



Faculty of Law, University of Macau

IMPLICATION OF MERGER AND ACQUISITIONS BY FOREIGN INVESTORS ON NATIONAL SECURITY IN CHINA

Thesis

To the Faculty of Law, University of Macau

In Candidacy for the Degree of Master

Of Public International Law, European Union Law and Comparative Law

By

GE JUNWEI (M-A6-6122-2)

Supervisor: Prof. MURUGA PERUMAL RAMASWAMY

December, 2008

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
CHAPTER I: INTRODUCTION	1
§1.1 BACKGROUND	1
§1.1.1 <i>Rapidly Growing Foreign Direct Investment</i>	1
§1.1.2 <i>Rising of Cross-border M&A</i>	2
§1.1.3 <i>National Security Issues</i>	3
§1.1.4 <i>Conflict between Restriction and Liberalization</i>	4
§1.1.5 <i>Present Situation of Cross-border M&A in China</i>	5
§1.2 LITERATURE REVIEW	6
§1.2.1 <i>Development of Legal System of Access of Foreign Investment</i>	7
§1.2.2 <i>Use of Foreign Investment and National Security Control</i>	7
§1.2.3 <i>Positive and Negative Influence of Cross-border M&A</i>	8
§1.2.4 <i>Effect of China's Absorption of Cross-border M&A</i>	9
§1.3 OBJECTIVES OF THIS THESIS	10
§1.4 METHODOLOGY	11
§1.5 SCOPE AND LIMITATION.....	11
§1.6 CHAPTER LAYOUT.....	12
CHAPTER II: HOW DOES CROSS-BORDER M&A INFLUENCE NATIONAL SECURITY OF CHINA	14
§2.1 DEVELOPMENT OF NATIONAL SECURITY IN THE ERA OF GLOBALIZATION.....	14
§2.1.1 <i>Rising of Non-traditional Securities</i>	15
§2.1.2 <i>Economic Security Turns into the Most Significant Concern</i>	16
§2.1.2.1 <i>Financial Market Security</i>	17
§2.1.2.2 <i>Domestic Industrial Security</i>	18
§2.1.2.3 <i>Trade Security</i>	18
§2.1.3 <i>Energy Security</i>	19
§2.1.4 <i>Environment Security</i>	20
§2.2 ADVANTAGE AND DISADVANTAGE OF CROSS-BORDER M&A TO NATIONAL SECURITY OF CHINA.....	21
§2.2.1 <i>Positive Implication to National Security Interests of China</i>	21
§2.2.1.1 <i>Influence on National Industrial Security</i>	21
§2.2.1.2 <i>Influence on National Technical Security</i>	23
§2.2.1.3 <i>Spillovers of Human Capital</i>	25
§2.2.1.4 <i>Influence on State-owned Enterprises-Most Important Part of National Economy</i>	25
§2.2.2 <i>Perceived Risks to National Security of China from Cross-border M&A</i>	27
§2.2.2.1 <i>Influence on National Strategic Industrial Security</i>	27
§2.2.2.2 <i>Influence on National Financial Security</i>	29
§2.2.2.3 <i>Influence on National Technical Security</i>	30
§2.2.2.4 <i>Cross-border M&A Supplant National Economy, Result in Erosion of State-owned Asset</i>	31
§2.2.2.5 <i>Monopoly Threats Caused by Cross-border M&A in China</i>	32
§2.2.3 <i>Case Analysis</i>	34
§2.2.3.1 <i>Carlyle (US) Purchase of Xugong (China)</i>	34
§2.2.3.2 <i>Sony's Acquisition of Sobey</i>	36

