International Lawyer

Volume 45 | Number 4 | Article 6

2011

Chinese Investments Overseas: Onshore Rules and Offshore Risks

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Abstract

Chinese investments overseas have seen strong growth rates in recent years. This has caused much interest, but also some concerns. Taking recently published official data as a starting point, this article first recalls how overseas investments of Chinese enterprises have evolved in the past and discusses what the current trend is. It then summarizes the main features of China's outward

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investment regime and discusses practical consequences of related rules and regulations. In its main part, this article explores the broader implications of China's increasing outbound investments by analyzing possible future scenarios and consequential risks, as well as available legal reactions.

I. Introduction

China's[1] economy recovered quickly from the global financial crisis of 2008–2009. During the first quarter of 2011, China's economy grew 9.7%, which is an impressive, although slightly lower, growth rate compared to the 10.3% of the first quarter of 2010.[2] It is believed that "China has surpassed Japan to become the second largest economy in the world."[3] Some commentators expect China to take the number one spot from the United States of America soon.[4]

In line with these developments, Chinese multi-nationals, in particular Chinese state-owned enterprises (SOEs),[5] are pushing across the borders. Consequently, Chinese overseas investments have seen strong growth rates in recent years. This has caused much interest, but also some concerns. Taking statistical data recently published by the PRC Ministry of Commerce (MOFCOM),[6] this article first recalls how overseas investments of Chinese enterprises have evolved in the past and discusses what the current trend is. China controls foreign inward investments by way of a variety of regulatory tools,[7] and the same is true for outward investments of Chinese enterprises. Section three, therefore, summarizes the main features of China's outward investment regime.[8] Section four discusses practical consequences of related rules and regulations. It also explores the broader implications of China's increasing outbound investments. Based on possible future scenarios, it identifies risks and possible legal reactions.

1. Here and in the following "China" stands for the Chinese mainland excluding Hong Kong, Macau, and Taiwan. After more than 150 years under colonial rule, Hong Kong and Macau became part of the People's Republic of China and obtained the status of Special Administrative Regions on July 1, 1997 and on Dec. 20, 1999 respectively. Based on the "one country, two systems-doctrine," invented by the late Deng Xiaoping, the legal systems of Hong Kong and Macau will remain unchanged for a period of fifty years from the date of the so-called hand-over. Lutz-Christian Wolff, *China's Private International Investment Law: One-Way Street into PRC Law?*, 56 AM. J. COMP. L. 1039, 1047-048 (2008). The situation of Taiwan is less settled, because both the central government in Beijing and Taiwan's government officially claim to be the legitimate representative for all of China. *Id.* at 1048.

2. Cary Huang, *Foreigners Put Focus on China Services Sector*, SOUTH CHINA MORNING POST, May 18, 2011, at B6.

3. Frances L. Woo, Malcolm Moller & Tiffany Chan, *China Outbound: To Infinity and Beyond–Offshore*, CHINA OUTBOUND INVESTMENT GUIDE, 2011, at 55, *available at* http://www.iflr.com/Article/2836570/Channel/193438/China-Outbound-To-infinity-and-beyondOffshore.html.

4. John Gong, *A Lot of Hot Air*, SOUTH CHINA MORNING POST, May 23, 2011, at A15.

5. LUTZ-CHRISTIAN WOLFF, CHINA OUTBOUND INVESTMENTS: A GUIDE TO LAW AND PRACTICE 4 (2011).

6. PRC MINISTRY OF COMMERCE, 2010 STATISTICAL BULLETIN OF CHINA'S OUTWARD FOREIGN DIRECT INVESTMENT (Nov. 18, 2011), *available at* http://hzs.mofcom.gov.cn/accessory/201109/1316069658609.pdf.

7. LUTZ-CHRISTIAN WOLFF, MERGERS & ACQUISITIONS IN CHINA: LAW AND PRACTICE 5-12 (4th ed. 2010).

8. Section 3 is an updated summary of a comprehensive study that was published in May 2011. *See* WOLFF, CHINA OUTBOUND INVESTMENTS, *supra* note 5.

II. Chinese Investments Overseas in Numbers[9]

A. Inward vs. Outward Volume

In the past, the focus of investment projects related to China was always on inward projects conducted by foreign entities on the Chinese mainland. The huge potential of the Chinese market and the relatively low labor costs suggested chances and opportunities that were not to be missed. Recent data indicate that this trend will continue. For example, between January and July 2011, the contracted foreign investment volume amounted to 140,276 billion U.S.D., marking an increase of 20.71% year on year.[10] The volume of actual used foreign investment was 69,187 billion U.S.D., which was an increase of 18.57% compared to 2010.[11]

Overseas investments of Chinese enterprises have seen similar impressive growth rates only in recent times. Between 1990 and 2000, China's outward investment volume was less than three billion U.S.D. per year.[12] China's outward investment volume has, however, increased considerably since the beginning of the new millennium.[13] The Chinese government pushed this development with the initiation of its so-called "going-out policy," which was driven, in part, by the goal to convert China's huge foreign exchange reserves of over two trillion U.S.D. into less risky tangible assets.[14] After a temporary slowdown resulting from the global financial crisis in 2008–2009, China's economy recovered quickly, finally yet importantly due to a government stimulus package worth four trillion RMB.[15] The volume of Chinese investment projects overseas has rebounded accordingly.[16]

In 2009 China ranked sixth worldwide in terms of its overseas investments,[17] contributing 5.1% to the aggregate global outward investment volume.[18] In 2010 China's overseas investment volume was, for the first time, bigger than Japan's. China now ranks fifth

9. *Id.* at 1-6.

10. PRC Ministry of Commerce, Statistics of January–July 2011 on National Absorption of FDI (Nov. 18, 2011), *available at* http://english.mofcom.gov.cn/aarticle/statistic/foreigninvestment/201109/20110907723320.html.

11. *Compare id., and* Jane Cai, *FDI Tapers Off Amid Global Turbulence*, South China Morning Post, Oct. 20, 2011, at B3 (reporting that foreign direct investment in mainland China grew 7.88% in Sept. 2011, marking a decrease from the 11.1% growth in Aug. 2011), *with* Denise Tsang, *Rising Costs to Hit China's FDI Rate*, South China Morning Post, Nov. 17, 2011, at B1-2.

12. Mellisa Murphy, *Freeman Briefing: Issue in Focus: China's "Going Out" Investment Policy*, Center for Strategic & Int'l Stud., May 27, 2008, at 1, *available at* http://csis.org/publication/freeman-briefing-may-27-2008.

13. *See* PRC Ministry of Commerce, *supra* note 6, at 82.

14. *A Brave New World: The Climate of Chinese M&A Abroad*, Economist Intelligence Unit, 2010, at 7; Mark O'Neill, *China's Western Front*, South China Morning Post Magazines, Sept. 19, 2011, at 16, *available at* http://www.scmp.com/portal/site/SCMP/menuitem.1d923702d0f3d4b2b5326b10cba0a0a0/?vgnextoid=05071ad157d52310VgnVCM100000360a0a0aRCRD&vgnextfmt=mag&issue=20110919&ss=Money&s=Magazines.

15. Wang Weidong & Geoffrey Mullen, *China's Stimulus Package and the Infrastructure Sector*, Asian-Counsel, Mar. 2009, at 32-34.

16. United Nations Conference on Trade and Development, *World Investment Report 2010*, 6, U.N. Doc. UNCTAD/WIR/2010 (July 22, 2010), *available at* http://www.unctad.org/en/docs/wir2010_en.pdf.

