on China’s Relations with the World*, 142 (Daniel Johanson, Jie Li & Tsunghan Wu, 2019).

<sup>36</sup> Xi Jinping, *Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind* (28 September 2015), [https://gadebate.un.org/sites/default/files/gastatements/70/70\\_ZH\\_en.pdf](https://gadebate.un.org/sites/default/files/gastatements/70/70_ZH_en.pdf) (last visited 23/10/2019).

<sup>37</sup> *Ibid.*

<sup>38</sup> The National People’s Congress of the People’s Republic of China, *Introduction to the National Security Law (Draft)* (关于《中华人民共和国国家安全法(草案)》的说明), 27/08/2015, [http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content\\_1945964.htm](http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1945964.htm) (last visited 15/10/2019).

security concerns in terms of the leadership of CCP and condemns ‘any act of treason, separatism, incitement of rebellion, subversion or incitement of subversion of the people’s democratic dictatorship regime.’<sup>39</sup> Articles 17 and 18 address the military interests of China. Article 19 stipulates that it is the State’s aim to safeguard ‘the basic system of the national economy and the order of the Socialist market economy’ and to complete ‘structures and mechanisms to prevent and dissolve economic security risks, to safeguard the security important sectors, crucial areas, focus industries, major infrastructure and major construction programmes as well as other economic interests that affect the lifelines of the national economy.’ Article 21 addresses concerns about natural resources and energy, Article 22 food security, Article 23 the Socialist culture and traditional Chinese culture, Article 25 information security, Article 29 social stability, Article 30 ecological environment, Article 31 nuclear technology, and Article 32 outer space. Article 33 ensures that the State will ‘adopt necessary measures to protect the security and proper rights and interests of Chinese citizens, organizations and bodies abroad.’<sup>40</sup>

Using broad language to describe the goals of the government, these articles provide guidance to agencies in formulating national security-related policies. For example, Article 25 discusses the need for establishing ‘a network and information security protection system’ with goals such as ‘strengthening the capability to protect network and information security,’ ‘achieving the security and controllability of core network and information technologies, crucial infrastructure and information systems and data in important areas,’ ‘preventing and sanctioning unlawful and criminal online activity’ and ‘maintaining cyberspace sovereignty, security, and the development interests of the State.’<sup>41</sup> The broad scope of the information security informs the later legislation of the Cybersecurity Law which came into effect in June 2017. Article 1 of the Cybersecurity Law makes clear that its aim is to ‘ensure cybersecurity; safeguard cyberspace sovereignty and national security, and social and public interests; protect the lawful rights and interests of citizens, legal persons, and other organizations; and promote the healthy development of the informatization of the economy and society.’ The law clearly approaches cybersecurity concerns as a threat to sovereignty and national security.<sup>42</sup>

In sum, the evolution and legalization process of the national security concept in China has been closely linked with China’s own economic development and changing role in global economic governance. From the initial limited idea based on security of existence, the current concept stressed a broad package of interests to protect in the NSL 2015. Two particular features of the national security with Chinese characteristics are worth noting for the purpose of this article. First, economic development is interconnected with security. This is premised on the expectation that improved development outcomes

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<sup>39</sup> NSL 2015, Article 15.

<sup>40</sup> NSL 2015, Article 33.

<sup>41</sup> NSL 2015, Article 25.

<sup>42</sup> More discussion on China’s concept of cybersovereignty and Cybersecurity Law see Jyh-An Lee, *Hacking into China’s Cybersecurity Law*, 53 Wake Forest Law Review 57 (2017).



will produce more stable states and societies, generating better security outcomes. Based on its own experience of economic reform, China's model emphasises a state-directed, infrastructure-led economic development. Second, it focuses more on the interrelationship between external and internal security challenges. With the growing integration with the global economy, promoting international security is recognized as an aim of the NSL 2015. From a Chinese perspective, international security should be achieved through building a community of common destiny, and BRI is a medium through which the Chinese model of development gets diffused and casts impacts on the future of international economic law.

### **National Security in Chinese Law on International Trade and Investment**

The NSL 2015 not only defines what falls into China's national security concerns but also mandates the security review of 'foreign investment that jeopardises, or may jeopardise, national security,' 'key materials and technologies,' 'internet or information technology products and services,' 'construction projects that implicate national security,' and 'other major projects or events.'<sup>43</sup> It further provides that 'each central state body' should take responsibility for 'national security reviews' and 'supervise the implementation of national security review decisions' for matters falling within its mandate.<sup>44</sup> Three regimes derived from these provisions apply directly to international economic legal issues: the national security review of the foreign direct investment (FDI), the Unreliable Entity List (UEL) and the export control.

#### ***National Security Review***

A national security review has existed in the Chinese FDI legal system long before the enactment of NSL 2015. When the country adopted an open-door policy in 1979, the first FDI related legislation, the Chinese-Foreign Equity Joint Ventures Law 1979, required all foreign investment to obtain approval to enter the Chinese market.<sup>45</sup> Despite not explicitly referring to national security, the reasons not to grant the approval included concerns that the investment might 'jeopardize China's sovereignty' and 'not conform with the requirements of the development of China's national economy.'<sup>46</sup> Similar provisions could also be found in the Detailed Rules for the Implementation of the Law on Wholly Foreign-Owned

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<sup>43</sup> NSL 2015 Article 59.

<sup>44</sup> NSL 2015 Article 60.

<sup>45</sup> The Chinese-Foreign Equity Joint Ventures Law (中外合资经营企业法) 1979, Article 1.

<sup>46</sup> Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (中外合资经营企业法实施条例) 1983, Article 5.

Enterprises 1990<sup>47</sup> and Detailed Rules for the Implementation of the Law on Sino-Foreign Contractual Joint Ventures 1995<sup>48</sup>. Both stipulated that foreign investment would not be permitted to enter the Chinese market if it was ‘detrimental to national sovereignty and public interests’ or ‘hazardous to national security.’ The essence of national security review, therefore, was embedded in the FDI approval procedure.<sup>49</sup>

When China adopted the Provisional Regulations on Guiding Foreign Investment in 1995, market access of FDI was divided into four categories of encouraged, approved, restricted and prohibited investment.<sup>50</sup> The Guidelines stipulated that the Guiding Catalogue of Foreign Investment Projects was to provide the basis for the assessment and approval of FDI projects, which was called Catalogue System. Under the system, the prohibited sectors were those that would ‘jeopardize national security or public interests,’ while the list of restricted sectors implied similar national security concerns.<sup>51</sup> At this stage, the concept of national security in Chinese general legal discourse was still centred on the traditional military and political concerns as discussed above. Thus the national security concept under the foreign investment regulations also reflected such a narrow approach, which is to be separated from a broader ‘public interest’ concern.<sup>52</sup> Some authors even argued that the protection of national security was in fact not the primary concern of China.<sup>53</sup> Rather the purpose of this regulation was to ‘guide the orientation of foreign investment, to keep the orientation of foreign investment in line with the national economy and social development planning of China’.

