ARTICLES

State as an Entrepreneur: A Study of the Investment Contractual Terms and Level of Control of China’s Sovereign Wealth Fund in its Portfolio Firms  
LI Jing

Challenges in China-ASEAN Food Safety Cooperation Governance Through Soft Law  
LU Yi

Increase the Liquidity of Shares in Foreign-Chinese Joint Ventures  
CHANG Danlin

CHINESE LAW & PRACTICE UPDATES

The Return of VIE-Structured Enterprise to China’s Domestic Capital Market—A Brief Legal Analysis and Other Factors to be Considered  
WU Guohua
PENG Jun
WANG Mingkai
WANG Biyu

Policy Above Law: VIE and Foreign Investment Regulation in China  
MAN Yunlong

INTERVIEW

“Theory Without Practice Is Lifeless; Practice Without Theory Is Thoughtless”: A Conversation with Harold Koh
<table>
<thead>
<tr>
<th>Administrative Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHEN Keru</td>
</tr>
<tr>
<td>LIU Nan</td>
</tr>
<tr>
<td>YANG Rui</td>
</tr>
<tr>
<td>ZHANG Jing</td>
</tr>
<tr>
<td>DAI Zheng</td>
</tr>
<tr>
<td>LIU Qing</td>
</tr>
<tr>
<td>ZENG Yuchen</td>
</tr>
<tr>
<td>ZHONG Xiaojin</td>
</tr>
<tr>
<td>GUAN Shangyicheng</td>
</tr>
<tr>
<td>WANG Wei</td>
</tr>
<tr>
<td>ZHANG Chenli</td>
</tr>
<tr>
<td>ZHU Xiaoli</td>
</tr>
</tbody>
</table>
CONTENTS

ARTICLES

LI Jing,
State as an Entrepreneur: A Study of the Investment Contractual Terms and
Level of Control of China’s Sovereign Wealth Fund in its Portfolio Firms....... 1

LU Yi,
Challenges in China-ASEAN Food Safety Cooperation Governance Through
Soft Law ................................................................. 141

CHANG Danlin,
Increase the Liquidity of Shares in Foreign-Chinese Joint Ventures......... 156

CHINESE LAW & PRACTICE UPDATES

WU Guohua, PENG Jun, WANG Mingkai, WANG Biyu,
The Return of VIE-Structured Enterprise to China’s Domestic Capital
Market—A Brief Legal Analysis and Other Factors to be Considered ....... 200
MAN Yunlong,

Policy Above Law: VIE and Foreign Investment Regulation in China ........ 215

INTERVIEW

“Theory Without Practice Is Lifeless; Practice Without Theory Is Thoughtless”:
A Conversation with Prof. Harold Koh ........................................... 223
State as an Entrepreneur: A Study of the Investment Contractual Terms and Level of Control of China’s Sovereign Wealth Fund in its Portfolio Firms

LI Jing*

ABSTRACT

In recent years, the increasing cross-border investments by sovereign wealth funds (“SWFs”) have aroused high-profiled controversies, particularly over the strategic motives behind them and the potential control they could exert over target firms. Using a hand-collected dataset consisting of 51 mergers and acquisitions (“M&As”), 5 joint ventures (“JVs”) and 23 fund investments made by China Investment Corporation (“CIC”) from 2007 to the end of 2013, this paper analyzes important direct control rights, such as level of ownership and voting rights, as well as director nomination and board representation, of CIC in its target firms. It is found that while CIC usually holds significant but non-controlling equity stakes in its targets, its voting rights are often restricted in the investment contracts with them; and it is a rule rather than an exception that CIC is generally not represented in targets’ boards. Except for one Chinese company in which CIC is the second largest shareholder, there is no evidence of CIC pursuing shareholder activism by exercising its voting rights or bringing up proposals, either in shareholder or board meetings of the portfolio companies.

Although CIC does not seem to have actively exercised its formal control rights, a further examination of the related business dealings occurred pre-and-post CIC investments across the networks of CIC and its targets suggests that practically, it is often not necessary for CIC to possess or use formal corporate governance tools to exert control over them. Rather, there are plenty of opportunities where CIC could still extract indirect private control benefits by virtue of the long-term post-investment relationships with the target firms. These findings question the necessity and efficacy of regulatory proposals forcing SWFs to remain passive in the corporate governance realm by, for example, asking them to suspend their voting rights. Countries hosting SWF investments should thus consider carefully before directing any new regulation at SWFs as a particular group of investors, and guard

© 2015 Peking University School of Transnational Law
against those proposals rushed out of short-term fad or political pressure, which may backfire for protectionism in the long run.
TABLE OF CONTENTS

I. Introduction .................................................................................................................. 4
II. An Overview of SWFs ................................................................................................. 10
   A. Cross-Border Investments by SWFs ...................................................................... 11
   B. Review of Literature on SWF Investment Characteristics and Strategies .............. 15
   C. The Major Concerns over SWF Investments ......................................................... 18
III. China Investment Corporation .................................................................................. 21
   A. An Overview of CIC ............................................................................................. 23
   B. CIC’s Strong Connections with China’s Government ............................................. 27
IV. Data and Discussion .................................................................................................. 36
   A. Data Collection and Description ......................................................................... 37
   B. General Characteristics of the Investments .......................................................... 58
   C. Direct Control in CIC’s Investments ................................................................... 64
      1. Level of Ownership, Voting Rights, Director Nomination Rights and Board Representation of CIC’s Non-Fund and Non-JV Investments .... 64
      2. Direct Control Rights in CIC’s JV Investments and Fund Investments ............. 71
   D. Indirect Control of CIC in Its Investment Targets ................................................. 79
   E. Huijin Investments ............................................................................................... 86
V. Conclusion .................................................................................................................... 97
I. INTRODUCTION

Although existing for more than a half century since the 1950s, SWFs have attracted worldwide interest only in recent years following their involvement in some large-scale cross-border M&A activities and their major capital investments into certain troubled financial institutions in developed countries.\(^1\) While one must admit that SWFs are becoming increasingly important players in the current international monetary and financial system,\(^2\) the rise of significant inflows of government-owned capital has still aroused heated discussions among both the public and the politicians in recipient countries, which have indicated mixed reactions towards the investments by SWFs,\(^3\) especially those funds from emerging economies. To begin with, the sheer volume of these government-controlled funds, which is already so big for the world to view in awe, has also been growing at an extremely rapid speed. As of 2012, SWFs were estimated to manage over US$5.3 trillion worth of assets, 80% of which were in the hands of developing economies.\(^4\) Even during 2007-2011 when the global financial crisis took place, the total cumulative value of SWFs assets rose at a rate of 10% per annum despite losses on individual holdings, compared with a 4% decline in the value of international banking

\(^{*}\) Li Jing is an assistant professor at Department of Business Law of Tilburg University. Ph.D. 2015, Tilburg University; LLM. 2010, Duisenberg School of Finance; MPhil. 2008, Tilburg University; LLM. 2004, Stockholm University; and LLB. 2003, University of International Business and Economics. This paper was presented at the 10th Annual Conference of the European China Law Studies Association (the “ECLS Conference”) held on Sep. 26 and 27, 2015 in the University of Cologne. For helpful comments I am grateful to Christoph van der Elst, Juha Karhu, Erik Vermeulen, Lutz-Christian Wolff, Meiting Zhu, and all participants of the “New Legal Perspectives on the Relation of the State and the Market” session at the ECLS Conference. All errors remain my own.

\(^3\) See UNCTAD (2008), supra note 1, at 25.
assets. Although the cumulative foreign direct investment ("FDI") by SWFs of US$127 billion remains somewhat small compared to the total SWF assets under management, the potential ability of colossal amount of funds to acquire block of shares in large and/or public listed firms that hold key economic resources can still heighten the anxiety of host economies over their economic interests and security. Moreover, the concerns that foreign-funded acquisitions do not add to productive capacity and bring in new technologies but simply transfer ownership and control from domestic to foreign hands can seem more reasonable now than ever, when the investors from abroad are not merely commercial entities such as transnational corporations but foreign governments which may have political incentives other than financial ones. To say the least, it seems understandable to question whether governmental investors, especially those from developing countries where an efficient corporate governance regime is generally not in place, are able to manage the portfolio companies efficiently as experienced professional investment managers and bring about good financial performance.

---

6 See UNCTAD (2013), supra note 4, at 10.
8 See Steffen Kern, Sovereign Wealth Funds—State Investments on the Rise, DEUTSCHE BANK RESEARCH (Sept. 10, 2007), at 7 ("Little is known about the extent to which the management of SWFs is independent in its investment decision with the aim of maximizing the return of the portfolio, or whether the government on behalf of which the SWF operates actually intervenes, and whether such interventions are in any way politically motivated"), http://www.dbresearch.com/PROD/CIB_INTERNET_EN-PROD/PROD0000000000215270.pdf.
9 See Shai Bernstein et al., The Investment Strategies of Sovereign Wealth Funds, 27 J. ECON. PERSPECT. 219, 223 (2013) ("If sovereign wealth funds are run by politically connected but financially inexperienced managers, we might expect that not only would they make poor choices in their home and foreign investments, but would also display poorer stock-picking ability even looking solely at the international portfolio of the fund"). For example, an empirical research on publicly listed companies in China shows that, firms with politically connected CEOs are more likely to show low degrees of professionalism, and the accounting and stock return performance of these firms fall behind those without politically connected CEOs. The reason for such differences, as they argue, is due to the fact that politicians may exploit companies under their control for the purposes of fulfilling objectives that are not consistent with firm value maximization. See Joseph P.H. Fan et al., Politically Connected CEOs,
generally, the current Western world certainly feels the difficulty in accepting a shift in the balance of power within the global economy from their community of industrialized countries to new emerging market giants. Many even believe that the re-emergence of state capitalism “will replace what was thought to be a global political economy set on a trajectory of increasingly unfettered free markets.”

Faced with such concerns and doubts, it is certainly pertinent for the recipient countries to carefully examine their existing regulatory framework and wisely determine the proper regulatory response towards these controversial government-owned funds. Apparently, doing so presumes a good understanding of the characteristics and strategies of SWFs investments in the first place; and in this respect, there is already a wave of empirical research burgeoning. Among other things, SWFs are compared with similar private institutional investors to unveil how they differ in terms of selecting investment targets and affecting both short-term and long-term firm performance. On a smaller scale, there are also studies that are not based on broad datasets comprising of many SWFs but rather focus on certain particular SWFs or recipient countries to discuss the relevant governance, investments, and regulatory issues in more details. However,


See discussion _infra_ Section II.

See discussion _infra_ Section II.

See, e.g., Paul Rose, _Sovereign Investing and Corporate Governance: Evidence and Policy_, 18 FORDHAM J. CORP. & FIN. L. 913 (2013) (discussing the domestic and external political and regulatory factors that discourage SWF engagement in corporate governance in the United States, and suggesting how SWFs and regulators can create the crucial “space” necessary for SWFs to provide appropriate stewardship over their equity investments); Richard Heaney et al., _Sovereign Wealth Fund Investment Decisions: Temasek Holdings_, 36 AUST. J. MGMT. 109 (2011) (using a sample dataset of 150 publicly listed Singapore firms over the period 2000-2004, this paper finds evidence suggesting that Temasek has a predisposition to invest in firms that are relatively large and have few director blockholders); see also Larry Catá Becker, _Sovereign
neither of the two research lines has endeavored to examine the specific contractual terms of SWF investments so far. A better knowledge of the terms of SWF investment contracts is apparently important as it offers a basis for understanding whether SWFs are rather passive investors or indeed exert active control rights in their portfolio companies as many worry about. To that end, contractual terms such as percentage of equity stake acquired and the voting rights attached thereto, as well as director nomination right and board representation, are highly relevant to decide the level of direct control by an SWF investor. Additionally, it is also useful to look at the pre- and post-investment business activities occurring across the networks of an SWF and its portfolio companies, which could either be co-investment in a joint venture immediately afterwards, or more long-term collaboration between the related firms in future business opportunities. Such business activities can provide important supplemental knowledge, as merely looking into the contracts may miss the larger picture of indirect and long-running influence SWFs can have over portfolio firms.

There were some 70 SWFs globally as of 2012,15 among which China Investment Corporation (“CIC”) has certainly stood out as an attention magnet as soon as it was created as the country’s official SWF in September 2007.16 Recently having become the second biggest economy in the world, China is increasingly playing an important and influential role in the global financial system.17 Being the second largest FDI recipient (after the United State (“US”)) and the third largest FDI investor (after the US and Japan) globally,18 and with its world-largest and continuously piling-up foreign exchange reserves hitting new record high at

---


15 See UNCTAD (2013), supra note 4, at 10.
18 See UNCTAD (2013), supra note 4, at 3 & 6.
almost US$3.5 trillion as of June 2013, it is no doubt that China’s position as a powerful major outward investor is being rapidly and repeatedly reinforced. Against such background, it is reasonable to assert that discussions about China are of particular importance under the topic of sovereign wealth investments, and systematic research of the contractual terms of CIC’s investment transactions will surely expose important information on the investment characteristics and strategies of the fund. While previous research has already made efforts to assemble a chronicle of all CIC’s investments, the most comprehensive of which being the China Global Investment Tracker jointly published by the American Enterprise Institute and the Heritage Foundation, their lists usually do not reveal much more transactional information than the amount of investments and the percentages of equity stakes purchased. Certain transactions have been discussed in more details just because they were somehow more “high-profiled” and thus more heavily covered by the media; but there still has not been a relatively complete dataset of the contractual terms of CIC investment agreements yet. As such, this research is motivated.

Compiling a hand-collected dataset of all CIC investment transactions from 2007 to the end of 2013, which altogether includes 51 M&As, 5 joint ventures, and 23 investments into other investment funds, this paper provides the very first empir-

---


21 China Global Investment Tracker, THE AMERICAN ENTERPRISE INSTITUTE & THE HERITAGE FOUNDATION, http://www.aei.org/china-global-investment-tracker/ (last visited Aug. 29, 2015). Note that this dataset is intended to cover large Chinese outward investments, regardless of whether they have been made by governmental agencies, state-owned enterprises, private firms, or the sovereign wealth fund. As such, investments done by CIC are only a part of the dataset.

22 See discussion infra Section IV.
ical study of the contractual terms of these investment agreements. It is found that CIC usually holds significant but non-controlling equity stakes, concentrating on the range of 5% to 20%, thus making it the largest or one of the largest blockholders of the companies. In contrast to such big equity blocks that they hold, CIC’s voting rights, to the extent the relevant information is available, are often restricted in the investment contracts it entered into with their targets. In terms of board representation, CIC does not have any seat in the boards of 29 non-fund and non-JV targets, while only has installed directors in 9 targets. It is worth noting that CIC’s absence in target boards is often not because of its small shareholding or the existence of absolute controlling shareholder(s) there; rather, in many cases, CIC is among the biggest shareholders and/or was vested with the right to nominate director(s) explicitly by the investment agreements. Except for SMIC, a Chinese company in which CIC is the second largest shareholder, there is no evidence of CIC pursuing shareholder activism by exercising its voting rights or bringing up proposals, neither in shareholder or board meetings of its portfolio companies. Although CIC does not seem to have actively exercised much of its formal control mechanisms, the fact that it is a cash-rich investor and is often among the shareholders with largest economic ownership in the portfolio companies, combined with its profound connections with the Chinese government which plays an overarching role in China’s economy, makes it a powerful business partner for firms that wish to pursue future cooperation and co-investment projects, and firms that wish to enter and grow in the Chinese market. Because the target firms cannot easily afford losing such an important investor and business partner, there are plenty of opportunities that CIC could extract indirect private control benefits from them in the long-term post-investment relationships. These findings show that, forcing SWFs to remain passive in the corporate governance realm by, for example, asking them to suspend their voting rights may not be entirely needed or helpful. Rather, the regulators of countries hosting SWF investments should carefully consider the necessity and level of any proposed regulation directed at SWFs as a particular type of investors, which should be weighed against the volume, performance and effect of the investments in the first place.
This paper is structured as follows. Section II briefly reviews the relevant literature on SWFs, with a focus on those that discuss their investment characteristics and strategies. Section III describes CIC and in particular its connections with the Chinese government. Section IV presents and analyzes the data of all CIC investments from 2007 to 2013, and Section V concludes.

II. An Overview of SWFs

As a descriptive term, SWFs refer to the investment funds owned or managed by state governments. According to the Santiago Principles, a set of voluntary best practice guidelines generally accepted by 26 IMF member countries with SWFs in 2008, “SWFs are special purpose investment funds or arrangements owned by the general government,” which are commonly established out of “balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.” When compared to other major institutional investor types, SWFs share important similarities with both pension funds and hedge funds. Like pension funds, SWFs also have long-term investment horizons, thus they do not have to focus only on highly liquid securities, but can rather diversify their investments across multiple asset categories. As stand-alone, unregulated pools of capital managed by investment professionals, analogy also is often made between SWFs and hedge funds when they purchase large ownership stakes in foreign companies. Furthermore, because both SWFs and hedge funds lie outside the traditional banking system, they are often criticized on the basis of not being

24 Id. at 1.
25 Id. at 3.
27 Id.
sufficiently transparent.\footnote{See Koch-Weser & Haacke, supra note 20, at 6.} Above being said, SWFs do possess important distinctiveness when compared to pension funds or hedge funds, and such distinctiveness is well summarized by Bertolotti et al. (2013) as follows:

SWFs seem to face numerous severe restrictions on the monitoring and/or disciplinary role they can realistically play, at least regarding their cross-border investments in listed companies. This is largely because any posture they take other than being purely passive investors might generate political pressure or a regulatory backlash from recipient country government.\footnote{Bertolotti et al., supra note 26.}

The potential concerns that are involved in SWF-financed cross-border investments will be discussed in more details in Section II.C below, but before that a brief review of the statistics of historical SWF FDI and the relevant empirical research findings about SWF investments are provided in Sections II.A and II.B, respectively.

\textbf{A. Cross-Border Investments by SWFs}

\textbf{FIGURE 1: ANNUAL AND CUMULATIVE VALUE OF FDI BY SWFS, 2000–2012 (IN US$ BILLIONS)}
Source: UNCTAD (2013). Data include value of flows for both cross-border M&As and greenfield FDI projects and only investments by SWFs which are the sole and immediate investors. Data do not include investments made by entities established by SWFs or those made jointly with other investors.  

Figure 1 above plots the cross-border FDI flows financed by SWFs from the beginning of the new millennium to year 2012. For the past decade of 2003-2012, cross-border M&As accounted for 89% of total SWF FDI, reflecting their position as strategic investment funds, in contrast to the fact that around 70% of the global FDI has been done through greenfield projects. More specifically, the sharp growth of SWF-financed FDI began to be observed as from 2005, fueled by the higher export surpluses in merchandise trade and the rising incomes from the export of oil and other natural resources that generated rapidly growing foreign-exchange reserves for SWFs. These funds caught international attention when they actively invested in many large financial service companies in the US and the EU that were seeking new investors during financial market crisis in 2007 to refresh their capital base. However, as the crisis proceeded into a global economic downturn, the worldwide slump in stock prices led to large book asset value losses in SWFs’ investments in 2008 and 2009, which are not immediately visible in Figure 1 as SWFs are generally long-term investors and have less need for liquidity and the losses were not directly realized. This being said, the total SWF-sponsored FDI in 2010 showed a significant drop from 2009, a considerable deviation from the trend of SWFs becoming more active foreign direct investors that started in 2005. Severe-ly bitten by the crisis and being uncertain about the global finan-

30 See UNCTAD (2013), supra note 4, at 11.
31 Id.
33 See UNCTAD (2008), supra note 1, at 23.
cial environment, the low appetite of SWFs for direct investments continued into 2011, which only returned in 2012 where the SWF FDI flows doubled the previous year at US$20 billion. The cumulative value of FDI by SWFs during the period 2000-2012 reached at US$127 billion; but that was only a small proportion of total US$5.3 trillion of SWF assets under management as of 2012. Figure 2 below presents the breakdown of such US$127 billion investments, in terms of which regions and sectors they have gone to. It can be seen that, strategically, the majority of SWF investments through FDI targets the services sector (70.4%), and in particular finance (16.8%), real estate (15.4%), utilities (8.8%) and construction (2.6%). With respect to geographical distribution, the majority of SWF FDI was allocated to developed economies, primarily in Europe (42.9%) and the US (14.3%); while the share of SWF FDI to developing and transition countries was only 23%, which has been in constant decline from its high of over 30% in 2008.

FIGURE 2: FDI BY SWFs, CUMULATIVE VALUE, BY REGION AND BY SECTOR / INDUSTRY, AS OF 2012

---

37 Id. ( “The low appetite for direct investments in 2010 can be traced back to the exceptionally uncertain global financial environment of previous years”).
38 See UNCTAD (2008), supra note 4, at 10.
39 Id. at 11.
40 Id. at 12.
An important point to be noted about SWFs is that they are for the most part portfolio investors, with only a small proportion of their investment value in the form of FDI. For example, FDI accounted for less than 5% of SWF assets under management and less than 1% of global FDI stock\footnote{FDI stock is the value of the share of their capital and reserves (including retained profits) attributable to the parent enterprise, plus the net indebtedness of affiliates to the parent enterprise. \textit{See} UNCTAD (2008), \textit{supra} note 1, at 249.} in 2011.\footnote{\textit{See} UNCTAD (2012), \textit{supra} note 5.} While foreign direct investment is defined as “an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy . . . in an enterprise resident in an economy other than that of the foreign direct investor,”\footnote{\textit{See} UNCTAD (2008), \textit{supra} note 1, at 249.} the cross-border acquisitions by SWFs normally involve purchasing shares of less than 10%, which is the threshold for an investment to be classified as FDI.\footnote{\textit{Id.} at 21.} Moreover, in addition to directly investing in government bonds and stocks, SWFs also allocate significant amount of their capital into alternative asset management industries. In 2010, for example, 1/3 of the SWF FDI were made to acquire shares of or inject capital into private equity funds and other funds, which was resulted from the aggravated concerns of these funds about the uncertainty of the global financial market for the previous years.\footnote{\textit{See} UNCTAD (2011), \textit{supra} note 36.} Figure 3 below shows the proportion of SWFs’ investment in various asset classes in 2012 and 2013. Generally, over a half of the SWFs have invested in private equity funds and more than 30% of them have invested in hedge funds in both years; while the overwhelming majority of the investors directed their capital to public equities and fixed income products. In particular, it is noted that during the first few years of the life of SWFs, fund managers tend to focus on building up their teams and accumulating asset investments in traditional funds, equities, and fixed income securities. As a result, they...
typically do not allocate much capital into alternative investments such as hedge funds and private equity funds.\(^{47}\)

**Figure 3: Proportion of SWFs Investing in Each Asset Class, 2012 vs. 2013**

![Figure 3: Proportion of SWFs Investing in Each Asset Class, 2012 vs. 2013](image)

Source: Preqin (2013).\(^{48}\)

**B. Review of Literature on SWF Investment Characteristics and Strategies**

Alongside the heightened debates on SWFs and their investments among media and regulators, (empirical) academic research is also burgeoning, which enables enhanced understanding of the behavior and performance of SWFs and provides valuable insights into their impact on financial markets. To start with, SWFs have a short-term positive impact on target firm performance, while longer-term impact varies across the findings of different research. The short-term response is generally consistent with other types of large institutional investors.\(^{49}\) In particular, the announcement date short-term abnormal stock return is significantly positive for firms whose shares are purchased but signifi-


\(^{48}\) Id.

cantly negative for firms whose shares are sold. More specifically, to the news about SWF purchase transactions, share price of the target firm would initially increase along with the transaction size, reach a maximum, and then decline. For sale transactions, abnormal returns first decrease with the fraction of the firm being divested by the SWF, reach a minimum, and then increase. Taken together, these results indicate that “firm value changes associated with SWF transactions reflect a tradeoff between gains from the monitoring or lobbying activities of the funds and losses from their extraction of private control benefits at the expense of minority shareholders.”

Similarly, evidence also shows that the positive short-term market reaction to announcement of SWF investment is an increasing function of the SWF transparency and level of target firms’ financial difficulties. Above being said, while investments by financial acquirers are typically value-increasing, the fact that the investor is an SWF nevertheless leads to a weaker (but still positive) market reaction, indicating a “sovereign wealth fund discount;” and such finding remains robust even if the target selection bias by SWFs and a set of other potentially related factors are controlled for.

SWFs diversify their investment portfolio by asset class and geographic region. In particular, SWFs are found inclined to invest in financially distressed, cash-constrained, and large multinational firms with poor performance and located in financially developed countries, which are similar to other institutional investors in terms of their preferences for asset characteristics.

Furthermore, SWFs also exhibit cultural biases and tend to invest

---

51 Id. at 278.
55 Kotter & Lel, supra note 52, at 367.
in familiar targets; and such cultural bias is particularly pronounced when compared with other institutional investors. In addition, SWFs also display significant industry biases and tend to invest more in large-cap stocks. These results are consistent with the notion that cultural traits affect government decisions about the allocation of capital, and that such culture-induced variation in preferences may serve political rather than social objectives. While this cultural bias is less pronounced when the fund has made repeated investments in the country, it is still quite persistent and disappears only slowly over time.  

In terms of whether SWFs invest in a herd-like manner, evidence shows that they actually do not cluster on the same side (buy or sell) of the market for some stocks/industries and not for others. On the contrary, they tend to follow a fairly similar investment strategy across industries in a given period and the level of homogeneity in their trading patterns across industries is more pronounced than for other investors. Such behavior may appear to be a reasonable choice for large funds pursuing long-term returns, which experience irregular fund inflows at the same time and invest them across various industries to diversify. As to whether bilateral political relations play a role in SWF decisions, evidence shows that relative to the countries in which they do not invest at all, SWFs actually appear to invest in nations with which they have relatively weaker political relations, which is contradictory to the predictions of FDI literature. Such result may suggest that SWFs have more than just financial considerations when making investment decisions.

In addition to investing in public equity, SWFs may also be financially motivated to inject capital into private equity as a result of their underperformance in the public markets. It is found that, although SWFs are less likely to invest in private equity over public equity when the investment is out-

---

59 Id. at 116.
60 Johan et al., supra note 49, at 157.
side their domicile nation, the economic significance of this effect is also less than that expected of other institutional investors.\(^{61}\) When investing cross-border, SWFs are less likely to invest in private than in public equity in those nations with better investor protection.\(^{62}\) In terms of how governance structures of SWFs are associated with the differences in their investment strategies, there is evidence showing that funds exposed to political influences show major distortions from long-run return maximization.\(^{63}\) SWFs with politician involvement are more likely to invest domestically, while those funds where external managers play an important role are more likely to invest internationally.\(^{64}\) Politically influenced SWFs are also found to concentrate their funds in sectors that have high price-to-earnings levels but then experience a drop in these levels in the year following the investment, and such behavior is especially pronounced in their domestic investments. In contrast, these patterns do not hold in funds that rely on external managers. Rather than being explained by the better private information that is possessed by SWFs with politician involvement, these findings actually reflect their willingness to chase trend and to overpay for investments.\(^{65}\)

**C. The Major Concerns over SWF Investments**

The impact of SWFs on target firms can be considered in the context of the literature on large shareholders,\(^{66}\) in that SWFs are often found to take large positions in the companies they invest.\(^{67}\) Having large shareholders in a firm can bring in both benefits and costs. On the one hand, large block ownership usually means substantial collocation of decision rights and wealth effects, which in turn leads to superior management or monitoring.\(^{68}\) As the ownership of the investor increases, he has also a greater incentive to increase the firm value; and to the extent that

\(^{61}\) *Id.* at 166.

\(^{62}\) *Id.* at 165.

\(^{63}\) Bernstein et al., *supra* note 9, at 233.

\(^{64}\) *Id.* at 228.

\(^{65}\) *Id.* at 231.

\(^{66}\) Kotter & LeL, *supra* note 52, at 361.

\(^{67}\) Dewenter et al., *supra* note 50, at 257.

these higher cash flows are shared with minority shareholders, they constitute shared benefits of control. On the other hand, in the process of using his control rights to maximize his own welfare, the large investor can however redistribute wealth—in both efficient and inefficient ways—from others. This cost of concentrated ownership becomes particularly important when others such as employees or minority investors have their own firm-specific investments to make, which are distorted because of possible expropriation by the large investors. In particular, it is found that there is a non-monotonic relationship between management ownership and firm value, which first increases, then declines, and finally rises slightly as board ownership rises. These results also apply individually to the ownership by the firm’s top officers and its outside board members. One interpretation of such findings is that, consistent with the role of incentives in reducing agency costs, performance improves with large shareholder ownership at first. However, as ownership gets beyond a certain point, the large owners gain nearly full control and are wealthy enough to prefer to use firms to generate private benefits of control that are not shared by minority shareholders.

While the above-mentioned cost-benefit tradeoff applies to any type of block owners, the fact that a government-controlled fund is the large investor may agitate the concerns particularly on the costs side, especially considering that almost half of the SWF investments since 2006 were from the countries classified by the Economist as authoritarian regimes or flawed democracies. More specifically, the political capture can introduce short-run pressures on SWFs to accommodate public demands for job creation and economic stabilization within the country, thus

69 Id.
72 Schleifer & Vishny, supra note 70, at 759.
“passing up on high net present value investments in other firms and creating product market distortions by favoring connected or poorly performing firms.”