17. *Id.*

18. Woo, Moller & Chan, *supra* note 3, at 55.

worldwide[19] and has reached a total outflow volume of 68,811.31 billion U.S.D., of which 12.5% was financial and 87.5% was non-financial in nature.[20] As of the end of 2010, more than 13,000 Chinese outward investors had invested in 16,000 foreign enterprises located in 178 countries and regions.[21] During the first half of 2011, Chinese companies invested in 2,169 foreign enterprises in 117 countries and regions.[22] There is broad consensus that China's overseas investment volume will continue to grow with force in the future.[23]

B. Target Countries

According to official statistics,[24] in 2010, Chinese overseas direct investments were spread in terms of the cumulative volume among different target regions as follows:[25]

- Asia: 65.24%
- Latin America: 15.31%
- Europe: 9.82%
- North America: 3.81%
- Africa: 3.07%
- Oceania: 2.75%

China's investments in Asia have slightly decreased since 2010, mirrored by a modest increase of investments in Europe, Latin America, and North America. In 2010, the following countries were ranked the top twenty-five destinations for Chinese investments overseas (the 2009 top destinations are indicated in parenthesis):[26]

(1) Hong Kong (Hong Kong)
(2) British Virgin Islands (Cayman Islands)
(3) Cayman Islands (Australia)
(4) Luxembourg (Luxembourg)
(5) Australia (British Virgin Islands)
(6) Sweden (Singapore)
(7) USA (USA)
(8) Canada (Canada)
(9) Singapore (Macau)
(10) Myanmar (Myanmar)
(11) Thailand (Russia)
(12) Russia (Turkey)
(13) Iran (Mongolia)
(14) Brazil (South Korea)
(15) Cambodia (Algeria)
(16) Turkmenistan (Congo)
(17) Germany (Indonesia)
(18) South Africa (Cambodia)
(19) Hungary (Laos)
(20) United Arab Emirates (UK)
(21) Japan (Germany)
(22) Pakistan (Nigeria)
(23) UK (Kyrgyzstan)
(24) Laos (Egypt)
(25) Vietnam (Iran)

19. United Nations Conference on Trade and Development, *World Investment Report 2011*, 9, 47, U.N. Doc. UNCTAD/WIR/2011 (July 26, 2011), *available at* http://www.unctad.org/en/docs/wir2011_embargoed_en.pdf.

20. PRC Ministry of Commerce, *supra* note 6, at 79.

21. *Id.*

22. PRC Ministry of Commerce, Statistics of China's Non-financial Foreign Direct Investment in the First Half of 2010 (Nov. 18, 2011), *available at* http://hzs.mofcom.gov.cn/aarticle/date/201107/20110707660092.html.

23. Woo, Moller & Chan, *supra* note 3, at 56.

24. PRC Ministry of Commerce, *supra* note 6, at 83-87.

25. For 2009 *see* Wolff, China Outbound Investments, *supra* note 5, at 2-3.

26. PRC Ministry of Commerce, *supra* note 6, at 83-87; for 2009 *see* Wolff, China Outbound Investments, *supra* note 5, at 2.

For tax structuring reasons, it is common practice for Chinese inward and outward investors to take advantage of special purpose offshore companies. Special purpose companies are normally located in low or zero tax jurisdictions and are used only to hold investments onshore, sometimes through additional layers of other special purpose companies. It is therefore not surprising to find Hong Kong, Luxembourg, the Cayman Islands,[27] and the British Virgin Islands[28] among the top destinations for Chinese investments. In particular, more than fifty-five percent of China's investments overseas were "channeled" through Hong Kong in past years.[29]

In 2010, Chinese acquisitions of Canadian and U.S. companies increased by eighty-one percent to 6.8 billion U.S.D.[30] This is seen as only the "beginning of a tidal wave" as another one trillion to two trillion U.S.D. of Chinese investments in U.S. targets alone is envisaged this decade.[31] Commentators expect that Chinese investments in Europe will also see a substantial increase in the years to come.[32] At the same time, Chinese investments in African countries have dropped proportionally from 3.8% of China's total overseas investment volume in 2009 to 3.07% in 2010.[33]

III. China's Outward Investment Regime

A. General

China's overseas investment regime is laid out in a variety of rules and regulations covering a number of subject areas, with different authorities in charge of their enactment, interpretation, and enforcement. The existing legislative diversity, as well as the power structure of the concerned government authorities, often makes it difficult to understand the precise procedure to be followed by a Chinese enterprise planning to invest abroad.

Additional problems arise from the fact that laws and regulations are partly unclear, inconsistent, or incomplete.[34]

The main features of China's outward investment regime are summarized in the following.[35]

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27. For investments in Africa via the Cayman Islands, Mauritius, and the Seychelles, *see* Woo, Moller & Chan, *supra* note 3, at 55.

28. *See* Naomi Rovnick, *Caribbean Tax Haven Adds Heat to China's Hot Money*, South China Morning Post, May 19, 2011, at A1, A4.

29. Enoch Yiu, *Rules Hamper Use of Yuan for Overseas Investment*, South China Morning Post, June 14, 2011, at B3. For the practice of "round-tripping" *see infra*, Section 3, Part D.

30. Woo, Moller & Chan, *supra* note 3, at 55; James Flanigan, *Ailing U.S. Firms Survive with a Helping Hand from China*, International Herald Tribune, July 8, 2011, at 16 (in 2010, the value of Chinese investments in U.S. companies was U.S. $5 billion); Eric Ng, *PetroChina Quits Deal for Canada Gas Firm Stake*, South China Morning Post, June 23, 2011, at B4 (withdrawing from a Canadian $5.4 billion stake in a natural gas project "has not affected PetroChina's overseas development plan and business strategy in North America.").

31. Flanigan, *supra* note 30, at 16.

32. Woo, Moller & Chan, *supra* note 3, at 58.

33. *Cf.* Wolff, China Outbound Investments, *supra* note 5, at 2.

34. *Cf.* Wolff, Mergers & Acquisitions in China, *supra* note 7, at 16.

35. *Cf.* Wolff, China Outbound Investments, *supra* note 5, at 13-27 (discussing approval and registration requirements); *id.* at 81-105 (discussing China's outbound investment tax aspects).

B. NDRC Approval

First, overseas investments in the form of direct investments, or M&A transactions, conducted directly or indirectly through offshore subsidiaries by Chinese individuals, legal persons, or other entities[36] require the approval of the National Development and Reform Commission (NDRC).[37] The NDRC approval requirement is meant to ensure: (1) compliance with Chinese laws and regulations; (2) compliance with industrial policies; (3) non-violation of the sovereignty, security and public interest of the Chinese state and of international law; (4) general compliance with the overall economic and financial state planning and development; (5) financial viability; and (6) technical feasibility of Chinese overseas investment projects.[38]

Chinese outward investors are not allowed to sign any legally binding documents before obtaining a NDRC Approval Certificate or a Filing Certificate.[39] The Approval or Filing Certificate issued by the NDRC, or the State Council, is required for Chinese outward investors to go through mandatory foreign exchange, customs, immigration, and tax procedures.[40] In principle, the NDRC decides whether approval is granted within twenty working days from the acceptance of the project application report.[41]

The power of different NDRC levels to approve outward investment projects differs depending on the size of a project, the target industry, and the target country or region.[42] Generally speaking, central level NDRC approval—in special cases with State Council endorsement—is necessary for big or strategically important projects.[43] Less important projects are within the approval power of provincial-level NDRC branches or NDRC branches at the level of municipalities directly under the central government, autonomous

36. Notice on Issues Concerning the Improvement of the Administration of Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n, June 8, 2009, effective June 8, 2009), art. 2 (China).

37. *Compare* Notice on Issues Concerning the Improvement of the Administration of Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n, June 8, 2009, effective June 8, 2009) (China), *and* Notice on Record-Filing Certification for Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n Gen. Office, May 30, 2007, effective May 30, 2007) (China), *with* Notice on Relevant Issues Concerning the Establishment of Risk Guarantee Mechanism for Key Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n and the China Export & Credit Ins. Corp., Jan. 25, 2005, effective Jan. 25, 2005) (China).

38. Interim Measures for the Administration of Verification and Approval of Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n, Oct. 9, 2004, effective Oct. 9, 2004), art. 18 (China) [hereinafter Interim Measures].

39. *Id.* art. 20 (supplemented by Notice on Relevant Issues Concerning the Establishment of Risk Guarantee Mechanism for Key Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n and the China Export & Credit Ins. Corp., Jan. 25, 2005, effective Jan. 25, 2005)) (China); Notice on Record-Filing Certification for Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm. Gen. Office, May 30, 2007, effective May 30, 2007) (China); Notice on Issues Concerning the Improvement of the Administration of Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n, June 8, 2009, effective June 8, 2009) (China); Notice on Delegating Powers on Approval of Overseas Investment Projects to Authorities at Lower Levels (promulgated by the Nat'l Dev. & Reform Comm'n, Feb. 14, 2011, effective Feb. 14, 2011) (China)).

40. Interim Measures, *supra* note 38, arts. 19-20.

41. *Id.* art. 11.

42. Notice on Delegating Powers on Approval of Overseas Investment Projects to Authorities at Lower Levels (promulgated by the Nat'l Dev. & Reform Comm'n, Feb. 14, 2011, effective Feb. 14, 2011) at 1-4, (China).