The first appearance of a process of national security review was found in the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2003,<sup>54</sup> where the Ministry of Foreign Trade and Economic Cooperation was granted the authority to organize a cross-departmental hearing on deals raising national security concerns.<sup>55</sup> While the legal design of the review mechanism

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<sup>47</sup> Detailed Rules For the Implementation of the Law on Wholly Foreign-Owned Enterprises (外资企业法实施细则) 1990, Article 6.

<sup>48</sup> Detailed Rules for the Implementation of the Law on Sino-Foreign Contractual Joint Ventures (中外合作经营企业法实施细则) 1995, Article 9.

<sup>49</sup> On the history of FDI regime, see Kong, Qingjiang, and Cherry Kaiyuan Chen, *Foreign Investment Screening in China*, in: Yearbook of Socio-Economic Constitutions, [https://doi.org/10.1007/16495\\_2020\\_6](https://doi.org/10.1007/16495_2020_6) (2020).

<sup>50</sup> *Id.*, at 11.

<sup>51</sup> Provisional Regulations on Guiding Foreign Investment (指导外商投资方向暂行规定) 1995, Articles 6 and 7.

<sup>52</sup> See K.C. Fung, Hitomi Iizaka & Sarah Tong, *Foreign direct investment in China: Policy, Recent Trend and Impact* 33 Glob. Econ. Rev. 99, 103-104 (2004).

<sup>53</sup> Yuwen Li and Cheng Bian, *A New Dimension of Foreign Investment Law in China – Evolution and Impacts of the National Security Review System*, 24 Asia Pacific L. Rev., 149, 156 (2016).

<sup>54</sup> Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (外国投资者并购境内企业暂行规定) 2003, Articles 19 and 20.

<sup>55</sup> Li & Cheng, *supra* n. 72, at 156.

is not the focus of this article, it is worth noting that the concept of national security in the legislation was already extended to ‘major factors which seriously impact market competition, the national economy and people’s livelihood, or state economic security.’<sup>56</sup> The review process was later affirmed in the Provisions on Mergers and Acquisitions of Domestic Enterprises 2006, requiring foreign investors to obtain approval from the Minister of Commerce (MOFCOM) when national security is involved.<sup>57</sup>

The national security review was for the first time provided by law in the Anti-Monopoly Law enacted in 2007.<sup>58</sup> Article 31 provides that a national security review can be conducted along with the primary competition review, but a formal review mechanism was only established by the Circular of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors in 2011.<sup>59</sup> After a six month trial period, MOFCOM issued the Regulation on Implementing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.<sup>60</sup> The review body was a Joint Inter-Ministerial Security Committee, and the National Development and Reform Commission and MOFCOM served as the lead for the review process.<sup>61</sup>

Although the Chinese review mechanism was largely inspired by the Committee on Foreign Investment in the United States, the concept of national security here was much wider than its US counterpart.<sup>62</sup> First, the scope of national security review covered ‘transactions involving important agricultural products, energy and resources, infrastructure facilities, and transportation services[,] core technologies[,] and important equipment manufacturing enterprises.’<sup>63</sup> Secondly, factors triggering the national security review process in China included: (1) national defence security; (2) the stable running

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<sup>56</sup> Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2003, Article 19.

<sup>57</sup> Provisions on Mergers and Acquisitions of Domestic Enterprises (关于外国投资者并购境内企业的规定) 2016, Article 12.

<sup>58</sup> Anti-Monopoly Law (中华人民共和国反垄断法) 2007.

<sup>59</sup> The Circular of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (關於建立外國投資者併購境內企業安全審查制度的通知) 2011, <http://www.mofcom.gov.cn/article/b/f/201102/20110207403117.shtml> (last visited 10/10/2019).

<sup>60</sup> Regulation on Implementing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (商务部实施外国投资者并购境内企业安全审查制度的规定) 2011, <http://www.mofcom.gov.cn/aarticle/b/c/201108/20110807713530.html> (last visited 10/10/2019).

<sup>61</sup> The Circular of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2011, Article 3.

<sup>62</sup> See Souvik Saha, *CFIUS Now Made in China: Duelling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 Nw. J. Int'l L. & Bus. 219 (2012). See also Qingxiu Bu, *The Ralls implications for the National Security Review*, 30 Commer. Law J. 3 (2016).

<sup>63</sup> Circular of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011), Article 1.1.

of China's economy; (3) the basic order of social life; and (4) the capacity of research and development of key technology involving national security.<sup>64</sup> The scope and factors above to be considered clearly went beyond national defence interests and could be understood from a broader context of China's governmental control in key sectors. In 2011, China still maintained the Catalogue System. The prohibited sectors included not only defence but also, for instance, publishing or processing traditional green tea which were often labelled as sectors with economic or cultural security importance.<sup>65</sup> The public interest concern in the past was thus absorbed into the new discourse of 'essential industries' which formed part of China's updated definition of national security.<sup>66</sup>

When the Foreign Investment Law (FIL 2019) was passed at the National People's Congress in 2019, two crucial changes were introduced in terms of this article's focus.<sup>67</sup> First, China started to adopt 'a negative list' with 'pre-establishment national treatment.'<sup>68</sup> That means the Catalogue System was replaced by a negative list, and only foreign investment in sectors listed in the negative list will be subject to special administrative measures regarding market entry. Foreign investment in all other sectors enjoy national treatment in terms of establishment in China. The current (2020) version of the National Negative List includes 33 measures in sectors ranging from rare earth mining, printing of publications, new energy vehicles, telecommunication services, education to film production.<sup>69</sup>

The second crucial change is a general announcement about the security review system, providing the existing national review mechanism with a legal source at higher hierarchy in the legal system when compared with the past practice of regulation or circular.<sup>70</sup> Compared to the final enacted FIL 2019, the draft version circulated in 2015 contained much more detailed provisions on national security review.<sup>71</sup> The draft enumerated ten factors to be considered in security review and an open-ended 'other factor' that the review authority 'deems appropriate to be considered'.<sup>72</sup> These ten factors included the potential impact on national defence, R&D ability for key technologies, leading status of domestic technology, dual-use goods and technology, key infrastructures and key technologies, information and

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<sup>64</sup> Circular of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011), Article 2.4.