Another distortion as a result of political involvement in SWFs’ investments is the appointment of politically connected but financially inexperienced managers, which can potentially reduce the overall skill of SWFs managers relative to professionals and diluting the returns. There is also a widespread fear that SWFs will not act as strictly commercial-minded investors seeking only the highest possible financial return, but will instead be commanded to invest strategically by home-country governments for the purposes of exerting political influence or gaining access to foreign technology. In terms of managing investments and taking corporate governance role in invested companies, governments are generally considered as bad operating managers. It is found that firm performance improves with privatization, while mixed public and private ownership has a negative impact on firm value, as governments can impose goals (such as employment maximization) inconsistent with shareholder wealth maximization. This being said, it cannot be taken for granted that SWFs should simply stay passive and suspend their voting rights so that they cannot use a portfolio company’s corporate governance structure to influence its decisions. This is because the market reacts differently depending on the behavioral and structural characteristics of the SWF involved. While larger discounts and deteriorating performance are found associated with large investments by highly politicized SWFs, one must admit that SWFs are highly heterogeneous to each other. Some funds, which are best exemplified by Norway’s

74 Bernstein et al., supra note 9, at 219.
75 Id. at 220.
76 Bortolotti et al., supra note 53, at 9.
78 See, typically, Ronald J. Gilson & Curtis J. Milhaupt, Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism, 60 STAN. L. REV. 1345, 1352 (2008) (proposing a simple corporate governance fix that “the equity of a U.S. firm acquired by a foreign government-controlled entity would lose its voting rights, but would regain them when transferred to non-state ownership”).
79 Bortolotti et al., supra note 53, at 40.
80 Id.
Government Pension Fund Global, have already succeeded in developing the necessary internal governance structures to the end of insulating management from political interference.81

A more nuanced issue is that an SWF may not necessarily influence its portfolio company by directly playing an active corporate governance role within the firm itself, such as assuming directorships, replacing CEO or other senior management. In a broader picture, the opportunities of post-investment target company business deals with firms related to/invested by the same SWF or *vice versa*, and the potential favorable or unfavorable government regulatory decisions that may affect the target firm, are all possible events indicative of SWF’s power and influence.82

Apparently, these events can take place even if the SWF investor agrees to forgo voting rights, or appoints no representative to the target firm’s board. Rather, what they reflect might be an (emerging) long-term relationship between the SWF and the target company, and there is arguably still considerable room for the SWF to exert indirect but effective control if the target firm wants to build up or preserve the relationship. While recent research has already started to notice this issue and finds that, for example, SWFs are actually often active investors and their post-investment activity is associated with differential long-run abnormal returns of the target firms,83 there still lacks a detailed case study of SWF investment contract terms, analyzed in the context of the pre- and post-deal activities surrounding the investment transactions, to enable a more thorough comprehension of the content and level of control rights of SWF investments. As such, this research is motivated, which will focus on one important SWF, namely the China Investment Corporation.

### III. CHINA INVESTMENT CORPORATION

Creating an SWF is certainly not the only means that a government has when it wishes to make and manage international investments. Instead, a continuum of institutional mechanisms is available for those purposes: with traditional foreign reserves

---

81 Id. at 41.
82 See Dewenter et al., *supra* note 50, at 258 & 274.
83 Id. at 277.
managed by central banks and/or finance ministries at one end, stabilization funds in the middle, and SWFs at the other end.\(^{84}\) Additionally, a government is also often seen to, either directly or indirectly, own, control, or sponsor domestic entities like banks or corporations to invest in foreign countries.\(^{85}\) Even when the discussion is narrowed down to SWFs, it is worth noting that a country can have more than one of such funds. As for China, the Sovereign Wealth Fund Institute, a research organization dedicated to studying SWFs, public pensions, central banks and other public investors,\(^{86}\) identifies four Chinese SWFs in its list of the world’s biggest SWFs, namely, CIC, SAFE Investment Company, National Social Security Fund, and China-Africa Development Fund.\(^{87}\) Among the four, however, only CIC is acknowledged by the Chinese government as its official sovereign wealth fund,\(^{88}\) which is mandated to diversify the state’s foreign exchange assets and achieve a relatively high risk-adjusted and long-term rate of return, through its investment activities outside the Mainland, consisting principally of portfolio investments with a small percentage of direct investments.\(^{89}\) As such, this paper will only

---


\(^{85}\) Although the official SWF of China is CIC, a number of gigantic state-owned corporations, banks, and sometimes even the government itself are also often identified in the media to have been involved in overseas investment transactions. A comprehensive list of China outward investments is provided by the China Global Investment Tracker, see *supra* note 21.


\(^{88}\) See KOCH-WESER & HAACKE, *supra* note 20, at 8.

\(^{89}\) *China Investment Corporation Announces the Establishment of a Wholly-Owned Subsidiary in Hong Kong*, CHINA INVESTMENT CORPORATION, (Nov. 7, 2010), http://www.china-inv.cn.
focus on China Investment Corporation and not delve into the other three funds.\[90\]

A. An Overview of CIC

As of the end of 2012, CIC’s total assets reached US$575.2 billion,\[91\] ranking as the world’s largest non-commodity SWF\[92\] and generally the fourth largest SWF, after Norway’s Government Pension Fund Global (US$838 billion), UAE’s Abu Dhabi Investment Corporation (US$773 billion), and Saudi Arabia’s SAMA Foreign Holdings (US$675.9 billion), which are all funds from oil-rich countries.\[93\] Incepted in 2007, CIC is still a young fund if compared to the world’s other major SWFs; while being the official entity mandated by the central government to invest and manage China’s gigantic and still swelling foreign exchange reserves,\[94\] it certainly assumes great responsibility and thus has established itself as one of the most important SWFs globally as soon as it was created. In addition, considering that China is the world’s second largest economy but also the world’s largest authoritarian regime,\[95\] people have reasons to be concerned over the fact that the Chinese superpower is now acting as the entrepreneur itself by making overseas investments through CIC. This is noted as reflecting a form of so-called “state capitalism” or “new mercantilism”, where the country is the unit whose value is to be maximized, with a corresponding increase in the role of the national government as a direct participant in and coordinator of

\[90\] For a brief comparison of CIC and the other three non-official Chinese SWFs, See KOCH-WESER & HAACKE, supra note 20, at 46.


\[92\] Non-commodity funds are typically established through transfers of assets from foreign exchange reserves, among which the China Investment Corporation is the most prominent example. See Gilson & Milhaupt, supra note 78, at 1355.

\[93\] See supra note 87.


the effort, to ensure that company-level behavior results in country-level maximization of economic, social, and political benefits.\textsuperscript{96} To some commentators, this is in contrast to the article of faith long believed by the developed economies, namely, free trade and competition amongst companies increases GDP at the national level, and it should be the market that polices the tautology.\textsuperscript{97} Interestingly, the above-mentioned notions are at odds with CIC’s own proclamations, which state that despite being a wholly government-owned entity, it maintains a strict commercial orientation and is driven by purely economic and financial interests.\textsuperscript{98} In order to better comprehend to what extent the Chinese central government plays a role in directing and participating in CIC’s investments, an overview CIC’s formal governance framework and investment philosophies is presented in Figure 4 and Table 1 below. This provides the necessary background information in support of a deeper exploration of CIC’s relationship with the Chinese central government, which follows in Section III.B.

**FIGURE 4: ORGANIZATIONAL STRUCTURE OF CIC (AS OF 2015)**

![Organizational Structure of CIC](http://www.china-inv.cn)

Source: China Investment Corporation.\textsuperscript{99}

\textsuperscript{96} Gilson & Milhaupt, supra note 78, at 1346.

\textsuperscript{97} Id.

\textsuperscript{98} See supra note 16.


© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>TABLE 1: COMPARISON OF INVESTMENT PRINCIPLES OF CIC AND ITS SUBSIDIARIES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date of Inception</strong></td>
</tr>
<tr>
<td><strong>Capitalization</strong></td>
</tr>
<tr>
<td><strong>Shareholder</strong></td>
</tr>
<tr>
<td><strong>China Investment Corporation (“CIC”)</strong></td>
</tr>
</tbody>
</table>


### Subsidiaries

<table>
<thead>
<tr>
<th>Subsidiaries</th>
<th>None</th>
<th>CIC International (Hong Kong) Co., Ltd.</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Huijin Investment Ltd.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CIC International Co., Ltd.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CIC Capital Corporation</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Investment Objectives

<table>
<thead>
<tr>
<th>Investment Objectives</th>
<th>CIC’s business objectives are to carry out an active and steady operation, endeavor to maximize the shareholder’s interests within an acceptable scope of risks, and continuously improve the corporate governance in the state-owned major financial institutions it controls.</th>
<th>Huijin acts as an investor on behalf of the State to achieve the goal of preserving and enhancing the value of state-owned financial assets.</th>
<th>Inherits CIC’s investment objectives.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Huijin</td>
<td>Inherits CIC’s investment objectives.</td>
<td>CIC Capital specializes in making direct investments to refine CIC’s overall portfolio management and enhance investment on long-term assets.</td>
<td>CIC Capital pursues a market-oriented commercial approach with a specialized mandate and global reach, and focuses on making direct investments.</td>
</tr>
</tbody>
</table>

### Investment Approach

<table>
<thead>
<tr>
<th>Investment Approach</th>
<th>CIC’s fundamental approach is to hold, manage, and invest its mandated assets to maximize shareholder’s value. CIC usually does not take a controlling role or seek to influence operations in the companies in which it invests.</th>
<th>Huijin does not intervene in the day-to-day business operations of the firms in which it invests.</th>
<th>Inherits CIC’s investment approaches.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Huijin</td>
<td>Inherits CIC’s investment approaches.</td>
<td>CIC Capital specializes in making direct investments to refine CIC’s overall portfolio management and enhance investment on long-term assets.</td>
<td>CIC Capital pursues a market-oriented commercial approach with a specialized mandate and global reach, and focuses on making direct investments.</td>
</tr>
</tbody>
</table>

---

102 *Id.* (pointing out that both CIC International (Hong Kong) and CIC Representative Office in Toronto are incorporated under CIC International).
While every investment is unique, CIC is committed to investing long-term. While CIC stresses that it operates with independence and its investment decisions are based on the pure economics of each

<table>
<thead>
<tr>
<th>Investment Scope</th>
<th>Huijin makes domestic equity investments in major state-owned financial enterprises, and exercises its shareholder rights to the extent of its capital contribution.</th>
<th>CIC International invests and manages capital outside Mainland China, covering the CIC’s overseas business together with CIC Capital.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CIC makes equity investments in domestic financial institutions primarily through its subsidiary Huijin.</td>
<td>CIC Capital focuses on making bilateral and multilateral fund investments, thus covering CIC’s overseas business together with CIC International.</td>
</tr>
<tr>
<td></td>
<td>CIC shall not actively seek investment in domestic non-financial enterprises, with the exceptions of purchasing overseas listed stocks, passive shareholdings and other circumstances as approved by the relevant government authorities.</td>
<td>Huijin does not conduct any other business or commercial activity.</td>
</tr>
</tbody>
</table>

Source: Unless otherwise indicated, the information above is collected from the official websites of CIC (http://www.china-inv.cn/) and Huijin (http://www.huijin-inv.cn/). As for CIC international, the information is from CIC’s 2011 annual report.

**B. CIC’s Strong Connections with China’s Government**

While CIC stresses that it operates with independence and its investment decisions are based on the pure economics of each
deal, one must note that CIC remains directly accountable to the State Council, which is China’s highest executive and administrative body. Most obviously, this is reflected in the fact that the appointment and removal of directors into and from CIC’s board, which is its ultimate decision-making organ, shall be subject to the State Council’s approval. In particular, CIC’s board should have one chairman and may have one vice chairman, and both of whom must be appointed by the State Council. The board of directors and senior executives are monitored by the board of supervisors, whose chairman must again be appointed by the State Council among the supervisors. Similarly, the State Council also appoints all the members of Huijin’s board of directors and board of supervisors. The fact that CIC is answerable directly to China’s top central governmental organ actually confers it with a cabinet ministerial standing. In reality, the senior officers of CIC are in constant contact with the high officials of the other relevant ministry-level authorities in terms of responding to government, reporting on actions taken, and negotiating investments in accordance with government policy, in a sense that all of these individuals effectively owe their careers to the Communist Party and the government. A more detailed account of the current, former and/or latter roles of the directors, supervisors, and senior officers of CIC and Huijin is presented below in Table 2 and Table 3.

<table>
<thead>
<tr>
<th>Position in CIC</th>
<th>Name</th>
<th>Member of Executive Committee</th>
<th>Term of Office</th>
<th>Current, Former, and/or Later Roles outside CIC</th>
</tr>
</thead>
</table>

103 See supra note 99 (pointing out that the State Council exercises shareholder’s rights on behalf of the State in CIC).
104 See supra note 94.
105 Id.
106 Id.
108 Qingxiu Bu, China’s Sovereign Wealth Funds: Problem or Panacea?, 11 J. WORLD INV. & TRADE 849, 877 (2010).
109 Clark & Monk, supra note 20, at 15.

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Appointment</th>
<th>Term</th>
<th>Former Positions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairman &amp; CEO</td>
<td>Ding Xuedong</td>
<td>July 2013–</td>
<td>July 2013–present</td>
<td>Former: Deputy Secretary of the State Council; Vice Minister of Finance; Director General of the Department of Education, Science and Culture; Director General of the Department of Agriculture, Director General of the Department of State-Owned Capital Administration</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Current: Chairman of Huijin</td>
</tr>
<tr>
<td>Chairman &amp; CEO</td>
<td>Lou Jiwei</td>
<td>2007–March</td>
<td>2007–March 2013</td>
<td>Former: Deputy Secretary General of the State Council; Executive Deputy Minister of Finance Later: Minister of Finance</td>
</tr>
<tr>
<td>Vice Chairman &amp; President</td>
<td>Li Keping</td>
<td>February 2014–present</td>
<td>February 2014–present</td>
<td>Former: Vice Chairman of the NCSSF</td>
</tr>
<tr>
<td>Executive Director,</td>
<td>Li Keping</td>
<td>June 2011–</td>
<td>June 2011–February 2014</td>
<td>Same as above</td>
</tr>
<tr>
<td>Executive Vice President &amp; Chief Investment Officer</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Executive Vice President &amp; Chief Operating</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Officer</td>
<td>Independent Director</td>
<td>Non-Executive Director</td>
<td>Years</td>
<td>Current Position</td>
</tr>
<tr>
<td>------------------</td>
<td>----------------------</td>
<td>------------------------</td>
<td>-------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Liu Zhongli</td>
<td>2007–present</td>
<td>Zhang Xiaoqiang</td>
<td>2007–present</td>
<td>Current: Vice Chairman of the NDRC</td>
</tr>
<tr>
<td>Wang Chunzheng</td>
<td>2007–present</td>
<td>Li Yong</td>
<td>2007–present</td>
<td>Current: Deputy Minister of Finance</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chen Jian</td>
<td>March 2011–present</td>
<td>Current: Vice Minister of Commerce (“MOFCOM”)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Hu Xiaolian</td>
<td>2007–present</td>
<td>Current: Deputy Governor of the People’s Bank of China (“PBOC”)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fang Shangpu</td>
<td>March 2011–present</td>
<td>Current: Deputy Administrator of the State Administration of Foreign Exchange (“SAFE”)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fu Ziying</td>
<td>2007–March 2011</td>
<td>Current with CIC position: Deputy Minister of the MOFCOM</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Liu Shiyu</td>
<td>2007–March 2011</td>
<td>Current with CIC position: Deputy Governor of the PBOC</td>
</tr>
</tbody>
</table>

Former: Chairman of the Economic Commission under the Chinese People’s Political Consultative Conference; Chairman of the NCSSF; Director of the Economic Restructuring Office of the State Council; Minister of Finance; Commissioner of the State Administration of Taxation

Former: Head of the Office of the Central Leading Group for Financial and Economic Affairs; Vice Minister of the National Development and Reform Commission (“NDRC”)
### Employee Director & Head of Human Resources Department

<table>
<thead>
<tr>
<th>Name</th>
<th>Period</th>
<th>Former Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Li Xin</td>
<td>July 2009–present</td>
<td>Former: Director General of the Finance and Audit Department at the State Administration of Science, Technology and Industry for National Defense; Division chief at the Ministry of Finance (“MOF”)</td>
</tr>
<tr>
<td>Yu Erniu</td>
<td>2007–July 2009</td>
<td>Former: Director and Chairman of Remuneration Committee of Bank of China; Division Chief at MOF Later: Retired</td>
</tr>
</tbody>
</table>

### Board of Supervisors

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Period</th>
<th>Former Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairman of Board of Supervisors</td>
<td>Li Xiaoping</td>
<td>May 2013–present</td>
<td>Former Vice President of the Industrial and Commercial Bank of China (“ICBC”)</td>
</tr>
<tr>
<td>Chairman of Board of Supervisors</td>
<td>Jin Liqun</td>
<td>September 2008–May 2013</td>
<td>Former: Vice President of the Asian Development Bank; Vice Minister of Finance Later: Chairman of China International Capital Corporation Limited (“CICC”) (after Li Jiange)</td>
</tr>
<tr>
<td>Chairman of Board of Supervisors</td>
<td>Hu Huaibang</td>
<td>2007–September 2008</td>
<td>Former: Secretary of Committee for Discipline Inspection at China Banking Regulatory Commission (“CBRC”) Later: Chairman of the Bank of Communications; Chairman of China Development Bank (“CDB”) as from June 2013</td>
</tr>
<tr>
<td>Supervisor</td>
<td>Dong Dasheng</td>
<td>June 2011–present</td>
<td>Current: Deputy Auditor General of the National Audit Office (“NAO”)</td>
</tr>
<tr>
<td>Supervisor</td>
<td>Zhou Mubing</td>
<td>June 2011–present</td>
<td>Current: Vice Chairman of the CBRC</td>
</tr>
<tr>
<td>Supervisor</td>
<td>Zhuang Xinyi</td>
<td>June 2011–present</td>
<td>Current: Vice Chairman of the CSRC</td>
</tr>
<tr>
<td>Supervisor</td>
<td>Last Name, First Name</td>
<td>Start Date – End Date</td>
<td>Current with CIC position</td>
</tr>
<tr>
<td>------------</td>
<td>---------------------</td>
<td>----------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Wang Huaqing</td>
<td></td>
<td>2007–June 2011</td>
<td>Current with CIC position: Secretary of Discipline Inspection of the CBRC</td>
</tr>
<tr>
<td>Fan Fuchun</td>
<td></td>
<td>2007–June 2011</td>
<td>Former: Deputy Chairman of the CSRC</td>
</tr>
<tr>
<td>Cui Guangqin</td>
<td></td>
<td>2007–present</td>
<td>Former: Director General of the Information and Postal Audit Office and Deputy Director General of the Department of Monetary Audit at the NAO</td>
</tr>
</tbody>
</table>

**Other Members of Executive Committee**

<table>
<thead>
<tr>
<th>Executive Vice President</th>
<th>Last Name, First Name</th>
<th>Start Date – End Date</th>
<th>Former position</th>
<th>Later</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peng Chun</td>
<td></td>
<td>March 2010–September 2013</td>
<td>Former: Executive Director and Executive Vice President of the Bank of Communications</td>
<td>President of Huijin</td>
</tr>
<tr>
<td>Fan Yifei</td>
<td></td>
<td>March 2010–present</td>
<td>Former: Executive Vice President of China Construction Bank</td>
<td></td>
</tr>
<tr>
<td>Yang Qingwei</td>
<td></td>
<td>2007–December 2009</td>
<td>Former: Director General of the Department of Investment at the NDRC</td>
<td>Chairman of China Jianyin Investment Ltd. as from February 2009</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Start Date</th>
<th>End Date</th>
<th>Previous Positions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Vice President</td>
<td>Xie Ping</td>
<td>2007–present</td>
<td></td>
<td>Former: President of Huijin; Various positions at the PBOC</td>
</tr>
<tr>
<td>Executive Vice President</td>
<td>Wang Jianxi</td>
<td>2007–May 2013</td>
<td></td>
<td>Former: Vice Chairman of Huijin; Deputy Chairman of CICC; Former Assistant Chairman of the CSRC; Later: Retired</td>
</tr>
<tr>
<td>Executive Vice President</td>
<td>Liang Xiang</td>
<td>March 2012–present</td>
<td></td>
<td>Former: Secretary of Discipline Inspecting Commission in the Export-Import Bank of China</td>
</tr>
<tr>
<td>Counselor &amp; Member of Executive Committee</td>
<td>Liang Xiang</td>
<td>2007–March 2012</td>
<td></td>
<td>Same as above</td>
</tr>
<tr>
<td>Chief Strategy Officer</td>
<td>Zhou Yuan</td>
<td>2012–present</td>
<td></td>
<td>Former: Executive Vice Chairman of Hong Kong Mercantile Exchange</td>
</tr>
<tr>
<td>Chief Risk Officer</td>
<td>Guo Xiangjun</td>
<td>2012–present</td>
<td></td>
<td>Former: Deputy Director General of the Department of Fiscal and Financial Affairs of the NDRC; Former Deputy Director General of the Macroeconomic Control Department of the State Council Office for Restructuring the Economic System</td>
</tr>
<tr>
<td>Chief Information Technology Officer</td>
<td>Hua Hua</td>
<td>2012–present</td>
<td></td>
<td>Former: Vice President of Great Wall Software International Ltd.</td>
</tr>
<tr>
<td>Member of Executive</td>
<td>Zhao Haiying</td>
<td>2012–present</td>
<td></td>
<td>Former: Executive Vice President and Director General of the Non-</td>
</tr>
</tbody>
</table>
Committee
Banking Financial Institutions
Department of Huijin; Deputy Director of the Department of Securities Issuance Supervision at CSRC
Current: Executive Vice President of Huijin

Sources: CIC annual reports 2008 – 2012, CIC’s official website (in particular the relevant press releases on personnel appointments and removals), and various news sources.¹¹⁰

**TABLE 3: CURRENT, FORMER AND/OR LATER ROLES OF HUIJIN’S DIRECTORS, SUPERVISORS, AND SENIOR OFFICERS**

<table>
<thead>
<tr>
<th>Position in Huijin</th>
<th>Name</th>
<th>Current, Former, and/or Later Role outside Huijin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Board of Directors</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chairman</td>
<td>Ding Xuedong</td>
<td>Former: Deputy Secretary of the State Council; Vice Minister of Finance; Director General of the Department of Education, Science and Culture; Director General of the Department of Agriculture, Director General of the Department of State-Owned Capital Administration</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Current: Chairman &amp; CEO of CIC</td>
</tr>
<tr>
<td>Vice Chairman</td>
<td>Li Jiange</td>
<td>Former: Deputy Director of the Development Research Center of the State Council, Deputy Director of the Economics Restructuring Office of the State Council, and Vice Chairman of the CSRC.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Current: Chairman of CICC</td>
</tr>
<tr>
<td>President</td>
<td>Peng Chun</td>
<td>Former: Executive Director and Executive Vice President of the Bank of Communications</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Current: Executive Vice President of CIC</td>
</tr>
<tr>
<td>Independent Director</td>
<td>Wu Xiaoling</td>
<td>Former: Deputy Governor of the PBOC; Administrator of the SAFE</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Current: Member of the Standing Committee and Vice Chairman of the Financial and Economic Committee of the National People’s Congress</td>
</tr>
<tr>
<td>Independent Director</td>
<td>Jin Lianshu</td>
<td>Former: Director General of the Department of Industry and Transportation at the MOF</td>
</tr>
</tbody>
</table>

¹¹⁰ Note that, the information on which the Table 2 and Table 3 is based was collected as of April 2014, when this paper was written up.
From the two tables above, one can reasonably infer that the central government is able to sustain effective control of CIC by virtue that almost all of its key personnals have followed typical “political official career paths”. Except for Mr. Zhou Yuan (Chief Strategy Officer) and Mr. Hua Hua (Chief Information Officer), all of the remaining 34 people that are working or have worked for CIC have served as governmental officials in various governmental authorities, or at least worked at one or more state-owned financial institutions. In particular, it is worth noting that all of the non-executive directors of CIC are in-office senior officials concurrently working at certain important economic, financial and foreign exchange regulatory authorities at equal ministry-level, such as the National Development and Reform Commission, the Ministry of Finance, the Ministry of
Commerce, the People’s Bank of China, and the State Administration of Foreign Exchange. As for the Executive Committee, while the members there do act in accordance with their roles and report to the Chairman and CEO in the first instance, they are ultimately accountable to the State Council, which is the one and only shareholder of CIC. As such, it is logical to infer that the decisions made by CIC are the results of compromise and consultation amongst the various government institutions involved, and the positions in CIC taken by former or current governmental officials pragmatically are just “job-rotations” that are part of their career paths within the Communist Party. In this sense, CIC’s adoption of the Santiago Principles may be less about a substantive effort to police its internal governance according to the guidelines generally accepted there, but more about claiming external legitimacy, which is part of a more general process of ‘normalizing’ relationships with the West. This being said, the commitment to Western institutional “forms” should not be taken to represent a similar functional allocation of powers and responsibilities consistent with the practice in many Western investment agencies. A more realistic contemplation of CIC would rather be that “it is an arm of the Chinese government just like other state-owned enterprises concerned with its resource needs and its status as a global power.”

IV. DATA AND DISCUSSION

Despite that CIC labels itself as a long-term financial investor which basically does not seek control rights in its portfolio companies, the fact that it is overwhelmingly staffed with former or current governmental officials and must ultimately be accountable to the State Council nevertheless makes the outside world question otherwise. Has CIC been rigorously complying with its formal investment principles in practice, or is it actually able to influence, either directly or indirectly, the business operations of the companies it invested in? For the purpose of shedding light on

\[111\] Clark & Monk, supra note 20, at 15.
\[112\] Id.
\[113\] Id. at 23.
\[114\] Id.
\[115\] Id. at 19.
these questions, this Section IV will turn to the investment trans-
actions made by CIC from its inception in 2007 to the end of
2013. In particular, I will collect and study the key contractual
terms of the investment agreements to the extent available, which
are then discussed in the context of the relevant events and deal-
ings surrounding these transactions, in order to offer a thorough
understanding of the content and level of CIC’s control/influence
in its portfolio companies. The paragraphs below elaborate this
data exercise.

A. Data Collection and Description

Starting as early as in 2008, CIC publishes annual reports116
where it discloses, among other things, the relevant financial
information such as asset allocation and the rate of return of its
overseas portfolio of the past year.117 This said, it is worth noting
that such disclosure does not include an exhaustive list of CIC’s
investments during that particular year, but is rather made in a
manner to give examples thereof. Absent a comprehensive collec-
tion of the historical investment transactions from the official
source, the China Global Investment Tracker jointly published by
the American Enterprise Institute and the Heritage Foundation so
far remains the only publicly available dataset of large (i.e., val-
ued at more than US$100 million) attempted Chinese outward
investments and contracts worldwide (excluding bond deals),
both failed and successful, in all industries as from January 1,
2005.118 According to this dataset, there have been altogether 48
investment transactions done by CIC in the period of 2007-2013,
ranging from May 2007 (investing in Blackstone) to September
2013 (investing in Uralkali). While this list surely serves as a
helpful basis to start my data collection, I did not take for granted
that it had already covered all of CIC investments made thus far,
given that there is no official disclosure from the investor itself in
the first place. To be on the safe side, I double-checked and sup-
plemented the list by (1) searching the official websites and

nv.cn (last visited Aug. 29, 2015).
117 See KOCH-WESER & HAACKE, supra note 20, at 56.
118 See supra note 21, and by downloading the full dataset.
public announcements of the relevant transaction parties and various news resources to ensure the accuracy of these entries; (2) comparing it with the “company deals” records of China Investment Corporation in the Thomson Reuters’ Thomson One database from 2007 to 2013 (inclusive), as well as with all the deals mentioned in CIC’s annual reports and press releases, to see whether this list missed some transactions and thus could be supplemented; and (3) running a general Internet search to capture those deals that took place during the period from July 1, 2013 to December 31, 2013, which might still be too recent to be recorded in any of the ready databases. The above-mentioned efforts finally generate a list containing an aggregate of 56 CIC transactions (excluding investments into asset management funds), among which 51 were acquisitions (both primary and secondary), and the remaining five were joint ventures. All of these 56 transactions were executed and completed directly between CIC (or one or more of its subsidiaries, investment vehicles or agents) and the target, thus excluding deals that were merely rumored or later suspended, and deals that only indirectly involved CIC as an investor.