43. Interim Measures, *supra* note 38, arts. 4, 7.

regions, cities under separate state planning, and the Xinjiang Production and Reform Commission.[44]

C. MOFCOM Approval

Non-financial overseas investments by Chinese entities with legal person status[45] also require the approval of MOFCOM.[46] The MOFCOM approval requirement applies whether an investment is direct or via the M&A mode, as well as in relation to the acquisition of control over foreign targets through other means.[47] An "Enterprise Overseas Investment Certificate" issued by MOFCOM upon approval[48] enables a Chinese overseas investor to handle foreign exchange, bank, customs, and other formalities.[49] In addition, offshore investments of subsidiaries controlled by Chinese outward investors are subject to a MOFCOM filing requirement.[50]

Central-level MOFCOM approval is required for relatively large projects and projects that are politically sensitive or that are conducted through special purpose companies.[51] Projects with an investment volume between ten million and one hundred million U.S.D., projects in the field of energy and minerals, and projects needing to raise funds within China, require provincial level MOFCOM approval.[52] For projects that are not within the approval power of central level MOFCOM or of provincial level MOFCOM, a standardized Application Form for Overseas Investment[53] must be submitted online.[54] According to MOFCOM, about eighty-five percent of all Chinese overseas investment projects should fall within this category.[55]

D. Industry-related Requirements

Special restrictions apply to Chinese overseas investments in regulated industry sectors. Overseas investments by financial institutions are subject to the approval of the China

44. *Id.* art. 5.

45. Measures for the Administration of Overseas Investments (promulgated by the Ministry of Commerce, May 1, 2009, effective May 1, 2009), art. 2 [hereinafter Administrative Measures]. Overseas investments by individuals and by China Investment Corporation (China's sovereign wealth fund company) are not covered by the Administrative Measures. Neal Stender, Lin Lawrence Zhou & Yan Zeng, Outbound unbound?, China L. & Prac., Apr. 15, 2009, at 18-19.

46. *See* Administrative Measures, *supra* note 45, *and* Notice on Joint Annual Inspection of Overseas Investments (promulgated by the Ministry of Commerce and the State Admin. of Foreign Exch., Dec. 28, 2009, effective Dec. 28, 2009) (China); Wolff, China Outbound Investments, *supra* note 5, at 17 (for special rules enacted at provincial and municipal level). Overseas investments are prohibited if they endanger China's sovereignty, national security or public interest, if they violate Chinese law, damage the relationships with a foreign country, or involve technology or goods that are prohibited from being exported. Administrative Measures, *supra* note 45, art. 9.

47. Administrative Measures, *supra* note 45, art. 38.

48. *Id.* arts. 5, 15.

49. *Id.* arts. 29, 30.

50. *Id.* art. 39.

51. *Id.* art. 6; *id.* art. 37 (for the term 'special purpose company').

52. *Id.* arts. 7, 14.

53. *Id.* art. 8.

54. *Foreign Investment Management System*, Ministry of Commerce, http://femhzs.mofcom.gov.cn/fecpmvc/pages/fem/LoginedHome.html (last visited Dec. 22, 2011).

55. Michael Tan, *Chinese Overseas Investment Summarized*, China L. & Prac. Feb. 3, 2010, at 24-25.

Banking Regulatory Commission and the State Administration of Foreign Exchange (SAFE).[56] The China Insurance Regulatory Commission must approve overseas investments in the insurance sector.[57] Overseas investment projects of securities companies are subjected to the approval of the China Securities Regulatory Commission (CSRC).[58] Similarly, overseas investments by companies listed on the Shanghai or Shenzhen stock exchange, as well as investments into foreign listed target companies, also require CSRC approval. Finally, involvement of the State-owned Assets Supervision and Administration Commission (SASAC) may be required for the state-owned sector.[59]

E. Round-tripping

It has long been common practice for Chinese companies to engage in so-called round-tripping practices.[60] Round-tripping entails the establishment of a special purpose company abroad that then re-invests in China by establishing (artificial) foreign investment enterprises (FIEs).[61] The main goal of these structures was originally tax-related, as FIEs enjoyed special tax holidays in China.[62] China's corporate income tax reform in 2008 and the recent steps to prevent tax evasion have made the use of round-trip investments for legal tax optimization more difficult.[63] According to anecdotal evidence round-tripping, however, is still widely used for tax avoidance purposes. Round-tripping also offers access to overseas debt financing through the special purpose company,[64] and it allows circumventing onshore regulatory as well as practical problems related to listings on one of the

56. Law of the People's Republic of China of Regulation of and Supervision over the Banking Industry (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 31, 2006, effective Feb. 1, 2007), art. 2; Certain Provisions on Financial Management of Financial Holding Companies (promulgated by the Ministry of Finance, Sept. 1, 2009, effective Sept. 1, 2009), art. 13 (China); Financial Rules for Financial Enterprises (promulgated by the Ministry of Finance, Dec. 7, 2006, effective Jan. 1, 2007), arts. 24, 27 ¶ 4 (China); Notice on Issues Concerning Foreign Exchange Administration for Overseas Direct Investment of Domestic Banks (promulgated by the State Admin. of Foreign Exch., June 30, 2010, effective Sept. 1, 2010) (discussing SAFE involvement).

57. Measures for the Administration of the Establishment of Overseas Insurance Institutions by Insurance Companies (promulgated by the China Ins. Regulatory Comm'n, July 31, 2006, effective Sept. 1, 2006), art. 14 (China); Provisions on the Administration of Insurance Companies (promulgated by the China Ins. Regulatory Comm'n, Sept. 25, 2009, effective Oct. 1, 2009), art. 74 (China); Administrative Measures Regarding Investment of Non-Insurance Institutions in Overseas Insurance Enterprises (promulgated by the China Ins. Regulatory Comm'n, July 31, 2006, effective Sept. 1, 2006), art. 6 (China); Measures for the Administration of Insurance Conglomerates (Interim) (promulgated by the China Ins. Regulatory Comm'n, Mar. 12, 2010, effective Mar. 12, 2010), arts. 9, 15 (China); Joel H. Rothstein, *Insurance as a Transforming Force for China Real Estate*, CHINA L. & PRAC. Dec. 9, 2009, at 20-23; Zhan Hao, *Ruling the Expanding Insurance Group Kingdom*, CHINA L. & PRAC. May 12, 2010, at 20-21.

58. Regulations on the Supervision and Administration of Securities Companies (promulgated by the State Council, Apr. 23, 2008, effective June 1, 2008), art. 13 (China).

59. Interim Measures for Administration of Overseas State-owned Property Rights of Central Enterprises (promulgated by the State-owned Assets Supervision & Admin. Comm'n of the State Council, June 14, 2011, effective July 1, 2011), arts. 2, 8 (China).

60. Also called: "outbound-inbound investments."

61. *See* WOLFF, MERGERS & ACQUISITIONS IN CHINA *supra* note 7, at 202 (providing a historical background).

62. *Id.*

63. *Id.*

64. Robert Cookson, *Investors Warned of Chinese Debt Danger*, FIN. TIMES, July 21, 2011, at 35.

Chinese stock exchanges in Shanghai or Beijing[65] by listing the special purpose company offshore. Offshore special purpose companies established by mainland entities for round-tripping purposes have also been popular targets of investments by foreign private equity funds.[66]

Since 2005, Chinese legislators have taken a tougher stance against round-tripping.[67] A SAFE registration and MOFCOM approval system for all outward foreign currency transfers was created.[68] The SAFE registration requires not only a prior issuance of the MOFCOM approval document,[69] but also a track record of at least three years for domestic enterprises using offshore special purpose companies for round-trip investments as well for the special purpose company itself.[70] Furthermore, if any round-trip transaction entails the acquisition of an onshore domestic enterprise, such enterprise will in principle not enjoy FIE status[71] and will be subject to central MOFCOM approval.[72] Finally, the overseas listing of an entity owned by mainland shareholders and established as a special purpose company for such listing purpose is subject to CSRC approval, MOFCOM approval, NDRC verification, and SAFE approval and must comply with certain other preconditions.[73]

F. Foreign Exchange Control

China still operates a rather strict foreign exchange control system.[74] As a matter of principle, foreign exchange (FOREX) cannot be used for payment purposes in China.[75]

65. Lu Haitian et al., *Venture Capital and the Law in China*, 37 Hong Kong L.J. 229, 251 (2007).

66. Marcia Ellis & Auria Styles, *Rethinking M&A in China*, 34 China Bus. Rev. 36, 36 (2007).

67. *See* Wolff, Mergers & Acquisitions in China, *supra* note 7, at 202-204.