<sup>65</sup> Kevin B. Goldstein, *Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities*, 3 *Tsinghua China L. Rev.* 215, 237-240 (2010).

<sup>66</sup> 'China's Peaceful Development' White Paper, *supra* n. 27.

<sup>67</sup> Foreign Investment Law (中华人民共和国外商投资法) 2019.

<sup>68</sup> FIL 2019, Article 4.

<sup>69</sup> Negative Lists for Foreign Investment 2020 (外商投资准入特别管理措施(负面清单)(2020年版), [http://www.gov.cn/gongbao/content/2020/content\\_5532623.htm](http://www.gov.cn/gongbao/content/2020/content_5532623.htm) (last visited 03/12/2020)

<sup>70</sup> FIL 2019, Article 35.

<sup>71</sup> Foreign Investment Law of the People's Republic of China (draft version to solicit opinions) (中华人民共和国外国投资法(草案征求意见稿)), <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml> (last visited 10/10/2019)

<sup>72</sup> Draft FIL Article 57.

Internet security, long-term demand of energy, food and other key resources, whether the foreign investment is controlled by the foreign government, stable functioning of the national economy, and social public interest and public order. The wide scope of national security concerns was appraised by some commentators as providing a necessary buffer for China as the liberalization of its market promised in the new FIL was far-reaching.<sup>73</sup>

The reason for a heavily simplified version of national security review in the FIL 2019 compared to the 2015 draft was not provided in legislative documents.<sup>74</sup> Suspicions from international companies were that China intended to keep the national security review flexible and unclear.<sup>75</sup> However, the omission of detailed rules is generally seen as a sign for delegated legislation later. This view is supported by the review mechanism found in the Measures for the Pilot Program of National Security Review of Foreign Investment in Pilot Free Trade Zones published yearly.<sup>76</sup> The pilot programme follows the same wide scope in the draft FIL and provides a long list of security concerns ranging from defence security to important agricultural products and key technologies and equipment. Although the Implementing Regulations of the Foreign Investment Law enacted in December 2019 remain silent about the national security review procedure, it is expected that an independent regulation on national security review will be introduced in responding to the global trend of FDI security screening legislations.<sup>77</sup>

With the enactment of FIL 2019, an institutional shift is also worth noting. According to a brief notice published online in April 2019, the National Development and Reform Commission (NDRC), a body overseeing economic planning of the whole country, has replaced MOFCOM and is charged with conducting national security reviews.<sup>78</sup> While the official rationale for the change is simply ‘adjustment of departmental responsibility,’ as the NDRC plays a special role in formulating the national economic

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<sup>73</sup> Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices* 13 Berkeley Bus. L.J. 255, 269 (2016).

<sup>74</sup> The National People's Congress of the People's Republic of China, *Introduction to the Draft of Foreign Investment Law of the Peoples Republic of China* (关于《中华人民共和国外商投资法(草案)》的说明), <http://www.npc.gov.cn/npc/c30834/201903/e167985f1a3a449b8815739326e3bd52.shtml> (last visited 10/10/2019).

<sup>75</sup> Amanda Lee, *China tightens 'national security' review for foreign investments, sparking fears of trade war retaliation*, South China Morning Post, 13/05/2019, <https://www.scmp.com/economy/global-economy/article/3010002/china-tightens-national-security-review-foreign-investments> (last visited 17/07/2019).

<sup>76</sup> The Measures for the Pilot Program of National Security Review of Foreign Investment in Pilot Free Trade Zones (国务院办公厅关于印发自由贸易试验区外商投资准入特别管理措施) 2015, [http://www.gov.cn/zhengce/content/2015-04/20/content\\_9629.htm](http://www.gov.cn/zhengce/content/2015-04/20/content_9629.htm) (last visited 10/10/2019).

<sup>77</sup> Xu Ping et al., *Comments on the Implementing Regulations of the Foreign Investment Law* (《外商投资法实施条例》评析), China Law Insight, 6/01/2020, <https://www.chinalawinsight.com/2020/01/articles/crossing-borders/外商投资开启全新时代：《外商投资法实施条例》> (last visited 15/07/2020).

<sup>78</sup> Announcement of the National Development and Reform Commission of the People's Republic of China [2019] No.4 (中华人民共和国国家发展和改革委员会公告 2019 年 第 4 号), 30/4/2019, [http://www.ndrc.gov.cn/zcfb/zcfbgg/201904/t20190430\\_935337.html](http://www.ndrc.gov.cn/zcfb/zcfbgg/201904/t20190430_935337.html) (last visited 10/10/2019).

development strategy, it inevitably raises the political level of security review and might allow more influence from economic development considerations.

The first case of security review under the new law involves a plan of Yonghui Superstores to increase its stake in the state-backed retailer Wuhan Zhongbai Group. Hong Kong-based Jardine Matheson Holding Limited, the sprawling British conglomerate, holds roughly a 20% stake in the majority Chinese-owned Yonghui through its subsidiary Dairy Farm International, and this deal thus falls under the scope of FIL 2019. The NDRC asked Yonghui to file for a foreign investment security review and to submit supplementary documents in August 2019.<sup>79</sup> While there are no official statements published by the NDRC, Chinese legal practitioners suspect the security concern of this review was found in the retailing industry affected by this deal, according to a MOFCOM ‘unofficial’ ‘internal’, i.e. not public, list of 57 sectors that will trigger national security review.<sup>80</sup> Another suspicion from the foreign media linked this request of review to the British nationality of the foreign investors and the anti-government protests in Hong Kong.<sup>81</sup> Whichever was the real concern underlying this case, the non-transparent operation of the NDRC combined with the vague language adopted by FIL 2019 only confirms the wide discretion available to the Chinese government in the national security review procedure.