In addition to the 56 deals mentioned above, a 2013 policy paper from the U.S.-China Economic and Security Review Commission also identified CIC to have provided financing into 18 investment fund vehicles. After applying similar refining methods, the final list consists of 23 fund investments by CIC in the period of 2007-2013, dated from April 2008 (investing in JC Flowers) to June 2012 (investing in Russia-China Investment Fund). Put together, these 79 transactions constitute my full sample of CIC investments from 2007 to 2013, which serves as the basis for hand-collecting the data on investment contract terms as well as pre-and-post-transaction events relevant to CIC’s

---

120 For example, according to the 13-D and 13-G filings with the Securities Exchange Commission, CIC had indirect control rights in three companies, namely, General Growth Properties, Inc., The Howard Hughes Corporation, and Rouse Properties, Inc., by virtue of its investment in Brookfield, a Canadian private equity fund.
121 See KOCH-WESER & HAACKE, supra note 20, at 50.
control and influence. The following Table 4, Table 5, and Table 6 enumerate these 79 transactions.
<table>
<thead>
<tr>
<th>Time of Investment</th>
<th>Target Name</th>
<th>Location of Target</th>
<th>Target Public as of Transaction?</th>
<th>Target Listing Venue</th>
<th>Target Sector</th>
<th>Target Subsector</th>
<th>Value (US$ mil.)</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>May-2007</td>
<td>Blackstone Group LP</td>
<td>US</td>
<td>IPO transaction</td>
<td>NYSE</td>
<td>Finance</td>
<td>Investment</td>
<td>3,000</td>
<td></td>
</tr>
<tr>
<td>Nov-2007</td>
<td>China Railway Group Limited</td>
<td>China</td>
<td>IPO transaction</td>
<td>SEHK</td>
<td>Transport</td>
<td>Railway</td>
<td>100 (HK$ 780)</td>
<td></td>
</tr>
<tr>
<td>Dec-2007</td>
<td>Morgan Stanley</td>
<td>US</td>
<td>Y</td>
<td>NYSE</td>
<td>Finance</td>
<td>Investment</td>
<td>5,579</td>
<td>Bailout transaction</td>
</tr>
<tr>
<td>Mar-2008</td>
<td>Visa Inc</td>
<td>US</td>
<td>IPO transaction</td>
<td>NYSE</td>
<td>Finance</td>
<td>Business services</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Jun-2009</td>
<td>CITIC Capital</td>
<td>China</td>
<td>N</td>
<td>N/A</td>
<td>Finance</td>
<td>Investment</td>
<td>Undisclosed</td>
<td></td>
</tr>
<tr>
<td>Jun-2009</td>
<td>Blackrock</td>
<td>US</td>
<td>Y</td>
<td>NYSE</td>
<td>Finance</td>
<td>Investment</td>
<td>2,800 (together with other investors)</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Jun-2009</td>
<td>Goodman Group</td>
<td>Australia</td>
<td>Y</td>
<td>ASX</td>
<td>Real estate</td>
<td>Property</td>
<td>159 (AU$ 200)</td>
<td>Bailout transaction (Bridge loan, which goes with the options to buy stapled securities of Goodman)</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------------</td>
<td>--------------------</td>
<td>----------------------------------</td>
<td>---------------------------------------</td>
<td>---------------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Jul-2009</td>
<td>Teck Resources Ltd</td>
<td>Canada</td>
<td>Y</td>
<td>NYSE and Toronto Stock Exchange</td>
<td>Metals</td>
<td>Copper</td>
<td>1,500</td>
<td>Bailout transaction</td>
</tr>
<tr>
<td>Jul-2009</td>
<td>Diageo</td>
<td>UK</td>
<td>Y</td>
<td>LSE and NYSE</td>
<td>Manufacturing</td>
<td>Beverages</td>
<td>368</td>
<td>(GBP 224)</td>
</tr>
<tr>
<td>Aug-2009</td>
<td>Goodman Group</td>
<td>Australia</td>
<td>Y</td>
<td>ASX</td>
<td>Real estate</td>
<td>Property</td>
<td>396.3</td>
<td>(AUS 500)</td>
</tr>
<tr>
<td>Aug-2009</td>
<td>Songbird Estates PLC</td>
<td>UK</td>
<td>Y</td>
<td>LSE AIM</td>
<td>Agriculture</td>
<td>Wholesaler of agricultural raw materials and commodities</td>
<td>1,730</td>
<td>(GBP 1,030) (together with other investors)</td>
</tr>
<tr>
<td>Sep-2009</td>
<td>Noble Group Ltd</td>
<td>HK</td>
<td>Y</td>
<td>SGX</td>
<td>Agriculture</td>
<td>Wholesaler of agricultural raw materials and commodities</td>
<td>850</td>
<td>Bailout transaction (combination of preference shares, ordinary shares, warrants, and a loan)</td>
</tr>
<tr>
<td>Sep-2009</td>
<td>PT Bumi Resources Tbk</td>
<td>Indonesia</td>
<td>Y</td>
<td>Jakarta Stock Exchange</td>
<td>Energy</td>
<td>Coal</td>
<td>1,900</td>
<td>Bailout transaction</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>-------------------</td>
<td>----------------------------------</td>
<td>--------------------</td>
<td>----------------------------------</td>
<td>---------------------------------------------</td>
<td>--------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------</td>
</tr>
<tr>
<td>Sep-2009</td>
<td>JSC KazMunaiGas Exploration Production</td>
<td>Kazakhstan</td>
<td>Y</td>
<td>LSE and Kazakhstan Stock Exchange</td>
<td>Energy</td>
<td>Oil and gas</td>
<td>939</td>
<td></td>
</tr>
<tr>
<td>Oct-2009</td>
<td>Poly (Hong Kong) Investments Ltd</td>
<td>China</td>
<td>Y</td>
<td>SEHK</td>
<td>Conglomerate</td>
<td>The overseas-listed company of “China Poly Group”, whose business covers real estate, trading, resources, culture and civil explosives.</td>
<td>53 (HK$ 408.6)</td>
<td></td>
</tr>
<tr>
<td>Oct-2009</td>
<td>Nobel Holdings Investments Ltd</td>
<td>Russia</td>
<td>N</td>
<td>N/A</td>
<td>Energy</td>
<td>Oil &amp; gas</td>
<td>300</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Oct-2009</td>
<td>SouthGobi Energy Resources Ltd</td>
<td>Canada</td>
<td>Y</td>
<td>Toronto Stock Exchange</td>
<td>Energy</td>
<td>Coal</td>
<td>500</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------------------------------</td>
<td>--------------------</td>
<td>---------------------------------</td>
<td>----------------------</td>
<td>--------------</td>
<td>------------------</td>
<td>------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>Oct-2009</td>
<td>Iron Mining International Ltd / Hong Kong Lung Ming Investment Holdings</td>
<td>Mongolia</td>
<td>N/A</td>
<td>Energy</td>
<td>Iron</td>
<td>500 to 700</td>
<td>Supportive transaction</td>
<td></td>
</tr>
<tr>
<td>Nov-2009</td>
<td>AES Corp</td>
<td>US</td>
<td>Y</td>
<td>NYSE</td>
<td>Energy</td>
<td>Electrical power</td>
<td>1,581</td>
<td></td>
</tr>
<tr>
<td>Nov-2009</td>
<td>China Longyuan Power Group</td>
<td>China</td>
<td>IPO transaction</td>
<td>SEHK</td>
<td>Energy</td>
<td>Wind power</td>
<td>400 (HK$ 3,100)</td>
<td></td>
</tr>
<tr>
<td>Nov-2009</td>
<td>GCL-Poly Energy Holdings Ltd</td>
<td>China</td>
<td>Y</td>
<td>SEHK</td>
<td>Energy</td>
<td>Solar photovoltaic</td>
<td>717 (HK$ 5,500)</td>
<td></td>
</tr>
<tr>
<td>Feb-2010</td>
<td>Apax Partners Worldwide LLP</td>
<td>UK</td>
<td>N</td>
<td>N/A</td>
<td>Finance</td>
<td>Investment</td>
<td>115 (rumored)</td>
<td></td>
</tr>
<tr>
<td>May-2010</td>
<td>Penn West Energy Trust</td>
<td>Canada</td>
<td>Y</td>
<td>NYSE and Toronto Stock Exchange</td>
<td>Energy</td>
<td>Oil &amp; gas</td>
<td>435</td>
<td></td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------------</td>
<td>--------------------</td>
<td>----------------------------------</td>
<td>----------------------</td>
<td>---------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------------------------------------</td>
</tr>
<tr>
<td>Jun-2010</td>
<td>Chesapeake Energy Corp</td>
<td>US</td>
<td>Y</td>
<td>NYSE</td>
<td>Energy</td>
<td>Oil &amp; gas</td>
<td>200</td>
<td></td>
</tr>
<tr>
<td>Dec-2010</td>
<td>Banco BTG Pactual Group</td>
<td>Brazil</td>
<td>N</td>
<td>N</td>
<td>Finance</td>
<td>Investment</td>
<td>300</td>
<td></td>
</tr>
<tr>
<td>Dec-2010</td>
<td>Northstar Tambang Persada Ltd</td>
<td>Indonesia</td>
<td>N</td>
<td>N/A</td>
<td>Energy</td>
<td>Coal</td>
<td>73</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(40% shareholder of Indonesian public company PT. Delta Dunia Makmur Tbk, which holds BUMA)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Feb-2011</td>
<td>VTB Group</td>
<td>Russia</td>
<td>Y</td>
<td>LSE and Moscow Exchange</td>
<td>Finance</td>
<td>Banking</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>Feb-2011</td>
<td>Morgan Stanley real estate loan</td>
<td>Japan</td>
<td>N/A</td>
<td>N/A</td>
<td>Real estate</td>
<td>Property</td>
<td>385</td>
<td>The target is a distressed asset portfolio.</td>
</tr>
</tbody>
</table>

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Time of Investment</th>
<th>Target Name</th>
<th>Location of Target</th>
<th>Target Public as of Transaction?</th>
<th>Target Listing Venue</th>
<th>Target Sector</th>
<th>Target Subsector</th>
<th>Value (US$ mil.)</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apr-2011</td>
<td>China Lumena New Materials</td>
<td>China</td>
<td>Y</td>
<td>SEHK</td>
<td>Materials</td>
<td>Thenardite</td>
<td>90</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Apr-2011</td>
<td>Semiconductor Manufacturing International Corporation (“SMIC”)</td>
<td>China</td>
<td>Y</td>
<td>NYSE and SEHK</td>
<td>Manufacturing</td>
<td>Semiconductor</td>
<td>250</td>
<td></td>
</tr>
<tr>
<td>Jul-2011</td>
<td>Enogex Holdings, LLC</td>
<td>US</td>
<td>N</td>
<td>N/A</td>
<td>Energy</td>
<td>Natural gas</td>
<td>518 (altogether by the investor group)</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Aug-2011</td>
<td>Diamond S Shipping LLC</td>
<td>US</td>
<td>N</td>
<td>N/A</td>
<td>Transport</td>
<td>Shipping</td>
<td>100</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Sep-2011</td>
<td>AES-VCM Mong Duong</td>
<td>Vietnam</td>
<td>N</td>
<td>N/A</td>
<td>Energy</td>
<td>Coal</td>
<td>93</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------</td>
<td>-------------------</td>
<td>---------------------------------</td>
<td>---------------------</td>
<td>--------------</td>
<td>-----------------</td>
<td>-----------------</td>
<td>------</td>
</tr>
<tr>
<td>Oct-2011</td>
<td>GDF SUEZ Exploration &amp; Production (“E&amp;P”) Business; and 10% stake in train 1 of the Atlantic LNG liquefaction plant</td>
<td>France; Atlantic LNG liquefaction plant located in Trinidad and Tobago</td>
<td>Y</td>
<td>Euronext</td>
<td>Energy</td>
<td>Oil &amp; gas</td>
<td>4,000</td>
<td>Bailout transaction (E&amp;P business for 3,150, Atlantic LNG liquefaction plant for 850)</td>
</tr>
<tr>
<td>Oct-2011</td>
<td>Horizon Roads (ConnectionEast)</td>
<td>Australia</td>
<td>Y</td>
<td>ASX</td>
<td>Transport</td>
<td>Tollway</td>
<td>270 (AU$ 300)</td>
<td>Supportive transaction (after the transaction ConnectionEast was privatized and delisted from ASX)</td>
</tr>
<tr>
<td>Dec-2011</td>
<td>Shanduka Group (Pty) Ltd</td>
<td>South Africa</td>
<td>N</td>
<td>N/A</td>
<td>Finance</td>
<td>Investment</td>
<td>243 (South African Rand 2,000)</td>
<td></td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------</td>
<td>--------------------</td>
<td>----------------------------------</td>
<td>----------------------</td>
<td>---------------</td>
<td>------------------</td>
<td>-----------------</td>
<td>------</td>
</tr>
<tr>
<td>Jan-2012</td>
<td>Kemble Water Holdings (Thames Water’s parent company)</td>
<td>UK</td>
<td>N</td>
<td>N/A</td>
<td>Utilities</td>
<td>Water and waste management</td>
<td>276</td>
<td></td>
</tr>
<tr>
<td>Feb-2012</td>
<td>EIG Global Energy Partners LLC</td>
<td>US</td>
<td>N</td>
<td>N/A</td>
<td>Finance</td>
<td>Investment (Private equity; and only invests in energy resources and related infrastructure)</td>
<td>Undisclosed</td>
<td></td>
</tr>
<tr>
<td>Feb-2012</td>
<td>Sunshine Oilsands</td>
<td>Canada</td>
<td>IPO transaction</td>
<td>SEHK</td>
<td>Energy</td>
<td>Oil</td>
<td>150</td>
<td></td>
</tr>
<tr>
<td>Apr-2012</td>
<td>Polyus Gold International Ltd</td>
<td>Russia</td>
<td>Y</td>
<td>(Only the global depositary receipts in) LSE and OTC (US)</td>
<td>Metals</td>
<td>Gold</td>
<td>425</td>
<td></td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>--------------------</td>
<td>-----------------------------</td>
<td>--------------------</td>
<td>----------------------------------</td>
<td>----------------------</td>
<td>---------------</td>
<td>------------------</td>
<td>-----------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>May-2012</td>
<td>EP Energy</td>
<td>US</td>
<td>N</td>
<td>N/A</td>
<td>Energy</td>
<td>Oil &amp; gas</td>
<td>300</td>
<td></td>
</tr>
<tr>
<td>Jun-2012</td>
<td>Eutelsat Communications SA</td>
<td>France</td>
<td>Y</td>
<td>Euronext</td>
<td>Technology</td>
<td>Telecom</td>
<td>490 (EUR 385.2)</td>
<td></td>
</tr>
<tr>
<td>Aug-2012</td>
<td>Cheniere Energy</td>
<td>US</td>
<td>Y</td>
<td>NYSE</td>
<td>Energy</td>
<td>Natural gas</td>
<td>500 (rumored)</td>
<td></td>
</tr>
<tr>
<td>Sep-2012</td>
<td>Alibaba Group Holding Ltd</td>
<td>China</td>
<td>N</td>
<td>N/A</td>
<td>Services</td>
<td>Business services (online shopping)</td>
<td>1,000 (rumored, the whole ordinary shares issue raised 2 billion)</td>
<td>Supportive transaction</td>
</tr>
<tr>
<td>Oct-2012</td>
<td>FGP Topco Ltd (parent company of Heathrow Airport Holdings)</td>
<td>UK</td>
<td>N</td>
<td>N/A</td>
<td>Transport</td>
<td>Aviation</td>
<td>730 (GBP 450)</td>
<td></td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------</td>
<td>--------------------</td>
<td>----------------------------------</td>
<td>----------------------</td>
<td>--------------</td>
<td>------------------</td>
<td>-----------------</td>
<td>------</td>
</tr>
<tr>
<td>Nov-2012 Deutsche Bank UK Headquarters</td>
<td>UK</td>
<td>N/A</td>
<td>N/A</td>
<td>Real estate</td>
<td>Property</td>
<td>392 (GBP 245)</td>
<td>The target is a 312,000 square feet office block</td>
<td></td>
</tr>
<tr>
<td>Nov-2012 Uralkali</td>
<td>Russia</td>
<td>Y</td>
<td>Moscow Exchange and LSE</td>
<td>Agriculture</td>
<td>Fertilizer</td>
<td>Undisclosed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dec-2012 Moscow Exchange</td>
<td>Russia</td>
<td>IPO transaction</td>
<td>Moscow Exchange</td>
<td>Finance</td>
<td>Securities exchange &amp; services</td>
<td>100 (but end up with smaller stakes than requested)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Feb-2013 Windfield Holdings Pty Ltd (SPV created to acquire Talison Lithium)</td>
<td>Australia</td>
<td>N</td>
<td>Talison was listed in Toronto Stock Exchange</td>
<td>Metals</td>
<td>Lithium</td>
<td>294.35 (CAD 300)</td>
<td>Supportive transaction</td>
<td></td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Target Name</td>
<td>Location of Target</td>
<td>Target Public as of Transaction?</td>
<td>Target Listing Venue</td>
<td>Target Sector</td>
<td>Target Subsector</td>
<td>Value (US$ mil.)</td>
<td>Note</td>
</tr>
<tr>
<td>--------------------</td>
<td>------------------------------</td>
<td>--------------------</td>
<td>---------------------------------</td>
<td>----------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Oct-2013</td>
<td>SIIC Environment Holdings Ltd</td>
<td>China</td>
<td>Y</td>
<td>SGX</td>
<td>Utilities</td>
<td>Water purification, supply and waste treatment, and related facilities</td>
<td>44.52 (SGD 56.1)</td>
<td></td>
</tr>
<tr>
<td>Nov-2013</td>
<td>Chiswick Park London</td>
<td>UK</td>
<td>N/A</td>
<td>N/A</td>
<td>Real estate</td>
<td>Property</td>
<td>1,280 (GBP 780)</td>
<td>The target is an office park.</td>
</tr>
</tbody>
</table>

Notes:

(1) The time of investment for each of the transactions is generally set at the time when transaction is officially announced by the parties involved therein, or the date of executing definitive investment agreements. When neither of the above is available, the time of investment mentioned in media anecdotes is used. As such, I do not record, for example, the time when only non-binding letters of intent are signed, the time when an already-executed transaction is completed, or the time when convertible bonds are converted into common equity.\(^\text{122}\)

\(^\text{122}\) For example, CIC invested in Uralkali in November 2012 by purchasing convertible bonds from the target. See *Private Issue of Exchangeable Unlisted Bonds Due 2014 (Bonds)*, URALKALI (Nov. 9, 2012), http://www.uralkali.com/press_center/company_news/item4116/. In September 2013, such bonds were converted into 12.5% equity in the target. See *Changes in Uralkali Shareholder Structure*, URALKALI (Sept. 24, 2013), http://www.uralkali.com/press_center/company_news/20130924/. Chengdong Investment Corporation is one of CIC’s investment vehicles. Apparently, the time of investment for this transaction should be November 2012 and not September 2013; and the entry in the China Global Investment Tracker database is thus not correct.
(2) Follow-on capital investments based on the same terms of an earlier transaction are not separately enumerated in my sample.\(^{123}\)

(3) For the value of investment, I use, to the extent possible, the numbers indicated in the official public announcements of the transactions, or in the definitive investment agreements. When neither of the above is available, the amount of investment mentioned in media anecdotes is recorded.

(4) A “supportive transaction” means that the concerned transaction was to support certain undertakings of the target firm, e.g., to raise funds to acquire another firm or to pursue some projects. A “bailout transaction” means that the concerned target firm was in heavy indebtedness or could even be on the edge of bankruptcy, and CIC was imported as a bailout investor to save it.

\(^{123}\) For example, CIC’s investment of 9.3% common units of Blackstone dated May 2007 was raised to 12.5% in October 2008, based on exactly the same terms (except that the newly bought units are not subject to transfer restrictions). But this raising of ownership is not separately listed in my sample. See The Blackstone Group L.P., Current Report (Form 8-K) (Oct. 16, 2008). Similarly, CIC invested US$5.6 billion into Morgan Stanley in December 2007 in exchange for an ownership of 9.86%. In June 2009, CIC followed up the investment in order to bring its equity ownership back to 9.86%, which was diluted to 7.68% after the October 2008 investment by Mitsubishi UFJ Financial Group into Morgan Stanley. See China Investment Corporation Purchases $1.2 billion Morgan Stanley Common Stock, SWFI (June 3, 2009), http://www.swfinstitute.org/sovereign-wealth-funds/china-investment-corporation-purchases-1-2-billion-morgan-stanley-common-stock. Again, this June 2009 follow-on transaction was not listed in my sample.
<table>
<thead>
<tr>
<th>Time of Transaction</th>
<th>Name of Main JV Partner</th>
<th>Target Sector</th>
<th>Target Subsector</th>
<th>Location of Main JV Partner</th>
<th>Main JV Partner Public as of the Transaction?</th>
<th>Listing Venue of Main JV Partner</th>
<th>Value of CIC's Contribution (US$ mil.)</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov-2009</td>
<td>GCL-Poly Energy Holdings Ltd</td>
<td>Energy</td>
<td>Solar photovoltaic</td>
<td>China</td>
<td>Y</td>
<td>HKSE</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>Feb-2010</td>
<td>Intel Capital Finance</td>
<td>Finance</td>
<td>Investment</td>
<td>US</td>
<td>N</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>May-2010</td>
<td>Penn West Energy Trust</td>
<td>Energy</td>
<td>Oil &amp; gas</td>
<td>Canada</td>
<td>Y</td>
<td>NYSE and Toronto Stock Exchange</td>
<td>799.73 (CAD 817)</td>
<td></td>
</tr>
<tr>
<td>Dec-2011</td>
<td>Global Logistic Properties Limited (GLP)</td>
<td>Real estate Property (Provider of modern logistics facilities)</td>
<td>Singapore</td>
<td>Y</td>
<td>SGX</td>
<td>272.9</td>
<td>Supportive transaction</td>
<td></td>
</tr>
<tr>
<td>Nov-2012</td>
<td>GLP</td>
<td>Real estate Property (Provider of modern logistics facilities)</td>
<td>Singapore</td>
<td>Y</td>
<td>SGX</td>
<td>Unknown</td>
<td>Supportive transaction</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Month</td>
<td>Fund Name</td>
<td>Fund Nature</td>
<td>Fund Manager</td>
<td>Country</td>
<td>Amount of Investment (US$ Mil.)</td>
<td>Amount of Fund (US$ Mil.)</td>
<td>Fund’s Planned Investments</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>----------------------------</td>
<td>----------------------</td>
<td>----------------</td>
<td>---------</td>
<td>--------------------------------</td>
<td>---------------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>2008</td>
<td>April</td>
<td>Unknown</td>
<td>Private equity-buyout</td>
<td>JC Flowers</td>
<td>US</td>
<td>3,200</td>
<td>4,000</td>
<td>Less likely to invest in large financial institutions than in smaller banks and brokerages that have not been the customary targets of SWFs.</td>
</tr>
<tr>
<td>2008</td>
<td>Early in 2008</td>
<td>Invesco Aim Liquid Assets Portfolio</td>
<td>Money market mutual fund</td>
<td>Invesco</td>
<td>US</td>
<td>2,100</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>Early in 2008</td>
<td>DWS Money Market Trust</td>
<td>Money market mutual fund</td>
<td>Deutsche Asset Management</td>
<td>US</td>
<td>1,500</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>September</td>
<td>Reserve Primary Fund</td>
<td>Money market mutual fund</td>
<td></td>
<td>US</td>
<td>5,400 (11.1% as of Sep 2008)</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Month</td>
<td>Fund Name</td>
<td>Fund Nature</td>
<td>Fund Manager</td>
<td>Country</td>
<td>Amount of Investment (US$ Mil.)</td>
<td>Amount of Fund (US$ Mil.)</td>
<td>Fund’s Planned Investments</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>-----------</td>
<td>-------------</td>
<td>--------------</td>
<td>---------</td>
<td>-------------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>2009</td>
<td>March</td>
<td>Morgan Stanley Real Estate Fund VII Global</td>
<td>International property investment fund</td>
<td>Morgan Stanley</td>
<td>US</td>
<td>800</td>
<td>6,000</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>June</td>
<td>Unknown</td>
<td>Fund of hedge funds</td>
<td>Blackstone</td>
<td>US</td>
<td>500</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>June</td>
<td>Unknown</td>
<td>Hedge fund</td>
<td>Morgan Stanley</td>
<td>US</td>
<td>Unknown</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>August</td>
<td>Unknown</td>
<td>Hedge fund (fixed assets)</td>
<td>Capula Investment Management LLP</td>
<td>UK</td>
<td>200</td>
<td>Unknown</td>
<td>In distressed debt and other fixed-income assets.</td>
</tr>
<tr>
<td>2009</td>
<td>September</td>
<td>Unknown</td>
<td>Hedge fund</td>
<td>Oaktree Capital Management LP</td>
<td>US</td>
<td>1,000</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>September</td>
<td>Unknown</td>
<td>Real estate fund</td>
<td>Goldman Sachs</td>
<td>US</td>
<td>600 - 700</td>
<td>Unknown</td>
<td>In US distressed assets ranging from real estate to infrastructure.</td>
</tr>
<tr>
<td>Year</td>
<td>Month</td>
<td>Fund Name</td>
<td>Fund Nature</td>
<td>Fund Manager</td>
<td>Country</td>
<td>Amount of Investment (US$ Mil.)</td>
<td>Amount of Fund (US$ Mil.)</td>
<td>Fund’s Planned Investments</td>
</tr>
<tr>
<td>-----</td>
<td>-------</td>
<td>-------------------</td>
<td>------------------------------------</td>
<td>-----------------------------</td>
<td>---------</td>
<td>------------------------------</td>
<td>---------------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>2010</td>
<td>February</td>
<td>SPDR Gold Trust</td>
<td>Largest physically backed gold exchange traded fund (“ETF”) in the world.</td>
<td>State Street Global Advisors</td>
<td>US</td>
<td>156</td>
<td>Unknown</td>
<td>(0.4% of the Trust's total shares)</td>
</tr>
<tr>
<td>2010</td>
<td>February</td>
<td>US Oil Fund</td>
<td>Commodity ETF</td>
<td>United States Commodity Funds LLC</td>
<td>US</td>
<td>79</td>
<td>Unknown</td>
<td>Crude oil futures</td>
</tr>
<tr>
<td>2010</td>
<td>February</td>
<td>Apax Europe VII</td>
<td>Private equity - buyout</td>
<td>Apax Partners</td>
<td>UK</td>
<td>956 (EUR 685)</td>
<td>1,550</td>
<td>(EUR 1,120)</td>
</tr>
<tr>
<td>2010</td>
<td>February</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Lexington Partners</td>
<td>US</td>
<td>500</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>February</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Pantheon Ventures</td>
<td>US</td>
<td>500</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>February</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Goldman Sachs</td>
<td>US</td>
<td>500</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Month</td>
<td>Fund Name</td>
<td>Fund Nature</td>
<td>Fund Manager</td>
<td>Country</td>
<td>Amount of Investment (US$ Mil.)</td>
<td>Amount of Fund (US$ Mil.)</td>
<td>Fund’s Planned Investments</td>
</tr>
<tr>
<td>------</td>
<td>-----------</td>
<td>------------------------------------</td>
<td>---------------------</td>
<td>-----------------------</td>
<td>---------------</td>
<td>---------------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>2010</td>
<td>March</td>
<td>Brookfield Retail Holdings III LLC (BRH III)</td>
<td>Private equity</td>
<td>Brookfield Asset Management</td>
<td>Canada</td>
<td>Two CIC vehicles collectively hold 99.499848% in BRH III.</td>
<td>Unknown</td>
<td>General Growth Properties, Inc. (GGP); The Howard Hughes Corporation; and Rouse Properties, Inc.</td>
</tr>
<tr>
<td>2011</td>
<td>March</td>
<td>Goodman Trust Australia Real estate fund</td>
<td>Goodman</td>
<td>Goodman Australia</td>
<td>156.24</td>
<td>1,260 (AUD 1,400)</td>
<td>100% of the ordinary units of ING Industrial Fund (IIF)</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>December</td>
<td>New Germany Fund Inc. Diversified, actively-managed closed-end mutual fund</td>
<td>Deutsche Asset Management</td>
<td>US</td>
<td>5% of the fund</td>
<td>Unknown</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

124 See supra note 120.
<table>
<thead>
<tr>
<th>Year</th>
<th>Month</th>
<th>Fund Name</th>
<th>Fund Nature</th>
<th>Fund Manager</th>
<th>Country</th>
<th>Amount of Investment (US$ Mil.)</th>
<th>Amount of Fund (US$ Mil.)</th>
<th>Fund’s Planned Investments</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>April</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Blackrock</td>
<td>US</td>
<td>200</td>
<td>Unknown</td>
<td>Invest both domestically and overseas, according to different sources.</td>
</tr>
<tr>
<td>2012</td>
<td>May</td>
<td>A Capital China Outbound Fund</td>
<td>Private equity-growth fund</td>
<td>A Capital</td>
<td>Belgium</td>
<td>Unknown</td>
<td>250–500</td>
<td>Take minority stakes alongside Chinese companies in midsized European companies with strong potential in China.</td>
</tr>
<tr>
<td>2012</td>
<td>June</td>
<td>Russia-China Investment Fund</td>
<td>Private equity</td>
<td>Russian Direct Investment Fund (“RDIF”, Russia's SWF)</td>
<td>Russia</td>
<td>1,000 (another 1,000 by RDIF, the rest from third party investors)</td>
<td>3,000–4,000</td>
<td>Equity investments primarily in Russian economy</td>
</tr>
</tbody>
</table>

© 2015 Peking University School of Transnational Law
B. General Characteristics of the Investments

As shown in the three tables above, CIC has invested in altogether 17 different countries/regions in all of the 79 transactions. In both the samples of non-fund investments and fund investments, the US was the most frequent destination: 12 out of the 56 non-fund investments and 17 out of the 23 fund investments were made into the US firms. In particular, the heavy concentration of investments in funds created by the US fund managers may be reflecting the US’s leading position in the global fund management industry. Following the US, the second largest group of firms absorbing CIC’s investments was from China itself, consisting of 9 different firms in aggregate. Note that, except for CITIC Capital and Alibaba Group Holding Ltd., both of which are closely-held companies within the time window of my sample, all of the remaining 7 Chinese firms are listed overseas (primarily in Hong Kong). If looking from the perspective of developed versus developing countries, CIC obviously has made more transactions in the former than in the latter group of countries for its non-fund investments, while the number of countries in each camp is actually the same. As for fund vehicles, all of CIC’s investments were made into developed countries except for Russia. See Table 7 below.

Table 7: Geography of CIC’s Investments (N=79)

<table>
<thead>
<tr>
<th></th>
<th>Non-Fund Investments and JVs</th>
<th>Fund Investments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Developed Economies</td>
<td>8 (Australia, Canada, France, Hong Kong, Japan, Singapore, the UK, the US)</td>
<td>5 (Australia, Belgium, Canada, the UK, the US)</td>
</tr>
<tr>
<td>Number of Transactions in Developed</td>
<td>34 (Australia 4, Canada 5, France 2, Hong Kong 1, Japan 1)</td>
<td>22 (Australia 1, Belgium 1, Canada)</td>
</tr>
</tbody>
</table>

125 See Fund Management, The CityUK (Sept. 2013), https://www.thecityuk.com/research/our-work/reports-list/fund-management-2013/, at 5 (pointing out that London is the second largest global center for hedge fund managers after New York), at 7 (pointing out that the US was by far the biggest source of mutual funds with more than a half of the world’s total). As for private equity, most of the world’s 50 largest firms are headquartered in the US. See The 2013 PEI 300, Private Equity International, http://www.peimedia.com/pei300 (last visited Aug. 29, 2015).

126 GCL-Poly Energy Holdings Ltd. is counted once as it appears both in the non-fund acquisition sample and in the joint venture sample.
Moreover, the majority of the companies invested by CIC were public companies. Among the 52 different targets (including three targets that are real estate property and loan portfolio\textsuperscript{127}) in the non-fund investments sample, the numbers of companies listed versus non-listed as of the time of transaction are 26 and 17, respectively. If the 6 firms that CIC invested in their initial public offerings\textsuperscript{128} and the 2 firms that are parent companies of listed entities\textsuperscript{129} are also added into the group of listed companies, the number of public companies invested by CIC will be more than twice of the non-public ones. The reason that public firms are preferred over non-public ones may be that for a foreign investor like CIC, the former type of companies infers less information asymmetry if compared to the latter type, thanks to the mandatory disclosure required for public companies.\textsuperscript{130} Moreover, because there is a ready market, i.e., the stock exchange, for the shares of the companies listed there, investor exit is thus made easier. Note that, for an external investor that typically does not seek control rights as what CIC explicitly claims itself to be, investor lock-in

\textsuperscript{127} They are marked as “N/A” in the column of “Target Public as of Transaction?”

\textsuperscript{128} They are marked as “IPO transaction” in the column of “Target Public as of Transaction?”

\textsuperscript{129} Namely, these two firms are Northstar Tambang Persada Ltd., the 40% shareholder of Indonesian public company PT. Delta Dunia Makmur Tbk., and Windfield Holdings Pty Ltd., which is a special purpose vehicle created to acquire Talison Lithium, an Australian public company listed in Toronto Stock Exchange.

