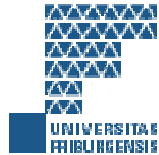




CADWALADER



Third Columbia International Investment Conference

FDI by State-Controlled Entities

Do the Rules Need Changing?

**Columbia University, Lerner Hall, Room 555
October 1-2, 2008**

PROGRAM

**Vale Columbia Center on Sustainable International Investment
Columbia Law School/The Earth Institute**

**Mark and Gail Appel and
the Center on Global Legal Problems
Columbia Law School**

**NCCR/World Trade Institute Berne
University of Fribourg**

Cadwalader, Wickersham & Taft LLP

In cooperation with

**Center for Transnationals' Studies (CTS)
Nankai University**



Conference Organizers

Vale Columbia Center on Sustainable International Investment Columbia Law School/The Earth Institute

The Vale Columbia Center on Sustainable International Investment promotes learning, teaching, policy-oriented research, and practical work within the area of foreign direct investment (FDI), paying special attention to the sustainable development dimension of this investment. It is a joint center of Columbia Law School and The Earth Institute. For more information, see: www.vcc.columbia.edu.

Center on Global Legal Problems Columbia Law School

The Center addresses globalization's legal dimensions through diverse interdisciplinary research and scholarship. The Center supports long term research projects, such as collaborative research with professional disciplines other than law, including economics and philosophy, and other professional schools including the schools of business, journalism, public health, and international affairs; periodic conferences and other speaker series; associations and public policy oriented projects with other Columbia University centers and programs, including the Earth Institute, the Institute for Human Rights, the Initiative for Policy Dialogue, and the Center for International Organizations; and joint programs with international organizations such as the United Nations. For more information, see: http://www.law.columbia.edu/center_program/global_legal

NCCR—World Trade Institute Berne University of Fribourg

The World Trade Institute is a center of advanced studies and a forum for interdisciplinary research and teaching in international trade law and economics. In cooperation with the University of Fribourg, the WTI hosts the National Centre of Competence in Research on International Trade Regulation. The purpose of NCCR Trade Regulation is to develop innovative, concrete policy recommendations that reflect a better balance between economic and other regulatory objectives. For more information, see: <http://www.nccr-trade.org>

Cadwalader, Wickersham & Taft LLP

Cadwalader, Wickersham & Taft LLP, an elite global law firm with offices in New York, London, Charlotte, Washington and Beijing, has provided more than 200 years of legal counsel to many of the country's and the world's most prestigious institutions. Cadwalader's rich history and well-established U.S. roots have led it to also become one of the world's most prominent law firms, with influence that has expanded around the globe as its attorneys advise clients with interests in Europe, South America, the Middle East and the Pacific Rim. Cadwalader's Private Equity, Real Estate and Financial Services Practices stand out as leaders in providing market intelligence and insight to clients that include sovereign wealth funds, private equity firms, hedge funds, national and international banks, real estate investment vehicles, as well as other financial institutions and corporate clients. For more information, see: <http://www.cadwalader.com/>

Center on Transnationals' Studies (CTS) Nankai University

The Center for Transnationals' Studies of Nankai University was established in August 1992. It was approved as a national key base for social science and humanities research, as well as research on transnational corporations (TNCs) by China's Ministry of Education in September 2000. The center endeavors to be a world, top-grade research center, and commits itself to the study of TNCs development. So far, it has produced several research papers concerning various aspects of TNCs, such as the impact of TNCs on China's economic development and related policy implications which draws much attention from both academia and government agencies.

Background

The process of global economic integration has accelerated during the past three decades, with world foreign direct investment (FDI) flows rising from \$40-50 bn at the beginning of the 1980s to \$1.5 trillion in 2007. Yet, in spite of the trend towards market liberalization and privatization during this period, the role of the state has arguably become more important in recent years. Indeed, many of the emerging market state-owned enterprises (SOEs) that survived the earlier waves of privatization are now flourishing, thanks in particular to booming global commodity prices and increased export earnings. Emerging market governments are also drawing on their accumulating exchange reserves to establish sovereign wealth funds (SWFs) for investment abroad. These two developments have contributed to a substantial increase of outward FDI from emerging markets, reaching \$210 bn in 2006 (five times world FDI flows during the early 1980s). For example, Chinese state-controlled entities are estimated to account for about four-fifths of the country's outward foreign direct investment.