### ***Unreliable Entities List and Export Control Law***

As early as May 2019, when the US began taking actions against Huawei, a Chinese telecommunication company, the Chinese government made an announcement to put together an ‘unreliable entities list’ of foreign companies and people that ‘block and stop supplying Chinese companies for non-commercial reasons, cause material injuries to Chinese companies or threaten China’s national security.’<sup>82</sup> As tensions have been increasing between China and the US, the Chinese press has described the list as a countermeasure against the long-arm jurisdiction of ‘some countries.’<sup>83</sup> The Provisions on Unreliable

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<sup>79</sup> Yonghui Superstores, *Announcement of the Notification from the National Development and Reform Commission (关于收到国家发展和改革委员会关于外商投资安全审查通知的公告)*, 23/08/2019, <http://static.cninfo.com.cn/finalpage/2019-08-23/1206554780.PDF> (last visited 23/10/2019).

<sup>80</sup> Yu Xigang et al., *FDI Security Review 2.0? (外商投资安全审查 2.0 时代即将到来)*, 04/09/2019, <http://www.zhonglun.com/Content/2019/09-04/1647363311.html> (last visited 23/10/2019).

<sup>81</sup> Asia Times, *China moves to close the door on opening-up*, 28/08/2019, <https://www.asiatimes.com/2019/08/article/china-moves-to-close-the-door-on-opening-up/> (last visited 23/10/2019)

<sup>82</sup> *Spokesperson at the Ministry of Commerce Answered Questions Regarding “Unreliable Entity List” (商务部新闻发言人就中国将建立“不可靠实体清单”制度答记者问)*(31/05/2019), <http://www.mofcom.gov.cn/xwfbh/20190531.shtml> (last visited 15/10/2019)

<sup>83</sup> Xinhua News Agency, *Who will be on the list of ‘unreliable entity list’? Four Factors for Consideration (谁会列入“不可靠实体清单”？中国明确四种考虑因素)* (01/06/2019), [http://www.xinhuanet.com/fortune/2019-06/01/c\\_1124571988.htm](http://www.xinhuanet.com/fortune/2019-06/01/c_1124571988.htm) (last visited 15/10/2019)

Entity List (UEL) was issued by MOFCOM in September 2020.<sup>84</sup> While MOFCOM has not named any specific foreign entity to be included on the list, the Provisions set out a formal mechanism for designating a foreign entity or individual to an UEL which will be subject to, among others, restriction or prohibition from engaging in import or export activities and investment in China.

A special unit in MOFCOM ('the working mechanism') will be established to take charge of the implementation of the UEL regime.<sup>85</sup> Under the Provisions, foreign entities, which will include foreign enterprises, organizations and individuals, engage in the following behaviour may be subject to sanctions:

- (1) endangering national sovereignty, security or development interests of China;
- (2) suspending normal transactions with an enterprise, other organization, or individual of China or applying discriminatory measures against an enterprise, other organization, or individual of China, which violates normal market transaction principles and causes serious damage to the legitimate rights and interests of the enterprise, other organization, or individual of China.<sup>86</sup>

While the first category addresses national security concerns that can also be found in the current export control and sanctions blacklists of the US,<sup>87</sup> the second category targets companies which have cut off supplies to a Chinese company pursuant to sanctions or export control restrictions imposed by other countries. Once a foreign entity is listed, it will be subject to restrictions on import and export, investment, and travel, and the authorities are also empowered to impose administrative fines.<sup>88</sup> The emphasis on anti-boycott is a unique feature of the UEL not seen in other countries' similar regimes.<sup>89</sup> MOFCOM in a press conference stressed that the UEL regime is not intended to target any particular country or entity but rather to maintain the 'normal market transaction principles.'<sup>90</sup> Nonetheless, companies seeking to comply with US sanctions against Chinese individuals or entities, or to cooperate with US civil or criminal investigations into business activities in China, can be readily the target of sanctions.

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<sup>84</sup> The Provisions on the Unreliable Entity List (不可靠实体清单规定), <http://www.mofcom.gov.cn/article/b/c/202009/20200903002593.shtml> (late visited 15/10/2020)

<sup>85</sup> The Provisions on the Unreliable Entity List, Articles 4-5.

<sup>86</sup> The Provisions on the Unreliable Entity List, Articles 2.

<sup>87</sup> Cindy Whang, *Undermining the Consensus-Building and List-Based Standards in Export Controls: What the US Export Controls Act Means to the Global Export Control Regime*, 22:4 J. Int'l Eco. L. 579 (2019).

<sup>88</sup> The Provisions on the Unreliable Entity List, Articles 10

<sup>89</sup> *Bu, supra* n. 10, at 160.

<sup>90</sup> *Spokesperson at the Ministry of Commerce Answered Questions Regarding "The Provisions on Unreliable Entity List"* (商务部条约法律司负责人就《不可靠实体清单规定》答记者问), [http://www.xinhuanet.com/fortune/2020-09/20/c\\_1126516613.htm](http://www.xinhuanet.com/fortune/2020-09/20/c_1126516613.htm) (last visited 1/12/2020)

One month after the release of the UEL Provisions, the Export Control Law (ECL) was passed and took effect on December 1, 2020.<sup>91</sup> The ECL primarily aims to protect China's national security by regulating the export of sensitive materials and technologies that appear on a control list.<sup>92</sup> The ECL is the first comprehensive and consolidated export control legislation in China. It defines China's export control authorities as a joint mechanism of units under both the State Council and the Central Military Commission that perform export control functions.<sup>93</sup> The ECL is perceived as part of a broader effort to build national security authorities and reflects broad justifications for national security-related trade actions.<sup>94</sup> Article 2 of the ECL further provides that controlled items include goods, technologies and services, as well as technical information and data related to the controlled items.<sup>95</sup> The expansive scope of controlled items combined with the development security under NSL 2015 pave ways for China to restrict the cross-border flow of technology, core source code and data of economic strategic importance.

Similar to UEL Provisions, the ECL warns that if any country or region abuses export control measures to harm the national security and national interests of China, China 'may reciprocally take measures based on the actual situation.'<sup>96</sup> Beyond the unveiled threat to foreign governments, this article might also be construed as authorizing the State Export Control Authorities to devise and deploy targeted export restrictions in response to specific foreign export control measures, which further supports the anti-boycott provision in UEL Provisions.<sup>97</sup> These two laws together provide a general framework for economic sanctions and arguably can be used as a retaliatory weapon against the US measures in the ongoing trade war.<sup>98</sup>

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<sup>91</sup> The Export Control Law of the People's Republic of China (中华人民共和国出口管制法), [http://www.xinhuanet.com/2020-10/18/c\\_1126624518.htm](http://www.xinhuanet.com/2020-10/18/c_1126624518.htm) (last visited 1/12/2020)

<sup>92</sup> ECL, Article 1.