\textsuperscript{130} Jere R. Francis et al., \textit{The Role of Accounting and Auditing in Corporate Governance and the Development of Financial Markets Around the World}, 10 \textit{ASIA-PAC. J. ACCT. & ECON}. 1, 7 (“Greater disclosure means more transparency and less information asymmetry between insiders and outsiders”), 26 (2003) (“Credible accounting facilitates contracting and resolves information asymmetry between the firm and the outside investors”).
can be a severe problem in closely-held firms, as a minority investor usually has no credible means to threaten exit by easily withdrawing capital or selling its ownership interests to third parties when managers underperform or engage in self-dealing.\footnote{Darian M. Ibrahim, \textit{The New Exit in Venture Capital}, 65 \textit{VAND. L. REV.} 1, 7 (2012) (pointing out that investor lock-in is a severe problem in closely held corporations, in that minority shareholders can neither look to the corporation for redemption, nor is there a ready market for selling shares to third parties).}

In terms of years of investment, CIC was set up in 2007 but for the first two years after its inception, only US$21 billion was invested. The gradual deployment of capital was considered “appropriate”, as CIC was still a new company while the global market conditions were highly turbulent as a result of the financial crisis.\footnote{China Investment Corporation, \textit{2009 Annual Report} (2010), http://www.china-inv.cn, at 32 (last visited Aug. 29, 2015).} Although after a year of full-fledged investments in 2009, CIC slowed down its pace of investment in 2010 due to the general uncertainty among SWFs about the market prospects,\footnote{See supra notes 36 & 37 and the accompanying texts.} an important shift in its investment strategy began to emerge this year. In particular, CIC has gradually diverted from its traditional “stocks + bonds” approach, while expanded the scope of its alternative investments to include, among other things, private equities and hedge funds.\footnote{China Investment Corporation, \textit{2010 Annual Report} (2011), http://www.china-inv.cn, at 27 (last visited Aug. 29, 2015).} This can be seen from the composition of CIC’s 2010 transactions—7 of the 14 investments in that year were made into fund vehicles, and 5 of them were private equity funds.\footnote{While Figure 5 generally supports this point, one must note that it does not show the whole picture as the investments recorded in this paper do not represent the full portfolio of CIC, which include cash funds and others, equities, fixed-income securities, and alternative investments. This being said, the Global Investment Portfolio Distribution published by CIC itself in its 2010 annual report does show that the proportion of alternative investments in its full portfolio in 2010 significantly increased relative to 2009. \textit{See} CIC \textit{2010 Annual Report}, \textit{Id.} at 29.} In particular, it has to be noted that the 8 transactions where CIC invested in troubled companies and distressed assets (marked as bailout or distressed asset transactions in Table 4) were mostly seen in the first year of its incorporation, within which 6 took place before the end of 2009. While the reduction of capital deployment into troubled companies and distressed assets
surely was due to the financial crisis gradually fading away after 2010, it also showed that CIC had intensified market research in the following years and started to take more prudent actions to manage its portfolio given the complex market conditions.\footnote{China Investment Corporation, 2011 Annual Report, supra note 100, at 24.}
Note: Based on CIC’s non-fund investments (presented in Tables 4 and 5 above); including altogether 52 different targets after removing the repeated ones.

Note: Based on CIC’s 13-F investments (filed with the SEC on February 5, 2010)\(^\text{137}\): covering 65 different securities after removing the repeated ones and those securities that do not have SIC codes.

For the 52 targets presented in the first pie chart above, I generally used the industry sectors designated to them in the China Global Investment Tracker dataset. For those firms that are not covered there, I searched their official websites to designate the industry sector. Obviously, CIC’s investments heavily cluster in energy (especially oil & natural gas) and finance firms, which count for more than half of all its portfolio companies. For the firms and securities included in CIC’s 2010 13-F filing, I checked their US Standard Industrial Classification (“SIC”) codes and used the major group divisions\(^\text{138}\) to designate their industry sectors. Similarly, CIC’s 13-F investments also heavily cluster in certain industry groups, particularly manufacturing, finance, and

\(^{137}\) China Investment Corporation, Form 13-F (Feb. 5, 2010), available at http://www.sec.gov/Archives/edgar/data/1468702/000095012310009135/00 00 950123-10-009135.txt.

\(^{138}\) These are decided by the first two digits of the four-digit SIC codes. See SIC Division Structure, UNITED STATES DEPARTMENT OF LABOR, https://www.osha.gov/pls/imis/sic_manual.html (last visited Aug. 29, 2015).
mining. Note that, besides the 10 firms that fall directly into the mining group, there are also 4 firms in the manufacturing group that are actually engaged in energy-and-resource-related businesses according to their sub-sector codes.\textsuperscript{139}

Therefore, while CIC officially claims itself to be a financial investor that operates on a commercial basis,\textsuperscript{140} the industry sector distribution of its past investments actually presents a quite different story. CIC is seen to have heavily invested both up-stream, in resources, and downstream, in utilities and logistics sectors.\textsuperscript{141} Regardless of whether the investment transactions are commercially sensible or not, they are highly strategic in nature as they are targeted at areas in which China’s economy has structural weaknesses.\textsuperscript{142} CIC’s investment pattern suggests that in addition to its role as portfolio investor, it is also being utilized as a tool to ensure the access to raw materials, as part of China’s broader economic development and energy needs.\textsuperscript{143} Actually, even CIC itself has also admitted that when choosing potential investment targets, it tends to invest in companies that will benefit from the “China factor” and take advantage of the potential growth of the Chinese economy.\textsuperscript{144} To support this, the 2009 investment in Canada’s Teck Resources was cited as an example. Teck is Canada’s largest diversified resource company whose major products include copper, steelmaking coal (coke), zinc, and energy,\textsuperscript{145} and China, which is undergoing a profound process of urbanization and industrialization and needs vast quantities of energy and resources to do so, is the largest consumer of its

\textsuperscript{139} These four firms are: Precision Castparts Corp. (3320, manufacturing: iron & steel foundries); Smith Intl Inc. (3533, manufacturing: oil & gas filed machinery & equipment); Tesoro corp. (2911, manufacturing: petroleum refining); and Valero Energy Corp. (2911, manufacturing: petroleum refining).
\textsuperscript{140} See supra note 16.
\textsuperscript{141} See KOCH-WESER & HAACKE, supra note 20, at 26.
\textsuperscript{142} Id.
\textsuperscript{143} Dixon & Monk, supra note 11, at 112.
The deal was considered as having enabled both sides to closely work together and identify future opportunities of mutual interest. A similar example is CIC’s 2009 investment in Hong Kong-based commodity supplier Noble Group. Given China’s position as the world’s biggest buyer of commodities including soybeans, soybean oil, cotton, iron ore, aluminum, copper, and zinc, CIC’s acquisition of significant equity stake in Noble is surely of great strategic value, as “what China needs, Noble helps to provide.”

C. Direct Control in CIC’s Investments

1. Level of Ownership, Voting Rights, Director Nomination Rights and Board Representation of CIC’s Non-Fund and Non-JV Investments

The very first mechanism of direct control that a shareholder has is of course its level of ownership and the voting rights that attach thereto. Moreover, in order to make voting rights more useful, shareholders also have the right to nominate potential candidates into the board, thus “limiting the informational and transaction costs of evaluating candidates, and permitting large electoral groups to vote on a limited number of viable candidacies”. These formal elements of corporate governance are of great importance, in the sense that an SWF’s informal influence depends ultimately on its ability to vote. The complete data over the contractual terms of the 51 non-JV investments made by CIC into 50 different non-fund targets, including those over the

---

147 Id. at 7.
149 Julian Velasco, The Fundamental Rights of the Shareholder, 40 UC DAVIS L. REV. 407, 416 (2006) (“[S]hareholders have the right to vote on important matters relating to the business, which gives them some control over the corporation”).
151 Gilson & Milhaupt, supra note 78, at 1364.
level and change of ownership, voting rights, director nomination rights, and board representation, are presented in the Appendix of this paper. These data are collected as of April 2014 to the largest extent possible from the official transactional documents, periodical financial reports, and prospectuses, which are available for those target firms that are either public or about to go public as of the time of transaction. Additionally, I also look at the public announcements made by the targets or CIC about the transactions, where a brief summary of the key deal terms may be provided even when the full investment agreements are not disclosed. These data are supported or double-checked with the target firms’ official websites and media anecdotes—they are particularly useful when the targets are private companies, which are generally not subject to statutory disclosure obligations.

In terms of the level of ownership, CIC typically acquires significant but non-controlling stakes in target companies (see Appendix). Despite its often large shareholding percentages, the voting rights that CIC has in its target firms are, to the extent that the relevant information is available or applicable, very much restricted. In particular, it explicitly gave up the right to vote when entering into the investment agreements with 6 firms, namely, Blackstone, Morgan Stanley, Chesapeake Energy, Northstar Tambang Persada Ltd., EIG Global Energy Partners, and Cheniere Energy, while in other 5 firms its voting rights are limited in different ways, e.g., by setting out certain specific items it is entitled to vote (Goodman Group), by requiring it to vote according to certain directions or recommendations (AES Corp.), by issuing to it a different class of securities which have only limited (Teck Resources) or no voting rights (Songbird Estates)\(^{152}\), or by capping its voting rights at a maximum percentage (SouthGobi). Among all of the 51 investment transactions, there are only two targets where one can clearly figure out that CIC have secured for itself full voting rights, namely, China

\(^{152}\) Note that, in Songbirds Estates, CIC holds not only preference shares but also ordinary shares, but only its preferences shares are without voting rights.
Lumena New Materials\textsuperscript{153} and SMIC, and it is worth noting that both of them are Chinese firms.

**TABLE 8: OVERVIEW OF CIC’S OWNERSHIP AND DIRECT CONTROL RIGHTS IN ITS NON-FUND AND NON-JV INVESTMENTS (N=51)**

<table>
<thead>
<tr>
<th>Ownership Percentage</th>
<th>Number of Targets</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 ≤ 5%</td>
<td>9</td>
</tr>
<tr>
<td>5% ≤ 10%</td>
<td>11</td>
</tr>
<tr>
<td>10% ≤ 15%</td>
<td>9</td>
</tr>
<tr>
<td>15% ≤ 20%</td>
<td>3</td>
</tr>
<tr>
<td>&gt;20%</td>
<td>8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Board Representation</th>
<th>Number of Targets</th>
</tr>
</thead>
<tbody>
<tr>
<td>No board representation</td>
<td>29</td>
</tr>
<tr>
<td>Among which, CIC had right to nominate director(s) but didn’t</td>
<td>4</td>
</tr>
<tr>
<td>With board representation</td>
<td>9</td>
</tr>
</tbody>
</table>

Note: the number of targets in each category is counted only to the extent the relevant information is available or applicable, thus the numbers do not add up to 51. Goodman Group, in which CIC has made investment twice, is counted only once.

Similarly, CIC generally does not have much direct control in the targets’ boards either. The number of firms where CIC does NOT have a board seat is more than three times of the firms where CIC is indeed represented in the board (Table 8). In particular, there are four cases where CIC does not have any board seat despite that the investment agreements with the targets, namely, Goodman Group, Songbird Estates, SouthGobi and Banco BTG Pactual, explicitly allowed it to nominate director(s) into their boards. A closer look at CIC’s board representation together with its ownership relative to the other major shareholders in the target firms generates even more interesting findings, which are presented in Table 9 below. While it is logical that a shareholder typically cannot secure itself a board seat when its ownership is

\textsuperscript{153} Although the voting rights will only be available to CIC when its converts its convertible bonds into shares.
too small, such as the cases where CIC only holds 1% of Diageo and 3.11% of Banco BTG Pactual and thus has no board representations in these two firms, this is apparently not the major reason explaining CIC’s generally low level of board representation in its target firms. In contrast, CIC is among the biggest shareholders in 10 firms,\textsuperscript{154} none of which has one or more shareholders beneficially owning more than 50% shares and thus can elect the entire board without concurrence of the other shareholders of the company,\textsuperscript{155} while it still does not hold any seat in the board thereof. It is worth noting that, although CIC does not directly have a director in Noble Group, Mr. Li Rongrong, the former chairman of China’s State-Owned Assets Administration and Commission (the “SASAC”),\textsuperscript{156} began to serve as a non-executive director at Noble from May 2011. Likewise, while CIC does not have any board seat in Sunshine Oilsands despite it is the second largest shareholder thereof, China Life, the largest state-owned commercial insurance group in Mainland China,\textsuperscript{157} and BOCGI, the overseas investment arm of the state-owned Bank of China, co-invested with CIC and each of them has a seat in the board of Sunshine Oilsands.\textsuperscript{158} Arguably, such board seats taken by former senior governmental official and large Chinese SOEs may indirectly compensate for CIC’s absence in the targets,

\textsuperscript{154} These 10 firms are: Goodman Group, Songbird Estates, Noble Group, China Lumena New Materials, Diamond S Shipping, Sunshine Oilsands, Polyus Gold, Eutelsat Communications, Uralkali, and Moscow Exchange.

\textsuperscript{155} For example, in SouthGobi, Ivanhoe held as of March 2012 approximately 58% of the company’s issued and outstanding common shares. Subject to CIC’s right to appoint a director, Ivanhoe’s ownership interest enables it to elect the entire board without the concurrence of any of the company’s other shareholder’s. \textit{See Annual Report 2011, SOUTHGOBI RES.}, http://www.southgobi.com/i/pdf/YE-2011.pdf, at 84 (last visited Aug. 7, 2015). The CIC indeed does not have any seat in SouthGobi’s board. The other five firms which have absolute controlling shareholder(s) and CIC is not represented in their boards are: CITIC Capital, JSC KazMunaiGas Exploration Production, China Longyuan Power Group, VTB Group, and SIIC Environment Holdings.

\textsuperscript{156} Since October 2010, Mr. Li began to serve as the Vice Chairman of the Economic Committee of the 11th Chinese People’s Political Consultative Conference, and is currently a member of the 17th Central Committee of the China Communist Party. \textit{See Li Rongrong (李荣融), CHINAVITAE}, http://www.chinavitae.com /biography/Li_Rongrong (last visited Aug. 7, 2015).


\textsuperscript{158} \textit{See Appendix}. 

© 2015 Peking University School of Transnational Law
as fundamentally these directors should all speak for the interests of the Chinese government, which decides the career of the officials and owns the investing SOEs.

**Table 9: CIC’s Board Representation vis-à-vis Its Relative Ownership in Target Firms (N=25)**

<table>
<thead>
<tr>
<th>Number of Targets</th>
<th>No board representation</th>
<th>CIC is one of the biggest shareholders but has no board seat</th>
<th>CIC’s shareholding is simply too small to have a board seat</th>
<th>No board seat because of absolute controlling shareholder(s)</th>
<th>With board representation</th>
<th>CIC is or is among the biggest shareholders</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>18</td>
<td>10</td>
<td>2</td>
<td>6</td>
<td>7</td>
<td>5159</td>
</tr>
</tbody>
</table>

Note: Here the sample consists of only 25 non-fund and non-JV target firms, because for them the information about CIC’s ownership relative to other shareholders and CIC’s board representation is both available, thus enabling me to analyze the relationship between the two.

The next important question is, to the extent that CIC does have direct control power in the form of voting rights and/or board seats, whether it has actively exercised such control in target companies. To answer this, I searched the Factiva database from September 2007 (when CIC was incorporated) to December 2013 using key words of “vote,” “approve,” “propose,” and “reject” (and their different conjugation forms) combined with the name of each of the target companies except those in which it is clearly known that CIC has neither voting right nor board seat. According to the findings, CIC has NOT been identified to have voted in favor or against certain issues, regardless in annual shareholder meetings or in board meetings, NOR is there any record showing that CIC has made any proposal to be voted at any shareholder meeting. Such findings should be carefully construed. It might seem too abrupt to conclude from there that CIC

159 These five firms are: AES Corp., GCL-Poly Energy Holdings, SMIC, GDF SUEZ E&P, and Shanduka Group. CIC also installed directors in Teck Resources, where it has only 6.7% voting right despite having 17.2% economic ownership; and in FGP Topco Ltd. (Heathrow Airport’s parent company), where it holds 10% but actually is the smallest shareholder.
is passive and does not exercise at all the key control rights that it has as a shareholder. Even if CIC indeed votes in shareholder or board meetings, this fact may not necessarily be disclosed in voting poll outcome announcements or board resolution announcements, which only publish the overall percentages of votes for each of the relevant agenda items. Another important source to know how exactly certain shareholder or director has voted or voiced on certain issues is the insiders of the relevant target firms or people close to their boards, who may talk about this when they are interviewed by journalists. But again, such anecdotes are largely not caught by the Factiva search, except for one case detailed in Box 1 below.

**BOX 1: CIC’S ROLE IN SMIC**

On June 29, 2011, Semiconductor Manufacturing International Corporation held its annual general meeting where one of the agenda items was to decide the re-election of directors. The poll result for re-electing Mr. David N. K. Wang, SMIC’s chief executive, was that only 41.79% of the votes were cast in favor, and Mr. Wang failed to be re-appointed into the board. According to media anecdotes, the direct reason for the failure of Mr. Wang’s re-election was that despite smaller shareholders such as Taiwan Semiconductor Manufacturing Company Limited, Walden International, and New Enterprise Associates (NEA) voted in favor of him, Datang Telecom Technology & Industry Holdings Co., Ltd. (“Datang”), which was the largest shareholder of the company, voted against, while CIC and Shanghai Industrial Investment (Holdings) Company Limited, being the second and third largest shareholders, abstained from voting. Datang voted against Mr. Wang because it wanted to campaign for Simon Yang, SMIC’s chief operating officer, to replace Mr. Wang as chief executive.

Three days later, in an urgently-convened interim board meeting, Mr. Zhang Wenyi, who was the former chairman of SMIC’s smaller rival Shanghai Huahong and former vice-minister of China’s Ministry of Electronics Industry, and who had just entered the board of SMIC as from June 30, 2011 as an independent non-executive director, was nominated by CIC as a candidate to fulfill the vacated executive director position after Mr. Wang’s failure of re-election. Note that, this happened against the background that, according

---

to CIC’s investment agreement, it could only nominate ONE director, and at that time it already had Mr. Lawrence Juen-Yee as a non-executive director in SMIC’s board. Datang initially was against Mr. Zhang’s election giving reason of “potential competition between Huahong and SMIC”, and its two board representatives both voted for Simon Yang to be the executive director to replace Mr. Wang. Mr. Zhang Wenyi finally managed to be elected as the executive director, and was appointed as the acting CEO of the company.161

This was seen by the outside as a compromise between Datang and SMIC’s overseas shareholders: the former agreed that Mr. Zhang would become the new chairman of SMIC’s board, while the latter agreed upon the resignation of Mr. Wang, which took effect as from July 13, 2011.

The drama described above represented public feud between two state-owned shareholders of SMIC, which began when Jiang Shangzhou, SMIC’s former chairman, died on June 27, 2011. Datang was brought into SMIC in 2008 and soon increased its stake to 19.4%, making it SMIC’s largest shareholder. It was reported that Datang had wanted to fully consolidate SMIC to create a vertically-integrated telecoms technology company, but such ambitions received a blow last year, when the well-connected Mr. Jiang, a former government official, brought in CIC as the second largest shareholder with a 13.6% stake.


164 Kathrin Hille & Robin Kwong, SMIC’s Future Unclear After Wang’s Resignation, FIN. TIMES (July 18, 2011), http://www.ft.com/cms/s/2/11e60a86-b12a-11e0-a43e-00144feab49a.html#axzz3gXFmKNpx.

© 2015 Peking University School of Transnational Law
2. Direct Control Rights in CIC’s JV Investments and Fund Investments

The key terms of CIC’s five JV investments are presented in Table 10. It can be seen that typically, CIC does not hold majority equity stake in the JVs it invested in, and in none of the cases CIC actively manages the JV.

As to the 23 fund investments that CIC has made, I was able to find the relevant terms about CIC’s control rights in 8 of them, which are presented in Table 11. Note that, investing in secondary market can not only help an SWF like CIC to mitigate the political backlash against it injecting capital into high-profiled public companies given the less regulation and disclosure imposed on private equity, it also has the advantage of allowing CIC to build indirectly but quickly a more mature and diversified portfolio, and making it less vulnerable to domestic criticism if its investments went sour. In particular, it has been submitted that usually as one of the major investors, CIC has been able to use its size to win special terms from private equity groups, including lower fees and transfer of knowledge on specialist markets. For example, Lexington Partners, Goldman Sachs and Pantheon Ventures have each agreed to manage US$500m for CIC through special accounts, which are to be kept separate from their main funds. Another example supporting this point is CIC’s investment in JC Flowers, where the terms for CIC are more favorable than the standard terms for investors. In its more recent investments, CIC has also been identified to have gone from merely investing in private equity funds to creating funds to meet both its

---


166 Martin Arnold, China Fund in Private Equity Push, Fin. Times (Feb. 17, 2010), http://www.ft.com/intl/cms/s/0/1691a3a6-1bf8-11df-a5e1-00144feab49a.html#axzz3gXFmKNpx.

167 Id.

168 Id.

169 Henny Sender, CIC Close to Fund Deal with JC Flowers, Fin. Times (Feb. 8, 2008), http://www.ft.com/intl/cms/s/0/aeaf55de-d3b1-11dc-8b56-0000779fd2ac.html#axzz3gXFmKNpx.

© 2015 Peking University School of Transnational Law
needs and China’s strategic imperatives, with examples such as the joint private equity fund that it initiated with Blackrock, the A Capital China Outbound Fund and the Russia-China Investment Fund, which were all created in 2012.


171 Id.
<table>
<thead>
<tr>
<th>Time of Investment</th>
<th>Name of Main JV Partner</th>
<th>JV Ownership Structure</th>
<th>JV Managed by</th>
<th>Contractual Terms on CIC's Ownership and Control Rights</th>
<th>Contractual Terms on Changing Ownership</th>
<th>Purpose of Creating the JV</th>
<th>Transactions Related to the JV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov/2009</td>
<td>GCL-Poly Energy Holdings Ltd</td>
<td>CIC: 49% GCL Poly: 51%</td>
<td>GCL Poly</td>
<td>CIC can appoint 2 out of 5 directors. Normal matters are decided by simple majority; but there is also a list of reserved matters that require the approval or affirmative vote of one CIC director. The actual controlling person of GCL Poly covenants that he or any of his controlled entity will not conduct competing business during the entire JV term and 18 months after its termination.</td>
<td>JV shares are transferrable to each partner's wholly-owned affiliates, otherwise, the other partner needs to approve. After 3 years, GCL Poly may give a prior notice to offer to sell to CIC part or whole of its shares. If CIC does not take up the shares within 45 days, then GCL Poly can sell to a third party on NO more favorable terms. After 3 years, CIC may give a prior notice to offer to sell to GCL Poly part or whole of its shares at a price of no less than 15% annual IRR of its investment in the JV. If GCL Poly does not take up the shares within 45 days, then CIC can sell to a third party that is NOT a competitor of GCL Poly, at ANY price and</td>
<td>To jointly invest in and develop photovoltaic electricity generation business.</td>
<td>Completion of the JV is conditioned upon and will take place the same time as the closing of CIC subscribing GCL Poly's shares (see Appendix).</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Name of Main JV Partner</td>
<td>JV Ownership Structure</td>
<td>JV Managed by</td>
<td>Contractual Terms on CIC's Ownership and Control Rights</td>
<td>Contractual Terms on Changing Ownership</td>
<td>Purpose of Creating the JV</td>
<td>Transactions Related to the JV</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------------------</td>
<td>------------------------</td>
<td>--------------</td>
<td>--------------------------------------------------------</td>
<td>----------------------------------------</td>
<td>--------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Feb/2010</td>
<td>Intel Capital</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A. This JV is a loose collaboration between CIC and Intel Capital to work together to identify and support strategic investments in pioneering companies across a wide array of technology sectors, including cleantech, software &amp; services, mobility and digital home.</td>
<td>N/A</td>
<td>To pair the resources of CIC with the technology expertise of Intel Capital to explore investments outside China, seeking cross border opportunities that will benefit both the US and China.</td>
<td></td>
</tr>
<tr>
<td>May/2010</td>
<td>Penn West</td>
<td>CIC: 45% Penn West: 55%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>To form a partnership and develop Penn West’s bitumen assets located in the Peace River area of Canada with the intent to secure a supply of high-quality bitumen for use in asphalt and other high-value products.</td>
<td>Concurrent with this JV transaction, CIC has also agreed to purchase 5% of Penn West’s outstanding trust.</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Name of Main JV Partner</td>
<td>JV Ownership Structure</td>
<td>JV Managed by</td>
<td>Contractual Terms on CIC’s Ownership and Control Rights</td>
<td>Contractual Terms on Changing Ownership</td>
<td>Purpose of Creating the JV</td>
<td>Transactions Related to the JV</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------------------</td>
<td>------------------------</td>
<td>---------------</td>
<td>----------------------------------------------------------</td>
<td>----------------------------------------</td>
<td>-----------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Dec/2011</td>
<td>Global Logistic Properties Limited (GLP)</td>
<td>CIC: 50% GLP: 50%</td>
<td>GLP</td>
<td>Unknown</td>
<td>Unknown</td>
<td>To purchase 15 logistics facilities from LaSalle Investment Management in Japan.</td>
<td>Earlier in 2011, GLP established a 50/50 JV with Canada Pension Plan Investment Board (“CPPIB”) to develop modern logistics facilities in Japan.</td>
</tr>
</tbody>
</table>
TABLE 11: CIC’S CONTROL RIGHTS IN ITS FUND INVESTMENTS*

<table>
<thead>
<tr>
<th>Time of Investment</th>
<th>Fund Name</th>
<th>Fund Nature</th>
<th>Firm</th>
<th>Relevant Terms on CIC’s Control Rights in the Fund</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov/2012</td>
<td>GLP</td>
<td>CIC: 34.2%; GLP: 34.2%; GIC 20%; CPPIB: 11.6%</td>
<td>Unknown</td>
<td>To buy Prosperitas-assets in Brazil. This JV is the first JV, i.e., the Stabilized JV, which is intended to buy the first portfolio of the logistics facilities. The second JV is the Development JV, which was by and among GLP, CPPIB and GIC, where GLP owns 41.3%, CPPIB 39.6% and GIC 19.1%.</td>
</tr>
</tbody>
</table>

* Data collected as of April 2014.

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Time of Investment</th>
<th>Fund Name</th>
<th>Fund Nature</th>
<th>Firm</th>
<th>Relevant Terms on CIC’s Control Rights in the Fund</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb/2010</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Lexington Partners</td>
<td>CIC’s investment will be managed through special accounts, which are to be kept separate from the main funds of the fund managers.</td>
</tr>
<tr>
<td>Feb/2010</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Pantheon Ventures</td>
<td>Same as above</td>
</tr>
<tr>
<td>Feb/2010</td>
<td>Unknown</td>
<td>Private equity</td>
<td>Goldman Sachs</td>
<td>Same as above</td>
</tr>
<tr>
<td>Mar/2010</td>
<td>Brookfield Retail Holdings III LLC (“BRH III”)</td>
<td>Private equity</td>
<td>Brookfield</td>
<td>Two of CIC’s subsidiaries hold a collective 99.499848% ownership interest in BRH III. These two CIC’s subsidiaries are able to appoint and remove the members of the board of directors of BRH III.</td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Fund Name</td>
<td>Fund Nature</td>
<td>Firm</td>
<td>Relevant Terms on CIC’s Control Rights in the Fund</td>
</tr>
<tr>
<td>--------------------</td>
<td>-----------</td>
<td>-------------------</td>
<td>-----------------------</td>
<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>Mar/2011</td>
<td>Goodman Trust Australia (“GTA”)</td>
<td>Real estate fund</td>
<td>Goodman</td>
<td>GTA is an A$1.4 billion fund established by Goodman and the three consortium partners to acquire and hold the ING Industrial Fund (“IIF”) portfolio. After this transaction, IIF was delisted from ASX. GTA will be owned by Goodman (holding a 19.9%), CPPIB (holding 42.5%), APG (holding 25.2%) and CIC (holding 12.4%). Board representation unknown.</td>
</tr>
<tr>
<td>May/2012</td>
<td>A Capital China Outbound Fund</td>
<td>Private equity - growth fund</td>
<td>A Capital</td>
<td>A capital will be the general partner of the fund, while Belgian Federal Holding Co. and CIC are the limited partners.</td>
</tr>
<tr>
<td>Jun/2012</td>
<td>Russia-China Investment Fund</td>
<td>Private equity</td>
<td>Russian Direct Investment Fund (“RDIF”, Russia’s SWF, which is 100% owned by VEB)</td>
<td>The fund is organized as a limited partnership and run commercially. RDIF will be primarily responsible for building up the professional investment team and fund management. Mr. Hu Bing is the Co-CEO of the fund. He is the managing Director and Head of Special Investments Department at CIC.</td>
</tr>
</tbody>
</table>

* Data collected as of April 2014.
D. Indirect Control of CIC in Its Investment Targets

It has been shown above that CIC has rather limited direct control rights in its investment targets, in a way that its voting rights are often restricted, and it has been a rule rather than exception that it is not represented in targets’ boards, even if it was contractually allowed to nominate directors in the first place. This being said, one must note that using formal corporate governance mechanisms to influence a portfolio company’s decision making is not the only way an SWF could seek to secure a strategic advantage from a portfolio firm.172 Given that CIC is generally committed to invest long-term instead of seeking quick exits from its portfolio companies,173 there could be ample post-investment opportunities for it to influence a target firm, which does not have to happen in formal corporate governance framework but can rather derive from the lasting strategic relationship between the target firm and CIC. In this Section, I focus on the related business transactions or dealings by and among firms from the target’s or CIC’s network that may take place before or after a particular CIC investment. Table 12 below presents a list of examples of these network transactions, collected as of April 2014 from media anecdotes and announcements of the relevant firms. Note that, this list is not exhaustive, in a sense that it neither means to capture the network transactions relating to all of CIC’s targets, nor does it intend to enumerate all the relevant business dealings of each of the included target firms, but only covers those major representative transactions.