68. *See* Notice on Relevant Issues Concerning the Administration of Foreign Exchange from Domestic Residents' Financing Through Overseas Special Purpose Vehicles and for Round-trip Investments (Circular 75), (promulgated by the State Admin. of Foreign Exchange Oct. 21, 2005, effective Nov. 1, 2005) (LEXIS China Online) (China); Neil Stender & Zeng Yan, *It's SAFE Again for China Venture Capital Round-trip & Red-chip Listings*, China L. & Prac., Nov. 2005, at 15–18; Neil Stender et al., *SAFE Plugs Holes for China/Offshore Round-trip Investments*, China L. & Prac., July 2007, at 58–60; *see also* Operation Rules on Relevant Issues regarding Foreign Exchange Control over the Financing and Return of Investment of Domestic Residents through Overseas Special Purpose Companies, (promulgated by the State Admin. of Foreign Exchange, May 20, 2011, effective July 1, 2011) (LEXIS China Online).

69. Stender, *supra* note 68, at 58-60.

70. Wolff, China Outbound Investments, *supra* note 5, at 23; *see* now the SAFE Rules of Operation for the FOREX Administration of Financing and Round-trip Investments of Chinese Citizens through Special Purpose Companies (promulgated by the State Admin. of Foreign Exchange, May 20, 2011, effective July 1, 2011) (LEXIS China Online) (China) (relating to individual round trip investors).

71. Acquisition of Domestic Enterprises by Foreign Investors Provisions (promulgated by the Ministry of Commerce, effective June 22, 2009), art. 9, ¶ 3 (LEXIS China Online) (China).

72. *Id.* art. 11.

73. *Id.* arts. 40–47; Ellis, *supra* note 66, at 36; Jonathan Zhou, *Little Red Chips Get an Overseas Opening*, China L. & Prac., May 2009, at 18.

74. Regulations of the People's Republic of China on Foreign Exchange Administration (promulgated by the State Council of the People's Republic of China, effective Aug. 5, 2008) (LEXIS China Online) (China) [hereinafter PRC Regulations on Foreign Exchange Administration] (supplemented by a large number of Circulars on specific topics).

75. *Id.* art. 8.

SAFE approval is required for the provision of security to foreign parties[76] and the granting of commercial loans to foreign parties by domestic non-banking institutions.[77]

Only designated financial institutions[78] are allowed to engage in FOREX business and have to operate special FOREX accounts for this purpose.[79] All incoming and outgoing FOREX payments have to be reported.[80] SAFE registration is required before foreign investors can open FOREX accounts.[81] SAFE has the right to inspect and examine FOREX transactions at any time.[82] SAFE can also impose penalties in case of violations.[83]

In response to the difficulties caused by the global financial crisis, China's foreign exchange control system saw some liberalization in 2009.[84] Amongst other measures,[85] the FOREX management system related to overseas investments was improved.[86] Chinese enterprises are now allowed to make overseas investments with their own foreign exchange funds, domestic foreign exchange loans, foreign exchange purchased with RMB funds, tangible assets, intangible assets, and other FOREX sources,[87] subject to SAFE registration and approval.[88] Chinese entities and individuals no longer need to convert current account FOREX receipts into RMB.[89] Moreover, Chinese individuals and entities may now keep offshore current account FOREX receipts offshore, *i.e.* these receipts

76. *Id.* art. 19.

77. *Id.* art. 20.

78. *Id.* art. 24.

79. *Id.* art. 24.

80. *Id.* arts. 6–7.

81. *Id.* art. 16.

82. *Id.* arts. 12, 33; Amy Chen & Jonathan Selvadoray, *PRC Foreign Exchange Administration Regulations Revised*, CHINA L. & PRAC., Oct. 2008, at 27.

83. PRC Regulations on Foreign Exchange Administration, arts. 39–49 (LEXIS China Online).

84. *See, e.g.*, Notice on Questions Regarding the Administration of Onshore FOREX Accounts of Foreign Institutions (promulgated by the State Admin. of Foreign Exchange, July 13, 2009, effective Aug. 1, 2009) (LEXIS China Online) (China).

85. WOLFF, MERGERS & ACQUISITIONS IN CHINA, *supra* note 7, at 226–228.

86. *See, e.g.*, Provisions on Foreign Exchange Administration for Overseas Direct Investments by Domestic Institutions (promulgated by the State Admin. of Foreign Exchange, July 13, 2009, effective Aug. 1, 2009) (LEXIS China Online) (China); *see also* Notice Regarding Foreign Exchange Administration of Overseas Direct Investment by Domestic Banks (promulgated by the State Admin. of Foreign Exchange, June 30, 2010, effective Sept. 1, 2010) (LEXIS China Online) (China); Measures for the Assessment of the Implementation of Foreign Exchange Regulations by Banks (promulgated by the State Admin. of Foreign Exchange, effective Aug. 1, 2010) (LEXIS China Online) (China).

87. Provisions on Foreign Exchange Administration for Overseas Direct Investments by Domestic Institutions (LEXIS China Online).

88. PRC Regulations on Foreign Exchange Administration, art. 9 (LEXIS China Online); Notice on Cancelling and Adjusting the Examination and Approval Power and Administration Policies for Some Foreign Exchange Businesses under Capital Accounts (promulgated by State Admin. of Foreign Exchange, May 23, 2011, effective June 1, 2011) (LEXIS China Online) (China); Circular on Several Issues Regarding the Submission of Tax Certificates for Overseas Payments in the Service Industry (jointly promulgated by the State Admin. of Foreign Exchange & the State Admin. of Tax'n, Nov. 25, 2008, effective Jan. 1, 2009) (LEXIS China Online) (China) (providing that tax certificates need to be submitted to competent tax authorities when domestic entities and individuals make overseas payments of more than 30,000 U.S.D.).

89. PRC Regulations on Foreign Exchange Administration, art. 13 (LEXIS China Online); Notice on Issues Regarding the Administration of Foreign Exchange for Foreign Lending by Domestic Enterprises (promulgated by State Admin. of Foreign Exchange, June 9, 2009, effective Aug. 1, 2009) (LEXIS China Online) (China); Liu Yi & Philip Zhengyu Ding, *Shareholder Loans Permitted to Overseas Subsidiaries*, CHINA L. & PRAC., July 2009, at 40.

do not have to be repatriated.[90] Even RMB investments overseas are now possible under measures introduced in early 2011,[91] although Chinese outward investors still seem to prefer using FOREX for overseas investment purposes supposedly due to the much easier approval procedure.

G. Financing[92]

Since December 6, 2008, qualified commercial Chinese banks are allowed to grant loans for M&A purposes to domestic purchasers of target companies and their offshore special purpose companies.[93] In this regard, certain preconditions must be fulfilled, *e.g.* banks must establish suitable risk-management systems and meet a high capital adequacy ratio of at least ten percent and maintain a specific loan loss reserve adequacy ratio of at least one hundred percent.[94] FOREX debt financing of overseas investment projects has been possible since August 2009.[95] Upon fulfillment of certain preconditions, domestic enterprises can provide loans to their offshore subsidiaries by making use of their foreign exchange funds, purchased foreign exchange funds, or currency sourced from foreign currency pools of their group companies.[96]

H. Merger Control

China's rather new merger control regime is developing fast and has generated a lot of interest in recent years. China's merger control rules apply to transactions inside and outside mainland China, provided that they affect competition within the Chinese markets.[97] Chinese outward investments may consequently fall within the scope of applicability.[98]

90. PRC Regulations on Foreign Exchange Administration, art. 9 (LEXIS China Online); Chen, *supra* note 82, at 26; Operation Rules on Relevant Issues Regarding Foreign Exchange Control over the Financing and Return of Investment of Domestic Residents through Overseas Special Purpose Companies (promulgated by the State Admin. of Foreign Exchange, May 20, 2011, effective July 1, 2011) (LEXIS China Online) (China).

91. Administrative Measures for the Pilot RMB Settlement of Outbound Direct Investment (promulgated by the People's Bank of China, Jan. 6, 2011, effective Jan. 6, 2011) (LEXIS China Online) (China).

92. *See* Jun Dai, *Financing of China Outbound Investments*, *in* Wolff, China Outbound Investments, *supra* note 5, at 9–70; *see also* Xi Chao, *Qualified Domestic Institutional Investors*, *in* Wolff, China Outbound Investments, *supra* note 5, at 71–79.

93. Guidelines for Risk Management of the Merger Loans of Commercial Banks (promulgated by the China Banking Regulatory Commission, Dec. 6, 2008, effective Dec. 6, 2008) (LEXIS China Online) (China).

94. *Id.* § 1.

95. Notice on Issues Regarding the Administration of Foreign Exchange for Foreign Lending by Domestic Enterprises (promulgated by the State Admin. of Foreign Exchange, June 9, 2009, effective Aug. 1, 2009) (LEXIS China Online) (China).

96. Notice on Relevant Issues Concerning the Foreign Exchange Administration of Overseas Loans Granted by Domestic Enterprises, arts. 1, 6, and 7 (promulgated by the State Admin. of Foreign Exchange, June 9, 2009, effective Aug. 1, 2009); *Regulator Makes Outbound Investment Easier*, China L. & Prac., July 2009, at 9.