<sup>93</sup> ECL, Article 5.

<sup>94</sup> Xinhua News Agency, *Focus on the Export Control Law: Implementing the Overall National Security* (聚焦出口管制法：贯彻总体国家安全观),

<http://www.npc.gov.cn/npc/c30834/202010/9ba0a978e68f403da7ae5a2cfc1ff3b5.shtml> (last visited 1/12/2020)

<sup>95</sup> ECL, Article 2.

<sup>96</sup> ECL, Article 48.

<sup>97</sup> Nathan Bush, Sammy Fang, John Zhang and Ray Xu, *China's New Export Control Law*, <https://www.dlapiper.com/en/us/insights/publications/2020/10/chinas-new-export-control-law> (last visited 1/12/2020).

<sup>98</sup> Bu, *supra* n. 10, at 172.



## **China's National Security and International Economic Law**

The previous section shows that China, through the NSL 2015 and subsequent legislation, has significantly expanded the content and scope of national security concerns and created relevant regimes to protect its national security. Certainly, China is not the only state adopting a broad concept of national security. A survey conducted by the Organization for Economic Co-operation and Development (OECD) in 2016 reports that a number of countries have re-evaluated what national security encompasses and that a broader scope of economic sectors are considered to be potentially national security sensitive, including energy, telecommunications, and healthcare for instance.<sup>99</sup> In addition to the expansion of national security concerns, states also more often invoke national security broadly to avoid the application of international trade and investment obligations.<sup>100</sup> Nevertheless, as the following discussion will show, the current development of international economic legal jurisprudence seems to affirm a narrow interpretation of security exceptions. Is China's updated national security in conflict with the national security exceptions? Would China enforce its security measures regardless of their legality under current international economic law? What would be the implications of China's perception of national security for the future of international economic law? These questions will be addressed in this section.

### ***Assessing China's National Security under its Current International Legal Obligations***

Since China is a member of the World Trade Organization (WTO), Chinese measures with impacts on international trade have to be scrutinized under the WTO Agreements. While there is no such multilateral mechanism in terms of international investment, China has entered into 127 bilateral investment agreements and 22 free trade agreements with an investment chapter.<sup>101</sup> It is this web of international investment agreements (IIAs) that constitute China's international legal obligations regarding FDI policies.

National security historically has been deemed an exception in the international economic legal system and was arguably not subject to any form of judicial review.<sup>102</sup> In WTO jurisprudence and international investment arbitration cases, very few disputes in fact involved the application of the national security exception. This pattern, however, has gone through a dramatic change in recent years.

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<sup>99</sup> Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security*, OECD Working Papers on Int'l Investment 2016/02 (2016).

<sup>100</sup> See the literature cited above nn. 3-4.

<sup>101</sup> UNCTAD, Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy>.

<sup>102</sup> See Heath, *supra* n. 3.

In the WTO, Russia has invoked Article XXI of the General Agreement on Tariffs and Trade (GATT) to justify its measures to block trade between Ukraine, Kazakhstan, and the Kyrgyz Republic that transited through Russia.<sup>103</sup> The US also tried to rely on the same exception to justify its tariffs on steel and aluminium.<sup>104</sup> In both disputes, the US as a third party in *Russia – Transit* and as a Respondent in *US – Steel and Aluminium Products* consistently argued that the national security exception was self-judging and thus non-justiciable by the WTO dispute settlement system. According to the US arguments, only the member invoking the national security exception could determine where the measure taken is in its own essential security interests, and the decision should not be judged by another body. Nevertheless, the Panel Report in *Russia – Transit* did not accept such a viewpoint.<sup>105</sup> The panel determined that actions taken under Article XXI are reviewable as one of the three circumstances laid out in the subparagraphs of Article XXI section (b) occurred at the time of the measure’s imposition and can be objectively assessed. Further, the panel can also objectively determine whether the measure has a plausible connection to the circumstance identified and the essential security interests the Member is seeking to protect.

Regarding the conditions under which national security exceptions can apply, GATT Article XXI(b)(iii) allows WTO members to take otherwise GATT-inconsistent measures ‘in time of war or other emergency in international relations.’ To interpret the meaning of ‘emergency in international relations’, the panel report defines it to be ‘a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.’<sup>106</sup> The panel report further stresses that ‘political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii).’<sup>107</sup> Although *US – Steel and Aluminium Products* is still pending, it might be safe to assume that the panel will take a similar approach as in Panel Report on *Russia – Transit*. Further, the Panel in *Saudi Arabia – IP Rights* (under appeal) essentially adopted the same tests.<sup>108</sup> Based on these cases, the national security exception under WTO law will be expected to apply only in very limited occasions, which all fall into the small remit of military security concerns.

When examining the provisions under China’s NSL 2015, UEL and ECL in light of this development in WTO jurisprudence, an immediate conclusion might be that if China does take trade-restrictive

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<sup>103</sup> Panel Report, *Russia - Measures Concerning Traffic in Transit on Ukrainian Products*, WTO Doc. WT/DS512/R (5/04/2019) [hereinafter *Russia-Transit* Panel Report].

<sup>104</sup> Request for consultations by China, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/1 (09/04/2018) [hereinafter *US- Steel and Aluminium Products*].

<sup>105</sup> *Russia-Transit* Panel Report, para 7.100.

<sup>106</sup> *Russia-Transit* Panel Report, Para 7.76.

<sup>107</sup> *Russia-Transit* Panel Report, Para 7.75.

<sup>108</sup> Panel Report, *Saudi Arabia - Measures concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (16/06/2020).

measures based on the widely-defined national security concerns under NSL 2015, such measures will not likely be accommodated under the WTO security exception. For example, the Chinese government might decide to ban the importation of products of a foreign company on the UEL as the company's operation poses a threat to China's technology security, i.e. the development of a certain technology by Chinese companies.<sup>109</sup> None of the conditions under GATT Article XXI will cover such concerns and there will be no safety valve provided under the WTO law.