These examples show that in many cases, CIC and many of its target firms do maintain active business contacts after direct CIC investments took place, and in some cases the business dealings, direct or indirect, started already before that. Typically, investment by CIC would open or strengthen a target firm’s business in China, which is doubtlessly a very big and important market. While it is indeed true that nowadays, the Chinese economy policy process is no longer monopolized solely by political elites like before with non-state actors, particularly those from the

172 See Gilson & Milhaupt, supra note 78, at 1365.
173 See Table 1.
business world and even the scholarly community, playing a greater role, one must note that the Chinese government is still deeply involved in the economy. For one thing, it has important sources of leverage over China’s state-owned enterprises, which are seen as the vehicle of implementing the government’s industrial policies. Although for the past two decades, SOEs appear to have retreated from the more competitive and more labor intensive industries, they still play a dominant role in core industries, such as petroleum, coking, nuclear fuel, raw chemical material, transport equipment, as well as mining and supply of electric and heat power, gas and water. Obviously, these industries coincide to a large extent with the sector distribution of CIC’s investments, which heavily concentrate on energy and resources firms, and to a lesser extent also on transport and utilities firms. Arguably, this supports the claim that China’s foreign relations often are tied to its desire to open new markets to Chinese imports and also to access resources to fuel China’s continued economic growth. Moreover, the government also heavily scrutinizes foreign investments, which are often made to comply with mandatory equity ownership thresholds as well as undergo lengthy governmental approval procedures and other political bureaucracies, especially in those restricted industries. But even in those lines of businesses where not many specific investment limitations are present in writing, there is still tremendous amount of government influence in practice, both at the provincial and central government level, on who gets to invest

---


175 Id. at 42.


177 See supra Section IV.B.


and under what terms. As such, it is of great importance for a foreign firm wishing to do business in China to be able to sustain a good relationship with the government.

Along this line of reasoning, the opportunity of having CIC as an investor apparently bears great meaning to a target firm. The CIC’s status as an important state-owned enterprise under the direct leadership of the State Council underscores its influence among the highest level of Chinese governmental bureaucracies. A target firm thus would have sound incentives to keep a good post-investment relationship with CIC, as the image of a trustful business partner with the official state investment company will not only facilitate further dealings with Chinese governmental officials, but also help bring about more potential business opportunities with key Chinese SOEs, such as the case of Teck Resources and GDF SUEZ (see Table 12). The role played by CIC there is best described by Mr. Gérard Mestrallet, Chairman and CEO of GDF SUEZ, when commenting on the execution of significant agreements with Chinese parties in 2013: “The signing of these agreements is proof of our commitment to China, further strengthened in recent years thanks to our partnership with the Chinese sovereign fund CIC. It enables us to increase and diversify GDF SUEZ’s activities in this country, where the Group has a strong presence in the environmental sector and is experiencing growth in the energy and energy services sectors.”

In addition to helping open up and strengthen business ties with the Chinese market, CIC often actively collaborates with its targets in potential investments into related business projects. When asked about the CIC investment in its 2009 Q3 earnings conference call, Mr. Paul Hanranan, president and CEO of AES Corporation, stated: “potentially to the extent there are larger transactions, what we would likely do is [to] go to [CIC] with the opportunities for the large transactions and see if they want to become, on a case by case basis, a joint venture partner, particu-

\[180\] Hearing Before the Comm’n (statement of Barry D. Solarz), supra note 174, at 168.

larly for big investments where we think that makes sense."\textsuperscript{182} Indeed, this statement well describes how the post-investment CIC-target collaboration can take place. Such collaborative relationship could have already been agreed in the form of a strategic cooperation agreement when the CIC investment took place, such as the cases of Goodman Group, PT Bumi, GCL-Poly, and Penn West; but it could also be gradually developed in the years following the CIC investment, such as that with Blackstone, Morgan Stanley, and Russian’s large state-owned bank VTB Group, which started after CIC invested in VTB in 2011 (see Table 12 below). While CIC also benefited from these collaborative relationships with its portfolio firms in a sense that it was introduced into their networks and could thus access good new business projects in foreign countries, CIC could still have important say in these relationships being a deep-pocketed investor or co-investor that is ready to expend large amount of capital into the projects. This again qualifies as a sound reason for a CIC portfolio company to respect this cash-rich business partner and keep a good long-term relationship with it after the direct investment happens.

As such, the ability of CIC to smoothen for its portfolio companies the progress of doing and enlarging their potential business in China, combined with the network transactions where it co-invests and cooperates with the portfolio companies as a valuable business partner, enable CIC to extract potential private control benefits from its target firms.\textsuperscript{183} Such control benefits are indirect, as they are realized without CIC necessarily possessing or making use of formal control rights such as voting and board seats in the portfolio firms; yet can still be influential, as they are derived from long-term business relationships where both sides practically cannot easily afford losing each other, and especially

\textsuperscript{182} AES CORPORATION, \textit{Q3 2009 AES Corporation Earnings Conference Call–Final}, Nov. 6, 2009, accessed from Factiva.

\textsuperscript{183} Dewenter et al., \textit{supra} note 50, at 275 (submitting that network transactions, such as those where the target firm had some business-related contact with the SWF’s network of investments, and also those cases where the wealth fund took an equity interest in another firm that is wholly or partially owned by the target firm, may provide opportunities for SWFs to extract private control benefits from target firms).
not CIC if the concerned target firms have active business in China.

**TABLE 12: EXAMPLES OF LONG-TERM CIC-TARGET COLLABORATIVE RELATIONSHIP**

<table>
<thead>
<tr>
<th>Company</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Morgan Stanley</td>
<td>CIC invested in Morgan Stanley in December 2007. CIC committed US$800 million in Morgan Stanley Real Estate Fund VII Global in March 2009; and in June 2009, it was identified to have ventured into hedge-fund investing by earmarking money to be seen by Morgan Stanley’s asset management unit. In 2010 CIC invested in Morgan Stanley’s Japanese real estate loan portfolio.</td>
</tr>
<tr>
<td>Invesco</td>
<td>CIC invested US$2.1 billion in Invesco Aim Liquid Assets Portfolio in early 2008. In the transaction where CIC bought the Deutsche Bank’s headquarters in London in November 2012, Invesco bought the office block on behalf of CIC as the asset manager there.</td>
</tr>
<tr>
<td>Teck Resources</td>
<td>CIC’s July 2009 investment in Teck Resources laid the groundwork for CIC’s entry into Canada. Mr. Felix Chee, who basically facilitated CIC-Teck deal, was appointed as the CIC director in Teck’s board, and later also became the Chief Representative of the very first overseas representative office of CIC, which was set up in January 2011 in Toronto. CIC’s July 2009 investment in Teck Resources has also allowed Teck to advance business with Chinese companies such as Jiangxi Copper Co., China’s largest integrated copper producer, which imported in October 2010 over 60,000 tons of copper ore concentrates from Teck’s copper mine in Chile. Teck opened in April 2013 an office in Shanghai to further strengthen its business ties in China. In 2012, China accounted for over 25% of Teck’s total revenues and became its biggest market.</td>
</tr>
<tr>
<td>Good-</td>
<td>Together with CIC’s August 2009 A$ 500 million investment into Goodman, CIC and Goodman also signed a Relationship Agreement where the parties will work together to explore a range of opportunities including:</td>
</tr>
<tr>
<td>Man</td>
<td>• Participation in new acquisitions;</td>
</tr>
<tr>
<td>Group</td>
<td>• Acquisition of assets currently held on Goodman’s balance sheet;</td>
</tr>
<tr>
<td></td>
<td>• Participation in significant private and public market situations across Goodman’s platform; and</td>
</tr>
<tr>
<td></td>
<td>• CIC working with Goodman to grow its business globally.</td>
</tr>
<tr>
<td></td>
<td>CIC invested in Goodman Trust Australia in March 2011 to help the fund acquire and privatize ING Industrial Fund.</td>
</tr>
<tr>
<td>PT Bumi</td>
<td>In addition to CIC’s US$1.9 loan to PT Bumi in September 2009, CIC and Bumi agreed to form a strategic alliance, allowing CIC to facilitate and participate in the future financing needs of Bumi or its affiliates, including project finance for its expanding infrastructure. CIC and Bumi also agreed to jointly pursue other investment opportunities in mining sector.</td>
</tr>
<tr>
<td>AES Corp</td>
<td>CIC invested in AES in November 2009. In addition, they also signed a letter of intent to invest 35% into AES Wind Generation, but this project didn’t proceed as planned and the LOI lapsed in June 2010.</td>
</tr>
<tr>
<td></td>
<td>In September 2011, CIC helped AES by buying a 19% stake in the AES-VCM Mong Duong Power Co., Ltd. in Vietnam, so that AES could raise funds for constructing Mong Duong 2, a joint venture between AES (10%) and the state-owned Vietnam National Coal–Mineral Industries Holding Corporation (90%).</td>
</tr>
<tr>
<td>GCL-</td>
<td>In addition to CIC’s November 2009 investment in GCL-Poly, the two parties also agreed to set up a JV to jointly invest in and develop photovoltaic electricity generation business.</td>
</tr>
<tr>
<td></td>
<td>In August 2011, CIC invested in Diamond S Shipping, which was founded by WL Ross &amp; Co. LLC.</td>
</tr>
<tr>
<td>Apax</td>
<td>In February 2010, CIC invested in both Apax Partners Worldwide LLP (acquiring 2.3% stake), and Apax Europe VII (with the amount of EUR685 million), a private equity fund managed by Apax.</td>
</tr>
<tr>
<td>Penn West</td>
<td>Along with CIC’s May 2010 investment in Penn West, the parties also agreed to form a partnership together to develop Penn West’s bitumen assets located in the Peace River area of northern Alberta, Canada.</td>
</tr>
<tr>
<td>VTB Group</td>
<td>CIC invested in VTB Group in February 2011.</td>
</tr>
</tbody>
</table>
|       | After that, they co-invested in Polyus (April 2012), Urakali (November 2012), and Moscow Exchange (December 2012). These invest-

© 2015 Peking University School of Transnational Law
ments were likely to be brought to CIC by VEB (in the case of Moscow Exchange by RDIF, which is Russia’s SWF and 100% owned by VEB).

In June 2012, CIC invested in Russia-China Investment Fund, a fund managed by RDIF, and VEB is the strategic partner of the fund.

In October 2013, VTB and China National Petroleum Corporation ("CNPC") signed a memorandum of understanding on mutual business cooperation, under which VTB Group will provide CNPC with a range of products and services to support the Chinese company’s business development activities across Russia and the CIS, particularly in Kazakhstan and Azerbaijan.

SMIC

CIC invested in SMIC in April 2011. According to the following sentence from 2012 annual report, SMIC and CIC had (or proposed) a joint venture: "In addition, an advance of US$3.9 million was made in 2011 to Zhongxin Xiecheng Investment (Beijing) Corporation Limited in conjunction with a joint venture between China Investment Corporation and the Company. The advance converted to capital of the new company after it was formed in 2012."

GDF SUEZ

In addition to CIC’s October 2011 minority investment in the Exploration & Production Division of GDF SUEZ and the acquisition by CIC of a 10% stake in train 1 of the Atlantic liquefied natural gas (“LNG”) liquefaction plant in Trinidad and Tobago, GDF SUEZ and CIC also agreed to cooperate on a non-exclusive basis in three areas in the Asia-Pacific region:

- Joint investment opportunities in existing and new energy-related projects;
- Financing cooperation in new projects; and
- Commercial sponsorship and support to GDF SUEZ.

As part of the development of its activities in the region, GDF SUEZ also signed with CNOOC a cooperation agreement in the LNG sector.

On the occasion of the French President François Hollande’s visit to China in April 2013, GDF SUEZ signed several significant agreements with Chinese partners in the field of natural gas storage, the provision of LNG regasification facilities and the environment. These agreements reflect the gathering momentum of GDF SUEZ’s development strategy in China.

Shanduka Group

CIC’s December 2011 investment in Shanduka Group allows both sides to jointly explore future investment opportunities in South Africa and other parts of Africa.

EIG Global Energy Partners

In February 2012, CIC purchased a minority stake in EIG Global Energy Partners. CIC is also an investor in funds managed by EIG.

CIC invested together with EIG Global Energy Partners in Sunshine Oilsands in February 2012.
Source: Collected as of April 2014 from media anecdotes and press releases of the relevant firms.

E. Huijin Investments

After discussing the control rights, both direct and indirect, of CIC in its portfolio companies, this Section IV.E will focus on Huijin, CIC’s wholly-owned subsidiary. Table 13 below presents the equity holdings of Huijin in 19 SOEs as of the end of 2013.\(^{184}\) This list is originally published on the official website of Huijin,\(^{185}\) and I supplement it by checking the portfolio companies’ 2013 annual reports or their official websites to reveal Huijin’s comparative ownership percentages relative to the other major shareholders (holding 5% and above) in them. In addition, I also collect data over the director and supervisor seats taken by Huijin in these firms (as of April 2014). It can be seen that, Huijin typically holds significant equity stake, in some cases even absolute controlling stake, thus is almost always the largest shareholder in its portfolio companies.\(^{186}\) This underlines the fact that Huijin is exclusively mandated to hold interest on behalf of the Chinese government in state-owned financial assets and to achieve the goal of preserving and enhancing the value thereof.\(^{187}\) In addition to its large equity ownership, Huijin’s monitoring role is further fortified by the directors and supervisors it has appointed into its portfolio companies; and it is not uncommon that Huijin’s board

\(^{184}\) Note that, one of these 19 SOEs is UBS Securities Co., Ltd., which was originally included in Huijin’s list of portfolio companies as of the end of 2012, but no longer appears in the 2013 version of this list as published on Huijin’s official website. This is because Huijin no longer holds any equity interest in the company after the transfer of its shares to Guangdong Provincial Communication Group Company Limited was approved by the CSRC in the beginning of 2014. See Zed-Alert, *Central Huijin Sells Entire Stake in UBS Securities, Z-BEN ADVISORS* (Jan. 13, 2014), http://www.red-pulse.com/red-pulse/2014-01-13/central-huijin-sells-entire-stake-ubs-securities.


\(^{186}\) Only except in China Development Bank Corporation, China Securities Co., Ltd., and UBS Securities Co., where Huijin is the second, second and third largest shareholder, respectively. As for Guotai Junan Investment Management Co., Ltd., no information is disclosed about its ownership structure thus it is impossible to figure out Huijin’s ownership relative to other major shareholders therein. See *infra* Table 12.

\(^{187}\) See *supra* Table 1.
representatives sit in important committees or act as chairman of portfolio companies. Note that, while the directors installed by CIC in its target firms have all been non-executives (see Appendix) except for Mr. Zhang Wenyi in SMIC, who entered the board first as a non-executive director but soon was appointed as the chairman and acting as CEO of the company (see Box 1), this is not always the case of Huijin. To the extent the relevant information is available, Huijin has executive board seats in China Reinsurance (Group) Corporation, China Galaxy Financial Holdings Co., Ltd., and China Investment Securities Co., Ltd. Therefore, to the extent of these three companies, Huijin does participate in the day-to-day business operations through the executive directors installed in them, instead of investing only as a monitoring shareholder.¹⁸⁸

¹⁸⁸ Note that, Huijin claims that it normally does not intervene in the day-to-day business operations of the firms in which it invests. See supra Table 1.
<table>
<thead>
<tr>
<th>Company Name</th>
<th>Core Business</th>
<th>Public?</th>
<th>Ownership</th>
<th>Other SHs (&gt;5%)</th>
<th>Board Size and Structure</th>
<th>Director and Board Committee Representation</th>
<th>Supervisor Representation</th>
</tr>
</thead>
</table>
| China Development Bank Corporation   | Banking       | N       | 47.63%    | Ministry of Finance, 50.18% | Total: 13
Executives: 2;
Non-executives: 8;
Independent non-executives: 3 | Unknown        | Unknown                        |
| Industrial and Commercial Bank of China Limited | Banking       | Y       | 35.33%    | Ministry of Finance, 35.09% | Total: 15
Executives: 3;
Non-executives: 6;
Independent non-executives: 6 | Huijin has 3 non-executive directors. | None                     |
| Agricultural Bank of China Limited   | Banking       | Y       | 40.28%    | Ministry of Finance, 39.21% | Total: 15
Executives: 4;
Non-executives: 6;
Independent non-executives: 5 | Huijin has 6 non-executive directors. | None                     |
<p>| | | | | | | | |
|                                       |               |         |           |                |                          |                                             |                          |</p>
<table>
<thead>
<tr>
<th>Company Name</th>
<th>Core Business</th>
<th>Public?</th>
<th>Ownership</th>
<th>Other SHs (&gt;5%)</th>
<th>Board Size and Structure</th>
<th>Director and Board Committee Representation</th>
<th>Supervisor Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Cheng Fengchao sits in Strategic Planning Committee, County Area Banking Business Development Committee, and Audit Committee.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Li Yelin sits in Strategic Planning Committee and Risk Management Committee.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Xiao Shusheng sits in Strategic Planning Committee, County Area Banking Business Development Committee, and Risk Management Committee.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Zhao Chao sits in Strategic Planning Committee and County Area Banking Business Development Committee.</td>
<td></td>
</tr>
<tr>
<td>Company Name</td>
<td>Core Business</td>
<td>Public?</td>
<td>Ownership</td>
<td>Other SHs (&gt;5%)</td>
<td>Board Size and Structure</td>
<td>Director and Board Committee Representation</td>
<td>Supervisor Representation</td>
</tr>
<tr>
<td>------------------------------</td>
<td>---------------</td>
<td>---------</td>
<td>-----------</td>
<td>-----------------</td>
<td>--------------------------</td>
<td>---------------------------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>Bank of China Limited</td>
<td>Banking</td>
<td>Y</td>
<td>67.72%</td>
<td>None</td>
<td>Total: 14</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Executives: 4;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-executives: 5;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Independent non-</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>executives: 5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>China Construction Bank</td>
<td>Banking</td>
<td>Y</td>
<td>57.26%</td>
<td>Temasek, 7.15%</td>
<td>Total: 15</td>
<td>None</td>
<td>Ms. Li Xiaoling</td>
</tr>
<tr>
<td>Corporation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Executives: 4;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-executives: 5;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Independent non-</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>executives: 6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>China Everbright Bank Co.,</td>
<td>Banking</td>
<td>Y</td>
<td>41.66%</td>
<td>None</td>
<td>Total: 15</td>
<td>Huijin has 6 non-executive directors.</td>
<td></td>
</tr>
<tr>
<td>Ltd.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Executives: 2;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-executives: 8;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Independent non-</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>executives: 5</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Ms. Narentuya sits in Strategy Committee and Audit Committee.
Mr. Wu Gang sits in Strategy Committee.

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Company Name</th>
<th>Core Business</th>
<th>Public?</th>
<th>Ownership</th>
<th>Other SHs (&gt;5%)</th>
<th>Board Size and Structure</th>
<th>Director and Board Committee Representation</th>
<th>Supervisor Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td>China Export &amp; Credit Insurance Corporation</td>
<td>Insurance N</td>
<td>73.63%</td>
<td>Unknown</td>
<td>Unknown</td>
<td></td>
<td>Committee and Remuneration Committee. Ms. Wang Shumin sits in Strategy Committee and Remuneration Committee.</td>
<td>Unknown</td>
</tr>
<tr>
<td>China Reinsurance (Group) Corporation</td>
<td>Insurance N</td>
<td>84.91%</td>
<td>Ministry of Finance, 15.09%</td>
<td>Total: 9 Executives: 4; Non-executives: 2; Independent non-executives: 3</td>
<td>Huijin has 1 executive director. Mr. Ren Xiaobing (vice president).</td>
<td>Mr. Wang Yong-gang (chairman) Mr. Ouyang Jinbao (from CIC) Mr. Wei Shiping (from CIC) The supervisory board consists of 5 supervisors, 3</td>
<td></td>
</tr>
<tr>
<td>Company Name</td>
<td>Core Business</td>
<td>Public?</td>
<td>Ownership</td>
<td>Other SHs (&gt;5%)</td>
<td>Board Size and Structure</td>
<td>Director and Board Committee Representation</td>
<td>Supervisor Representation</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>----------------</td>
<td>---------</td>
<td>----------------</td>
<td>---------------------------------------</td>
<td>--------------------------</td>
<td>---------------------------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>New China Life Insurance Co., Ltd.</td>
<td>Insurance</td>
<td>Y</td>
<td>31.34%</td>
<td>Baosteel Group Corporation, 15.11%</td>
<td>Total: 15</td>
<td>Huijin has 3 non-executive directors.</td>
<td>representing shareholders, the other 2 representing employees.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Executives: 2; Non-executives: 7; Independent non-executives: 6</td>
<td>Ms. Zhao Haiying sits in Strategy and Investment Committee, and Nomination and Compensation Committee.</td>
<td>Ms. Ai Bo (from CIC)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Meng Xingguo sits in Strategy and Investment Committee, and Risk Management Committee.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Liu Xiangdong sits in Audit Committee, and Risk Management Committee.</td>
<td></td>
</tr>
<tr>
<td>China Jianyin Investment Limited</td>
<td>Investment</td>
<td>N</td>
<td>100%</td>
<td>None</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
<tr>
<td>China Galaxy Financial Holdings Co., Ltd.</td>
<td>Investment</td>
<td>N</td>
<td>78.57%</td>
<td>Ministry of Finance, 21.43%</td>
<td>Unknown</td>
<td>Mr. Chen You’an (chairman, non-executive)</td>
<td>Unknown</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Mr. Xu Guoping (executive, used to work in Huijin)</td>
<td></td>
</tr>
<tr>
<td>Company Name</td>
<td>Core Business</td>
<td>Public?</td>
<td>Ownership</td>
<td>Other SHs (&gt;5%)</td>
<td>Board Size and Structure</td>
<td>Director and Board Committee Representation</td>
<td>Supervisor Representation</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------</td>
<td>---------</td>
<td>-----------</td>
<td>-----------------</td>
<td>--------------------------</td>
<td>-------------------------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Shenyin &amp; Wanguo Securities Co., Ltd</td>
<td>Securities</td>
<td>N</td>
<td>55.38%</td>
<td>Shanghai Jiushi Corporation, 13.38%; and China Everbright Group, 12.51%</td>
<td>Unknown</td>
<td>Mr. Li Jiange (chairman, non-executive)</td>
<td>Unknown</td>
</tr>
<tr>
<td>China International Capital Co., Ltd.</td>
<td>Investment</td>
<td>N</td>
<td>43.35%</td>
<td>GIC 16.35%; TPG Asia V Delaware, L.P., 10.30%; KKR Institutions Investments L.P., 10.00%; China National Investment and Guaranty Co., Ltd., 7.65%; Mingly Corporation, 7.35%; and Great Eastern Life Assurance Company Limited, 5.00%</td>
<td>Unknown</td>
<td>Mr. Li Jiange (chairman, non-executive)</td>
<td>Unknown</td>
</tr>
<tr>
<td>China Securities</td>
<td>Securities</td>
<td>N</td>
<td>40%</td>
<td>Beijing State-Owned Capital</td>
<td>Total: 11</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
<tr>
<td>Company Name</td>
<td>Core Business</td>
<td>Public?</td>
<td>Ownership</td>
<td>Other SHs (&gt;5%)</td>
<td>Board Size and Structure</td>
<td>Director and Board Committee Representation</td>
<td>Supervisor Representation</td>
</tr>
<tr>
<td>------------------------------</td>
<td>------------------------</td>
<td>---------</td>
<td>-----------</td>
<td>----------------</td>
<td>--------------------------</td>
<td>-----------------------------------------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>China Investment Securities Co., Ltd.</td>
<td>Securities N</td>
<td>100%</td>
<td>None</td>
<td>Unknown</td>
<td>Executives: unknown; Non-executives: unknown; Independent non-executives: 2</td>
<td>Mr. Long Zenglai (chairman, non-executive, worked in Huijin before the chairmanship)</td>
<td>Unknown</td>
</tr>
<tr>
<td>UBS Securities Co., Ltd.</td>
<td>Securities N</td>
<td>0%</td>
<td>Beijing Guoxiang Asset Management Co., 33%; UBS AG, 20%; Guodian Capital Holding Co., 14%; and</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Company Name</td>
<td>Core Business</td>
<td>Public?</td>
<td>Ownership</td>
<td>Other SHs (≥5%)</td>
<td>Board Size and Structure</td>
<td>Director and Board Committee Representation</td>
<td>Supervisor Representation</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------------</td>
<td>---------</td>
<td>-----------</td>
<td>----------------</td>
<td>--------------------------</td>
<td>---------------------------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>China Everbright Industry Group Limited</td>
<td>Investment</td>
<td>N</td>
<td>100%</td>
<td>None</td>
<td>Unknown</td>
<td>Mr. Yuan Linjiang₁₈⁹</td>
<td>Unknown</td>
</tr>
<tr>
<td>Jiantou Zhongxin Assets Management Co., Ltd.</td>
<td>Asset management</td>
<td>N</td>
<td>70.00%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
<tr>
<td>Guotai Junan Investment Management Co., Ltd.</td>
<td>Asset management</td>
<td>N</td>
<td>14.54%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

₁₈⁹ See Board of Supervisors, CENTRAL HUIJIN INVESTMENT LTD., http://www.huijin-inv.cn (last visited Aug. 7, 2015). Mr. Yuan already served as the Deputy General Manager of the Credit Management Department and Risk Management Department of China Everbright Bank before he joined Huijin.
Note: If the “Board Size and Structure” column is marked as “unknown” while the “Director and Board Committee Representation” column still indicates certain Huijin representatives, it means that the board structure of the company is not disclosed and the exact board representation of Huijin is unknown. In these cases, I check the resumes of the company’s key personnel (typically senior executives and/or board chairmen) that are disclosed on its official website, and consider a person as a Huijin representative if the disclosure indicates that he sits in the company’s board and has worked in Huijin immediately before his position in the portfolio company.
V. CONCLUSION

In recent years, the increasing cross-border investments by sovereign wealth funds have aroused high-profiled controversies, particularly over the strategic motives behind them and the potential control they could exert over target firms. While there is already a burgeoning body of studies providing important empirics on the characteristics and performance of SWF investments, the specific contractual terms of their investment transactions, which offer direct evidence over the nature and level of SWF control in their portfolio companies, are still largely left unresearched. Being the official SWF from the world’s second largest economy, China Investment Corporation is under the direct leadership of the Chinese central government, and many of its senior officers are previous or current high governmental officials. Although CIC claims itself as a purely financial investor and does not seek control in its portfolio companies, the majority of its investments concentrates on energy and resources firms, showing that it has been utilized as a tool to ensure the access to raw materials, which are needed to fuel China’s fast economic development.

Using a hand-collected dataset consisting of 51 M&As, 5 JVs and 23 fund investments made by CIC from 2007 to the end of 2013, this paper analyzes important direct control rights, such as level of ownership and voting rights, as well as director nomination and board representation, of CIC in its target firms. It is found that CIC usually holds significant but non-controlling equity stakes, clustering in the range of 5% to 20%, thus making it the largest or one of the largest blockholders of the companies. In contrast to such big equity blocks that it holds, CIC’s voting rights are, to the extent the relevant information is available, often restricted in the investment contracts it entered into with the targets. It explicitly gave up its voting rights in 6 firms, in other 5 firms its voting rights were either limited in different ways or capped to certain percentages. In terms of board representation, CIC does not have any seat in the boards of 29 targets, while only has installed directors in 9 targets. It is worth noting that, CIC’s absence in target boards is often not because of its small shareholding or the existence of absolute controlling shareholder(s) there; rather, in many cases, CIC is among the biggest sharehold-
ers and/or was vested with the right to nominate director(s) explicitly by the investment agreements. Except for SMIC, a Chinese company in which CIC is the second largest shareholder, there is no evidence of CIC pursuing shareholder activism by exercising its voting rights or bringing up proposals, either in shareholder or board meetings of the portfolio companies.

Although the findings summarized above show that CIC does not seem to have actively exercised its formal control rights, it is not warranted to so conclude that it is largely a passive investor and does not have much control over its target firms. A further examination of the pre-and-post transaction business dealings happened across the networks of CIC and its targets shows that, practically, it is often not necessary for CIC to possess or use formal corporate governance tools to exert control over the targets. Rather, the fact that it is a cash-rich investor and is often among the shareholders with largest economic ownership in the portfolio companies, combined with its profound connections with the Chinese government which play an overarching role in China’s economy, makes it a powerful business partner for firms wishing to pursue future cooperation and co-investment projects, and firms expecting to enter and grow in the Chinese market. Because the target firms cannot easily afford losing such an important investor and business partner, there are plenty of opportunities that CIC could extract indirect private control benefits from them in the long-term post-investment relationships.

