

# ***Interlocking Legalities of the Chinese Presence in Latin America and Its Perception: Theory, Operationalization, and Impact in Columbia***

Larry Catá Backer

W. Richard and Mary Eshelman Faculty Scholar; Professor of Law and International Affairs  
Pennsylvania State University | 239 Lewis Katz Building, University Park, PA 16802 1.814.863.3640 (direct)  
|| [lcb11@psu.edu](mailto:lcb11@psu.edu)

“The Legal Dimensions of China’s Presence in Latin America” Dr. Monika Prusinowska (University of Barcelona) and Dr. Daniel Sprick (University of Cologne)

Abstract: The object of this research is to explore the nature, character, and application of Chinese investment in Latin America from three related levels. The focus will be on the business and human rights-sustainability field. *The first is the theoretical level.* The object is to develop a theoretical basis for understanding the premises, principles, and orienting concepts that distinguish Chinese investment from that of other metropolitan centers (and particularly those of the E.U. and the U.S.). This part builds on substantial previously published theoretical work both on the development of Chinese Socialist internationalism and its expression in trade and trade based human rights. *The second is the structural level.* This section explores how Chinese theoretical approaches have been translated into trade and investment policy with emphasis on Latin America. The focus here is on both the means through which Chinese projection of economic power is realized—mostly through State Owned finance and operational entities—and the way in which those means are managed in both home and host states through regulatory and compliance systems that themselves may draw on international regulatory frameworks. The focus of the first two sections, then, is on the interiorization of regulatory environments within the structures of State and enterprise. *The third, and perhaps the most interesting part of this study is the operational level.* Working with colleagues and students in Cali, Columbia, the object here is to try to begin to explore the way theory and structure work on the ground. The object is to develop data about the way that Chinese trade is felt by those in the home state. That requires, in turn, to get a sense of who feels presence, and how presence is experienced. Initially, the focus may be on the involvement of Chinese enterprises and officials in judicial proceedings and in interactions with officials. Development of this stage of the project is still very much in a preliminary stage. The perspective is an outsider rather than insider perspective. Presence, in this sense, is understood as a function of impact. In turn, impact is in its essence the way in which the theoretical and frameworks are exteriorized. The focus here, in a sense, to use Chinese concepts is on the way that the host State experiences Chinese investment on the ground.

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El objetivo de esta investigación es explorar la naturaleza, el carácter y la aplicación de la inversión china en Latino América desde tres niveles relacionados. El enfoque estará en el campo de las empresas y los derechos humanos y la sostenibilidad. El primero es el nivel teórico. El objetivo es desarrollar una base teórica para comprender las premisas, los principios y los conceptos orientadores que distinguen la inversión china de la de otros centros metropolitanos (y en particular los de la UE y los EE. UU.). Esta parte se basa en un trabajo teórico sustancial publicado anteriormente sobre el desarrollo del internacionalismo socialista chino y su expresión en el comercio y los derechos humanos basados en el comercio. El segundo es el nivel estructural. Esta sección explora cómo los enfoques teóricos chinos se han traducido en políticas comerciales y de inversión con énfasis en América Latina. El enfoque aquí se centra tanto en los medios a través de los cuales se materializa la proyección china del poder económico (principalmente a través de entidades financieras y operativas de propiedad estatal) como en la forma en que esos medios se gestionan tanto en los estados de origen como en los de acogida a través de sistemas regulatorios y de cumplimiento que pueden basarse en marcos regulatorios internacionales. El enfoque de las dos primeras secciones, entonces, se centra en la interiorización de los entornos regulatorios dentro de las estructuras del Estado y la empresa. La tercera parte, y quizás la más interesante de este estudio, es el nivel operativo. Trabajando con colegas y estudiantes en Cali, Colombia, el objetivo aquí es tratar de comenzar a explorar la forma en que la teoría y la estructura funcionan en el terreno. El objetivo es desarrollar datos sobre la forma en que el comercio chino es percibido por aquellos en el estado de origen. Eso requiere, a su vez, obtener una idea de quién siente la presencia y cómo se experimenta la presencia. Inicialmente, el enfoque puede estar en la participación de

las empresas y los funcionarios chinos en los procedimientos judiciales y en las interacciones con los funcionarios. El desarrollo de esta etapa del proyecto se encuentra todavía en una fase preliminar. La perspectiva es más bien la de un forastero que la de un interno. La presencia, en este sentido, se entiende como una función del impacto. A su vez, el impacto es en esencia la forma en que se exteriorizan los marcos teóricos. En este caso, en cierto sentido, el enfoque para utilizar conceptos chinos se centra en la forma en que el Estado anfitrión experimenta la inversión china sobre el terreno.