On the other hand, China may have much more room for manoeuvre under its current international investment agreements. Since its first bilateral investment agreement with Sweden, China has entered into around 150 IIAs up to now. Nevertheless, around 90% of these IIAs were concluded before 2006. That means, most of China's IIAs contain the so-called 'old generation' IIA clauses where the investor protection clauses are usually vaguely defined and the host country's right to regulate is not mentioned expressly, even though it has to be read into the text of any investment treaty.<sup>110</sup> Two particular elements in IIAs are crucial for our discussion on national security: first, whether the protection granted by an investment treaty is extended to pre-establishment phase; second, whether there is an essential security exception in the IIAs.

As international investment agreements are the source of host country's legal obligations in terms of treatments accorded to foreign investors and investment, the scope of application provided in the treaties decides the reach of these legal obligations. Although market access provisions in investment agreements are common, they do not uniformly provide foreign investors with completely unrestricted or full rights of entry and establishment. Most of the current Chinese IIAs preserve full state control over entry and establishment of FDI, and the protection of national treatment only applies once the investment is established in the host country.<sup>111</sup> In fact, pre-establishment national treatment is only found in two Chinese investment agreements.<sup>112</sup> Accordingly, China's practice of requiring national security review of foreign investment is outside the scope of almost all of its IIAs. Although the FIL 2019 Article 4 states that China will grant pre-establishment national treatment to all foreign investment except for those in the sectors on the negative list, this does not stem from its international obligations under investment law and thus is not reviewable by international tribunals. Moreover, how China exercises its national security review or whether its application of national security factors is arbitrary is also not governed by its international investment agreements.

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<sup>109</sup> UEL Article 7(1).

<sup>110</sup> *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7), also see Suzanne Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. Int'l Eco L. 1037 (2010).

<sup>111</sup> Yu-Ting Ye, *Towards a Balanced and Liberal Chinese Bilateral Investment Treaty Regime in the Context of One Belt One Road*, 41 Hous. J. Int'l. L. 107 (2018).

<sup>112</sup> China – Japan – Korea Trilateral Investment Agreement (2012) and China - Hong Kong CEPA Investment Agreement (2017).

Once foreign investment is established in China, substantive protection regarding expropriation, non-discrimination, fair and equitable treatment and full protection and security should be accorded. Similar to international trade rules, a significant number of international investment agreements contain provisions that allow states to invoke essential security interests in times of necessity. In contrast to the limited conditions provided in GATT Article XXI, the essential security exception clauses in IIAs often loosely allow contracting parties to apply measures that are 'necessary for the protection of its own essential security interests.' The existing arbitration case law construing essential security provisions comes from Argentina's response to the financial crisis of 2001 and 2002.<sup>113</sup> In these cases Argentina argued that it should be exempted from liability on the grounds that a state of necessity or emergency, which was brought on by an economic, social and political crisis, had occurred in Argentina. The tribunals examined the necessity defence under customary international law and, although the tribunals reached different conclusions, they nevertheless all agreed that socio-economic emergencies should not be excluded.<sup>114</sup> Following this interpretation, China's national security concerns could be justified under the IIAs, although arbitral tribunals in individual cases might decide otherwise as there is no central interpretation mechanism in the field of international investment disputes and each IIA contains its own variation of essential security text.

This is not the whole story, however. In fact, only 12 of China's IIAs contain national security or essential security exceptions. Some are very specific and only apply to military security concerns. For instance, in the 2015 China-Korea Free Trade Agreement, each party can take measures to address essential security interests taken in armed conflict or emergency in international relations,<sup>115</sup> while others only provide for measures which the host country considers necessary for the protection of its essential security interests.<sup>116</sup> The most well-structured security exception clause can be found in the 2008 China-Colombia BIT. Article 12 allows parties to adopt or maintain measures 'intended to preserve public order including measures to protect the essential security interests of the State,' provided that such measures:

- 'a) are only applied where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;
- b) are not applied in a manner constituting arbitrary discrimination;
- c) do not constitute a disguised restriction on investment;
- d) are proportional to the objective they seek to achieve;

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<sup>113</sup> Katia Yannaca-Small, *Essential Security Interests Under International Investment Law*, in *International Investment Perspectives: Freedom of Investment in a Changing World* 93 (OECD, 2007).

<sup>114</sup> See William J. Moon, *Essential Security Interests in International Investment Agreements*, 15 J. Int'l Eco L. 481 (2012).

<sup>115</sup> Article 12.14.

<sup>116</sup> For example, China-India BIT (2006) and China - Mauritius BIT (1996).

- e) are necessary and are applied and maintained only while necessary; and
- f) are applied in a transparent manner and in accordance with the respective national legislation.’

When this exception is invoked, Article 12 continues to affirm that the international arbitral tribunal will have the power to review the application. Such a clear approach to essential security exceptions, as mentioned above, is rarely seen. With the majority of IIAs containing no security exception, Chinese measures impacting the operation of established foreign investment will not be excused by essential security concerns. For instance, as the computer service industry is undergoing great technology development, what encompasses core technology and data will also evolve along the time. Technologies not listed as controlled items under the ECL now might be strategically important, and hence of national interest, when new commercial purposes are found. Another example is that the Chinese government may impose controls against particular companies or technologies in which other governments have imposed export controls that affect Chinese entities. Under these scenarios, established foreign investors will be subject to restrictions or prohibitions to participate in trade and investment. If these measures are found to violate IIA protection of foreign investors, China is unlikely to be able to justify them on the basis of an essential security exception.

Thus, in the context of international investment law, China enjoys great liberty to apply its national security concept to review and select foreign investment entering into its territory. However, once the foreign investors have entered into its market, national security is no longer listed as a legitimate reason for China to take measures impeding foreign investors’ interests protected by investment treaties, unless the foreign investors come from countries which have signed IIAs with security exceptions.

The discussion above is made in a context in which national security concerns are treated as an exception in the current international economic law, and as an exception, both its content and application are limited.<sup>117</sup> China’s perception of national security encompasses more than what can be accommodated within the national security exceptions. Nevertheless, China has consistently stated its intention to adhere to the current multilateral system and rules. For example, as a third party of the *Russia – Transit* dispute, China submitted its viewpoints on both the jurisdiction and interpretation issues under GATT Article XXI.<sup>118</sup> Regarding the jurisdiction of the Panel, China took the view that the measures under Article XXI are reviewable by the dispute settlement mechanism.<sup>119</sup> On the interpretation of the national security, China referred to the preparatory work of the GATT and stressed the sensitive nature of the exception as it relates to the sovereignty and security interests of WTO

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<sup>117</sup> On the exceptionalism of national security, *see* Heath, *supra* n. 3.