97. People's Republic of China Anti-Monopoly Law, art. 2 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (LEXIS China Online) (China) [hereinafter PRC Anti-Monopoly Law]; Marc Williams, *The Impact of the Anti-Monopoly Law*, *in* China Outbound Investments, *supra* note 5, at 43–58 (2011).

98. PRC Anti-Monopoly Law, art. 2 (LEXIS China Online).

China's current merger control regime is based on the *PRC Anti-Monopoly Law*, which became effective on August 1, 2008.[99] The merger control rules of the *PRC Anti-Monopoly Law* are supplemented by a large number of implementation rules and regulations[100] enacted after August 2008 and to be enacted in the future. Supervision and enforcement of China's merger control rules are within the scope of authority of MOFCOM.[101] MOFCOM must be notified[102] and specific documents must be submitted if a transaction meets one of the following thresholds:[103]

(1) the aggregate global turnover[104] of all the concerned enterprises exceeded RMB 10 billion in the previous financial year and the turnover within China[105] of at least two of the parties exceeded RMB 400 million in the previous financial year; or

(2) the aggregate turnover within China of all the concerned parties exceeded RMB 2 billion in the previous financial year, and the turnover within China of at least two concerned parties exceeded RMB 400 million in the same period.[106]

99. PRC Anti-Monopoly Law; *supra* note 97, art. 57; Williams, *supra* note 97; WOLFF, MERGERS & ACQUISITIONS IN CHINA, *supra* note 7, at 247–71.

100. *See, e.g.*, Regulations Concerning Thresholds for the Notification of Concentrations of Business Operators (promulgated by the State Council of the People's Republic of China, Aug. 3, 2008, effective Aug. 3, 2008) (LEXIS China Online) (China); Guidelines for Conducting Anti-Monopoly Examinations Regarding Concentrations of Business Operators (Jan. 1, 2009); Guidelines for the Notification of Concentrations of Business Operators (promulgated by the Anti-Trust Bureau of the Ministry of Commerce, Jan. 5, 2009, effective Jan. 5, 2009) (LEXIS China Online) (China); Guidelines for the Documents and Materials for the Notification of Concentrations of Business Operators (promulgated by the Anti-Monopoly Bureau of the Ministry of Commerce, Jan. 5, 2009, effective Jan. 5, 2009) (LEXIS China Online) (China); Guidelines of the Anti-Monopoly Commission Under the State Council Concerning the Definition of Relevant Markets (promulgated by Anti-Monopoly Comm'n of the State Council, May 24, 2009, effective, May 24, 2009); Measures for the Examination of the Concentrations Between Undertakings, (promulgated by the Ministry of Commerce, Nov. 21, 2009, effective Jan. 1, 2010) (LEXIS China Online) (China); Measures for the Reporting of Concentrations of Business Operators (promulgated by the Ministry of Commerce, Nov. 21, 2009, effective Jan. 1, 2010 China) (LEXIS China Online) (China); Tentative Provisions on Implementing Divestiture of Assets or Business in Concentration of Undertakings (promulgated by the Ministry of Commerce, July 5, 2010, effective July 5, 2010) (LEXIS China Online) (China); Measures for the Calculation of Turnover for the Consolidated Declaration of the Business Operators in Financial Industry (promulgated jointly by the Ministry of Commerce, the People's Bank of China, China Banking Regulatory Comm'n, China Securities Regulatory Comm'n, and China Insurance Regulatory Comm'n, July 15, 2009, effective Aug. 15, 2009) (LEXIS China Online) (China).

101. WOLFF, MERGERS & ACQUISITIONS IN CHINA, *supra* note 7, at 251. MOFCOM has established an Anti-Monopoly Bureau. *See* MOFCOM, *Anti-Monopoly Bureau*, http://fldj.mofcom.gov.cn (last visited on Nov. 18, 2011). The Anti-Monopoly Commission of the State Council is in charge of strategic and coordination work. PRC Anti-Monopoly Law, *supra* note 97, art. 9 ¶ 1; *see also* Susan Ning, *Overview of the Anti-Monopoly Law*, CHINA L. & PRAC., Oct. 2007, at 23–25; Sharon Mann, *Competition Law and Policy Developments in China: the New Anti-Monopoly Law*, ASIAN COUNSEL, June 2008, at 42-46.

102. For details of the notification requirements, *see* Measures for the Reporting of Concentrations of Business Operators (LEXIS China Online).

103. Regulations Concerning Thresholds for the Notification of Concentrations of Business Operators, art. 3 (LEXIS China Online); Alexander Vincent, *Notification Thresholds for Merger Control*, CHINA L. & PRACT., Sept. 2008, at 42–43.

104. For a definition of "turnover," *see* Measures for the Reporting of Concentrations of Business Operators, arts. 4–7 (LEXIS China Online).

105. "In China" is defined in Measures for the Reporting of Concentrations of Business Operators, art. 4, ¶ 2 (LEXIS China Online).

106. For transactions conducted within the finance industry by banks, securities companies, futures companies, and other financial institutions, the turnover that triggers the notification requirement shall be calcu-

MOFCOM can allow transactions subject to the fulfillment of certain conditions.[107] MOFCOM should reach a final decision within ninety days.[108] Between 2008 and the end of 2010, MOFCOM cleared over 207 transactions, subjected six transactions to conditions, and disallowed one transaction.[109] Until mid-December 2011, an additional 194 notifications had been received of which 160 have been reviewed and closed.[110] Four cases were granted conditional approval and five cases were withdrawn.[111] None of the published MOFCOM decisions involve any Chinese overseas investment project or relates to purely Chinese transactions without foreign involvement.[112]

I. Investments in Hong Kong, Macau, and Taiwan

In line with the concept "one country, two systems,"[113] investments by mainland enterprises in Hong Kong and Macau are treated like investments in foreign countries.[114] Special rules apply in relation to investments by mainland enterprises in Taiwan.[115] These rules have been enacted against the background of the conclusion of an *Economic Cooperation Framework Agreement* (ECFA), which was signed by mainland and Taiwan representatives in June 2010 and became effective on September 12, 2010.[116] Investments by mainland entities in Taiwan, including investments via offshore vehicles, require NDRC and MOFCOM approval.[117] In addition, the State Council's Taiwan Affairs Office has to be involved in the approval process.[118] Preferential treatment under the ECFA as well as special government support, *e.g.* in the form of special consultancy services, are available

lated on the basis of only ten percent of the turnover. Measures for the Calculation of Turnover for the Consolidated Declaration of the Business Operators in Financial Industry (LEXIS China Online).

107. PRC Anti-Monopoly Law, *supra* note 97, art. 23.

108. For the possibility to extend this period *see id.* art. 26, ¶ 2.

109. Susan Ning & Huang Jing, *MOFCOM Revealed Yearly Merger Control Statistics*, China Law Insight, Sept. 26, 2011, http://www.chinalawinsight.com/2011/09/articles/corporate/antitrust-competition/mofcom-revealed-yearly-merger-control-statistics.

110. Susan Ning, Liwei Wang & Hazel Yin, AMB Director Shang Ming Speaks on Merger Enforcement in 2011, China Law Insight, Jan. 4, 2012, http://www.kingandwood.com/practice.aspx?id=antitrust-competition&language=en.

111. *Id.*

112. Wolff, Mergers & Acquisitions in China, *supra* note 7, at 261-62.

113. Wolff, *supra* note 1.

114. This is because regulations such as the "Administrative Measures on Matters to be Verified for Investments in and Establishment of Enterprises in the Hong Kong and Macau Special Administrative Regions by Mainland Enterprises," originally effective Aug. 31, 2004, are no longer in force.

115. Measures for the Administration of Investments of Mainland Enterprises in Taiwan (promulgated by the National Development and Reform Comm'n, the Ministry of Commerce, and the Taiwan Affairs Office of the State Council, Nov. 9, 2010, effective Nov. 9, 2010) (China L. & Pract.) (China); Yujing Shu et al., *New Regulations Governing Investment in Taiwan by Mainland Enterprises*, China Outbound Investment Guide 2011, at 87-89, *available at* http://www.iflr.com/Article/2836629/Channel/193438/New-regulations-governing-investment-in-Taiwan-by-mainland-enterprises.html; Wolff, *Approval and Registration Requirements*, *in* Wolff, China Outbound Investments, *supra* note 5, at 13–27.

116. Economic Cooperation Framework Agreement, Ministry of Economic Affairs, Republic of China, http://www.moea.gov.tw/Mns/populace/news/News.aspx?kind=1&menu_id=40&news_id=19723 (last visited Dec. 22, 2011).