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## 1. Introduction

Since the start of the 21<sup>st</sup> century globalization has moved decisively in new directions. At the start of the 21<sup>st</sup> century the movement embodied a single-minded effort toward global convergence of principles manifested through a rules based international order. That rules based ordering went by several names, each grounded in an ideology of convergence that reflected particular rationalizations of the ideal of political-economic ordering. Generally these ordering were structured to align ideal with the international ordering developed after 1945. That, in turn, was founded on the ordering principle that States occupied the apex of political authority, that political authority occupied the apex space in the framing of huma social relations; and that the community of States could constitute its own apparatus of governance into which it could delegate certain authority, and from which it might develop structures for converging norms, principles and expectations. Some of these might be made mandatory at least among States through legally binding instruments. But many others would embody non-binding consensus, direction, expectation or ideal among States. And States would develop disciplinary institutions though international mechanisms for review, monitoring, discussion, and the development of capacity grounded in fact based interactions through increasingly technically competent bureaucracies interlinked with similar bureaucracies developed for States and other actors. People and institutions bound to and emerging from the domestic legal orders of States were insulated from all of this by States which were the subjects of this converging architecture and its own legalities at the international level. Nonetheless, State based legal obligations and expectations embedded within an increasingly rich superstructure of guidance and expectations.

There were substantial consequences to this convergence ideology and the structures and frameworks developed to fulfill its objectives. First was the development of structures within which the project of convergence could be undertaken. This required the elaboration of a large architecture of international institutions. Second, that elaboration, in turn, required the expansion of international law into its third phase—from a contract law among states, to a means of imposing multilateral mandatory measures around consensus based principles and practices, and lastly to the object pf international law as a means of constituting international institutions, mimicking a government or at least a bureaucracy serving States, to which powers and authority could be delegated up by their State members. Third, those inter-governmental bureaucracies could produce several sorts of objects—mandatory legally binding measures, guidance and principles that were meant to describe expectations, and technical operations through secretariats that could produce and analyze data and develop standards against which behavior expectations could be measured, and State parties actions assesses against expectation. Fourth, all of

these efforts were meant to fulfill the normative goals and legal obligations of States as they were developed through the great converging normative instruments—and particularly the norms set out in the International Bill of Human Rights, the treaties and expectations around humanitarian law and the laws of war, and the rules for trade that were meant to produce a convergence of international economic law. Fifth, the institutional and normative architecture of convergence was to be managed through the elaboration of multiple judicial and dispute resolution bodies through which a jurisprudence of convergence could be developed around constantly refined expectations and understanding of mandatory rules.

Beneath all of that was a set of operational presumptions. These were meant to make more effective the transposition of the convergence at the State level through their international bureaucracies housed in the institutions built to serve those ends. *The first were expectations of accountability.* These were meant to develop aligned systems of officials who were technically capable of understanding normative obligation and expectation and translating those into the operational spheres of their institutions in their functionally differentiated system spheres. For every technically competent administrator in the public sphere there was to be an equally technically competent administrator in the institutions subject to discipline (usually private sector economic organs). Solidarity between these techno-bureaucracies would then make it more seamless to align the expectations of public (and international) normative converged systems into all spheres of private social relations. *The second were expectations of a coercive influence.* The basic idea was twofold. The first involved capacity building and technology transfer. The second involved nudging effects based on power relations. Capacity building is grounded in the premise of assimilation through training and education. That process of education is not merely technical but also one that, through technical training, also embedded the underlying premises and cognitive cages essential to the understanding of that technical training—to learn how to use the hammer correctly one has to also agree on the entire system around which it is possible to understand what is correct and what is not. Nudging effects grounded in power relations might best be understood as variations of cram-down strategies and the “Brussels effect.”