<sup>118</sup> Addendum of the Panel Report, *Russia - Measures Concerning Traffic in Transit on Ukrainian Products*, WTO Doc. WT/DS512/R/Add.1 (5/04/2019).

<sup>119</sup> *Ibid.*, para 5.

members.<sup>120</sup> Therefore as argued by China when assessing claims relying on the national security exception, a Panel should keep extreme caution to maintain the delicate balance between a WTO member's rights to protect its essential security and any abuse of the exception.<sup>121</sup> In China's opinion, what legitimizes a WTO member's invocation of Article XXI is its 'Good Faith' when deciding to take action to protect its essential security interests,<sup>122</sup> while any bad faith evasion of its WTO obligations should be prevented. It thus follows that China is unlikely to confront the current international trade law by stretching the scope of national security exception to justify its trade-restrictive measures. This is also supported by the official statement made by the MOFCOM when asked about how the UEL will be implemented. According to the MOFCOM spokesperson, China intends to implement the UEL 'in a manner complying with international rules.'<sup>123</sup>

On the other hand, things are not so clear on issues outside the domain of the WTO rules. As analysed earlier, China's FDI national security review mechanism operates on the foundation of its extended scope of security interests and this mechanism is largely not governed by China's current IIA provisions. Nevertheless, the salient impact of the 'national security concept with Chinese characteristics' is expected to be brought through the BRI and define the central feature of a Chinese new economic law order.

### ***The Implications of National Security with Chinese Characteristics***

As highlighted earlier, the national security with Chinese characteristics has two particularities relevant to the discussion here: the emphasis of interconnection between economic and security and a pro-active role of China in promoting international security through economic collaboration and partnership. Since its launch in 2013, BRI is considered by Chinese policy makers and legal scholars as the backbone of an emerging order in which China has become the centre.<sup>124</sup> It is intimately intertwined with Xi's vision for a future community of common destiny and is often touted as a means to reshape the international economic legal order.<sup>125</sup> Callahan, moreover, points out that economic activities under the BRI are

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<sup>120</sup> *Ibid.*, para 8.

<sup>121</sup> *Ibid.*, para 9

<sup>122</sup> *Ibid.*, para 10.

<sup>123</sup> *Spokesperson at the Ministry of Commerce Answered Questions Regarding "The Provisions on Unreliable Entity List"* (商务部条约法律司负责人就《不可靠实体清单规定》答记者问), *supra* n. 93.

<sup>124</sup> Nadège Rolland, *China's Vision for New World Order*, The National Bureau of Asian Research 40-41 (2020). See also An Chen and Dong Chen, *What should be China's Strategic Position in the Establishment of New International Economic Order?: With Comments on Neo-Liberalistic Economic Order, Constitutional Order of the WTO and Economic Nationalism's Disturbance of Globalization*, 10 *The Journal of World Investment & Trade* 359 (2009); Zhao Longyue, *Thoughts on China's Strategy to Participate in Global Governance in the New Era* (新时代中国参与全球治理战略路径的思考), 25 *J. Int'l Eco. L. (China)* 21 (2018); Zeng Huaqun, *Common Development: The initiative on the Bilateral Investment Treaty Practice between China and "One Belt One Road" States* (共同发展：中国与“一带一路”国家间投资条约实践的創新), 26 *J. Int'l Eco. L. (China)* 1 (2019).

<sup>125</sup> Wang, *supra* n. 6, 585.

leveraged to build a tightly-knit community in Asia, which in turns will make China a normative power that sets the rules of the game for global governance.<sup>126</sup>

Nevertheless, some more critical views argue that China is not pursuing proactive international investment policy-making.<sup>127</sup> By examining the IIAs concluded by China, Berger finds that the design of Chinese IIAs is mainly driven by its partner countries' preferences. When negotiating post-2008 IIAs, China does not have model BITs as the starting point. Instead, it adopted a highly flexible approach that heavily depends on who the partner was and whether the partner had model BIT in place. As a result of this particular negotiation strategy, there is no consistent Chinese approach to international investment rule-making, let alone the ambition to create a new legal order.<sup>128</sup> While it is possible that China's practices in IIA negotiations might be different from its policy in BRI, a further analysis of key policy documents that frame the BRI also confirms that China does not have an assertive 'grant strategy' as claimed by some scholars to reconstitute a global or regional order with new norms and rules.<sup>129</sup> Moreover, although a political discourse on global governance was developed in China focusing on the country's role in global affairs, the Chinese practices in recent IIAs show that China's rise has not yet challenged existing international investment law. On the contrary, China has been following the existing norms and institutions developed by the West.<sup>130</sup> Thus, there is no major challenge to the old international economic order yet.

Indeed, the current practice has not shown the picture of a clear, well-defined new international economic legal order to replace the old one. However, even though China does not have a detailed blueprint or a strategy for such a new order, China is poised to build a new order. Some argue that the adherence to the existing norms and institutions is China's strategy to cultivating legitimacy as a responsible power and this gained reputation is to be utilised to push for its own initiatives and norms.<sup>131</sup> Rhetorical emphasis on the importance of respecting international institutions is a signalling technique to ensure that China is not seeking to deviate or uproot the existing order, while the core of BRI is an economic model informed by China's own development experience on offer to the Global South.<sup>132</sup> Referred to as 'selective reshaping', Wang observes that through the BRI China seeks to fine-tune or challenge the existing hard law in respect of traditional issues and to develop standards regarding new

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<sup>126</sup> Callahan, *supra* n. 8, 228.

<sup>127</sup> See Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 *The Journal of World Investment & Trade* 843 (2015).

<sup>128</sup> *Ibid.*.

<sup>129</sup> See Lee Jones, *Does China's Belt and Road Initiative Challenge the Liberal, Rules-Based Order?*, 13 *Fudan J. Hum. Soc. Sci.* 113 (2020).

<sup>130</sup> Dilini Pathirana, *Rising China and Global Investment Governance: An Overview of Prospects and Challenges*, 4 *The Chinese Journal of Global Governance* 122, 143 (2018).

<sup>131</sup> Benabdallah, *supra* n. 8, 98.