In response to the rising importance of state-owned enterprises and sovereign wealth funds (SWFs) – collectively referred to here as “state-controlled entities” (SCEs) – policy-makers in a number of countries are re-thinking their own investment regulatory frameworks. The world has thus witnessed a resurgence of the role of the state vis-à-vis markets, with governments acting as both a source of – and potential impediment to – FDI.

The principal issues raised by this phenomenon will be addressed systematically at this Conference, organized by the Vale Columbia Center on Sustainable International Investment, Columbia Law School's Center on Global Legal Problems, the World Trade Institute, the University of Fribourg (Switzerland), and Cadwaladar, Wickersham & Taft LLP, in cooperation with Nankai University (China). The Conference will examine the role of state-controlled entities in the world FDI market, with a particular emphasis on the role of sovereign investment agencies (those parts of SWFs engaged in FDI), and will explore the range of policy responses being considered to deal with this *problématique*.

The role of state-driven outward FDI has led to considerable discussion in North America and Europe, particularly in light of CNOOC's aborted bid for the U.S. oil firm UNOCAL in 2005, and Dubai Ports World's 2006 thwarted attempt to acquire U.S. port facilities. More recently, the discussion has intensified, as developed-world policy-makers and media focus their scrutiny on a specific breed of state-controlled entities, sovereign investment agencies (SIAs).

Sovereign wealth funds and those parts of them that engage in FDI are not new (the first one dates back to 1953), yet their number and the resources available to them have risen dramatically in recent years. These government-controlled entities control about \$3 trillion in assets (nearly twice the amount controlled by hedge funds). Morgan Stanley reckons that this figure will rise to \$12 trillion by 2015. The largest of these funds, the Abu Dhabi Investment Authority, controls approximately \$875 billion. With growing pools of exchange reserves, emerging market SIAs increasingly become sources of FDI.

Last year's high-profile stake in Blackstone by the China Investment Corporation is just one example of the increasing influence of these entities. Global financial institutions, especially in the U.S., have welcomed close to \$100 billion in capital from SIAs in the past year. Though these funds have

provided much-needed liquidity to developed country banks, there are increased concerns about them being expressed in a number of capitals. Leaders in the U.S. and EU have issued calls for a policy response.

In 2007, a number of preliminary steps were taken by developed countries, at the domestic and international levels, to address the rules for SIA investments (and state-controlled entity investment in general). The U.S. revised the law underpinning its Committee on Foreign Investment in the United States (CFIUS), thereby especially strengthening its investment review mechanism for state-controlled entities. A number of other countries (e.g., Germany, the Republic of Korea) are considering establishing similar screening mechanisms. On the international stage, G-7 leaders called on global institutions to examine further the structure, transparency and accountability of SWFs. The IMF and OECD are both working on the issue, developing a set of best practices for SWFs and a code for inward investment, respectively.

This Conference will be an opportunity to take stock as we have gained more experience with FDI by state-controlled entities, and various institutional efforts have advanced. The Conference offers a neutral platform to understand better the views and concerns of the principal players; facilitate knowledge sharing; help demystify (where appropriate) aspects of the issue; and explore the way forward. Participants include representatives of the principal stakeholders, including representatives from sovereign investment agencies, state enterprises and governments.

The Conference puts the spotlight on a number of key questions to which the phenomenon of state-controlled entities has given rise. What do we know about their relative importance in the world FDI market and how do their behavior and strategy differ from those of private investors? To what extent are state-controlled entities (and SIAs in particular) – be they from emerging markets or developed countries – profit-maximizing or policy-driven entities? Is the rise of state-controlled entities leading to different rules for various categories of investors and a reversal of the broad trend in the liberalization of national FDI laws? How do policy-makers reconcile the tensions between national security and the need of investors for a stable and predictable regulatory FDI framework? Do the rules need changing? What are practical solutions?

The proceedings of the Conference will be published.