Each of these presumptions, and the architectures built around them, were grounded in the intertwining of various forms of extraterritoriality in the service of convergence. *First convergence was understood as aligning public policy* (originating in States and expressed through their international organizational instrumentalities) *with the objectives of private social collectives* (and especially economic organs). This convergence could be achieved in a variety of ways but importantly through the development of aligned institutional mechanisms through which collective solidarity could be inculcated. This convergence thorough solidarity building institutions has been the subject of much academic literature coming from a variety of perspectives but generally sharing the ordering foundational ideology of the convergence ideal state. *Second, objectives convergence required the internationalization of the normative architecture around which compliance based systems could be developed.* Much energy was spent since the 1990s on the development of a large, complex, and comprehensive system of norms—expressed through all of the instruments of power (treaty, regulations, principles, norms, declarations) and deepened through the production of an increasingly discussion driving production of reports, analysis, information and the like from the secretariats of international organizations, sometimes aligned

with the similar efforts of civil society organs sharing either normative vision, objectives or results. Third, several forms of projection of this sort of regulatory organization could support the extension of local regulation beyond the territorial or control jurisdiction of public powers (mostly States). These are well known, much discussed, and consistently controversial. Among them were the domestication of international law, norms and sensibilities and then its projection out to other States—the idea being that a State was not acting for itself but rather as some sort of agent for converged internationalisms. Another was the privatization of this form of extraterritoriality by injecting these approaches to the actions of State investment vehicles (for example sovereign wealth funds, and import-export mechanisms) and State owned or controlled enterprises. Yet another enlisted the courts of a State as quasi international bodies, allowing them increasingly broad jurisdiction to settle disputes. At their limits, variations of universal jurisdiction might be grounded in the idea that courts are now, within that jurisdiction, merely instruments of international (and thus uniformly applied) obligations with legal effect (either as public or private law). Lastly, administratively based nudging strategies, grounded in compliance based oversight and fueled by data rich environments of oversight, made nudging schemes more plausible. This makes possible something like a bio-politics of techno-bureaucracies through which powerful actors subject to a mandatory norm regime could require those not subject to those norms to conform as a condition of either access to markets or the continuity of profitable relationships. Through these interlinkages it would be possible, in an ideal state, to reach a point where convergence would produce substantially effective universalization of the fundamental norms and forms of behaviors that would move social relations closer to the realization of unity within tolerable levels of diversity.

By the third decade of this century, however, the quest for unity could be measured as a function of the increasing diversity of its normative orders. Each of them retained the underlying cognitive cage of convergence, but now confined within the cage of the presumptions, values, and objectives of the political economic models of the apex States around which these sub-global systems were beginning to emerge. Three of these politically differentiated systems appear to have an outside influence on the development of these sub-systems of convergence: Marxist-Leninist (so-called Socialist) convergence systems with its State hub in China; liberal democratic markets driven systems with its hub in the United States, and liberal democratic regulatory systems with its hub in the institutions of the E.U. Each of these convergence based systems is notable for two fundamentally similar characteristics. *The first* is that each has transposed and naturalized the convergence impulse as and in its own political economic model. These models express the ordering premises around which values can be created and systems rationalization may be undertaken. That produces internal convergence among like-minded State and other collectives and may be expressed by solidarity among State and private actors. *The second* is that each of these systems continues to embrace the forms and objectives of the extraterritorial impulse, but now directed to the expansion of their own convergence systems. But this extraterritorial impulse is manifested in ways that align with the values and presumptions of the political-economic model through which they are utilized. Thus, for example, The Marxist-Leninist approach might focus on a more top down centrally ordered system in which fundamental objectives aligned with State purpose would be compelling but substantial space would be opened for means of fulfilling those objectives. These would be combined with intense programs of state to state and people to people systems of cooperation through which capacity building, and convergence of underlying normative structures might be enhanced. This is built into the structures of the Chinese Belt & Road Initiative and its ideological

foundations. The European model would rely on its so-called Brussels Effect. One can understand that as the instrumentalization of European internal governance and its projection outward as the means through which convergence can be enhanced through regulatory compliance systems.