<sup>132</sup> *Ibid.*, 99-100; see also Astrid H. M. Nordin and Mikael Weissmann, *Will Trump Make China Great Again? The Belt and Road Initiative and International Order*, 94:2 *Int Aff.* 231 (2018).

issues that fall outside the WTO domain.<sup>133</sup> Even if the aim of the BRI is not to replace the existing norms, the Chinese development model underpinning the initiative and the preference to a separate whole set of China-centred institutional arrangements will lead to a parallel order.<sup>134</sup>

Shaffer and Gao offer a detailed roadmap toward such a ‘new Chinese economic law order.’<sup>135</sup> They observe that China is incrementally developing a loose model of global economic governance through a web of finance, trade, and investment initiatives involving memoranda of understanding, contracts, and trade and investment treaties. Wang holds a similar view that BRI does not have a rigid institutional design while soft law instruments are frequently mobilised in contrast to the current international economic order.<sup>136</sup> In the centre of this web of soft law instruments will be China’s supply-chain and, in this way, China hopes to ‘shift the centre of geopolitical gravity away from the US and back to Eurasia.’<sup>137</sup> This order will develop norms for the substantive areas where China has increased economic and geopolitical interests, concerns and capacity, for example e-commerce, data localisation, investment and infrastructure.<sup>138</sup> Compared to the passive adaptation to the WTO rules, in these areas China seeks more ‘norm entrepreneurship’ in international law in terms of promoting Chinese standards and participating in rule making.<sup>139</sup>

How would China’s national security concept influence this order then? As China assumes the role of rule maker in the BRI, it will seek to reshape the international economic law order to reflect its values, interests and status.<sup>140</sup> Under the geoeconomics framework proposed by Roberts *et al*, four consequences of the rivalry between the US and China will be brought to the international economic field, including an increase in difficulties to agree to new or amendment of existing multilateral rules; movement of trade conflict resolution from legal to political methods; efforts of US and China to create spheres of influence; and convergence of approaches in certain areas.<sup>141</sup> In particular in relation to national security issues, the two countries have moved towards a ‘more politicized and less judicialized’ approach to address national security in international economic law.<sup>142</sup> That is, the room for states to rely on national security to justify policies affecting international economic activities will be wider and is unlikely to be subject to the control of hard legal obligations or independent international tribunals.

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<sup>133</sup> Wang, *supra*. n. 6, at 591.

<sup>134</sup> Pathiran, *supra* n. 152, at 148-149; also see Jones, *supra*. n. 151, 132.

<sup>135</sup> Shaffer and Gao, *supra*. n. 6.

<sup>136</sup> Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. Int’l Eco. L. 29, 41-42 (2019).

<sup>137</sup> Shaffer and Gao, *supra*. n. 6, 31.

<sup>138</sup> Wang, *supra*. n. 6, at 596.

<sup>139</sup> *Id.*, at 597

<sup>140</sup> Weifeng Zhou & Mario Esteban, *Beyond Balancing: China’s Approach Towards the Belt and Road Initiative*, 27:112 J. Contemp. China 482, 498-499 (2018).

<sup>141</sup> Roberts, Moraes & Ferguson, *supra*. n. 3, 16.

<sup>142</sup> *Id.*, 18-19.



For instance, while telecommunication infrastructure contracts are encouraged to connect the Digital Silk Road, a component of the BRI, China still maintains tight control of cross-border data flow to ensure cybersecurity, an element of its national security.<sup>143</sup>

A more salient impact of the ‘national security with Chinese characteristics’ is to provide the normative foundation for the BRI. As discussed, the two particular features of ‘national security with Chinese characteristics’ are the close interconnection between economic development and security and the emphasis of partnership in international security. The BRI is exactly the medium through which China can create a community with common destiny based on norms learnt from its own development path. The BRI instruments place strong emphasis on the key role played by governments’ visible hands in planning and implementing industrial policy in markets, which underpins China’s own domestic experience.<sup>144</sup> Furthermore, a principle central to the BRI is the recognition of the sovereign rights of nations to pursue their ‘own path of national development’ and exercise their ‘national policy rights.’<sup>145</sup> The ideal international economic order will then allow countries to legitimately pursue diverging political and development models. The BRI provides a platform where national governments can agree on particular terms and details of cooperation with China individually and on a case-by-case basis.<sup>146</sup> Each agreement is tailored to the particular developmental needs of the participating state. This is in contrast to the neoliberal Western model of setting up a set of norms and institutions that constrain the role of the state in the economy, imposing certain policies onto participating countries and monitoring their implementation by judicialized dispute settlement. Therefore, in the Chinese international economic order, the concerns of national security are driven by the pursuit of economic development in a manner negotiated between China and the participating states. As the cooperation is individually negotiated, there will be enough flexibility for governmental intervention in the economy and no need to revoke national security exceptions in bilateral agreements in responding to foreign governmental measures threatening economic development as seen in the current trade war.

## Conclusion

Since China joined the WTO in 2001 and actively participated in international investment agreements, the multilateral trading rules have provided guidelines for China’s market reform and trade liberalization; its FDI regulatory regime has also been gradually updated with practices common to Western countries. In parallel with the advance of China’s presence in global trade and investment flows, however, China is now seeking to have a greater voice and representation in the international economic order.

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<sup>143</sup> Jinhe Liu, *China’s Data Localization*, 13:1 Chin. J. Commun. 84, 91 (2020).

<sup>144</sup> Shaffer and Gao, *supra*. n. 6, 1-2.

<sup>145</sup> Vangeli, *supra*. n. 8, 70.

<sup>146</sup> *Id.*, 71.

This article uses China's legal discourse on the national security concept to analyse its potential for offering an alternative economic legal order. When 'national security with Chinese characteristics' is unpacked, we can find multi-dimensional concerns about a stable and prosperous China. China's version of national security encompasses domestic stability and external security, both to be supported by a strong economy and military force. If economic development is an essential element of national security, government interference is necessary and thus heavy involvement of state policy in the markets essential. Whilst China continues to declare its intention to abide by its legal obligations under international economic agreements, new issues outside the mandate of the current regimes are difficult to be accommodated under narrow security exceptions. Through the BRI, China is building up a new normative network by connecting infrastructure projects, private contracts, investment treaties and free trade agreements and soft law instruments. This network will serve as the means to promote the Chinese version of national security in which economic development is an integral element of national security.