§2.2.3.3	<i>Arcelor and Mittal's Acquisition of Laiwu Steel Corporation</i>	38
§2.2.4	<i>Summary and Analysis</i>	39
CHAPTER III: MEASURES TO BALANCE NATIONAL SECURITY AND CROSS-BORDER M&A		40
§3.1	CONVENTIONAL DEFENSE MEANS	40
§3.1.1	<i>Industrial Policy Review</i>	40
§3.1.2	<i>Merger Control</i>	41
§3.2	NATIONAL SECURITY REVIEW SYSTEM	42
§3.2.1	<i>Rising Means to Protect National Interest</i>	42
§3.2.2	<i>Make Full Use of the Principle of National Sovereignty</i>	44
§3.2.3	<i>Protect National Interest Comprehensively</i>	46
CHAPTER IV: A COMPARATIVE STUDY OF LEGAL RESTRICTIONS ON CROSS-BORDER M&A IN CONCERN WITH THREAT TO NATIONAL SECURITY		48
§4.1	A RESTRICTION TIDE IN INTERNATIONAL COMMUNITY LED BY SOME IMPORTANT DEVELOPED COUNTRIES	48
§4.1.1	<i>The U.S.</i>	48
§4.1.2	<i>Canada</i>	50
§4.1.3	<i>Australia</i>	50
§4.1.4	<i>Germany</i>	51
§4.1.5	<i>The U.K.</i>	52
§4.1.6	<i>France</i>	52
§4.1.7	<i>Japan</i>	52
§4.2	COMPARATIVE STUDY OF NATIONAL SECURITY REVIEW SYSTEMS OF THE U.S., CANADA AND JAPAN	53
§4.2.1	<i>Review Object</i>	54
§4.2.1.1	<i>Provisions of Review Object in U.S. Law</i>	54
§4.2.1.2	<i>Provisions of Review Object in Canadian Law</i>	55
§4.2.1.3	<i>Provisions of Review Object in Japanese Law</i>	56
§4.2.1.4	<i>Comparative Analysis of Review Object</i>	57
§4.2.2	<i>Standard of National Security Review of Cross-border M&A</i>	58
§4.2.2.1	<i>General Introduction</i>	58
§4.2.2.2	<i>Analysis of the U.S. Review Standard</i>	59
§4.2.3	<i>Review Procedure</i>	61
§4.2.3.1	<i>Review Procedure of the US</i>	61
§4.2.3.2	<i>Review Procedure of Canada</i>	63
§4.2.3.3	<i>Review Procedure of Japan</i>	65
§4.2.3.4	<i>Comparison and Analysis of Review Procedure</i>	66
CHAPTER V: NATIONAL SECURITY REVIEW SYSTEM OF CHINA		70
§5.1	DEVELOPMENT OF REGULATORY SYSTEM ON CROSS-BORDER M&A IN CHINA	70
§5.1.1	<i>General Laws and Regulations</i>	70
§5.1.2	<i>Special Legal Regulations Concerning Cross-border M&A of Listed Companies</i>	72
§5.1.3	<i>Special Legal Regulations Concerning Cross-border M&A of Non-listed Companies</i>	73
§5.1.4	<i>Newly Constituted Anti-monopoly Law of China Pays Special Attention to Merger Control to Cross-border M&A</i>	75
§5.2	ESTABLISHMENT PROCESS OF THE PRINCIPLE "MAINTAINING NATIONAL SECURITY"	76
§5.3	NATIONAL SECURITY REVIEW OF CROSS-BORDER M&A IN CHINA	78

§5.3.1	<i>Review Object</i>	78
§5.3.1.1	<i>Merging Party</i>	78
§5.3.1.2	<i>Merged Party</i>	79
§5.3.1.3	<i>M&A Activities</i>	80
§5.3.2	<i>Review Standard</i>	81
§5.3.3	<i>Procedure Rules of National Security Review of China</i>	82
§5.4	PROBLEMS IN PRESENT LEGAL SYSTEM OF CHINA	82
§5.4.1	<i>Conflicts between Different Legal Documents</i>	83
§5.4.2	<i>Unreasonable Allocation of Right and Power</i>	85
§5.4.3	<i>Lack of Defined Review Reasons</i>	87
§5.5	REMARKS	88
CHAPTER VI: SUGGESTIONS TO IMPROVE NATIONAL SECURITY REVIEW SYSTEM OF CHINA		89
§6.1	IMPROVE LEGAL BASIS OF NATIONAL SECURITY REVIEW	89
§6.2	IMPROVE THE INSTITUTIONAL FRAMEWORK	90
§6.2.1	<i>Establish Radial Foreign regulatory Legal System</i>	90
§6.2.2	<i>Establish Cooperation Inter-department on Basis of Institutional Reform</i>	91
§6.3	DEFINE A REASONABLE REVIEW STANDARD	92
§6.4	CLARIFY THE NATIONAL SECURITY REVIEW PROCEDURE	94
§6.5	PAY SPECIAL ATTENTION TO ESSENTIAL INDUSTRIES	94
CHAPTER VII: CONCLUSION AND RECOMMENDATIONS		97
§7.1	SPECIFIC CONCLUSIONS AND RECOMMENDATIONS	97
§7.1.1	<i>Implications of Cross-border M&A to National Security</i>	97
§7.1.2	<i>Reasonable Measures to Avoid National Security Risk Caused by Cross-border M&A</i>	99
§7.1.3	<i>Objectives, Legality, Reasonability and Necessity of National Security Review</i>	100
§7.1.4	<i>Enhancing and Improving National Security Review System of China</i>	101
§7.1.4.1	<i>Deficient Legal Framework and Institutional Obstacles</i>	102
§7.1.4.2	<i>Improvement of Foreign Investment Legal Framework</i>	103
§7.1.4.3	<i>Institutional Adjustment: Establishing a Permanent National Security Review Body</i>	104
§7.1.4.4	<i>Clarification of Review Procedures and Review Standard</i>	104
§7.2	GENERAL CONCLUSION AND RECOMMENDATIONS	106
BIBLIOGRAPHY		i
A. PRIMARY SOURCES		i
A.1	<i>International Law</i>	i
A.2	<i>National Law of other Countries</i>	i
A.3	<i>Law and Regulation of China</i>	ii
B. SECONDARY SOURCES		vi
B.1	<i>Monographs</i>	vi
B.2	<i>Articles</i>	viii
B.3	<i>Dissertation</i>	xv
B.4	<i>Report and Work Paper</i>	xviii
B.5	<i>Websites</i>	xix
B.6	<i>Electronic Documents</i>	xx