Even as the impulse to convergence, and its methodologies, have survived, and perhaps thrived under conditions of post-global fracture, the underlying normative premises that are at the heart of the convergence project have fractured enough to make their differences significant. Nonetheless, the differences are masked by the common language of the old architecture of global convergence. Thus, all three systems may speak to globalization through shared values and integrated norm based systems, but the words mask sometimes quite different value systems that inform concepts with meaning. None of this would matter much except that these systems each exist to ensure that their convergence systems expand and ultimate drive a renewed pathway to convergence. Internal convergence, then, is threatened by the extraterritorial reach of competing systems, and is grounded both on the cultivation of internal solidarity and external expansion. These impulses become acute and acutely troublesome because each of these solidarity convergence systems is deeply interpenetrated by the others (though in different ways), and all of them compete for dominance among those state and other actors existing beyond the metropolitan centers of each. That makes Latin America, Africa and South East Asia particularly important targets for competitive activity.

This might be thought to present itself especially in the form of more fractured systems of functionally differentiated state-based rights regimes applying differentiated clusters of international norms. Especially in the context of human rights related compliance obligations, what started out as the development of conduct and normative expectations built into the guidance of instruments like the UN Guiding Principles of Business and Human Rights and the earlier OECD Guidelines for Multinational Enterprises has increasingly acquired two profoundly important characteristics. The first is the increasing effect to impose mandatory state based compliance regulatory structures, sometimes tied to or derived from earlier international normative guidance. The second is an equally insistent effort to project the reach of compliance based national regulatory structures extraterritorially. Neither of these trends would be of unusual significance except that, in the absence of a set of unifying or coordinating principles or rules, both States and business enterprises (along with the civil society organs which serve an important monitoring and representative (collective) role) the resulting regulatory web can produce inconsistent and oppositional requirements and risk parameters that may adversely impact both regulatory objectives, and in the case of developing states, their ability to effectively manage development strategies. The complexities of these interlocking and layered regulatory systems that run from apex States and their enterprises to and through their supply and value chains has increased substantially in the face of the development of Chinese approaches to trade, markets, international relations, regulation and human rights.

These cross currents are especially evident in the context of Latin America. Latin American States—and their key stakeholders—must navigate regulatory systems that are both indigenous, must also be sensitive to regulatory systems that are projected inward by firms and through international agreements from abroad. The situation has become more complex as Latin America's usual trading partners—the North America and Europe, has increasingly been challenged by China trade and

investment activity in Latin America. Also changing are the forms of investment—from supply chain oriented production for markets to large financing and infrastructure projects that are meant to be directed by and through host States. These investments have been comprehensive—from large and small projects (ports, roadways and communications networks), to commodity and products oriented investment tightly aligned with production chains stretching up to and through the home (hub) State. These are accompanied by an investment in social, cultural, and political alignments in ways that echo the Venezuela-Cuba structures of investment from the early 2000s and the ALBA project,. These are manifested differently in ways to align with the normative projects of each leading state. For the Marxist-Leninist convergence model, the forms of capacity building and solidarity are managed through State to State and people to people programs which are meant to align values, outlook, and sympathies. For the United States convergence model, the form is markets driven and focused formally on free trade arrangements, supplemented by state aid and substantial involvement by host state based civil society organizations (sometimes funded to those ends by the State). For the Europeans it is more oriented to the bureaucratic regulatory model grounded in administrative management around which cultural and social exchanges may be managed and convergence objective discussions may be had.

