



VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY



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**Roundtable on
States and State-Controlled Entities as Claimants in
International Investment Arbitration**

**Columbia University, Case Lounge
435 West 116th Street, New York, NY
March 19, 2010**

PROGRAM

**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, paying special attention to the sustainable development dimension of this investment. It is a joint center of Columbia Law School and The Earth Institute at Columbia University. For more information, see: www.vcc.columbia.edu.

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Themes and objectives of the Roundtable

International investment by State-controlled entities (SCEs) is on the rise. State-owned enterprises (SOEs), especially from Europe, have long been active players in the world foreign-direct-investment (FDI) market. They have been joined, in the past few years, by a wide range of SOEs from emerging markets, including from China, India, Russia, and Singapore. China's outward FDI – some 80-90% of which is undertaken by SOEs – doubled from \$27 billion in 2007 to \$56 billion in 2008 and appears to have reached that level again in 2009, in a climate where world FDI flows dropped by 40%. SWF's, and especially the Middle East, are also of note and, with cumulative FDI reaching \$65 billion by the end of 2008, are rapidly gaining prominence on the international stage. To that, portfolio investment by SWFs needs to be added; in the financial sector alone, total investments by SWFs are estimated to be around \$100 billion.

Parallel to the rise of international investment, investors have become more assertive in pursuing their rights under international investment agreements (IIAs). The result has been a rise in treaty-based international investment disputes, whose number had surpassed 300 by the end of 2008, with the majority of them having arisen during the past five years. Virtually all of them, moreover, were initiated by private firms.

In the light of these developments, it is not surprising that the number of international arbitrations initiated by State-controlled entities, while currently limited, appears to be on the rise and will likely grow in coming years. This, in turn, leads to the question as to what specific issues may arise in international arbitrations if a claimant is a State or a State-controlled entity.

The present Roundtable is meant to address these specific issues. More specifically, it will review cases brought in the past by SCEs and the issues that were discussed in their context, and it will look at the experience gained in commercial arbitrations as regards SCEs. From there, the Roundtable will move on to a number of specific issues that appear to be most relevant in the context of SCEs as claimants, namely issues related to the initiation of claims, forum selection, parallel proceedings, counterclaims, and third-party financing.

It should further be noted that the discussion of SCEs as claimants in investment disputes is embedded in a broader discussion of the role of SCEs and especially SWFs in today's world economy. In particular, there are concerns – justified or not – that SCEs undertaking international investment pursue not only commercial, but also non-commercial considerations and that, in any event, they may have different responsibilities arising from the nature of their ownership. It is partly in light of these and other concerns that the Santiago Principles were adopted under the aegis of the IMF, and the OECD issued OECD a Declaration on Sovereign Wealth Funds.

Understanding the new environment in which SCEs may operate as parties to international arbitrations, as well as the principal issues relating to disputes involving them, becomes an increasingly important matter for anyone interested in international investment law and arbitration.

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08:30 – 9:00 **Breakfast and Registration**

09:00 – 9:30 **Welcome and opening remarks**

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

Selvyn Seidel, Chair, Burford Group Ltd.

Edward Kehoe, Partner, King & Spalding

Nigel Blackaby, Partner, Freshfields Bruckhaus Deringer LLP

Presentation of the themes of the Roundtable by Maya Steinitz, Associate-in-Law, Columbia Law School; Counsel, International Arbitration

9:30 – 1:00 **Session I – What do we know and what are the issues?**

Chair: Michael Reisman, Myres S. McDougal Professor of International Law, Yale Law School

Joseph Neuhaus, Partner, Sullivan & Cromwell LLP, “**Overview of illustrative cases initiated by States/SCEs**”

This presentation surveys cases initiated by States and SCEs in investment arbitration. Emphasis will be given to what we already know from past experience to be unique about States/SCEs as claimants and what are the critical issues that have arisen in such actions or can reasonably be expected to arise in the future.

Nigel Blackaby, Partner, Freshfields Bruckhaus Deringer LLP, “**States/SCEs as claimants/plaintiffs: lessons learned from contract arbitration and domestic litigation**”

Given the relative novelty to of States/SCEs acting as claimants in international investment arbitration, much can be gained from lessons learned in international commercial arbitrations involving states and SCEs as claimants and states as plaintiffs in domestic litigation for example, the unique advantages – strategic and otherwise - sovereigns enjoy, the constraints they are under given their accountability to their constituents, the applicability of legal doctrines particular to sovereigns, such as sovereign immunity, and effect on enforceability of awards in favor of sovereigns.

