Foreword

This book introduces a fairly new perspective in the studies of international trade law, and particularly in those dealing with Chinese business law; no longer the domestic laws of the Eastern Giant Nation only, but an organized approach, from a non “Western-centric” standpoint, to the legal profiles involved in the very fast growing investments of Chinese business entities in Western countries, up to the analysis of particular facets of such an interaction.

It would be improper to talk about an inversion of the investments flows toward and from China, although this may be already a truth for some European countries. For instance, witness the utterly recent acquisition by a Chinese entity of a controlling interest in a historic Italian tire manufacturer (see § 1.05[B][3]), which might have, for example, created such an inversion in the China–Italy investments balance. Certainly however, when the Chinese markets and their industries were rapidly opened, almost for the first time in history, to foreign investment in a manner that was fully consistent with Chinese policies,1 few would have forecast that such reciprocity might have occurred in such a comparatively short time.

As trivial as it might be, this is a further striking effect of the globalization. This time, however, the absolute novelty of having flows of direct investments coming from any kind of Chinese business entity, both public and private, landing in European and North American countries (and elsewhere, of course) is, in the authors’ opinion, a further effect of today’s globalization, which includes the fast, basically easy circulation of goods, and then of money, and then of ideas. Today’s globalization fosters the massive circulation of people, and among these people, the idea of going with their funds, either owned or managed, “where none of us had been before,” is made much easier to do.

1. For the limited scope of the trade relations between China and the European countries between the two World Wars, see Ike Griffith, Germans and Chinese (Cal University Press, 1999); William Kirby, Germany and Republican China (Stanford University Press, 1984); Phoebe Chow, British Opinion and Policy towards China, 1922–1927 (PhD diss., London School of Economics, 2011); Jacques Binoche, “La politique extrême-orientale française et les relations franco-japonaises de 1919 à 1939,” Revue française d’histoire d’outre-mer, 76 (1989) 264–85. La France et le Pacifique. pp. 263-275. Before World War I, such relations were, and in part still are, bitterly felt as having been semi-colonial in nature. The Hong Kong and Macau examples, as well as the Tianjin extraterritorial areas, remain a clear example of the nature of those relations.
This book is, in a certain way, an actual example of the “people’s side” of globalization. Italian and American junior scholars found their way to China, where they were taught in Chinese law by a Chinese professor, and then exchanged what they had learned from “Western” professors.

Consistently, now they think it useful to describe how this kind of global circulation is applied, in China and in some of the main targets of the Chinese direct investments abroad, in compliance with the necessarily many bodies of rules governing these financial activities, in the many countries, and in the international organizations (and, in Europe, quasi-Federation, as disputed as this classification may be) gathering those countries, at least for economic purposes.

This also explains why the authors start with an examination, possibly an unprecedented one, of China’s body of rules concerning “its own” outbound direct investments, rules which are often overlooked by the receiving partners, or sellers, of business entities, or part of them. Under a strictly contractual point of view, such a knowledge of the legal environment, where an outbound investment is coming from, is a duty of those who, as stated, “receive” such an investment: It is a facet of the “know your customers rule.”

Certainly, the legal practice has attempted to make this duty easier, including in the standard text for those transactions (memorandums of understanding, joint venture agreements, acquisitions, share purchase agreements, and the like) clauses where the foreign investor declares itself to be in full compliance with its national laws, in planning its investments: Is that enough? Could the “receiving” party suffering a damage as a result of the original “illegality” of the investment, under the national laws of the investor, successfully get compensation in the country where such a business was considered a nullity, failing the compliance with local laws on, for example, money? Western precedents of the 1980s say no, although since then the laws pertaining to investments have been greatly softened. But the principles of investments were not softened, and the true protection for investments remains knowledge of the customer, which is much better than just having an agreement on paper.

Roman law said Nemo ius ignorare censetur, “Nobody is supposed to know anything about law”; possibly the word “law” should today include any law having an influence on the validity of the agreed trading scheme: Nemo ius, etsi peregrinum, ignorare censetur.²

This is the permanent aim, and unifying element, of the several parts of this book: the “domestic” Chinese law rules on outbound investments, then the undoubtedly complicated set of rules typical of the European Union. The EU is an immense market for goods and investments, in principle, necessarily open to external imports, but also the result of ongoing mediations between countries still having remarkable

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². This is also the trend in more recent legislations in the area of conflict of laws: see, e.g., the European Regulation No. 593/2008, art. 9.3 on the (Overriding mandatory provisions . . . “Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”).
differences, not only in languages (which remain a clear sign of such differences), but also in legal histories, principles, social organization, and, in some places, even ideological approaches to the laws pertaining to economics.

These last “concerns” are specifically addressed in this book, which gives a long-term appraisal (see Chapter Four) of the development of the Chinese–European relations, giving a proper weight to the likely effects of the reforms already approved or about to be approved through the action of the present Chinese government.

Then, there are many sections in this book that present a detailed study of areas such as relations with the United States and the intellectual property rights issue; the merger and acquisition European controlling law; and the much more rare (but “explosive” when they are applied) rules on “dominance,” which have the unusual effect of moving governments to argue on what is the good law in the area.

The book is closed by a gem, namely, an inside, masterly introduction to the organization and operations of the CIC, the China Investment Corporation, particularly as far as the European Union is concerned, in a circular recall to the starting exam of the Chinese outbound investments regulation; law as approved, and law in action, as it has ever been in legal studies.

Fabio E. Ziccardi
Professor of Comparative Law (retired)
The State University of Milan
Department of International, Legal and Historical-Political Studies