October 1, 2008, Wednesday

8:30 - 9:30 **Breakfast and registration**

9:30 – 10:00 **Welcome and opening remarks**

Karl P. Sauvant, Executive Director, Vale Columbia Center on Sustainable International Investment

José E. Alvarez, Hamilton Fish Professor of International Law and Diplomacy and Director, Center on Global Legal Problems, Columbia Law School

Philippe Gugler, Professor of Economics and Social Sciences, University of Fribourg, Switzerland

Xian Guoming, Professor of Economics and International Business, President Assistant, Nankai University; Director of the Center for Transnationals' Studies; Dean of TEDA College

Deryck Palmer, Bankruptcy Partner, Cadwalader, Wickersham & Taft LLP

10:00 – 10:30 **Introductory Speech:** “What could be a common approach to state-controlled entities that reconciles national security and investor predictability?”, **David M. Marchick**, Managing Director of Government and Regulatory Affairs, The Carlyle Group

Considering the approaches taken at the national and international levels, what could be the principles/guidelines for reconciling national security and investor predictability?

10:30 - 13:30 **Session I:** What do we know?

Chair: Philip Bobbitt, Herbert Wechsler Professor of Jurisprudence, Columbia Law School

1. “What do we know about state-controlled entities and especially SWFs?”, **Karl P. Sauvant**, Executive Director, Vale Columbia Center on Sustainable International Investment, and **Kamil Gérard Ahmed**, Associate, Akin Gump Strauss Hauer & Feld LLP

The distinction between SWFs and other state-controlled entities. Various types of SOEs. Evidence on the strategy etc. of SWFs and SOEs (vs. hedge funds, private equity funds and other investment vehicles). Do state-controlled entities behave differently from private enterprises, and such entities from emerging markets differently from those from developed countries? Are implications different for developed and developing countries? What governance issues arise?

2. “Sovereigns and merchants: similarities and differences”, **Deryck Palmer**, Bankruptcy Partner, Cadwalader, Wickersham & Taft LLP, and **Alicia Clifford**, Private Equity Attorney, Cadwalader, Wickersham & Taft LLP

As SWFs become increasingly important investors around the globe, what lessons, if any, can be drawn by comparing SWFs with other sources of equity financing, such as private equity firms (traditionally known as merchant banks)? Are SWFs long term, commercial investors? What issues are SWFs likely to encounter when investing in distressed assets?

3. “Experiences with state-controlled entities and concerns relating to them”, **Alan Rugman**, L. Leslie Waters Chair of International Business and Professor of International Business, Business Economics and Public Policy, Indiana University

The experience to date regarding FDI by SWFs and SOEs and the concerns related to their outward FDI, including their validity. What’s new about these concerns?

4. “Western financial institutions and eastern state-controlled funds: a global financial network”, **Katharina Pistor**, Professor of Law, Columbia Law School

A series of transactions has created a set of ties between financial institutions from the West and state controlled funds or other financial institutions from the East. Viewed together these ties form an emergent network that spans the globe. A critical question this contribution will address is what function these network relations might play for the global financial market place.

Lead discussants:

Lawrence Goodman, Managing Director and Head of Emerging Market Strategy, Bank of America

José Antonio Ocampo, Professor of Professional Practice in International and Public Affairs, SIPA, Columbia University; former UN Under-Secretary-General for Economic and Social Affairs; and former Minister of Finance and Public Credit, Colombia

Paola Subacchi, Research Director, International Economics, Chatham House (The Royal Institute of International Affairs)

13:30 – 15:30 **Lunch (Broadway Room, Lerner Hall)**

Keynote address: “The rise of state-controlled entities in context”, **Jeffrey D. Sachs**, Director, The Earth Institute at Columbia University; Quetelet Professor of Sustainable Development, Columbia University

15:30 – 18:00 **Session II:** Should national security trump predictability for investors?

Chair: Rudolf Dolzer, Professor, Director, Institute of International Law, University of Bonn

5. “National security and predictability for investors at the *national* level”, **Mark A. Clodfelter**, Counsel, Winston & Strawn LLP, previously Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State

How is national security defined and who judges? What, if any, are the common threads for approaches/definitions of national security? What are the implications for the needs of investors for a predictable regulatory framework at the national level? How are the tensions between the two dealt with?

6. “National security and investor predictability at the *international* level”, **Patrick Juillard**, Professor Emeritus, Sorbonne University, Paris

To what extent do international investment agreements address the issue of national security and predictability for investors? How is it defined and who judges? Are there common approaches/definitions? What are the implications for investor predictability? How are the tensions between protecting national security and maintaining a predictable regulatory framework for investors reconciled?