Stanimir Alexandrov, Partner, Sidley Austin LLP, “**Initiation of claims by SCEs: jurisdiction, standing and consent**”

This presentation will discuss the special jurisdictional and standing issues faced by States and SCEs under IIAs and in investment arbitration fora, as well as the issue of consent to arbitration under IIAs and under investment contracts. It will include a discussion of definition of “investor” and “investment” under IIAs and the extent to which SCEs are covered under the agreements.

10:30 – 10:45 *Coffee/tea break*

10:45 – 13:00 **Discussion**

Lead discussants:

Pieter Bekker, Partner, Crowell & Moring

Mark E. Feldman, Chief, NAFTA/CAFTA-DR Arbitration, Office of the Legal
Adviser, U.S. Department of State

Tom Johnson, Partner, Covington & Burling LLP

Adnan Mazarei, Assistant Director Middle East and Central Asia, IMF

13:00 – 14:30 **Lunch**

Keynote address by Hans Smit, Stanley H. Fuld Professor of Law, Columbia Law
School

14:30 – 17:30 **Session II – New frontiers**

Chair: Eduardo Silva Romero, Partner, Dechert (Paris) LLP; Co-Chair of ICC Task
Force on States and State-Controlled Entities

Maya Steinitz, Associate-in-Law, Columbia Law School; Counsel, International
Arbitration, “**Forum selection and parallel proceedings by States/SCE as
claimants in international investment arbitration**”

*Forum selection and parallel proceeding are increasingly used in order to vindicate
not only investment claims but also contract claims arising from the same factual
scenarios. Both are also employed, however, for tactical and strategic reasons.
Sovereigns can also avail themselves of fora available to sovereigns only such as the
ICJ and the WTO. This presentation will discuss the considerations parties to an
arbitration involving a State or a SCE as a claimant may weigh when selecting among
available fora and when deciding whether and how to pursue parallel proceedings.
Where possible, examples from past or current proceedings will be included.*

Efraim Chalamish, Global Fellow, New York University Law School, “**Claims and
counter-claims by States and SCEs under BITs and contracts**”

*This presentation will address what kinds of claims are potentially available to
States/SCEs, and which claims have historically been brought by such entities, under
BITs and investment contracts. The presentation may also address emerging issues,
such as Sovereign Wealth Funds regulations and potential claims.*

Selvyn Seidel, Chair, Burford Group Ltd., “**Third-party funding of States’/SCEs’
international arbitrations**”

*Third party funding of parties to international arbitrations, including those initiated
by States/SCEs, is a growing trend. This presentation will describe the nature and
scope of this phenomenon as well as its effects on access to justice of parties from the
developing world, arbitration dynamics, and the potential outcomes of arbitrations. It
will also explore how such funding may have different requirements and rules in*

different jurisdictions and what are the applicable ethical standards in international arbitrations.

Emmanuel Jolivet, Associate Professor, the University of Versailles; General Counsel, ICC, “**The perspective of the ICC**”

This presentation will include empirical information, including statistics, from the ICC regarding state and SCEs’ claims under investment contracts and under BITs. It will also cover the types of substantive and procedural issues that arise when a state or a SCE serves as a claimant in a contract investment dispute.

15:45 – 16:00 *Coffee/tea break*

16:00 - 17:30 **Discussion**

Lead discussants:

Eliseo Castineira, Attorney, Independent arbitration practitioner, Paris
David Gaukrodger, OECD Senior Investment Law Consultant

17:30 - 17:50 **Lessons learned**

Robert Howse, Lloyd C. Nelson Professor of International Law,
NYU School of Law

Theodore Posner, Partner, Crowell & Mornings LLP

17:50 - 18:00 **Closing remarks** by Karl P. Sauvants, Executive Director, Vale Columbia Center on Sustainable International Investment

18:00 – 20:00 **Reception**

Rapporteur: Michael Nolan, Partner, Milbank, Tweed, Hadley and McCloy LLP