Within this fractured but convergence-oriented ecology of related but competing systems, then, a certain level of interpenetration is inevitable. These interpenetrative pathways for structural coupling (to use the language and sensibilities of Niklas Luhmann) serve as the means for expanding systemic reach, for continued development through interpenetrative dialectics, and a means of leveraging competitive systems toward inter-systemic convergence (for the benefit of the active system in this dialectic. For example, requiring downstream supply chain enterprises in Africa to adhere to the requirements of the European Corporate Sustainability due diligence directive, or enforcing U.S. sanctions based regimes through the operations of Latin American downstream operations (either through control of contract relations), projects hub state objectives through a supply chain and also (in the best case) has an effect on the expectations and normative operational baselines for host state enterprises. The same might be said to apply to infrastructure. The model is an ancient one for building unity through pathways—the Puerta del Sol in Madrid, the Zero mile marker in Byzantine Constantinople; and the siting of Beijing all attest to the power of this physical manifestation of ties that bind. The most advanced institutionalization of this ancient trope in contemporary form is the Chinese Belt & Road Initiative. Nonetheless there are strong counterparts elsewhere tied to global cable and petroleum pipelines—and in its most advanced form to the global banking system built around a U.S. hub. But interpenetration also produces countermeasures as hub oriented systems seek to preserve their own autonomy and authority. In the U.S. that tends to be sanctions based; in China it tends to revolve around interdiction of access. In Europe a combination built around law compliance regimes.

Much of this is intuitive, but there is relatively little research for evidence of any of this at a more granular level. Much of the reasons for that, of course, is that the emerging system is hardly well formed enough to study systematically. Part of it may lie in drag—the cognitive cages of global convergence is a hard enclosure from out of which to emerge. One of the most interesting spaces in which this sort of competitive interpenetration occurs in through the forms and behaviors, the expectations and conduct, of institutional manifestations of foreign direct investment, and more specifically, where that investment is manifested through the formation of a host country enterprise. *Here the question might be posed as*

*follows*: where hub state enterprises form host state enterprises, either through ownership or control relations, are these host enterprises likely to “go native” and operate in accordance with the rules, forms, and expectations of the host state—including its public policy objectives—or will that enterprise formation and relationship be used as a means of using host state legality (in this case the law of enterprises) and the expectations of enterprise behaviors, to shift both closer to the model, forms, and expectations of the home state. In simpler terms, do home state behaviors, expectations, and governance forms follow direct investment and operation from home to host state?

The effects can be significant and were recently and dramatically highlighted in the case of the formation and operation of TikTok in the United States. On that case, the issue revolved around the transposition of behavior and operations expectations from the home state that were embedded, in the structures and operations of the host state enterprise. In the case of TikTok, the issue revolved around national security; where that transposition is the result of the extra-territorialization of compliance based expectations—the so-called Brussels Effect—the focus is on convergence through private relationships guided by the mandatory rules of the home state. One does not focus here on sovereignty-affecting issues but rather the more subtle ways in which interpenetration might also affect the way in which the host state's own normative space may be influenced from outside of itself through the actions, interpretations and behavior roles of domesticated foreign enterprises.

Two areas of this possible general pattern might be worth highlighting, and these point to the focus and object of this essay. The first is on the expectation, rules and practices of enterprise governance. And the second is on the way on which these manifest themselves where the political-economic systems of home and host states differ in some important respect, differences that then touch on the nature of public management of private conduct and institutions. The issue of enterprise governance has, in its own right, been an object of both national and international guidance and regulation for some time. Since the middle of the last century, at the international level that focus as emerged within International Financial Institution programs of “good governance,” as well as through a long tradition of soft law guidance from the Organization for Economic Cooperation and Development. In both cases attention is centered on structures of administration. Yet that attention is meant as a pathway to the realization of certain normative objectives: quality control, avoidance of corruption, transparency, systems for monitoring operations, and related systems for managing compliance related objectives, both legally binding and those derived from operational expectations. They are also meant to affirm and reinforce the underlying normative basis for the operation of State licensed private legal persons within largely market driven private spheres of activity in which the State may regulate but which the State is itself, in the role of a State, an active participant. More recently, issues of good governance has been more closely tied to a set of roughly converging normative values and their consequential objectives that have, in turn, been embedded in systems of compliance, and especially those commonly referenced as ESG (Environmental, Governance, and Social) reporting in one of another of its various forms.