These findings about CIC’s investments and control rights in its portfolio companies may shed light on the highly-controverted issue of SWF regulation. It can be inferred that, forcing SWFs to remain passive in the corporate governance realm by, for example, asking them to suspend their voting rights can often be unnecessary, as the investment agreements between an SWF and its targets could have already installed certain contractual restrictions to that end. More importantly, for an SWF that holds non-controlling but significant economic ownership, formal corporate governance mechanisms are not the only set of means that it can employ to influence the target firms. Rather, the long-term collaborative relationship between the two sides can create many opportunities for the SWF to secure strategic control benefits over target firms, while such indirect control cannot be captured by simply suspending the SWF’s formal corporate
governance rights. Therefore, the regulators of countries hosting SWF investments have good reasons to first examine their existing laws and regulations and consider carefully the necessity and level of regulation they are going to propose for SWFs as a particular group of investors, as regulatory measures rushed out of short-term fad or political pressure may backfire for protectionism in the long run.
**APPENDIX: DIRECT CONTROL RIGHTS OF CIC IN ITS NON-JV, NON-FUND INVESTMENTS (N=51)**

<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>May/2007 Blackstone Group LP</td>
<td>* 9.3% of outstanding common units (2008 annual report). * Standstill: CIC's beneficial ownership must be at anytime less than 10%. If less, CIC can acquire additional common units in the open market (this cap was raised to 12.5% in October 2008). As of February 2009, the only 5%-and-above common unit holder with voting rights is Investment Funds Managed by Affiliates of AXA Financial, Inc., holding 13% of the class (2008 annual report)</td>
<td>* Is a limited partner by holding common units of the Blackstone Group LP; * NO voting rights (while other common unit holders have only limited voting rights), and NO right to elect Blackstone's general partner or its directors, which will be elected by its founders; * Only can vote when the LP Agreement is going to be amended to have material adverse effect on the rights and preferences of the</td>
<td>* May not transfer the purchased common units for at least 4 years after the closing of Blackstone's IPO without prior written consent of Blackstone. * After that, CIC may sell up to 1/3 of the common units each year of the subsequent 3 years, but also need to notify Blackstone in advance. * Further issuances: for one year after the closing of IPO, Blackstone must not offer any new securities representing 5% or more of</td>
<td>No board representation.</td>
<td>CIC's holding was raised to 12.5% on October 16, 2008 by renewing the investment letter agreement. All other terms were the same, except the new agreement provided that the additional common units acquired by CIC are NOT subject to the transfer restrictions in the original investment agreement.</td>
</tr>
</tbody>
</table>

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov/2007 China Railway Group Limited</td>
<td>4.3% of the shares that are offered in HK H-share IPO; but only 0.7% of the company's outstanding shares following the A+H share IPO.</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Dec/2007 Morgan Stanley</td>
<td>9.86%. CIC’s ownership shall be no more than 9.9%.</td>
<td>As of April 2008, Morgan Stanley only had one 5%-and-above shareholder, namely, State Street Bank and Trust</td>
<td>CIC will be a PASSIVE and FINANCIAL investor. It shall have no special rights of ownership</td>
<td>Standard preemptive right; No transfer allowed prior to the first anniversary of the</td>
<td>No board representation.</td>
<td>CIC's ownership was diluted to around 7.68% following Mitsubishi UFJ Financial Group’s</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>----------------------------------------</td>
<td>------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>---------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>Mar/2008 Visa Inc</td>
<td>Undisclosed</td>
<td>Company, beneficially holding 12.97% common stock (2008 proxy statement). and NO role in the management, including NO right to designate a member of Morgan Stanley's board.</td>
<td></td>
<td>closing date.</td>
<td>No board representation.</td>
<td>investment in Morgan Stanley in October 2008. In June 2009, CIC participated in Morgan Stanley’s public offering and bought US$1.2 billion common stock to bring its equity ownership back to 9.86%.</td>
</tr>
<tr>
<td>Jun/2009 CITIC Capital</td>
<td>40%</td>
<td>CIC is the single largest shareholder; but effectively CITIC Group Corporation is the largest shareholder as it owns CITIC Capital through two of its subsidiaries.Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td>Qatar Holding LLC entered CITIC Capital in August 2012 by subscribing new shares, owning 22.22%. As a result, CIC's shares were diluted to 31.11%.</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Jun/2009 Blackrock</td>
<td>Less than 3%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td>CIC could have sold most of its Blackrock's holdings around September 2012.</td>
</tr>
<tr>
<td>Jun/2009 Goodman Group</td>
<td>Not more than 19.9% of Goodman's stapled securities, after converting BOTH the options and the exchangeable preferred units issued in the August transaction below.</td>
<td>N/A</td>
<td>N/A, as this is a bridge loan transaction.</td>
<td>CIC received options to buy Goodman's stapled securities traded on the ASX within a two-year term.</td>
<td>N/A</td>
<td>CIC invested again in August 2009, see below.</td>
</tr>
<tr>
<td>Jul/2009 Teck Resources Ltd</td>
<td>17.2% equity stake but only 6.7% voting interests. * Standstill: CIC will not acquire additional securities of Teck (other than pursuant to its anti-dilution rights).</td>
<td>Teck A shareholders will hold 61.8% voting interest upon completion of the transaction, and Temagami Mining Company Limited will hold a 28.5% voting interest. * CIC subscribed class-B shares of Teck, and invested as a long-term passive financial investor. * Class A common shares carry 100 votes per share; * CIC agrees to hold the purchased shares for at least one year following closing. After the one-year holding period, CIC should also not sell the purchased shares to a participant in the worldwide</td>
<td></td>
<td>Felix Chee, special advisor, appointed into the board since 2010. He is also a member of audit committee and pension committee. Mr. Chee is the chief representative</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time of Investment</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>-------------------------------------------------------------</td>
<td>------------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Class B subordinate voting shares carry 1 vote per share. The approval of the holders of Class B shares is generally required before fundamental corporate changes can be enacted, and for that purpose the Class B shareholders will vote separately from the Class A shareholders. Standstill: CIC should refrain from soliciting proxies, proposing to effect any extraordinary transaction involving Teck, or assisting any third party in doing so.</td>
<td>Contractual Terms on Change of CIC in Canada. * Anti-dilution: Provided CIC does not sell any purchased shares, it will have the right to maintain its percentage ownership interest through open market purchases or through participation in additional issuances of Teck Class B shares.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul/2009 Diageo</td>
<td>1%</td>
<td>As of August 2009, the 3%–and-above shareholders in Diageo were Capital Research and Management Company, holding 4.99%; and Legal &amp; General Group Plc, holding 4.12% (2009 annual report).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Aug/2009 Goodman Group</td>
<td>Not more than 19.9% of Goodman’s stapled securities, after converting BOTH the options purchased in the June 2009 bridge loan transaction above</td>
<td>CIC is the largest shareholder in Goodman.</td>
<td>* CIC will only be able to vote on those preference matters, including payment of dividend or distribution in respect of the exchangeable preferred units; * Transferability: free transferability is only available in tranches after certain dates. * Goodman redemption right: Goodman can opt to redeem</td>
<td>No board representation.</td>
<td>* CIC sold 6.9% of its stake on Dec. 15, 2012. * CIC still holds around 9.9%, and continues to be the largest investor in Goodman.¹⁹⁰</td>
<td></td>
</tr>
</tbody>
</table>


© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>and the exchangeable preferred units sold in this transaction.</strong></td>
<td>reduce of capital; approving the terms of buy-back agreement; winding-up; disposal of the whole property, business and undertaking, and any proposal that affect rights attached to the exchangeable preferred units.</td>
<td>the exchangeable preferred units, only in full, and under certain conditions.</td>
<td>* CIC redemption right: CIC cannot require Goodman to redeem its exchangeable preferred units, except following Goodman's failure to pay distributions on the securities, or in the event of default.</td>
<td>* For other matters, CIC irrevocably agrees to abstain from voting.</td>
<td>* CIC can nominate a member to the board of Goodman, subject to CIC holding a minimum of 10% of Goodman's issued capital.</td>
<td>* Preference shares: non-voting, non-redeemed</td>
</tr>
</tbody>
</table>

Aug/2009 14.72% of issued ordinary share As of March 2010, the other 3%-and-
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Songbird Estates PLC</td>
<td>capital and 45% of issued preference share capital.</td>
<td>above ordinary shareholders of Songbirds were: Qatar (23.96%), Glick (23.95%), Morgan Stanley (9.34%). Thus CIC was the third largest ordinary shareholder of Songbird. Qatar holds the other 55% of preference shares (2009 annual report).</td>
<td>convertible, have fixed cumulative dividend. Preference shares are unlisted. * Board can consist of maximum 14 directors, 2 are independent, up to 3 to be appointed by CIC (the same also for Qatar, Glick and Morgan Stanley). Each of CIC, Qatar, Glick, and Morgan Stanley can appoint a representative to the executive committee of the board, which reviews the company's budget and operating plan. * Each of them also has veto right over</td>
<td>for at least two years after issue.</td>
<td>members, and each of the other 3 substantial shareholders (Qatar, Glick, and Morgan Stanley) appointed 3 directors.</td>
<td>CIC has NO board representation.</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-----------------------------------</td>
<td>----------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Sep/2009 Noble Group Ltd</td>
<td>14.91%</td>
<td>CIC is the second largest shareholder, after Noble Temple Trading Inc., holding 23.81%. Lexdale International Limited is the third largest shareholder, holding 9.26% (2009 annual report).</td>
<td>Investment agreement contains no terms on these issues.</td>
<td>* 3-month lock-up from the completion of the placement; * No disposal of any CIC shares in a negotiated transaction to any party whose principal business competes directly with a principal business of Noble, unless with Noble's prior written consent; * Pre-emptive right to maintain CIC's shareholding for 3 years after the completion of the placement, provided that such right shall terminate if CIC's Although CIC did NOT appoint any director in the board, it is worth noting that as from May 2011, Mr. Li Rongrong, the former chairman of the SASAC, began to serve as a non-executive director at Noble.</td>
<td>actions relating to the company's capital structure.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>------------------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Sep/2009 PT Bumi Resources Tbk</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A, as this is a debt transaction.</td>
<td>N/A, as this is a debt transaction.</td>
<td>No board representation.</td>
<td>Tranche 1 of the debt was prepaid in November 2011; the remaining debt was settled in October</td>
</tr>
</tbody>
</table>

shareholding interest is less than 5% of the total issued share capital of Noble;
* For a period of 3 years after the completion of the placement, without the prior written consent of the Company, CIC shall not acquire further securities such that its total ownership would exceed 20% of Noble's total issued share capital;
* Noble has right of first refusal if CIC sells its shares.
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sep/2009 JSC KazMunaiGas Exploration Production</td>
<td>11%</td>
<td>As of the end of 2008, the biggest shareholder of the company was NC KMG, holding 61.36% of total issued ordinary share capital (2009 annual report).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td>2013 with CIC. Among other things, a portion of CIC's debt balance was to be swapped by Bumi's holdings in a number of its subsidiaries; and up to US$150 million by new shares of Bumi. Bumi’s shareholders approved this swap in January 2014.</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>---------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Oct/2009 Poly (Hong Kong) Investments Ltd</td>
<td>2.3%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Oct/2009 Nobel Holdings Investments Ltd</td>
<td>45%</td>
<td>CIC owns 45% of Nobel, Kaisun Energy Group Limited owns 5%, and the rest 50% remains with Nobel.</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td></td>
</tr>
</tbody>
</table>
| Oct/2009 SouthGobi Energy Resources Ltd | 22% (assuming full conversion of the convertible debenture) | As of 2010 year end, the only two 10%-and-above shareholders of SouthGobi were Ivanhoe Mines Ltd., holding 57%; and CIC, holding 13.6% (2010 annual report). | * CIC will not have any voting rights in SouthGobi beyond 29.9%.  
* While the debenture loan is outstanding, or while CIC has a minimum 15% direct or indirect stake in SouthGobi, CIC has the right to nominate one director to SouthGobi’s Board, which has 8 Board | * Conversion timing: CIC has the right to convert the debenture, in whole or in part, into common shares 12 months after the date of issue; while SouthGobi has the right to call for the conversion of up to half of the debenture on the earlier of 24 months after the issue date under  | No board representation. | South Gobi called for conversion and CIC converted half of the debenture into common shares in March 2010, and after the conversion CIC owned only 13.6% of common shares (2010 annual report). |
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct/2009 Iron Mining International Ltd / Hong Kong Lung Ming Investment Holdings</td>
<td>33%</td>
<td>Ownership of Iron Mining International Ltd as of April 2012: 1/3 - CIC, 1/3 - Boldtumur Eruu Gol LLC, and 1/3 - Lung</td>
<td>Unknown</td>
<td>The terms of CIC's investment in Iron Mining International involve a $500 million convertible loan, with an option</td>
<td>Unknown</td>
<td></td>
</tr>
</tbody>
</table>

Note: **SHs**: Shares in Hong Kong; **CIC**: China Investment Corporation; **Contractual Terms on Voting Rights and Director Nomination Rights**: Certain agreed circumstances; *Preemptive right and right of first offer: While the debenture loan is outstanding, or while CIC has a 15% direct or indirect stake in SouthGobi, CIC has certain pre-emptive rights on a pro-rata basis, and the right of first offer for any direct and indirect sale of Ivanhoe Mines’ ownership stake in SouthGobi.*
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov/2009 AES Corp</td>
<td>15%</td>
<td>CIC is the largest shareholder in AES, holding 16.44% (proxy statement February 2012).</td>
<td>* CIC shall cause all shares beneficially owned by it to be counted as present at any AES’s stockholder meeting; * For the election of directors and for equity incentive plans or other employee or director compensation matters, CIC must vote ALL of its shares in the manner for the company to increase the loan to $700 million.</td>
<td>* Transfer: No transfer allowed within 12 months of the closing without prior written consent of AES. But CIC can transfer a maximum of no more than 1% of the Company’s shares at any time as long as such transfers are made in the open market. When CIC sells more than 5%, the shares must be</td>
<td>Mr. Zhang Guobao appointed to AES board by CIC in December 2011. He is Vice-Chairman of China’s NDRC and recently held the position of Administrator (Minister-Level) of the Chinese National Energy Administration.</td>
<td>The transaction was closed in March 2010. CIC’s beneficial ownership reduced to 8.29% as of December 2013 as a result of selling a total of 120 million shares both back to AES and to the market.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>recommended by the board;</td>
<td></td>
<td></td>
<td>* For all other matters, CIC can vote as it determines in its sole and absolute discretion; * CIC, as security for its obligations above, must irrevocably appoint AES as its attorney and proxy; and such irrevocable proxy shall only be terminated when CIC’s economic interest percentage is 5% or less; * CIC has right to designate 1 director into AES's board, provided that it holds more than 5% of the outstanding</td>
<td>first offered to AES. * Pre-emptive right: CIC shall have pre-emptive right provided that the offering of new securities shall be at least US$50 million.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>----------------------------------</td>
<td>----------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>--------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Nov/2009 China Longyuan Power Group</td>
<td>5.32%</td>
<td>CIC is the second largest shareholder, holding 5.09%. The biggest shareholder is Guodian Group, holding 63.68% (2009 annual report).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>------------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Nov/2009 GCL-Poly Energy Holdings Ltd</td>
<td>20.09%</td>
<td>CIC was the second largest shareholder in GCL-Poly, holding 20.09% as of 2010 year end. The largest shareholder was a company beneficially owned by Mr. Zhu Gong Shan, GCL-Poly's chairman (2010 annual report).</td>
<td>CIC could appoint two non-executive directors into the board, provided that it owns more than 12% of GCL-Poly’s shares; or otherwise one director, if it holds between 5% and 12%. GCL-Poly’s board consists of 12 directors.</td>
<td>* CIC is subject to 9-month lock-up; but can transfer to any of its affiliate or wholly-owned third party subsidiary; * Within these 9 months, GCL Poly shall not issue new shares to third parties at a price equal or lower than CIC's subscription price without CIC's prior written consent; * CIC has preemptive right on a pro rata basis.</td>
<td>Mr. Chau Kwok Man, Cliff, non-executive director from December 2009 to November 2012. He is the Managing Director and Head of Finance Department of CIC. Ms. Bai Xiao Qing, non-executive director from December 2009 to March 2012. She is the Managing Director of the Special Investments Department of CIC. Mr. Zhou Yuan has been a non-executive director and a member of the Connected Transaction Committee of the GCL-Poly since</td>
<td>CIC’s ownership was approximately 20.1% of the issued share capital of GCL-Poly as of December 31, 2012 (2012 annual report).</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>-------------------------------------------</td>
<td>-----------------</td>
<td>------------</td>
</tr>
<tr>
<td>Feb/2010 Apax Partners Worldwide LLP</td>
<td>2.3%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>November 2012. Mr. Zhou has been CIC's Chief Strategy Officer since February 2012, and CIC's Head of Finance Department since November 2012. Mr. Zhang Qing, the head and managing director of Special Investment Department of CIC, appointed as a non-executive director since March 2012.</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td>May/2010 Penn West Energy Trust</td>
<td>5.3%</td>
<td>Unknown</td>
<td>Investment agreement contains no terms on these issues.</td>
<td>Transferability: For one year commencing upon the closing date, CIC must notify Penn West if it determines to sell more than 500,000 units in a single transaction or 1 million units in any month. Pre-emptive right: CIC shall have pre-emptive right provided that its ownership maintains above certain levels.</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Jun/2010 Chesapeake Energy Corp</td>
<td>Undisclosed</td>
<td>Unknown</td>
<td>CIC bought Chesapeake non-voting convertible preferred stock, which pays a 5.75% cumulative dividend and has a liquidation preference of US$1,000 per share.</td>
<td>* Preferred stock are not redeemable; * The preferred stock will be subject to mandatory conversion after May 17, 2015 into Chesapeake common stock, at the option of the company and subject to certain conditions.</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC’s Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>-----------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Dec/2010 Banco BTG Pactual Group</td>
<td>3.11%</td>
<td>The members of the December 2010 investors (including CIC) and some other people collectively represent around 2.2% of the voting power of all shares entitled to vote at a general meeting of the shareholders of BTG Pactual Participations. BTG GP owns shares that represent around 95.4% of the voting power of all shares entitled to vote at a general meeting of the shareholders of BTG Pactual Participations. André Santos Esteves, the controlling shareholder, controls BTG GP.</td>
<td>* So long as the members of the investor Consortium (of which CIC is a member) continue to hold, in aggregate, directly or indirectly, at least 5% of the total outstanding securities of BTGI and Banco BTG Pactual (“Requisite Ownership Percentage”), the board of directors of each Issuer shall nominate one individual designated by the representative of the members of the Consortium such that the members of the Consortium will have 1 designee on each such board.</td>
<td>* Transfer: No transfer allowed before the consummation of IPO; limited transfer starting from 6 months after the consummation of IPO and ending on the first anniversary of the consummation of IPO; afterwards, may freely transfer. In both cases, the transfers must be on a recognized securities exchange on which the Units generally trade.</td>
<td>The boards of directors of Banco BTG Pactual SA and BTG Pactual Participations (collectively, the &quot;Issuers&quot;), shall consist of between 5 and 11 directors. No board representation.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>----------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td>In Banco BTG Pactual SA, the interests of the Dec. 2010 Investors are part of the free float, which is only 16.7% of the voting rights. (BTG Pactual website).</td>
<td></td>
<td></td>
<td>The boards of directors of the Issuers are responsible for, among other things, electing and removing the executive officers and supervising the other members of management. In addition, the representative of the members of the Consortium has the right to designate one non-voting observer to attend meetings of the board of directors of each Issuer. Moreover, the members of the Consortium agree to refrain from requesting the adoption of the cumulative rights if the partners or BTG Pactual Holding proposes to transfer any of BTG Pactual’s equity securities in connection with change of control or to a strategic investor.</td>
<td>* Right of First Offer (“ROFO”): if any member of the Consortium or any partner desires to transfer investor subject Units in a ROFO Transaction, BTG Pactual Holding shall have a right of first offer.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>tive voting procedure.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>* CIC Letter Agreement: So long as CIC affiliates continue to hold at least 50% of the equity originally purchased in 2010, the Issuers have agreed, subject to certain conditions, to nominate one individual identified by such affiliates for election to the board of directors of each Issuer at the annual shareholders meeting of such Issuer’s in 2012 and 2013</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The above is summarized from BTG Pactual’s Euronext prospectus, dated</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>----------------------------------------</td>
<td>-------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Dec/2010</td>
<td>Northstar Tambang Persada Ltd. (40%)</td>
<td>8% (in BUMA)</td>
<td>Unknown. After the transaction, Northstar Equity</td>
<td>None of the acquirers (including CIC) has voting rights in Unknown</td>
<td>Unknown</td>
<td>October 8, 2013.</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation Afterwards</td>
<td></td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------------------</td>
<td></td>
</tr>
<tr>
<td>Partner of Indonesian public company PT. Delta Dunia MakmurTbk., which holds BUMA)</td>
<td>Undisclosed, but the investor group that subscribed ordinary shares have bought around 10% altogether.</td>
<td>Partners continues to retain voting rights and a controlling interest in Northstar Tambang Persada Ltd..</td>
<td>Northstar Tambang Persada Ltd..</td>
<td>Unknown</td>
<td>CIC has neither management board nor supervisory council representation.</td>
<td></td>
</tr>
<tr>
<td>Feb/2011 VTB Group</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Feb/2011 Morgan Stanley real estate loan portfolio</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC’s Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
</tbody>
</table>
| Apr/2011 China Lumena New Materials | 6.41% (2011 annual report) | As of the end of 2011, CIC was the second largest shareholder in China Lumena, holding 6.41%, after Mr. Suo Lang Duo Ji, holding 33.53% (2011 annual report). | * The bond has an interest rate of 6% per annum.  
* Voting: CIC has no right to attend or vote at any meeting of China Lumena as a bondholder, until and unless its converts bonds into shares. A bondholder may exercise its conversion right only from and including the date falling 6 months from the closing. | * Transfer: A bondholder may assign or transfer any of its bonds with the prior written consent of China Lumena to any third party, but it will be reasonable for China Lumena to withhold consent to any assignment or transfer to a third party engaged in (A) the mining, processing or manufacturing of natural thenardite products or (B) the production, development and sales of poly-phenylene sulfide products).  
* The bonds will mature in 3 years post-closing and | No board representation. |
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
</table>
| Apr/2011 Semiconductor Manufacturing International Corporation (SMIC) | 13.6% (based on 13-D filing as of June 3, 2011 which used the number of ordinary shares from May 2011) | In June 2012, CIC converted all of its convertible preferred shares into common stocks at the conversion rate of 10 ordinary shares per convertible preferred share, and its warrants expired without being exercised. As a result of such, CIC was the second largest shareholder in the SMIC, holding 11.27%, after Datang Telecom Technology & Industry Holdings Co., Ltd., which held 19.27% (2012 annual report). | * Voting right: CIC is entitled to receive notice of, attend and vote at any shareholders meeting SMIC.  
* CIC can nominate 1 director into the board, which consists of 10 directors. | * Pre-emptive rights: CIC has the right to subscribe for such number of additional convertible preferred shares so as to enable it to hold a pro rata portion of SMIC’s issued share capital equal to the original percentage of CIC.  
* Lock-up: CIC shall not transfer the convertible preferred shares, without prior written consent of SMIC, for a period of two years from closing of the share purchase transaction. | Mr. Lawrence Jueng-Yee Lau has been a director since 2011. In 2010, he was appointed chairman of CIC International (Hong Kong) Co., Limited.  
Mr. Zhang Wenyi was nominated by CIC and was elected as a director in July 2011. Mr. Zhang is now the CEO and chairman of SMIC’s board. Mr. Zhang has served as Vice Minister of China’s Ministry of Electronics Industry. | On 18 December 2013, SMIC agreed to issue pre-emptive bonds to CIC, which will be convertible to approximately 0.9% of the issued share capital of SMIC as enlarged assuming full conversion. |
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul/2011 Enogex Holdings, LLC</td>
<td>Undisclosed</td>
<td>Enogex Holdings, LLC is a joint venture set up by OGE Energy Corp. (owning 90.1%) and ArcLight Capital (owning 9.9%) on October 6, 2010. The investor group (including CIC) was brought in by ArcLight to support its investment in Enogex Holdings.</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
<tr>
<td>Aug/2011 Diamond S Shipping</td>
<td>10.5%</td>
<td>According to Diamond S’s prospectus filed in February</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
</tr>
</tbody>
</table>

However, such lock-up restrictions will cease to apply if certain key people stop their employment with SMIC.
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>LLC</td>
<td></td>
<td>2014, it has 5 shareholders with 5%-and-above ownership interests, namely, WL Ross Group, LP (32.2%); First Reserve Management, LP (27.2%); CarVal Investors, LLC (18.3%); CIC (8.6%); and Siguler Guff Advisers, LLC (6.4%).</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sep/2011 AES-VCM Mong Duong Power Co</td>
<td>19%</td>
<td>AES: 51%, and Posco Energy 30% (website of AES-VCM Mong Duong Power).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>----------------------------------------------</td>
<td>----------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Oct/2011 GDF SUEZ E&amp;P Business; and Atlantic LNG liquefaction plant</td>
<td>30% of GDF SUEZ E&amp;P, and 10% stake in the train 1 of the Atlantic LNG liquefaction plant in Trinidad and Tobago</td>
<td>The rest of GDF SUEZ E&amp;P is owned by GDF SUEZ Group (GDF SUEZ E&amp;P website).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>GDF SUEZ E&amp;P International’s board is composed of 7 members, 5 from GDF SUEZ, 2 from CIC (GDF Suez E&amp;P website).</td>
<td></td>
</tr>
<tr>
<td>Oct/2011 Horizon Roads (ConnectionEast)</td>
<td>13.84%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>The board of ConnectionEast consists of 9 directors, where CIC has 1 director named Dapeng Xu. As to other investors in the consortium, APG Asset Management has 1 director, National Pension Service has 1, Universities Superannuation Scheme has 2, and Arbejdsmarkedets Tillagspension has 1.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC’s Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>-------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>----------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Dec/2011 Shanduka Group (Pty) Ltd</td>
<td>25.73%</td>
<td>CIC is the second largest investor in Shanduka, holding 25.73%, after Tshivhase, which holds 29.63% (Shanduka’s website).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>CIC has 2 directors in an 11-people board. Mr. Zhang Qing, managing director in Special Investments Department in CIC. Mr. Zhang replaced Mr. Hu Bing, who was appointed in March 2012 and resigned in November 2012. Mr. Hu was the head of Special Investments Department in CIC (Shanduka’s 2012 and 2013 annual reports). Mr. Wang Hui, head of the Metals and Mining Team of Special Investments Department of CIC (Shanduka’s web-</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>-----------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Jan/2012 Kemble Water Holdings (Thames Water's parent company)</td>
<td>8.68%</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>The board of Thames Water consists of 16 directors, and CIC has 1 director. Dapeng Xu became a non-executive director in October 2012. He is a director in CIC’s Special Investment Department.</td>
<td></td>
</tr>
<tr>
<td>Feb/2012 EIG Global Energy Partners LLC</td>
<td>Undisclosed</td>
<td>CIC’s has a minority investment.</td>
<td>CIC’s investment has NO voting rights and is subject to certain protective rights.</td>
<td>Unknown</td>
<td>Unknown</td>
<td></td>
</tr>
</tbody>
</table>

© 2015 Peking University School of Transnational Law
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb/2012 Sunshine Oilsands</td>
<td>7.43%</td>
<td>CIC is the second largest investor in the company, owning 8.45%, after Orient International Resources Group Limited, owning 9.42%. China Life is the fifth largest investor, holding 5.99%; and BOCGI's ownership is less than 5% and thus is not disclosed (2012 annual report).</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation; the board has 10 directors. China Life has 1 director in the board, namely, Mr. Tingan Liu; and BOCGI has 1 director, namely, Haotian Li.</td>
<td></td>
</tr>
<tr>
<td>Apr/2012 Polyus Gold International Ltd</td>
<td>5% less 1 share</td>
<td>As of 2012 year end, Polyus's holding of voting rights were as follows: Mr. Suleiman Kerimov (40.22%); Mr. Mikhail Prokhorov (37.78%); CIC (4.99%); and JSC VTB Bank (3.65%)</td>
<td>Unknown</td>
<td>* 180-day lock-up after closing; * Restrictions on depositing shares into Global Depository Receipts program for specified periods if CIC's ownership goes</td>
<td>No board representation; the board has 8 directors.</td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>-----------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>above 5%;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>* CIC was provided with anti-dilution protection prior to admission of Polyus into LSE.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC's Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>-------------------------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>----------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Jun/2012 Eutelsat Communications SA</td>
<td>7%</td>
<td>As of June 30, 2012, CIC was the third largest shareholder of Eutelsat, after Fonds Stratégique d’Investissement (25.62%) and Abertis Telecom S.A.U. (8.35%) (Eutelsat reference document, 2012-2013).</td>
<td>CIC is a passive investor that will not be joining the board.</td>
<td>Not to dispose of the acquired shares during the initial 6 months.</td>
<td>No board representation.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC’s Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug/2012 Cheniere Energy</td>
<td>Undisclosed</td>
<td>Unknown</td>
<td>No voting rights. Invested as a co-investor with Blackstone. ¹⁹³</td>
<td>Unknown</td>
<td>Blackstone have 2 board seats in Cheniere Energy Partners LP (2012 annual report); while CIC will have no direct influence on Cheniere. ¹⁹⁴</td>
<td></td>
</tr>
</tbody>
</table>


³⁹⁴ *Id.*
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sep/2012 Alibaba Group Holding Ltd</td>
<td>Undisclosed, but the investor group that subscribed ordinary shares was rumored to have bought around 5.6% altogether.¹⁹⁵</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown, but likely no board representation.¹⁹⁶</td>
<td></td>
</tr>
</tbody>
</table>


¹⁹⁶ Alibaba was a closed corporation as of the CIC transaction thus its board composition was not disclosed. However, sources said that in considering where to list its shares in its 2014 IPO, Alibaba had proposed allowing a group of 28 partners, who own about 10% of the company, to nominate a majority of its corporate board. Those partners would include founder Jack Ma and other senior executives. Doing so is to ensure that Alibaba’s top executives can still keep control of the board after IPO. See Telis Demos et al., Alibaba: NYSE, Nasdaq Approve Partnership Structure Proposal, WALL STREET J. (Oct. 21, 2013 7:28 p.m. ET), http://www.wsj.com/articles/SB100014240527023036724045791499813228056134; and Paul J Davies, Alibaba Board Wrestles Over Listed Future, Fin. TIMES (Sept. 8, 2013), http://www.ft.com/intl/cms/s/0/5f436052-16e1-11e3-9ec2-00144feabdc0.html#axzz3t7ONyjMZ. As such, and given that the investor consortium altogether hold only 5.6% of the company, it is unlikely that CIC alone would have a seat in the insider-controlled board.
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct/2012 FGP Topco Ltd (parent company of Heathrow Airport Holdings Ltd)</td>
<td>10%</td>
<td>As of December 2012 (after Qatar acquired shares in FGP), the shareholders in FGP were: Ferrovial (33.65%), Qatar (20%), Britannia Airport Partners (13.29%), GIC (11.88%), Alinda (11.18%), and CIC (10%). Thus CIC was the smallest investor.</td>
<td>CIC can join the boards of FGP Topco Ltd and of Heathrow Airport Holdings Ltd.</td>
<td>Unknown</td>
<td>Heathrow Airport Holdings Limited has a board of 15 directors, where CIC appointed 1 director. Mr. Zhang Qing was appointed as a non-executive director in March 2013. He is managing director of Special Investments Department at CIC. Qatar Holdings has 2 directors in the board.</td>
<td></td>
</tr>
<tr>
<td>Nov/2012 Deutsche Bank UK Headquarters</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Time of Investment and Target Name</td>
<td>Percentage of Ownership Purchased</td>
<td>Ownership of CIC Relative to other SHs **</td>
<td>Contractual Terms on Voting Rights and Director Nomination Rights</td>
<td>Contractual Terms on Changing CIC’s Ownership</td>
<td>Board Representation</td>
<td>Afterwards</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>---------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Nov/2012 Uralkali</td>
<td>12.5%</td>
<td>As of December 2013, CIC is the third largest shareholder in the company, holding 12.5%, after ONEXIM Group (21.75%), and Uralchem OJSC (19.99%) (Uralkali website).</td>
<td>Unknown</td>
<td>The convertible bonds purchased by CIC are due in 2014, but were converted in September 2013 into a 12.5% stake.</td>
<td>The company has a board of 9 members. CIC has no board representation.</td>
<td></td>
</tr>
<tr>
<td>Dec/2012 Moscow Exchange</td>
<td>4.58%</td>
<td>CIC is the 6th largest shareholder of the company as of September 25, 2013, holding 5.3%, after Central Bank of Russia (22.47%), Sberbank (9.6%), Vneshekonbank (8%), EBRD (5.8%), UniCredit Bank (5.7%), MICEX-</td>
<td>Unknown</td>
<td>Unknown</td>
<td>No board representation.</td>
<td></td>
</tr>
</tbody>
</table>

*All data as of December 2013.*
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb/2013 Windfield Holdings Pty Ltd ((SPV created to acquire Talison Lithium)</td>
<td>35%</td>
<td>Finance (6.6%), and VTB Bank (5.4%).(^{197})</td>
<td>The rest 65% is owned by Tianqi Group.</td>
<td>CIC's investment in Windfield does not have controlling rights.</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

\(^{197}\) Состав акционеров ОАО Московская Биржа, владеющих более 5% уставного капитала общества [Shareholder of Moscow Exchange, holding more than 5% of the share capital of the company], МОСКОВСКАЯ БИРЖА [MOSCOW EXCHANGE], http://moe.x.com/s1343 (last visited Aug. 7, 2015).
<table>
<thead>
<tr>
<th>Time of Investment and Target Name</th>
<th>Percentage of Ownership Purchased</th>
<th>Ownership of CIC Relative to other SHs **</th>
<th>Contractual Terms on Voting Rights and Director Nomination Rights</th>
<th>Contractual Terms on Changing CIC's Ownership</th>
<th>Board Representation</th>
<th>Afterwards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct/2013 SIIC Environment Holdings Ltd</td>
<td>7.68%</td>
<td>The company has a controlling shareholder, i.e., Shanghai Industrial Holdings Limited (“SIHL”), which owns 50.79% of the company after the transaction. The majority shareholder of SIHL is Shanghai Industrial Investment (Holdings), which is supervised by the Shanghai Government.</td>
<td>Unknown</td>
<td>CIC, and also the other investors, shall not transfer or dispose the purchased shares within 9 months from the listing of the shares issued in the transaction.</td>
<td>No board representation.</td>
<td></td>
</tr>
<tr>
<td>Nov/2013 Chiswick Park London</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

* Data collected as of April 2014.