117. Administrative Measures for Mainland Enterprises Investing in the Taiwan Region, arts. 4–6. (promulgated by the Ministry of Commerce, the Nat'l Dev. & Reform Comm'n, and the Taiwan Affairs Office of the State Council, Nov. 9, 2010, effective Nov. 9, 2010) (LEXIS China Online) (China).

118. *Id.* art. 7.

subject to the fulfillment of certain criteria.[119] NDRC examination and MOFCOM examination of Taiwan investment projects are to be conducted in line with the *Interim Measures* and the *Administrative Measures*.[120] The completion as well as any amendment of the investment formalities in Taiwan must be registered with the NDRC, MOFCOM, and the State Council's Taiwan Affairs Office within fifteen working days.[121]

IV. Status Quo and Possible Future Developments: Is Action Required?

A. Delays of Onshore Approvals

As set out in the previous sections, Chinese enterprises are facing a number of restrictions when investing overseas. China's outward investment regime is diversified and complex.[122] Consequently, it is often difficult in practice to find out what precisely the legal requirements are in a particular case to obtain clearance for an overseas investment project.[123] Furthermore, in some cases it was troublesome to obtain the necessary approvals at all. It has even been suggested that delays of over one year may have to be expected depending on the facts of a particular case despite the existing statutory timelines. In many other cases, however, the process apparently did not create any difficulties and the necessary approvals were obtained without many problems after some negotiations with the relevant authorities.[124]

Chinese outward investors and their foreign counterparts can of course be adversely affected by any delay. The fact that it cannot be predicted precisely at what point in time the Chinese approval authorities may clear a project creates uncertainties, which require close attention.[125] As the required approvals are *de facto* closing conditions for overseas investment projects, China's overseas investment rules need to be considered with great care when planning and structuring Chinese outward transactions as well as when drafting underlying documentation. Statutory timelines and the possibility of delays beyond those timelines must be taken into account.[126] Moreover, it has been reported that the approval requirements may have, in some cases, jeopardized the chances of Chinese outward investors by delaying the finalization of investment decisions and giving other non-Chinese investors a competitive advantage in terms of timing when it came to bid for lucrative targets.[127]

119. *Id.* art. 14.

120. *Id.* arts. 7, 9.

121. *Id.* art. 11.

122. *See supra* section III.

123. *Id.*

124. *See* Jason Chan, *Restructuring First for Outbound Chinese M&A*, CHINA L. & PRAC., Apr. 2011, at 15.

125. For a similar problem in relation to inward investments, *see* Lutz-Christian Wolff, *International M&A and the Problem of the Effective Date under Chinese Law*, 33 COMMON LAW WORLD REV. 283, 283-94 (2004).

126. Benesh, Friedlaender, Coplan & Aranoff, LLP, *China Goes Global: Examining China's Outbound Investment*, CHINA INSIGHTS, Jan. 2010, at 5; Stender, *supra* note 45, at 18-19.

127. Economist Intelligence Unit, *supra* note 14, at 198.

B. Is China Taking Control of the World's Markets?

While its rapidly increasing outward investment volume evidences China's economic strength, many other parts of the world are struggling to overcome ongoing economic problems. In particular, it became clear in the summer of 2011 that the global economic problems, which had been thought to be solved in the aftermath of the 2008-2009 crisis, continue to exist. The crisis is ongoing and may have even deepened. All of a sudden, China is seen not only as being strong enough to come to the aid of failing European economies, but also as "a potential savior of the global economy."[128]

At the same time, enterprises, particularly in the West and in Japan, have become cheap targets for Chinese investments.[129] This provokes the question of whether many parts of the world's economies will soon be controlled by Chinese enterprises, and, if so, whether this should give rise to concerns and whether any action is required. Cases in which proposed Chinese investments have been blocked by competent state authorities, in particular in the United States and Australia for state security reasons,[130] seem to confirm fears along these lines.[131] In this regard, it must also be considered that Chinese SOEs are the driving force behind China's overseas investments.[132] Even more than other Chinese enterprises SOEs are said to be ultimately controlled by the Chinese Communist Party.[133] Is it consequently necessary to assume that the Chinese Communist Party will soon be in charge of a rapidly growing number of non-Chinese multi-nationals and, thus, greater portions of

128. Cary Huang, *World's Banker of Choice*, S. CHINA MORNING POST, Oct. 1, 2011, at A7, *available at* http://topics.scmp.com/news/china-news-watch/article/Worlds-banker-of-choice.

129. *See* Economist Intelligence Unit, *supra* note 14, at 4; Takahiko Hyuga, *Japan Says "Ni Hao" as Brands Trump Diplomatic Tensions in China Takeovers*, BLOOMBERG (Dec. 16, 2010, 1:12 AM), http://www.bloomberg.com/news/2010-12-15/japan-says-ni-hao-as-brands-trump-diplomacy-for-china-deals.html; Woo, Moller & Chan, *supra* note 3, at 56.

130. *See* Susan Ning, Yin Ranran & Huang Jing, *List of Outbound Investments by Chinese Companies Scrutinized for National Security Concerns*, CHINA LAW INSIGHT (Mar. 11, 2011, 6:37 PM), http://www.chinalawinsight.com/2011/03/articles/corporate/antitrust-competition/list-of-outbound-investments-by-chinese-companies-scrutinized-for-national-security-concerns/; Bien Perez, *Huawei Calls US' Bluff on Security Threat Claims*, S. CHINA MORNING POST, Feb. 26, 2011, at A1, A6; *see also* UNCTAD World Investment Report 2010, *supra* note 16, at 76-81 (reporting that recent developments at the level of national investment regimes are to a certain extent ambivalent. On the one hand, there is a trend to increasing liberalization. On the other hand, domestic regimes, as well as the attitude of those bodies in charge of the implementation of these regimes, show signs of new protectionism.).

131. In light of national security systems in other countries and the increasing foreign investment volume in China via the M&A route, China has, in the meantime, established its own national security system based on article 31 of the Anti-Monopoly Law of the People's Republic of China. *See generally* Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), *translated in* 2008 China Law LEXIS 1761. *See also generally* Circular of the General Office of State Council on Establishment of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (promulgated by the General Office of the State Council, Feb. 3, 2011, effective Mar. 4, 2011), *translated in* 2011 China Law LEXIS 118; Provisions of the Ministry of Commerce on the Implementation of the Safety Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Commerce, Aug. 25, 2011, effective Sept. 1, 2011), *translated in* 2011 China Law LEXIS 573.

132. *See supra* note 5 and accompanying text.

133. *See* RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS 54 (2010).

foreign markets?[134] Do potential target countries have to tighten controls of Chinese inward investments via their national security control systems?

A closer look reveals that related fears are unsubstantiated, at least at this point in time. First, it appears to be a natural consequence of China's new economic strength and the liberalization of the Chinese economic system over the past three decades that Chinese enterprises are globalizing their operations.[135] There is no hard evidence suggesting that Chinese outward investors are not behaving like any other multi-national enterprise with headquarters in other countries. In particular, it cannot be argued that Chinese outward investors are following a more aggressive investment policy than other countries. There is also no evidence that Chinese investments overseas are aimed at conquering foreign markets in order to increase China's political power.[136] In particular, China's overseas investment regime, as outlined above, appears to be more restrictive than those in most Western countries. Furthermore, UNCTAD has drawn attention to the fact that while most of China's outward investors are SOEs, it appears that the number of Chinese SOEs that have invested abroad is still comparatively small.[137] Finally, despite China's impressive growth rates, its overseas investment volume is still rather moderate compared with the size of the country and its population in relation to its gross domestic product (GDP).[138] Also, as already mentioned, in 2010 China's portion of global foreign direct investment (FDI) outflows reached only approximately 5.1%.[139]

C. Global Impact of Economic and Socio-political Onshore Problems

While China's economic development in the past years was impressive, as outlined in the previous sections, it cannot be ignored that there are actual and potential problems and risks. In fact, some commentators have argued that China's fast economic growth is unbalanced and unsustainable:

> One worry is that the first wave of bad loans from China's huge 2008-2009 stimulus is about to hit. The bigger concern is how growth in recent years left the domestic financial system less resilient. China's expansion relies on various counterproductive policies: an undervalued, nonconvertible currency, off-balance-sheet arrangements to mask debt and ample credit to politically connected firms that don't necessarily make the most productive use of capital.[140]

In this regard, China's economic growth over the past decades in absolute numbers does not say much about the economic competitiveness and the sustainability of its econ-