These two areas then bring one to the specific focus of this research. The first is that the so-called Socialist “Good Governance” Model for enterprise governance merits additional study in its own right as it has developed particularly within the last two decades. And the second is that the interpenetrative effects of this Socialist “Good Governance” Model in the context of Chinese overseas

investment may now have reached a point where it, like those of other apex States, have significant interpenetrative effects. That is, that the emerging sensibilities, values and expectations of Socialist Good Governance as it has emerged in China’s New Era may now find its way into the expectation and practice s of host State enterprises formed or operated as part of Chinese overseas investment. The investment part is not unique—but the transposition of a model, its values and sensibilities, which is potentially different enough from competing systems to be noted, may add a substantially different set of practices and behaviors into the corporate or more generally the enterprise behaviors and models of host state enterprises.

Centering attention on Chinese investment in Latin America, the object is to explore the nature, character, and application of Chinese investment in China from three related levels. The focus will be on enterprise governance and compliance structures and pathways within the broader field of business and human rights-sustainability. It is here that the differences among models and the nature of interpenetrative effects may be more visible, and its effects on the practices, operationalization, and expectations of host state enterprises more apparent. The object is not to suggest that these interpenetrative effects are good or bad. The object is more modest—to consider that possibilities of interpenetration of values and practices within the domestic legal ordering of host States but now from a system the values structures of which are different in some respects from the traditional penetrative models. From a systems perspective, then, what is sought here is a better understanding of structural coupling in the context of direct investment and its effects of enterprise organization and practice in host states. That, in turn, may be measured as a function of the difference between Socialist, markets driven, and regulatory compliance models of human rights-sustainability on economic activity is now well known if less well understood.

*The first is the theoretical level.* The object is to develop a theoretical basis for understanding the premises, principles, and orienting concepts that distinguish Chinese investment from that of other metropolitan centers (and particularly those of the E.U. and the U.S.). The focus is on both the normative premises around which economic activity is organized within Chinese Marxist-Leninism, and the way these principles are then embedded in the principles and practices of Chinese economic internationalism. The former is a function of evolving Chinese Marxist-Leninist theory and its practices within China; the latter may be extracted in part from the theory and operations of a principle organizational policy of Chinese external relations—the Belt & Road Initiative. This part builds on substantial previously published theoretical work both on the development of Chinese Socialist internationalism and its expression in trade and trade based human rights.

*The second is the structural level.* This section explores how Chinese theoretical approaches have been translated into trade and investment policy with emphasis on Latin America. The focus here is on both the means through which Chinese projection of economic power is realized—mostly through State Owned finance and operational entities—and the way in which those means are managed in both home and host states through regulatory and compliance systems that themselves may draw on international regulatory frameworks. While the Belt & Road Initiative provides a useful outward facing framework for understanding structure, the inward facing institutional structures tied to the administrative and CPC organs charged with aligning economic activity (and its forms) with State



objectives and values that play a central role. The focus of the first two sections, then, is on the interiorization of regulatory environments within the structures of State and enterprise.

*The third, and perhaps the most interesting part of this study is the operational level. Working with colleagues and students in Cali, Columbia, in the Semillero de derecho societario de ICESI, the object here is to try to begin to explore the way theory and structure work on the ground. The object is to develop data about the way that the sensibilities, practices, and expectations of the Chinese Socialist "Good Governance" Model may be expressed as and through the enterprise institutions established in Columbia. The theory is that key elements of Chinese style good governance can be expressed in and through Colombian corporate statutes. The question is whether and to what extent that expression may vary from a baseline, and then to consider the implications of interpenetration for the way in which expectation and practice can be affected within a legal structure. Foreign investment in general, and Chinese investment more specifically, is felt by those in the home state. That requires, in turn, to get a sense of who feels presence, and how presence is experienced. Initially, the focus may be on the practices and patterns of enterprise formation (especially with respect to patterns of choices where the statutes permit variation, and the coherence of resulting governance structures. Presence, in this sense, is understood as a function of impact. In turn, impact is in its essence the way in which the theoretical and frameworks are exteriorized. The focus here, in a sense, to use Chinese concepts is on the way that the host State experiences Chinese investment on the ground. Development of this stage of the project is still very much in a preliminary stage; a future investigation may consider the involvement of Chinese enterprises and officials in judicial proceedings and in interactions with officials. The perspective is an outsider rather than insider perspective.*