Lead discussants:

James Mendenhall, Partner, Sidley Austin LLP, former U.S. Trade Representative General Counsel

Michael J. Smart, Director, International Trade and Investment, National Security Council

18:00 – 21:00 **Drinks followed by Dinner (Party Room, Lerner Hall)**

Dinner address: “Systemic implications of large pools of anonymous capital: risks and the need for transparency”, **Manfred Schekulin**, Chairperson, OECD Investment Committee

October 2, 2008, Thursday

8:30 – 9:30 **Breakfast**

9:30 – 13:00 **Session III:** Should FDI by state-controlled entities be regulated differently than FDI by other entities?

Chair: José E. Alvarez, Hamilton Fish Professor of International Law and Diplomacy and Director, Center on Global Legal Problems, Columbia Law School

7. “The resurrection of screening mechanisms: is CFIUS a model for other countries?”, **Alan Larson**, Senior Advisor, Covington & Burling LLP; **Mark Plotkin**, Partner, Covington & Burling LLP; **David Fagan**, Associate, Covington & Burling LLP

Brief description of CFIUS. What are other countries doing? Is CFIUS an example of institutional diffusion and, in particular, are we returning to screening mechanisms? What would be the terms of reference of a CFIUS-type mechanism that take due account of national security and investor predictability?

8. “Best practices of countries host to state-controlled entities”, **Manfred Schekulin**, Chairperson, OECD Investment Committee

The work of the OECD in this area.

9. “Sovereign wealth funds and the IMF”, **Charles R. Blitzer**, Assistant Director, Monetary and Capital Markets Department, International Monetary Fund

The work of the IMF in this area.

10. “Sovereign wealth funds: what should the EU do?” **Philippe Gugler**, Professor of Economics and Social Sciences, University of Fribourg, Switzerland and **Julien Chaisse**, Alternate Leader, World Trade Institute, Bern, Switzerland

Several European Union governments have become alarmed about sovereign wealth funds. The European Commission is considering how it should respond to this new phenomenon without going against its tradition of openness to capital investments. We will explore the justifications of a common EU approach to SWFs and its possible contents.

Lead discussants:

Rainer Geiger, Associate Professor of International Law, Sorbonne University, Paris, former Deputy Director, Financial and Enterprise Affairs Division, OECD

Michael W. Reisman, McDougal Professor of International Law, Yale Law School

13:00 – 15:00 **Lunch (Broadway Room, Lerner Hall)**

Lunch address: "Sovereign Investing in the United States: The U.S. Government View," **Clay Lowery**, Assistant Secretary for International Affairs, United States Department of the Treasury

15:00 – 17:45 **Concluding Roundtable:** Do the rules need changing for state-controlled entities?

Apart from the issues already discussed, this Roundtable of earlier speakers as well as others will discuss the following: What regulatory action and/or mechanisms, if any, are needed? Do FDI rules need to distinguish between different categories of foreign direct investors/investments? What are some specific and practical ideas for the way forward?

Chair: Charles R. Blitzer, Assistant Director, Monetary and Capital Markets Department, International Monetary Fund

Participants:

Antonio Hernández, Chief Strategy Officer, Invest in Spain; WAIPA's Director for the EU Region.

Andreas F. Lowenfeld, Rubin Professor of International Law, New York University Law School

Todd Malan, Vice President, International Public Policy, Goldman Sachs

Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development

Curtis Milhaupt, Fuyo Professor of Japanese Law and Albert E. Cinelli Enterprise Professor of Law, Columbia Law School; Director, Japanese Legal Studies Center

Wesley Scholz, Director, Office of Investment Affairs, U.S. Department of State; Vice-Chair, OECD Investment Committee; and Co-Chair G-8 Heiligendamm Investment Working Group

Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics

17:45 - 18:00 **Closing remarks**

Deryck Palmer, Bankruptcy Partner, Cadwalader, Wickersham & Taft LLP

Xian Guoming, Professor of Economics and International Business, President Assistant, Nankai University; Director of the Center for Transnationals' Studies; Dean of TEDA College

Julien Chaisse, Alternate Leader, Investment Division (IP11), World Trade Institute, Bern, Switzerland

José E. Alvarez, Hamilton Fish Professor of International Law and Diplomacy and Director, Center on Global Legal Problems, Columbia Law School

Lisa E. Sachs, Program Coordinator, Vale Columbia Center on Sustainable International Investment

Rapporteur: Maya Steinitz, Associate, Latham & Watkins LLP