134. *Id.*
135. Wolff, Mergers & Acquisitions in China, *supra* note 7, at 197.
136. *Id.*
137. UNCTAD World Investment Report 2011, *supra* note 19, at 31.
138. *Compare* Gong, *supra* note 4, at A15 (describing China's GDP and GDP per capita) *with supra* Part II.A (describing China's overseas investment volume).
139. Woo, Moller & Chan, *supra* note 3, at 79; PRC Ministry of Commerce, *supra* note 6, at 79.
140. William Pesek, *John Paulson, Subprime God, Flees Muddy Waters*, Bloomberg (June 21, 2011, 2:00 PM), http://www.bloomberg.com/news/2011-06-21/john-paulson-subprime-god-flees-muddy-waters-william-pesek.html. *See also* David Barboza, *Threat Lurking Under China's Explosive Growth*, Int'l Herald Trib., July 8, 2011, at 1, 17; McGregor, *supra* note 133, at 269.

omy.[141] In 2011, China's current GDP does not even reach one-tenth of the per-capita level of that of the United States.[142] While some commentators have argued that "there is no imminent threat of an economy-collapsing banking crisis,"[143] China's finance industry has been said to carry huge risks due to bad loans.[144] Moreover, the rising off-balance sheet exposure of Chinese banks[145] could at any time trigger a chain reaction within the Chinese economy that may be difficult to control.[146]

In addition, debt-financing strategies through offshore special purpose companies[147] could lead to considerable risk exposure of inward investors.[148] If money borrowed by a special purpose company is—as usual—used for investments in China, then foreign creditors have no direct entitlement to the assets of the onshore investee company if the company encounters economic difficulties.[149] In addition, under mainland China's foreign exchange control rules, the investee company would, in such a case, be able to remit only after-tax profits abroad to service the offshore debt via the special purpose company.[150] Commentators have drawn attention to the fact that these profits—if any—may be insufficient under the current market conditions to pay off offshore debts leading to refinancing needs in due course.[151]

The lack of transparency due to insufficient corporate governance structures of Chinese companies, as recently exposed in relation to Chinese companies listed overseas, adds to the problems and a declining confidence in the Chinese economy.[152] It must also be considered that China can no longer automatically be regarded as a low-cost country.[153] In contrast, China must compete globally, *i.e.*, based on technological innovation and superior market expertise.[154] If and how China will be able to meet this challenge remains to be seen.

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141. Gong, *supra* note 4.

142. *Id.* Gong also points out that immediately before the downfall of the Qing dynasty in 1912, China held the top GDP spot worldwide, at 241 billion U.S.D.

143. Barboza, *supra* note 140, at 17; *see also* INT'L MONETARY FUND, *People's Republic of China: Financial System Stability Assessment*: IMF COUNTRY REPORT NO. 11/321 7 (2011) [hereinafter IMF REPORT], *available at* http://www.imf.org/external/pubs/cat/longres.aspx?sk=25350.0.

144. *See* Pesek, *supra* note 140; IMF REPORT, *supra* note 143, at 28.

145. *See* IMF REPORT, *supra* note 143, at 25; Barboza, *supra* note 140, at 1; Lulu Chen, *Fitch Sees Growing Risk on Mainland*, S. CHINA MORNING POST, June 23, 2011, at B3; Pesek, *supra* note 140, at B10.

146. *See* IMF REPORT, *supra* note 143, at 35.

147. *See supra* Part III.E.

148. Cookson, *supra* note 64, at 23.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See* Pesek, *supra* note 140, at B10 (observing that "China's prospects are becoming as murky as the governance of its companies"); Sophie Yu, *Mainland Net Stocks Fall on U.S. Fraud Allegations*, S. CHINA MORNING POST, Oct. 1, 2011, at B1.

153. Gong, *supra* note 4.

154. *See id.*

Moreover, China's dramatic income disparity has caused concern.[155] About 150 million Chinese live on less than one U.S.D. per day.[156] Human rights violations, struggles over land rights, management-labour problems,[157] economic problems, and social unrest are reported almost on a daily basis,[158] although one must assume that only a very small percentage of what is actually happening is being published.

Considering all of this from the viewpoint of Chinese investments overseas, it is obvious that the more interwoven China's economy is with foreign economies, the greater the risk that onshore problems could also have a considerable impact abroad.[159] At this point in time, one can, of course, only speculate how severe these onshore problems are and precisely what their impact may be. Despite the pessimistic comments reported above, it seems unlikely that China's national economy will, in the short and medium term, run into large-scale problems triggering a global crisis. It is, however, prudent not to ignore the situation altogether, but to assume that it is possible that Chinese overseas investors may encounter economic difficulties.[160] Careful structuring of cooperation projects with Chinese partners and diligent drafting of the underlying contract documents should aim at avoiding unnecessary exposure.

One special aspect that should be considered is the possibility that Chinese entities with overseas investments and Chinese business partners in general become insolvent.[161] China has revised its insolvency system as of June 1, 2007 when the new *PRC Enterprise Bankruptcy Law* entered into force.[162] The new *PRC Enterprise Bankruptcy Law* unifies the previously applicable separate regimes for SOEs and other entities[163] and now covers all mainland business entities with legal person status.[164] It was one of the main goals of the reform of China's insolvency system to provide a practicable set of rules to address the

155. *See id.* (describing the problem in terms of per capita GDP); Jerome A. Cohen, *Happy Returns?*, S. CHINA MORNING POST, June 21, 2011, at A13, *available at* http://www.usasialaw.org/wp-content/uploads/2011/06/2011.06.22-SCMP-Cohen-Happy-returns.pdf.

156. Press Release, Economic and Social Council, Anti-Poverty Experts in Commission for Social Development Offer Ways to Keep Ranks of People Without Adequate Food, Clothing, Shelter From Swelling; Disconnect Between Reality of Poverty—Actions of Governments Explored, as Panelists, Delegates Alike Call for Alternative Poverty-Eradication Paradigm, U.N. Press Release SOC/4772 (Feb. 10, 2011), *available at* http://www.un.org/News/Press/docs/2011/soc4772.doc.htm.

157. *See, e.g.*, Mimi Lau, *Strikers Dragged Off as Police and Bosses Get Tough*, S. CHINA MORNING POST, June 24, 2011, at A7; *see also* Cohen, *supra* note 155.

158. *See* Minxin Pei, *Spilling Over*, S. CHINA MORNING POST, June 20, 2011, at A13; *see also generally* Cohen, *supra* note 155, at A13.

159. *See* Barboza, *supra* note 140, at 17 (opining that "any significant slowdown . . . would have international repercussions").

160. *See* May Chan, *S.M.E. Credit Crisis "Could Sweep China" After a Wave of Businesses Failures in Wenzhou Caused by Firms Forced to Borrow at Steep Rates, Economists Fear the Problem Will Be Contagious*, S. CHINA MORNING POST, Oct. 4, 2011, at A1.

161. *See id.*

162. *See generally* P.R.C. Enterprise Bankruptcy Law (promulgated by the Standing Comm. Nat'l People's Congress, Aug. 27, 2006, effective June 1, 2007).

163. Lutz-Christian Wolff, *Insolvency, Dissolution, Liquidation*, China Company L. Guide (CCH) 280-750 (2004).

164. *Id.* at 280-760. The PRC Enterprise Bankruptcy Law is supplemented by the "Provisions of the Supreme People's Court on the Appointment of Insolvency Administrators in Enterprise Insolvency Cases," the "Provisions of the Supreme People's Court on the Determination of Insolvency Administrators' Remuneration in Trial of Insolvency Enterprise Cases," the "Provisions of the Supreme People's Court on Several Issues on the Applicable Laws for Enterprise Insolvency Cases Pending at the Time of Implementation of the

situation of insolvent companies, in particular SOEs.[165] While on paper the previous regimes may have been sufficient in this regard, it was the implementation of related rules that had failed.[166] It is still unclear if the new *PRC Enterprise Bankruptcy Law* has really improved the situation.[167]

Under China's insolvency regime, the insolvency of legal person entities can lead to their liquidation, reorganization, or settlement arrangements between the debtor and its creditors.[168] Proceedings are commenced on the basis of a non-mandatory application by a creditor (or even the debtor itself) to the competent People's Court.[169] As for cross-border insolvency, more precisely the availability of overseas assets for the distribution to creditors of an insolvent Chinese legal entity, the *PRC Enterprise Bankruptcy Law* applies the concept of universality.[170] From the perspective of Chinese law, onshore insolvency proceedings should also cover overseas assets, including stakes in foreign business entities.[171] The implementation of this rule is, of course, subject to the laws of the country where related assets are located.[172]

D. Geo-political and Strategic Risks

China's outward investment projects, in particular China's investments in Africa, have sparked some discussion as to the way they were implemented and the rationale behind the selection of particular target countries.[173] As indicated above,[174] a relatively large percentage of China's investments overseas found its way into Asian target countries, while a still remarkable portion ended up in Africa and Latin America.[175] In contrast, cumulative investment ratios in North America and Europe are relatively low, although this appears

PRC Insolvency Law," all effective as of June 1, 2007, and the "Provisions on Certain Issues Regarding the Application of the 'PRC Enterprise Bankruptcy Law' (1)," effective as of Sept. 26, 2011.