** When the “Ownership of CIC Relative to Other SHs” column is marked as “unknown”, it means that the target is either a closed company and thus does not disclose its ownership structure, or CIC’s ownership there is too small to be disclosed and thus not able to be compared with other shareholders.
Challenges in China-ASEAN Food Safety Cooperation Governance Through Soft Law

LU Yi*

ABSTRACT

It has been 5 years since the ASEAN-China Free Trade Zone was established. This economic cooperation has injected much energy to the trade among these 11 countries. The ASEAN-China Food Safety Cooperation is one of the key areas for cooperation in this region. This cooperation is promoted and secured by soft law governance. Generally speaking, soft law is an effective tool to govern widely shared international issues such as food safety problems. However, due to the features and uneven development levels from ASEAN countries and China, such as legal capacity, economic development, diplomatic relations, culture, history and so on, the current food safety cooperation between ASEAN and China is quite flexible and loose. To some extent it is less effective than it is supposed to be. More political sense is found in these documents than legal implications. Admittedly, such an arrangement might be designed purposefully in order to allow all countries to learn more about each other, or as we call it “learning by doing.” In addition, all countries could enjoy the flexibility and strengthen cooperative fruits in the future. Nevertheless, when we judge the current effectiveness of this cooperative mechanism, and by comparing it with the WTO regime on food safety which contains a hard law feature, there are three major challenges imbedded in the cooperation. This paper focuses on the three challenges for the time being. First, it argues that ambiguity in legal rights and obligations in the cooperative documents lead to loose implementation of the cooperation. Second, it maintains that a loose consultation mechanism provides weak legal protection and might drive the disputed parties to forum-shopping for the WTO DSM. Third, overlaps between the WTO agreements and the cooperation agreements jeopardize the effectiveness of the ASEAN-China food safety cooperation. This paper also discusses

* Lu Yi, Lecturer in Law and Assistant Director of Center for Research on Transnational Law, Peking University School of Transnational Law. The author would like to thank the commentators from the 12th Asian Law Institute (ASLI) Conference at the National Taiwan University on May 21&22, 2015, and special thanks go to the editors of Peking University Transnational Law Review. All errors are of course all mine. The author can be reached at luyi@stl.pku.edu.cn.
solutions and orientation for future policy making based on the three challenges.
I. INTRODUCTION

Nowadays, food safety is of global concern. Unsafe food poses a great threat to public health both through domestic marketing and cross-border food transactions. China and the Association of Southeast Asian Nations (ASEAN) are mutually important trade partners since their strategic partnership was established in 2003. According to a report in 2013, China is ASEAN’s biggest trade partner, and ASEAN is China’s third biggest partner with a 12 percent increase in trade volume on an annual basis.¹

Among traded goods between China and ASEAN, agricultural food takes up an important portion. Due to the utmost significance of food safety to agriculture and health sectors, leaders of China and ASEAN agreed to strengthen cooperation in the field of inspection and quarantine to support the establishment of ASEAN-China Free Trade Area (FTA) at the 8th ASEAN-China Summit in November 2004.² Subsequently, both sides established ASEAN-China ministerial consultation and cooperation mechanism in 2007 and held four China-ASEAN Ministerial Meetings on Quality Supervision, Inspection and Quarantine (SPS Cooperation)³ so far. Both parties have made great efforts on food safety cooperation based on a series of cooperative documents.

Since all ASEAN countries and China are members of the World Trade Organization (WTO), they are also subject to the WTO agreements governing food safety such as the General Agreement on Tariffs and Trade (GATT), the Technical Barriers to Trade (TBT) Agreement and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). In view of this, documents on the ASEAN-China food safety cooperation are more demonstrative instead of substantive. More specifically, these agreements could be regarded as soft law.

³ The first China-ASEAN Ministerial Meeting on SPS Cooperation was held in October 2007, the second in October 2010, the third in September 2012 and the fourth in September 2014.
This paper is organized in the following parts. First, it criticizes the reduced legal implications due to ambiguity in legal rights and obligations in the cooperative documents. Second, it argues that the cooperative documents reduce the feasibility of implementation due to overlap of themes with WTO agreements. Third, it analyses the difficulties for solving conflicts arising from the documents due to lack of dispute settlement mechanism. This paper aims at evaluating the challenges embedded in the current soft law mechanism on ASEAN-China food safety cooperation.

II. THE SOFT LAW CHARACTER OF ASEAN-CHINA FOOD SAFETY COOPERATION DOCUMENTS

There have been abundant discussions on functions and drawbacks of soft law in international governance since 1970s. In his classic article in 1993, Prof. Francis Snyder provided a widely recognized statement with regard to “soft law”—“rules of conduct which, in principle, have no legally binding force but which, nevertheless, may have practical effects.” When explaining why states choose a soft law approach in the international arena, Prof. Andrew Guzman and Prof. Timothy Meyer provided four explanations which can also be applied in the ASEAN-China cooperation. Within the ASEAN-China Food Safety Cooperation framework, the soft law arrangement on food safety cooperation between ASEAN and China has played a great role in preserving amicable cooperation. The Food safety cooperation arrangement is under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China (the Framework Agreement) which was signed in November 2002. Since then, the trade volume between China and ASEAN has climbed from USD 54.767 Billion in 2002 to USD 480.394 Billion in 2014.

First, states choose soft law as a “coordinating device.”\(^7\) For the sake of easiness and convenience and in order to reduce the complication created by bargaining, all parities tend to identify the focal point where all share common interest in an expressed agreement.\(^8\) Indeed, the ASEAN-China Free Trade Zone covers a population of 1.9 billion\(^9\) people and the need for safe food trade is pressing. What is more, both parties are critical partners in cross-border trade. China is the top 1 trading partner of ASEAN and ASEAN is the top 3 trading partner of China in 2011.\(^10\) Against this background, both parties strive for a coordinating device to strengthen mutual cooperation, which is reflected in the Chapeau of the Memorandum of Understanding Between ASEAN and China on Strengthening Sanitary and Phytosanitary Cooperation (MOU). This MOU is concluded with both parties’ desire to “further promote the cooperation . . . in implementation of the SPS Agreement” and wishes to “further strengthen the strategic partnership.”\(^11\) Furthermore, the MOU establishes a wide range of cooperation, including information sharing, personnel exchange, professional training, collaborative research, as well as a regular consultation mechanism. While these arrangements are set up as guidelines which neither contain frequency nor contents of the cooperation, such expressive provisions ensure that a cooperation system will be preserved. Due to complexity of implementing the cooperation, it is not necessary to put down the details of the cooperative areas. In this sense, the MOU functions as a device to make sure that all parties will participate and coordinate within a certain scope of food safety cooperation.

\(^7\) Andrew Guzman & Timothy Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 177, 188.

\(^8\) Id.


\(^10\) Id.

Second, according to the loss avoidance theory, the 3Rs ("reputation, retaliation, and reciprocity") instead of monetary damage is the guarantee of compliance. The cost of non-compliance is more severe than it is in a domestic context. Since compliance of international instruments mainly relies on reciprocity, soft law is more suitable for laying down mutual promises among states. In other words, it is unnecessary to resort to solemn terms in the form of hard law. When it comes to the situation of ASEAN-China food safety cooperation, it is established upon the long-term friendship between China and each of the ASEAN countries. Mutual trust in one another leads to a basis for a softer way to ensure both parties keep the promise. Therefore, it is not necessary for all parties to lay down harsh rules on food safety preservation.

Third, Prof. Andrew Guzman and Prof. Timothy Meyer contend that according to the delegation theory, parties “anticipate the need for and the pressure on legal rules to evolve in response to changed circumstances.” So soft law is regarded to be effective to accommodate the uncertainty over the future. Alongside the development of food technology and food safety governance capability, all parties strategically adopt the soft law approach to provide enough room for future development. They managed to do so by providing general guidelines.

Fourth, the international common law theory explains the compromise of a set of “potentially deeper rules on which [states] are unable to generate a broad agreement can instead agree to shallow or vague rules.” Considering the current demanding need of food safety in cross-border transactions, all parties share common interest. However, different levels of economic development and legal environment lead to different mindsets about the cooperation. Some parties pursue a more detailed cooperation mechanism while others prefer a general framework. It is impossible to reach a unanimous consensus on the substances of an agreement. Instead, a general framework offers more flexibility while also providing a basis for mutual cooperation.

---

12 Andrew Guzman & Timothy Meyer, supra note 7, at 193.
13 Id.
14 Id.
15 Id. at 197.
16 Id. at 202.

© 2015 Peking University School of Transnational Law
Overall, the current ASEAN-China food safety cooperation benefits from soft law governance. It provides a platform with great flexibility and potentials for future closer collaboration. However, soft law governance is like a double-edged sword, which also challenges the present cooperation with regard to the purpose of “safeguarding human, animal and plant health and facilitating and promoting regional trade.”17 The following sections will expound the challenges embedded in the current arrangement.

III. CHALLENGE 1: AMBIGUITY IN LEGAL RIGHTS AND OBLIGATIONS IN THE COOPERATIVE DOCUMENTS

The current documents are generally 10-provision ones. Moreover, the content is more like slogans and intention to endeavor together instead of rights and obligations in a “hard law” document. Lack of specific legal rights and obligations poses doubts on the provisions about the feasibility and seriousness of the provisions.

For example, the first article presents objectives which are rather forward-looking and general. Terms such as “equality, mutual benefit and mutual respect” and “the protection of the life and health of human beings, animals and plants, the protection of the interests of consumers, and the promotion of regional trade”18 set up the overall objectives of the MOU. They are on one hand, undoubtedly essential, while on the other hand hard to implement. In other words, as a bunch of general guidelines which are not well defined, these terms cannot be the basis for settling disputes.

As another example, Article II sets forth the scope of cooperation. As the most specific it can be, the MOU claims to establish an information sharing platform, conduct personnel exchange, provide professional trainings and conduct collaborative research19, etc. Much room is left for implementation in these areas in other documents instead of laying down detailed arrangements as for these four aspects. Admittedly, it is a complex task to coordinate information and personnel exchange among 11 countries with different levels of scientific research capability and professional hu-

17 MOU, supra note 11.
18 MOU, supra note 11, art. I.
19 MOU, supra note 11, art. II.
man resources. The purpose of the MOU when all parties concluded it in 2007 was to concrete the mutual intention of establishing a regular cooperation system. The scope is open-ended and the current terms are sufficiently flexible for future implementation. Nevertheless, the cooperative areas are ambiguous and there is no time frame to effectuate them. To the best, all parties will work earnestly on the intellectual and information exchanges, while to the worst, no party is willing to initiate the activity and just leave this provision as an empty promise. Such uncertainty leads to unpredictability in the future. Even worse, since the method, frequency and content of such cooperative areas are not specified, it makes attribution of liability almost impossible.

Besides from the MOU, the same problem is easily discovered in other documents under the ASEAN-China Food Safety Cooperation. The Phnom Penh Joint Statement issued by the Second ASEAN-CHINA Ministerial Meeting on SPS Cooperation mentions that the meeting

“recognises the importance of and the need for strengthening animal and plant inspection and quarantine cooperation, preventing exotic pests from being introduced from the territory of one Party into the Other and spreading, securing the safety of agriculture, forestry and fisheries, protecting ecological environment as well as the health of human being and promoting the development of economic and trade relations.”

Although the second SPS cooperation meeting is successful, judging from the result, there is not much new substantial consensus reached at the meeting. Instead, all parities just reiterated the importance of the aim of the cooperation and expressed that the resolution should carry the cooperation on. Without specific provisions on implementable items, the effectiveness of the biennial meetings is questionable.

---


© 2015 Peking University School of Transnational Law
Based on the above, the four meetings held between the two parties so far mainly contribute to emphasizing the initial goodwill for friendly cooperation. Fortunately, both parties established specific working groups on Food Safety, Animal Inspection and Quarantine, and Plant Inspection and Quarantine. Terms of reference for the Food Safety Working Group provides working scope and the regular/emergency meeting system. This working group undertakes the ground work for cooperation.

IV. CHALLENGE 2: LACK OF A DISPUTE SETTLEMENT MECHANISM

Flexibility of the arrangement leads to another challenge for both parties, which is lack of a thorough dispute settlement mechanism. Article IX of the MOU provides that amicable consultation and/or negotiations should be the processes when a dispute arises. Since both parties are also subject to the TBT and SPS agreements as well as the WTO Dispute Settlement Mechanism (DSM), the consultation and negotiations set forth in the MOU indicate a high level of mutual trust and friendship between the parties. However, if a dispute indeed cannot be solved by these amicable procedures, all parties could still resort to the WTO DSM.

Admittedly, with the support of a successful dispute settlement mechanism, there is no need for ASEAN and China to design a complicated mechanism besides the WTO DSM. What is more, considering the feature of flexibility of the whole set of documents, the motif is amicable cooperation, so all parties have more confidence in friendship rather than worries over non-compliance. In addition, the shared long-standing cultural aversion to litigation make all parties direct the Asian countries to resort to softer ways in dispute settlement.

Despite this, without a dispute settlement mechanism, the provisions in all documents within the ASEAN-China Food Safety Cooperation would be vulnerable. Promises need to be kept. However, there is only a weak guarantee through general words and mutual understanding based on friendship. Alongside continuous

---

22 MOU, supra note 11, art. IX.
deepening of the cooperation as time goes by, disputes among different parties are inevitable. Actually, negotiation is also recom-
mended as a priority within the WTO framework. However, if con-

sultation could not be reached within 60 days, a panel will be con-
stituted upon request from the complaining party. Judgments by specially-appointed independent experts are based on interpretations of the agreements alongside with individual countries’ commit-
ments. If the judgment is still not satisfactory to either party, the panel’s ruling can be appealed within a limited period. Only

issues of law covered by the panel report will be examined on ap-

peal by three members of the permanent seven-member Appellate

Body (AB). The Appellate Body can uphold, modify or reverse the

panel’s legal findings and conclusion23 but cannot remand a dis-

pute to the panel for further consideration.24 Depending on whether

an appeal is included, the maximum period of time for a dispute to be concluded will only be one year or one year and three months.25

The fact that AB judgments are enforceable is a unique feature of

the AB. Although the DSM tries to expedite the procedure for par-
ties, resorting to DSM is still a time-consuming and resource-de-

manding mechanism.

The paper proposes that the cooperation could establish a

mini dispute settlement panel on an ad hoc basis. Lawyers, scien-
tific experts and government officials could serve as panelists for

settling disputes. Although the provisions in the MOU are ambig-

uous and general, disputes are still likely to arise from this docu-

ment. Take Article V for example, without prior written approval

of the owning party, “the use of the name, logo and/or official em-

blem of any of the Parties on any publication, document and/or pa-

per is prohibited.”26 The following is a scenario. Provided that one

party abuses its power to use any of the above marks of another

party without prior authorization, the other party may go to nego-
tiation or consultation for a solution. Such solution could either be

the rectification of the wrongful act or subsequent authorization

23 World Trade Organization, Understanding The WTO: Settling Disputes A


is_e/tif_e/disp1_e.htm (last visited July 19, 2014).

24 James Bacchus, Inside the World Trade Organization, COLUMBIA.EDU, 8, 


25 World Trade Organization, supra note 23.

26 MOU, supra note 11, art. V.
from the owing party. However, if neither is possible, both parties may go to the “mini panel” by providing evidence and legal arguments. Legal bases could be the cooperation agreements for the cooperation as well as international agreements to which both parties are signatories, such as the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Since there is no provision in terms of compensation or penalties in the MOU, both parties could refer to TRIPS for further solution. Compared to resorting to the DSM, the “mini panel” could function as an ad hoc platform for efficient solutions. If there are still disputes over the decision, the disputed parties may go to the WTO DSM for further recourse. In this way, this system could serve a three-fold function. First, it could ensure that the disputes among the 11 countries first be solved within the cooperation system in a timely manner. Second, it will protect the functionality and authority of the ASEAN-China food safety cooperation and reduce the harm to this system by solving disputes within this system. Third, it could also protect the utility of the WTO DSM. In other words, by providing a mini panel within the cooperation system, the parties’ right to participate in the WTO DSM is not jeopardized.

To sum up, challenges exist in the cooperation documents due to the lack of a thorough dispute settlement mechanism. Parties could choose either to go to amicable negotiations or a consultation mainly based on friendship, or go to the WTO DSM. There is no intermediate solution which is both convenient and efficient for the parties. Therefore, an ad hoc “mini panel” might be a great step to bridge these two procedures.

V. CHALLENGE 3: OVERLAPS BETWEEN THE WTO AGREEMENTS AND THE COOPERATION AGREEMENTS JEOPARDIZE THE EFFECTIVENESS OF THE ASEAN-CHINA FOOD SAFETY COOPERATION

Although there is no expressed consent to the relationship between the ASEAN-China Food Safety Cooperation and the WTO agreements, as partners within the cooperation framework and member states of the WTO, all parties are bound by all documents. Specifically, the TBT agreement and SPS agreement are most relevant to the food safety cooperation documents. The author contends that the overlaps among these documents jeopardize the cooperation in the following ways.
First, the WTO is a self-sufficient system and the agreements are binding on all member states. There is no need for all parties to reiterate the terms taken from the WTO agreements in the cooperation documents. What is more, the cooperation documents are much weakly safeguarded than the WTO agreements. In this sense, the reiteration of the terms such as information exchange in aspects of “the implementation of the WTO SPS Agreement and related emerging issues by the relevant Parties”\(^\text{27}\) does not have substantial value to cooperation. Instead, existence of such provisions makes the parties tend to undervalue the cooperation documents compared to the WTO agreements. This indicates the weakness in implementation of soft law compared to hard law.

Second, thanks to the working group on food safety, each party assigns 2-3 people to constitute the working group, which is responsible for information sharing, problem solving in the cross-border transactions, personnel trading and laboratory capability building, etc.\(^\text{28}\) However, this may cause double staffing in the food safety area since all parties are supposed to be equipped with personnel working on similar issues as required by the WTO rules. It is undisputable that this working group is necessary for strengthening the cooperation among the 11 countries. But judging from the information sharing platform, the ASEAN-China Food Safety Database,\(^\text{29}\) the data are not up to date or accurate. To fulfill the transparency requirement set forth in the SPS agreement, the WTO website provides SPS Notification Information System and SPS Information Management System. All parties are required to file updated information, alerts or notifications to these systems. Such systems are sophisticated and functioning very well. This might make the working group on food safety within the China-ASEAN cooperation, whose regular meeting system is simply once a year, weightless. In addition, parties may go to the SPS systems for more information as a parallel mechanism to the ASEAN-China Food Safety Database. Again, against the background that the WTO has

\(^{27}\) MOU, \textit{supra} note 11, art. II 2 (d).


already provided a sufficient and effective platform for the same purpose, faith in this framework might be reduced.

As discussed above, the value and wishes of the ASEAN-China Food Safety Cooperation are highly appreciated. Nevertheless, a smaller-scale regional cooperation with great overlap with the WTO agreements on food safety might cause problems. These problems are not limited to reduced faith in the current cooperation framework, more reliance on the WTO SPS systems, and less effectiveness of the cooperation.

Solutions for this problem could include two ways. First, both parties set down more specific and rigorous arrangement for the cooperation, such as more frequent meetings and improvement on the ASEAN-China SPS Information Web, especially on information sharing and information updating. The Rapid Alert System for Food and Feed from the European Union (EU) is a sophisticated risk communication model to follow. In addition, the trilateral cooperative relations among China, EU and the United States could provide a set of models on documents and meeting mechanism for ASEAN-China food safety cooperation. Only when this regional information sharing network is at least as developed and informative as the WTO SPS systems would all parties pay enough attention. Second, set up a more sophisticated cooperative mechanism which is not offered by the WTO SPS system. Due to the manageable size of 11 countries’ cooperation, an innovative framework different from the SPS systems could stand. In this regard, the cooperation systems in which China participated such as the trilateral cooperation among China-EU-U.S. cooperative initiative and the APEC Food Safety Cooperation Forum might provide useful experiences to draw on. More details will be separately discussed in another paper.

---

VI. CONCLUSION

2015 is the 5th anniversary of the ASEAN-China Free Trade Zone. Food safety cooperation within this region is mainly under soft law governance. Generally speaking, soft law is an effective tool to govern widely shared international issues such as food safety protection. When we look back to this cooperation, safer cross-border food trade between ASEAN and China has been promoted with regard to import and export inspection, scientific cooperation, personnel exchange, etc.

However, due to the special features of these countries, such as legal capacity, economic development, diplomatic relations, culture, history and so on, the current food safety cooperation between ASEAN and China is both ambiguous and flexible to some extent. Thus, it is less effective than it is supposed to be. The current cooperation is a “learning by doing” process for all countries. In this sense, admittedly such an arrangement might be designed purposefully in order to allow all countries to learn more about each other. In addition, all countries will enjoy the flexibility and strengthen the cooperative fruits in the future. Nevertheless, when we judge the current effectiveness of this cooperative mechanism, and by comparing them with the WTO TBT and SPS agreements which have a hard law feature, there are mainly three challenges imbedded in the cooperation. First, ambiguity in legal rights and obligations in the cooperative documents leads to difficulties in implementation. This is because the lack of specific legal rights and obligations lead to the implacability of implementing.

Second, the lack of a dispute settlement mechanism in the future reduces the seriousness of the provisions. Good wishes on the basis of friendly diplomatic relationship are not perfectly reliable in international trade. It is possible that amicable negotiations and consolations will lead to fruitless result. Whenever this happens, the parties have no other solution except for going to the WTO DSM. However, it is time-consuming and not compatible with the long-standing culture of aversion to litigation. Since no intermediate solutions exist in the current cooperation, this paper argues that an ad hoc “mini panel” might be constructive to settle a dispute.

Third, overlaps between the WTO agreements and the cooperation agreements jeopardize the effectiveness of the ASEAN-
China food safety cooperation. On the one hand, since the WTO is a self-sufficient system and the agreements are binding on all member states, there is no need for all parties to reiterate the terms taken from the WTO agreements in the cooperation documents. On the other hand, due to less sophisticated level of the cooperation compared to the WTO system, faith in this framework might be reduced compared to the WTO SPS systems. With these three challenges in mind, this paper proposes a more innovative and aggressive way to enrich the current cooperative documents. The ASEAN-China Food Safety Cooperation should be more region-specific rather than simply reiterating the terms within the WTO framework. With an eye to the different development levels, these challenges might still exist within the near future. It is originated from the soft law feature of the cooperative documents as a top reason, but is also related to political and economic cooperation.
Increase the Liquidity of Shares in Foreign-Chinese Joint Ventures

CHANG Danlin *

ABSTRACT

Under the current Chinese foreign investment laws, there are two restrictions on transfer of shares in Foreign-Chinese Joint Ventures (hereinafter “FC-JV”). Firstly, each of the shareholders in a FC-JV must consent to the transfer of shares. Secondly, the transfer of shares is subject to government approval. In practice, such restrictions have decreased the liquidity of shares in FC-JV significantly, which causes adverse effects on foreign investments in FC-JV.

Although the problems associated with the transfer of shares in FC-JV have drawn increasing attention, this Article contends that the current legal discussions fail to present any effective solution to address the lack of liquidity problem in FC-JV because they did not take into account the respective interests of different parties who have a stake in the transfer of shares in FC-JV. In this connection, this article seeks to provide a positive analysis of law on the respective parties’ incentives to fill in the gap of current commentaries. In addition, this Article also uses the methodology of economic analysis of law to provide some insights for the positive analysis of law.

By applying the various analytical methods discussed above, this Article argues that the rules regulating the transfer of shares in FC-JV should be revised in two aspects. Firstly, from a private law perspective, the unanimous consent requirement should be changed from a mandatory

* Ms. Chang Danlin, LL.M. candidate, Law School, University of Chicago; J.D. in U.S. law and J.M. in Chinese law, School of Transnational Law, Peking University. Before joining Chicago, Danlin had practiced in the field of international commercial arbitration, cross-border transactions, and in-house lawyering, with the goal to broaden her horizon and to deepen her understanding of commercial law. The author owes a debt of gratitude to all the faculties, staffs, and peers at the School of Transnational Law. Her special thanks to Prof. Sang Yop Kang, her thesis advisor, for his encouragement and advice. Her thanks also to Prof. Douglas Levene, Prof. Steven Kargman, Prof. Mark Feldman, Prof. Francis Snyder, Prof. Peter Malanczuk, Prof. G. Marcus Cole, Prof. Zhang Shuanggen, Prof. Jin Zining, Prof. Peng Bing and Prof. Yin Tian.
law to a default rule. Secondly, from a public law perspective, the regulations on the transfer of shares should be separated from the regulations on market entry. Furthermore, the government approval requirement for share transfer should be replaced by a filing requirement. It is important to discuss these two proposals at the same time because both of them have significant impacts on the liquidity of shares in FC-JV.

Key Words: Foreign-Chinese Joint Ventures; Liquidity of Shares; Positive Analysis of Law; Economic Analysis of Law.
TABLE OF CONTENTS

I. Introduction ................................................................................................................. 160

II. The Discussions and Evaluations of the Restrictions .............................................. 164
   A. The Unanimous Consent Requirement for the Transfer of Shares in FC-JV .............. 164
      1. The Adverse Effects of the Unanimous Consent Requirement on the Liquidity of Shares in FC-JV ................................................................. 165
      2. The Possible Justifications for the Unanimous Consent Requirement .................. 166
   B. The Government Approval Requirement for the Transfer of Shares in FC-JV .............. 167
      1. The Adverse Effects of the Government Approval Requirement on the Liquidity of Shares in FC-JV ................................................................. 168
      2. The Proposed Justifications for the Government Approval Requirement Could No Longer Hold ................................................................. 170
   C. The Recent Efforts Made by the Supreme Court to Solve the Lack of Liquidity Issue in FC-JV ................................................................. 171

III. The Importance of Increasing the Liquidity of Shares in FC-JV .......................... 173
   A. The Importance of Liquidity of Shares for Foreign Investors in FC-JV ......... 173
   B. Several Other Factors That Encourage Foreign Investment in FC-JV Have Become Less Important ................................................................. 175
   C. The Reactions of Foreign Investors .................................................................... 178
      1. Foreign Investors May Make Concealed Investment .......... 178
      2. Foreign Investors Tend to Shift Their Investment Mode ...... 180
   D. The Problem of Corporate Deadlock ................................................................. 182
   E. Increasing the Liquidity of Shares in FC-JV Can Relieve the Problems .......... 183

IV. The Proposal for Increasing the Liquidity of Shares in FC-JV .......................... 184
   A. Shift the Unanimous Consent Requirement from a Mandatory Rule to a Default Rule ................................................................. 184
      1. The Mandatory Rule and the Default Rule .......................... 185
      2. The Positive Analysis of the Default Rule in the Context of FC-JV ............... 189
   B. Change the Approval Requirement into a Filing Requirement ...... 191
      1. The Approval Requirement for the Transfer of Shares Cannot be Justified by Public Interests ................................................................. 192
      2. The Positive Analysis of a Filing System in the Context of FC-JV

© 2015 Peking University School of Transnational Law
I. INTRODUCTION

Following the growth of Foreign-Chinese Joint Ventures (hereinafter “FC-JV”) in China, the number of disputes involving the transfer of shares in FC-JV has also increased significantly. Most of these disputes arise out of or in connection with two restrictions on the transfer of shares in FC-JV, and the Chinese judicial system has encountered many issues in resolving such disputes.

Firstly, Chinese law requires that each of the shareholders in a FC-JV must consent to the transfer of shares. Secondly, the transfer of shares is subject to government approval. It is evidenced in these disputes that the transfer of shares in FC-JV has been problematic due to these restrictions.

On the other hand, the transfer of shares is a very important exit mechanism for foreign investors to recover their investments. The lack of liquidity of shares in FC-JV severely restricts the foreign investors’ ability to recover their investments at the time they

1 In order to limit the scope of its application, this Article only discusses FC-JV that is incorporated as limited liability companies. As to other forms of FC-JV, the analysis in this Article might not be complete or adequate to reach the same conclusion because much of such analysis is made based on the specific characteristics of limited liability companies. Nevertheless, the scope of this Article is still wide enough because most of FC-JVs are incorporated as limited liability companies. 万鄂湘 (WAN EXIANG), 最高人民法院关于审理外商投资企业纠纷案件若干问题的规定 (一) 条文理解与适用 [INTERPRETATION AND APPLICATION OF THE PROVISIONS OF THE SUPREME PEOPLE’S COURT ON SEVERAL ISSUES CONCERNING THE TRIAL OF DISPUTES INVOLVING FOREIGN-INVESTED ENTERPRISES], at 11 (2011).