165. *See* Travis Hodgkins, *China's New Bankruptcy Law—First Report From the Ground*, China L. Blog (June 12, 2007), http://www.chinalawblog.com/2007/06/chinas_new_bankruptcy_law_firs.html.

166. *See* Enoch Yiu, *Liquidation Specialist Warns of Mainland Risks*, S. China Morning Post, Oct. 24 2011, at B3, *available at* 2011 WLNR 21764870.

167. *See* Wolff 2004, *supra* note 163, at 100-281.

168. *Id.*

169. PRC Enterprise Insolvency Law art. VII.

170. *See id.* art. V.

171. *See id.*; Wolff 2004, *supra* note 163, at 281-620.

172. *Id.*

173. *See* McGregor, *supra* note 133, at 116 ("When Iraq couldn't raise the money it owed for arms bought during the Iran-Iraq war, it paid in kind in 1996 by offering PetroChina a $1.2 billion oil concession in tandem with Norinco, the state weapons manufacturer . . . . Likewise, Chinese investment in oilfields in Sudan was done in parallel with arms sales by a state-owned weapons firm to the Khartoum regime."); *Obey the Rules, New Zambia Leader Tells China*, Reuters (Sept. 26, 2011, 12:24 PM), http://af.reuters.com/article/topNews/idAFJOE78P0EZ20110926; *see also* Toh Han Shih, *Controversial Chinese Projects in Cambodia Bow to Public Pressure*, S. China Morning Post, Sept. 3, 2011, at B1-2, *available at* 2011 WLNR 17432751.

174. *See supra* Part II.

175. *See* Woo, Moller & Chan, *supra* note 3.

to be changing[176] with Chinese investments now specifically targeting companies with advanced technology,[177] global brands, and trade names.[178]

According to official Chinese sources, Chinese overseas investments are industry oriented, *i.e.*, they are focused on those countries where the conditions for a particular type of investment or investments in a particular industry are the best.[179] In contrast, some foreign commentators have identified strategic interests behind many of China's investment projects overseas. In particular, it has been noted that China must secure its supplies with natural resources, energy, and rare earths[180] to fuel its economic growth.[181] Indeed, between 2004 and 2009 almost fifty percent of the acquisitions of Chinese investors overseas worth more than fifty million U.S.D. were aimed at targets in the natural resource and energy sectors.[182] According to UNCTAD, in recent years more than twenty percent of China's total overseas investment volume was in the extractive industries.[183]

Others have suggested that China's overseas investments may be driven by attempts to "buy" United Nations voting power through investments in developing countries, in particular in Africa and Latin America.[184] According to another viewpoint, China simply invests where other countries have yet to invest, *i.e.*, China is picking up what has not been targeted by non-Chinese.[185] Finally, there have been reports that Chinese entities have often found it difficult to adjust to the Western cultural environment.[186] This could ex-

176. *See* Flanigan, *supra* note 30, at 54 (North America); O'Neill, *supra* note 14, at 16-17 (Europe); Woo, Moller & Chan, *supra* note 3, at 57-58 (North America).

177. *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 14, at 8; Kevin Nie, *Chinese Automakers' Overseas M&A–From the Perspective of IPR*, CHINA INTELL. PROP., Apr. 2010, at 42-43, *available at* http://www.chinaipmagazine.com/en/journal-show.asp?id=591; Woo, Moller & Chan, *supra* note 3, at 55.

178. *See* Doris Li, *Beijing Automobile Speeds Up Brand Development By M&A*, CHINA INTELL. PROP., Apr. 2010, at 35-37, *available at* http://www.chinaipmagazine.com/en/journal-show.asp?id=589; Nie, *supra* note 177, at 42-43; Woo, Moller & Chan, *supra* note 3, at 55.

179. *See* Murphy, *supra* note 12, at 7-10; WOLFF, CHINA OUTBOUND INVESTMENTS, *supra* note 5, at 3.

180. *See* Ed Zhang & Toh Han Shih, *China Pays for Risky African Ventures*, S. CHINA MORNING POST, Feb. 25, 2011, at A1, A6, *available at* 2011 WLNR 3689812; Woo, Moller & Chan, *supra* note 3, at 55.

181. MCGREGOR, *supra* note 133, at 115 (stating that in 1993 "China became a net oil importer" and "China's reliance on oil imports, which had been growing every year since, marked a turning point for its economy and redefined its broader security interests for ever as well."); Woo, Moller & Chan, *supra* note 3, at 55; *see also* Simon Parry, *Chilly Reception for Icelandic Venture*, S. CHINA MORNING POST, Sept. 13, 2011, at A4 ("the response to the idea of a Chinese multimillionaire buying up what amounts to 0.3 per cent of Iceland has been decidedly chilly in parts of Reykjavik, where suspicions are rife that the project is in fact a cover for Chinese strategic development . . . part of a bigger move by Beijing to get access to the trans-Arctic shipping lanes that could open as polar ice caps melt."); the investment proposal has in the meantime been rejected by the Internal Affairs Ministry of Iceland on the basis of various legal issues, see Stephen Chan, Nordic Ventures far from Finished, S. CHINA MORNING POST, Nov. 28 2011, at A4.

182. ECONOMIST INTELLIGENCE UNIT, *supra* note 14, at 13.

183. *UNCTAD World Investment Report 2011*, *supra* note 19, at 47.

184. *See* Susan Stumme, *Leaked US Cable Says China Has "No Morals" in Africa*, AGENCE FR. PRESSE (Dec. 8, 2010), http://www.google.com/hostednews/afp/article/ALeqM5gNV4PQJy0-vBVobjbRuITqI21wcA?docId=CNG.c41db06392485b1ac24c577f6d55fb67.441; Prak Chan Thul, *Analysis: China Pumps Up Cambodia Economy, But At What Cost?*, REUTERS (Apr. 5, 2011, 3:01 AM), http://www.reuters.com/article/2011/04/05/businesspro-us-cambodia-china-idUSTRE73412E20110405; *Beijing's Aid "A Double-Edged Sword,"* S. CHINA MORNING POST, Apr. 7, 2011, at A14 (discussing soft loans provided through a foreign aid programme offered by China).

185. My colleague, Professor Yu Xingzhong, brought this point to my attention.

186. *See* Hannah Seligson, *For American Workers in China, a Culture Clash*, N.Y. TIMES, Dec. 24, 2009, at B1 (N.Y. edition), *available at* http://www.nytimes.com/2009/12/24/business/global/24chinawork.html.

plain why Chinese enterprises prefer to invest in Asia rather than in Western countries.[187] Adding to the difficulties of Chinese overseas investors in Western markets could be the reluctance to take advantage of high quality but expensive legal, financial, and industry-related consultancy services when setting up and developing business abroad.[188]

All the above reasons sound plausible and may have their own justifications. In other words, different Chinese overseas investment projects in different geographical regions may be based on different rationales. In this regard it must also be acknowledged that it would be surprising if the Chinese government did not to take strategic aspects into account. Governments of other countries must do exactly the same.

V. Final Remarks

The world order is currently undergoing fundamental changes, and it remains to be seen where China will stand upon completion of the ongoing reshuffle. It is clear, however, that China is a strong newcomer in the international investment arena while, at the same time, other countries have lost much of their former power in recent years. Successful newcomers are always eyed with suspicion.[189] This may explain the common reluctance to accept China's increasing overseas investment volume as what it is, namely evidence of the globalization efforts of multi-national enterprises located in a country which has or is about to become a political and economic mega-power.

Overseas investments of Chinese enterprises are developing rapidly despite a rather strict domestic outward investment regime. The increasing volume of Chinese outward investments creates chances and risks not only for Chinese, but also for foreign parties. Future developments must be monitored closely because China's overseas investment strategies have the potential to destabilize the world, whether they fail or succeed.[190]

187. *See* WOLFF, MERGERS & ACQUISITIONS IN CHINA, *supra* note 7, at 3.
188. Dr. Markus Ederer, EU Ambassador to China, has kindly drawn my attention to this aspect.
189. *See* MCGREGOR, *supra* note 133, at 272.
190. *Id.*