2 陈业宏、田玉军 (Chen Yehong & Tian Yujun), 论外商投资企业股权转让的法律问题 [A Discussion about the Legal Issues Regarding the Transfer of Shares in Foreign-Invested Enterprises], 学习与实践 [STUDY AND PRACTICE], issue 5, at 73 (2013).

3 See id. at 73–79 (2013); 郑 (ZHANG E), 中国涉外商事审判研究第一辑 [RESEARCH ON FOREIGN-RELATED COMMERCIAL TRIAL (FIRST ISSUE)], at 209–43 (2010).

4 The two restrictions are discussed in Part II.

5 Liquidity is the ability of shareholders to sell desired number of shares immediately, without significant discount. Zohar Goshen & Gideon Parchomovsky, the Essential Role of Securities Regulation, 55 DUKE L. J. 711, 714 (2004). The key elements are “time, price and quantity,” id. at 720. In other words, the lack of liquidity is that shareholders cannot sell desired number of shares immediately, without significant discount, id.
choose.\(^6\)

In fact, the lack of liquidity issue has been a crucial consideration for many foreign investors in deciding whether to invest in FC-JV.\(^7\) Although there are other factors that encourage foreign investment in FC-JV, many of such factors have become less important.\(^8\) Consequently, FC-JV is no longer as popular as it was.\(^9\)

Meanwhile, the problems associated with the transfer of shares in FC-JV have drawn increasing attention. Some scholars argue that the unanimous consent requirement should be amended to be consistent with the PRC Company Law, which requires only majority consent,\(^10\) while others insist that the unanimous consent

\(^6\) Even worse, they may find it impossible to exit from a FC-JV when they are locked into irreconcilable internal disputes with their joint venture partners, which in turn may result in a total loss of their investments.

\(^7\) The lack of liquidity in private company, such as FC-JV, is the main reason for foreign investors to apply a discount to the value of such company. See John Koeplin, et al, the Private Company Discount, 12(4) JOURNAL OF APPLIED CORPORATE FINANCE 94, 94–95 (2000).

\(^8\) This is discussed in Part III. In summary, three factors used to be very important for foreign investors in deciding whether to invest in FC-JV. Firstly, Chinese government did not encourage the alternative investment modes other than FC-JV. Thus, if foreign investors wanted to enter into Chinese market, FC-JV was the best choice. Secondly, foreign investors relied on the Chinese investors to introduce cheap labor force and raw materials. Thus, they had the incentive to cooperate with Chinese partners, which could be achieved through investing in FC-JV. Thirdly, FC-JV could receive preferential treatments that were not available to domestic company, which gives competitive advantages to FC-JV. In other words, it was very likely that FC-JV could become a profitable company, which increases the expected return of foreign investors. For an early discussion on the characteristics of FC-JV from the perspective of foreigners, which can provide some insights to their investment strategies. See Paul W. Beamish, The Characteristics of Joint Ventures in the People’s Republic of China, 1(2) JOURNAL OF INTERNATIONAL MARKETING 29, 29–48 (1993).

\(^9\) The decrease of FC-JV in China is observed in both Chinese sources and English sources. See, e.g., Pinyao Lai, Foreign Direct Investment in China: Recent Trends and Patterns, 2 CHINA & WORLD ECONOMY 25, 30 (2002); Dean Xu, et al., Performance of Domestic and Foreign-Invested Enterprises in China, 41 JOURNAL OF WORLD BUSINESS 261, 262 (2006); 胡春华 (Hu Chunhua), 中外合资企业独资化的若干法律问题 [Legal Issues in the Change of Foreign Investment Mode from Equity Joint Venture into Wholly Owned Enterprise], 成都大学学报社科版 [JOURNAL OF CHENGDU UNIVERSITY (SOCIAL SCIENCE EDITION)], issue 2, at 16 (2007).

\(^10\) 刘贵祥 (Liu Guixiang), 外商投资企业纠纷若干疑难问题研究 [Researches on Salient Issues in Disputes Regarding Foreign-Invested Enterprises], 法律适用 [JOURNAL OF LAW APPLICATION], issue 1, at 17 (2010). Actually, many commentators focus on the issue of equal treatment of domestic company and FC-JV.
is still important for FC-JV.\textsuperscript{11}

As to the government approval requirement for share transfers in FC-JV, some commentators focus on analyzing the relationship between government approvals and validity of relevant share transfer agreements.\textsuperscript{12} Others argue that matters that require government approvals should be limited or that the government approval requirement should be completely abolished for share transfers in FC-JV.\textsuperscript{13}

This Article contends that the decrease of investment in FC-

However, this Article contends that the assumption of equal treatment is that the effects of transfers of shares are the same on domestic company and FC-JV. It is the comparator that determine the similarity. Although nationality should not be a comparator, as discussed in Part III, the level of interdependence among shareholders should be a justifiable comparator. In a word, a general contention of equal treatment is not enough to support the application of the same rule to the transfer of shares in domestic company and FC-JV. For a discussion about the role of comparator. See McCollan, Aileen, Cracking the Comparator Problem: Discrimination, “Equal Treatment” and the Role of Comparisons, 6 European Human Rights Law Review 650, 650–55 (2006).

\textsuperscript{11} Chen & Tian, supra note 2, at 76.


\textsuperscript{13} See, e.g., Chen & Tian, supra note 2, at 75 (arguing that government authorization is unnecessary if the transfer of shares does not violate relevant foreign investment law and industrial policies); 叶林等 (Ye Lin, et al.), 外商投资企业法发展的新动向——“外商投资企业法高端论坛”综述 [The New Developments of the Rules Regulating Foreign-Invested Enterprises: Summary of the Forum Discussions on the Rules Regulating Foreign-Invested Enterprises], 法律适用 [JOURNAL OF LAW APPLICATION], issue 8, at 92 (2010) (arguing that state control should only be applied to matters regarding national security, economic security and anti-trust considerations); 甘培忠 (Gan Peizhong), 外商投资企业审批制度应彻底废除 [The Government Approval Requirement for Foreign-Invested Enterprises Should be Repealed], 法制日报 [JURISPRUDENCE DAILY], Dec. 29, 2005, at 9 (arguing that the government approval requirement should not depend on the nationality of investors, and that the goal of the government approval is to protect public security and other important social values).
JV is detrimental both to foreign investors and their Chinese partners. Also, it will have adverse effects on China’s interest as a whole. Therefore, there is significant benefit for China in attracting foreign investment in FC-JV by increasing the liquidity of the shares in FC-JV.\footnote{Even it is true that there are other factors affecting foreigners’ investment strategies, the increase of liquidity at least can give them more incentives to invest in FC-JV.} The key issue is how to increase such liquidity from the legal perspective.

This Article also contends that although the current legal discussions on the transfer of shares in FC-JV have provided valuable insights to the relevant issues involved, they fail to present any effective solution to address the lack of liquidity problem in FC-JV. The reason for such failure is that they did not take into account the respective interests of different parties who have a stake in the transfer of shares in FC-JV. This Article argues that the understanding of the interests of the foreign investors in FC-JV is crucial for understanding the importance of liquidity issue for these investors.

More importantly, a better understanding of the interests of the foreign investors will provide valuable insights in evaluating the FC-JV share transferring rules’ effect on their behavior. Such positive analysis of law can be a useful tool for the law makers in designing more effective rules to achieve their legislative purposes.\footnote{See MILTON FRIEDMAN, The Methodology of Positive Economics, in THE PHILOSOPHY OF ECONOMICS—AN ANTHOLOGY, 145–46 (Daniel M. Hausman ed., 3th ed. 2007).} In this connection, this Article seeks to provide a positive analysis of law on the respective parties’ incentives to fill in the gap of current commentaries on the transfer of shares in FC-JV.

In addition, this Article also uses the methodology of economic analysis of law. Such methodology seeks to describe parties’ behaviors in reaction to the laws by applying the tools of microeconomics, such as the balance of costs and benefits.\footnote{See generally Kaplow Louis & Shavell Steven, Economic Analysis of Law, 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1661–784 (2001).} One key assumption of this method is that parties in the market are rational.\footnote{Id.} This Article argues that this should be the case for foreign investors in FC-JV, because they are sophisticated market participants. Thus,
the methodology of economic analysis of law can provide invaluable insights for the positive analysis of law.

On a separate note, the analysis in this Article does not apply to FC-JVs that have state-owned enterprises as their shareholders. The transfer of shares in such FC-JVs may trigger the issue of state assets management. In such cases, economic efficiency may not be the driving consideration for the legislators and the arguments put forward by this Article may therefore be inapplicable.

By applying the various analytical methods discussed above, this Article argues that the rules regulating the transfer of shares in FC-JV should be revised in two aspects. Firstly, from a private law perspective, the unanimous consent requirement should no longer be the mandatory rule. Secondly, from a public law perspective, the government approval requirement on share transfer should be replaced by a filing requirement. It is important to discuss these two proposals at the same time because both of them have significant impacts on the liquidity FC-JV shares.

This Article is organized as follows. In Part II, the restrictions on the transfer of shares in FC-JV are discussed and evaluated in detail. In Part III, the importance of increasing the liquidity of shares in FC-JV is analyzed. Then, in Part IV, a proposal taking into account both private law issues and public law issues is discussed with a focus on their positive effects. In Part V, it is argued that the proposed amendments conform to the Chinese policies concerning foreign investments. Finally, this Article concludes that the current restrictions should be changed accordingly in order to benefit the Chinese economy as a whole.

II. THE DISCUSSIONS AND EVALUATIONS OF THE RESTRICTIONS

A. The Unanimous Consent Requirement for the Transfer of Shares in FC-JV

According to Article 10 of the Equity Joint Ventures Law,18
the transfer of shares in FC-JV shall not be made without the unanimous consent of the shareholders. The Regulation of Equity Joint Ventures further specifies that the violation of the unanimous consent requirement shall make the transfer of shares invalid.\textsuperscript{19}

1. The Adverse Effects of the Unanimous Consent Requirement on the Liquidity of Shares in FC-JV

Both in theory and in practice, the unanimous consent requirement decreases the liquidity of shares in FC-JV significantly.\textsuperscript{20} Specifically, the unclear separation of ownership and management in a limited liability company results in the fact that corporate decisions would have significant impact not only on the value of shares held by the shareholders but also on other interests of the shareholders.\textsuperscript{21} In this case, the shareholders would have quite diverse considerations regarding the exit of a shareholder that strongly affects the operation of FC-JV, which makes it difficult for them to have unanimous decision.\textsuperscript{22}

In order to avoid such a problem, in practice, some foreign investors and Chinese investors agree to include a blank consent clause in their joint venture agreement providing unanimous consent \textit{ex ante} for the transfer of shares in certain agreed circumstances.\textsuperscript{23} However, such compromise may not serve the parties’

\textsuperscript{19} 中外合资经营企业法实施条例 [Regulations on the Implementation of the Law on Chinese-Foreign Equity Joint Ventures (2001 Revision)] (promulgated by the State Council, July 22, 2001, effective Jul. 22, 2001), art. 20, CLI.2.36341 CHINALAWINFO. Although the implementation of the Contractual Joint Venture Law does not address this issue specifically, the same rule should apply to the transfer of shares in contractual joint venture, which is required by a consistent interpretation of law.

\textsuperscript{20} Chen & Tian, supra note 2, at 76.


\textsuperscript{22} Gilson, supra note 21, at 149.

\textsuperscript{23} Since such joint venture agreements are usually confidential, there is no public data on this point. However, some lawyers who have relevant practical experience support this kind of practice.
best interests. Firstly, it is impossible for the parties to predict all the appropriate circumstances that should be provided with unanimous consent ex ante.\(^{24}\) Secondly, the transaction costs resulting from negotiating such blank consent clause should be taken into account.\(^{25}\) Such transaction costs may be very high because parties have to devote resources in getting relevant information regarding each circumstance that is subject to the blank consent, in order to make an informed decision.\(^{26}\) Moreover, it may not be easy to monitor the occurrences of the detailed contingencies, which also increases the transaction costs.\(^{27}\) Thirdly, the parties may find ex post that they do not want to agree on the transfer of shares while they have already relinquished their veto rights by agreeing on the blank consent ex ante. Moreover, whether such blank consent clause can be approved\(^{28}\) would be decided case by case. As discussed below, such government approval causes uncertainty for foreign investors and may be manipulated.

In sum, the unanimous consent requirement decreases the liquidity of shares in FC-JV significantly.

2. The Possible Justifications for the Unanimous Consent Requirement

There are several reasons for restricting the liquidity of shares in FC-JV through the unanimous consent requirement. Firstly, it is argued that the strong interdependence among the


\(^{25}\) *Id.* at 113.


\(^{28}\) The joint venture contract is subject to government approval. 中外合资经营企业法 [Law on Chinese-Foreign Equity Joint Ventures (2001 Revision)] (promulgated by the Standing Comm. of Nat’l People’s Cong., March 15, 2000, effective March 15, 2000) art.4, CLI.1.34972 CHINALAWINFO. The amendments of the joint venture contract are also subject to government approval. See 融发投资 (香港)有限公司与黑龙江省电影发行放映公司合资经营合同纠纷上诉案 [Disputes Arising from Joint Venture Agreement Between Hong Kong Rongfa Investment Ltd and Heilongjiang Film Distribution Company] （2001）民四终字第 8号, (Sup. People’s Ct. Sept. 5, 2002) CLI.C.71875 CHINALAWINFO.
shareholders, whose number in many cases is just two or three,\textsuperscript{29} in FC-JV justifies the unanimous consent requirement. Secondly, both the Chinese and foreign investors probably are looking for a long and stable relationship at the time of establishing a FC-JV in order to benefit from the advantages of each other.\textsuperscript{30} Moreover, the Chinese authorities expect Chinese investors to acquire, through cooperation, from foreign investors advanced management\textsuperscript{31} and technology.\textsuperscript{32}

This Article argues that none of them can justify a mandatory rule. The key is that shareholders themselves are best suited to decide what kind of protection is appropriate. A mandatory rule lacks the flexibility to fit into different situations, in particular FC-JVs. This is further discussed in Part IV.

\textbf{B. The Government Approval Requirement for the Transfer of Shares in FC-JV}

The Regulation of Equity Joint Ventures provides that the transfer of shares in FC-JV shall be invalid without the approval of relevant government authority.\textsuperscript{33} The Supreme Court further clar-

\textsuperscript{29} Chen & Tian, supra note 2, at 76.


\textsuperscript{31} \textit{See} Suqi Qin, \textit{Transition and Incentive in China’s Foreign Investment Regime}, 10 KOR. U. L. REV. 135, 138 (2011) (“Thus, the first law of foreign investment was established to . . . allow the collaboration of Chinese and foreign companies to assist in China’s acquisition of advanced procedures in production and management.”).


\textsuperscript{33} 中外合资经营企业法 [Law on Chinese-Foreign Equity Joint Ventures (2001 Revision)] (promulgated by the Standing Comm. of Nat’l People’s Cong., March 15, 2000, effective March 15, 2000) art.20, CHINALAWINFO. \textit{See also} 外商投资企业投资者股权变更的若干规定 [The Provisions for the Alteration of Investors’ Equities in Foreign-funded Enterprises] (promulgated by the
ified in the *Green Valley* case that the relevant government authority is authorized by the statutes to examine the substantive issues, rather than simply the formality, in the transfer of shares. This gives the authority a lot of discretion.

1. The Adverse Effects of the Government Approval Requirement on the Liquidity of Shares in FC-JV

This Article contends that the discretion of the government authority causes great uncertainty for the foreign investors about whether they can successfully transfer the shares in time even after they get consents from the other shareholders, which apparently decreases the liquidity of their shares. This is especially true when the approval process lacks transparency. There are at least two factors contributing to such uncertainties.

On one hand, the government authority may lack the expertise to develop a set of appropriate and consistently applied standards in its substantive review of the transfer of shares. Specifically, the same authority, which is usually at local or municipal level,

---

34 Particularly, the Supreme Court held that the government authority could take into account the credit status of investors, national economic development goals and national interests when deciding whether to approve the transfer of shares. 香港绿谷投资公司诉加拿大绿谷（国际）投资公司等股权纠纷案 [*Hong Kong Green Valley Investment Company v. Canada Green Valley (International) Investment & Management Ltd.*] (2002) 民四终字第 14 号, (Sup. People's Ct. Aug. 11, 2003) CLI.C.67341 CHINALAWINFO. *See also* 陈文伟、万利 (Chen Wen-wei & Wan Li), 论外资股权转让合同的效力 [*A Discussion on the Validity of Share Transfer Agreements in Foreign-Invested Companies*], in 全国律协经济专业委员会 2010 论坛成都论文集 [*Collected Papers in the 2010 Cheng Du Forum Held by the National Legal Association Economic Law Committee*], at 9 (2010); 中国政法大学民商经济法学院商法研究所 [*Institute of Commercial Law in the School of Civic, Commercial and Economic Law of China University of Political Science and Law*], 公司法评论 2010 年第 2 辑 [*Commentaries on Corporate Law, Issue 2 Of 2010*], at 81 (2010).

35 Chen & Tian, supra note 2, at 73.

36 商务部关于下放外资投资审批权限有关问题的通知 [*The Notice of the Ministry of Commerce on Decentralizing the Examination and Approval Power for Foreign Investment*] (promulgated by the Ministry of Commerce, June 10, 2010, effective June 10, 2010), art 1, CLI.4.133971 CHINALAWINFO. In fact, the decentralizing has been conducted progressively during the past ten years, and such process is still continuing. For example, in 2009,
is assigned with the regulation of nearly every aspects of the shareholding structure of FC-JV\textsuperscript{37}. Thus, the development of its expertise on a specific matter, such as the transfer of shares, is limited significantly by the available financial resources and personnel resources. Meanwhile, the examination of the complicated substantive issues underlying the transfer of shares requires high level of expertise. Such conflicts may result in mistakes and delays even when the government authority acts in good faith, which increases the risk of foreign investors.

On the other hand, the governmental discretion may be manipulated. Firstly, having the foreign investors in FC-JV may enhance the political performance of the officers in charge\textsuperscript{38} and accordingly be beneficial to their promotions.\textsuperscript{39} Thus such officers...
have the incentive to manipulate their authorities to achieve their personal interests. Secondly, Chinese investors may influence the government authority through exploring their network advantages to block the exit of foreign investors, when they regret giving blank consent *ex ante*\(^{40}\) and want to avoid the breach of contract.

In sum, the interference of public power makes foreign investors face significant liquidity risk.

2. The Proposed Justifications for the Government Approval Requirement Could No Longer Hold

There are several reasons raised in China for adopting such government approval requirement.

Firstly, it is contended that the government authority must examine whether the transfer of shares complies with Chinese foreign investment regulations and industrial policies, such as market permission of foreign investment.\(^{41}\) However, regulations or policies on market entry should be distinguished from the ones on exit mechanism.\(^{42}\) By transferring their shares, the foreigners try to exit the particular FC-JV rather than enter into a new one. Even if the transferee is a foreigner, the approval requirement still cannot be justified, because the establishment of FC-JV has already opened the market to foreigners. Thus the question left is whether we should regulate the exit activities of foreign investors. This will be addressed in Part IV.

---

\(^{40}\) This is discussed in Section A of this Part.

\(^{41}\) Chen & Tian, *supra* note 2, at 74; *Institute of Commercial Law in the School of Civic, Commercial and Economic Law of China University of Political Science and Law, supra* note 34, at 81; 郑鄂 (Zhang), 中国涉外商事审判研究第一辑 [*Research on Foreign-Related Commercial Trial (First Issue)*], at 239 (2010).

Second, it is concerned that the transfer of shares will impact the activities of FC-JV that is subject to governmental monitoring by changing its ownership structure. But such regulatory mission should not be achieved through the approval procedure that roughly interferes with the internal matter of FC-JV.

Third, it is argued that the transfer of shares may reduce the sharing of foreigners in FC-JV and accordingly disqualifies it from enjoying preferential treatments. However, as discussed in Part III, most of such preferential treatments have already been abolished after China’s joining into the World Trade Organization, and the abolishment of all preferential treatments would happen in the near future. Thus this reason can no longer justify the government approval requirement.

In sum, the government approval requirement should be reconsidered.

C. The Recent Efforts Made by the Supreme Court to Solve the Lack of Liquidity Issue in FC-JV

Realizing the problems associated with the transfer of shares in FC-JV, the Supreme Court have made some efforts with the hope to solve those problems by issuing the Judicial Provision in 2010.

43 Chen & Tian, supra note 2, at 74.
44 For a criticism on applying the approval procedure to matters subject to governmental monitoring, see 叶林等 (Ye Lin, et al.), 外商投资企业法发展的新动向—“外商投资企业法高端论坛” 综述 [The New Developments of the Rules Regulating Foreign-Invested Enterprises—Summary of the Forum Discussions on the Rules Regulating Foreign-Invested Enterprises], 法律适用 [JOURNAL OF LAW APPLICATION], issue 8, at 91 (2010). See also Huang, supra note 30, at 404 (it is argued that “China’s reform has been primarily motivated to save, rather than dismantle, socialism”).
45 毛海波 (Mao Haibo), 外商投资企业股权转让疑难问题探析 [Analyzing the Problems of the Share Transfer in Foreign-Invested Company], 法治研究 [JOURNAL OF LAW APPLICATION], issue 10, at 67 (2010). 最高人民法院关于审理外商投资企业纠纷案件若干问题的规定 (一) [Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Funded Enterprises (I)] (promulgated by the Sup. People’s Ct., May 17, 2010, effective Aug. 16, 2010) art. 9, CHINALAWINFO.
However, such efforts are not very effective.

As to the unanimous consent requirement, the Supreme Court introduces the concept of implied consent that is employed in the PRC Company Law.\(^47\) It is provided that if a shareholder neither agrees to the transfer of shares nor purchases the transferred shares, it shall be implied that he agrees with the transfer of shares.\(^48\) In this case, the shareholder cannot block the transfer of shares through the unanimous consent requirement. However, such an approach has been criticized as it ignores the interests of the shareholders who do not agree to the transfer of shares.\(^49\)

As to the government approval requirement, the Judicial Provision mainly focuses on clarifying the effect of government approvals on the validity of the relevant share transfer agreements and allocating liabilities among different parties at stake. But it failed to address the problems associated with the government approval itself. This is due to the deference of judicial power to administrative power.\(^50\) Thus the problems can only be solved by legislation.

To sum up, this Article proposes that the restrictions on the transfer of shares should be reconsidered by balancing the cost re-


\(^{48}\) Id.

\(^{49}\) Such shareholder may simply be unwilling to buy the shares or unable to buy the shares. 甘培忠、吴韬 (Gan Peizhong & Wu Tao), 有限公司股权转让探析 [Analyzing the Transfer of Shares in Limited Liability Companies], 南京大学学报 [JOURNAL OF NANJING UNIVERSITY], issue 1, at 37 (2005).

\(^{50}\) Most of the rules on government approval are stipulated in administrative provisions or regulations. 王保树 (Wang Baoshu), 公司法形态结构改革的走向 [The Future Direction of the Reform on the Structure of Corporate Law], 中国法学 [JURISPRUDENCE OF CHINA], issue 1, at 113 (2012). In other words, such rules are result of the exercise of administrative power. In China, the judicial power can restrict the administrative power through its review of administrative activities in administrative proceedings. 赵永行 (Zhao Yongxing), 论行政权与司法权的关系 [The Relationship Between Administrative Power and Judicial Power], 现代法学 [MODERN LAW SCIENCE], issue 5, at 56 (1997). However, the courts cannot examine the administrative regulations and provisions in the absence of a specific case. 行政诉讼法 [Administrative Procedure Law] (promulgated by Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 12, CLI.1.4274 CHINALAWINFO.
III. THE IMPORTANCE OF INCREASING THE LIQUIDITY OF SHARES IN FC-JV

In this Part, it is first presented that the liquidity of shares in FC-JV is very important for foreign investors. Then it points out that several other factors that used to encourage foreign investors to invest in FC-JV have become less important. Thus, foreigners in FC-JV have great incentive to reduce their expected costs by resolving the liquidity problem.\(^{51}\) Some of them choose to make concealed investment, some shift to other investment mode, and, even worse, some may simply leave the Chinese market, which is not good for Chinese investors and China as a whole. In addition, the inability to exit FC-JV when there are irreconcilable internal disputes with their joint venture partners may lead to the status of corporate deadlock, which can generate negative impacts on the Chinese market. Thus it is concluded that the liquidity of shares in FC-JV should be increased.

A. The Importance of Liquidity of Shares for Foreign Investors in FC-JV

Apparently, the difficulties in withdrawing investment increase the risk of investment for foreigners significantly. In this Section, it is emphasized that certain factors make the exit mechanism particularly important for foreign investors in FC-JV.

First of all, due to different cultural backgrounds and management philosophies, shareholders in FC-JV may incline to have conflicts.\(^{52}\) This problem is highlighted during the global financial crisis.\(^{53}\) Thus, an effective exit mechanism has special value for foreign investors in FC-JV, considering that they face a high risk

---

\(^{51}\) The lack of liquidity increases the risk of investment. The expected cost equals to the risk multiple the loss. Thus reduce the risk can reduce the expected cost.

\(^{52}\) 张凤翔 (ZHANG FENGXIANG), 中外合资企业公司法纠纷难点与审判分析 [ISSUES ON THE CHINESE-FOREIGN EQUITY JOINT VENTURES DISPUTES AND THE RELEVANT JUDICIAL ANALYZING], at 159–62 (2010).

\(^{53}\) 郑鄂 (ZHANG), 中国涉外商事审判研究第一辑 [RESEARCH ON FOREIGN-RELATED COMMERCIAL TRIAL(First Issue)], at 239 (2010).
of investment failure due to internal conflicts.

Secondly, relevant laws and regulations impose unanimous consent requirement on important decision-making procedures in FC-JV.\textsuperscript{54} Considering the different management philosophies between foreign investors and Chinese investors, such unanimous consent requirement would easily lead to a corporate deadlock when there is a conflict between them. In such a case, an effective exit mechanism becomes very important for foreigners to get away from the status of corporate deadlock, which otherwise may result in a total loss of their investments.

Thirdly, in some cases, foreign investors are minority shareholders in FC-JV whose interests are quite vulnerable to the majority shareholders.\textsuperscript{55} Accordingly, exit mechanisms become very important for them. Two reasons account for this minority shareholder structure. First, it may not be permitted to be a majority shareholder in FC-JV under anti-monopoly law or national security reviews. Also, in some industrials, foreign invested companies are subject to domestic control.\textsuperscript{56} In other words, foreign investors in such industries can only be minority investors.

Moreover, transfer of shares is a much more convenient and

\textsuperscript{54} According to relevant law, important corporate decisions require unanimous consent of the directors. \textit{See supra} note 22, art. 33; \textit{supra} note 20, art. 29; Wang, \textit{supra} note 51, at 114. Although in the management of FC-JV, the board of directors is the highest management organ rather than the shareholder meeting, the shareholders nevertheless can indirectly affect the board of directors through their appointing authority over the directors. \textit{See Wang, supra} note 51, at 113 (2012); John Childa & Yanni Yan, \textit{Investment and Control in International Joint Ventures: the Case of China}, 34 (1) Journal of World Business, 3, 5–7 (1999).


\textsuperscript{56} 指导外商投资方向规定 \textit{[The Regulations on the Guidance of Foreign Investment]} (promulgated by the State Council, Feb. 11, 2002, effective April 22, 2002) art. 8, CLI.2.39354 CHINALAWINFO; 外商投资产业指导目录 \textit{[The Catalogue for the Guidance of Foreign Investment Industries]} (revision in 2011) part two, CLI.4.164578 CHINALAWINFO. \textit{See also} 尹翔 (Yin Xiang), \textit{外资并购中外国投资者投资额的准入问题}, \textit{政法论坛} \textit{[The Market Entry Issues in Inbound Mergers and Acquisitions]}, 29 (1) \textit{Tribune of Political Science and Law}, 166, 167 (2011).
feasible exit mechanism than others, such as liquidation and capital reduction, for foreign investors. This is because the laws have distinguished liquidation and capital reduction from the transfer of shares and impose heavier regulations on the former in order to protect the interests of non-shareholders. Specifically, liquidation and capital reduction decrease FC-JV’s ability to pay off its debts by reducing the amount of its equity, which adversely affect non-shareholders, such as creditors. In contrast, the transfer of shares only changes the ownership structure in FC-JV.

All in all, the liquidity of shares in FC-JV is very important for foreign investors.

B. Several Other Factors That Encourage Foreign Investment in FC-JV Have Become Less Important

In the past, there were several factors that encourage foreign investment in FC-JV. However, as discussed in the following, such factors have become less important.

Firstly, FC-JV used to be the only encouraged foreign investment mode in China. Meanwhile, other investment modes were either highly regulated or not allowed. Thus, for foreigners who

---

57 Zhang, supra note 54. This Article agrees with the conclusion of the author, but proposes different reasons.

58 For a discussion on the liquidation process of FC-JV under Chinese law, see Zhang, supra note 53, at 117–30 (2010).

59 It may be argued that such change can also have adverse effects on non-shareholders where the exiting shareholder has play a key role in the daily operation of FC-JV. In this case, the leave of such shareholder is harmful for the prospect of FC-JV, which may in turn affect the credit capacity of FC-JV. However, this impact on non-shareholders is indirect and in fact is just a normal business risk that non-shareholders should take. Moreover, this business risk can be allocated between creditor and debtor through contractual arrangement. See Melnik, Arie & Steven Plaut, Loan Commitment Contracts, Terms of Lending, and Credit Allocation, 41.2 The Journal of Finance 425, 425–35 (1986).

60 Yingqi Wei, et al., Entry modes of foreign direct investment in China: a multinomial logit approach, 58 Journal of Business Research 1495, 1497 (2005). The goal of the government to open Chinese market was to “introduce advanced technology and management skills, through cooperation between Chinese and foreign investors.” Because FC-JV is an ideal mode for such cooperation, the government would like to encourage such mode of foreign investment. Li, Chinese Foreign Investment Laws: A Review from the Perspective of Policy-oriented Jurisprudence, 19.1 Asia Pacific Law Review 35, 41 (2011).

61 Wei, et al., supra note 60. See also Au, Jeffrey K. D., Hopes and Fears of...
wanted to enter into Chinese market, FC-JV was the best choice. However, nowadays, the situations have been changed significantly. Wholly Foreign Owned Enterprises (hereinafter “WFOE”) are encouraged. Other investment models are also available to foreign investors. The Opinion on Utilization of Foreign Investment issued by the State Council in 2010 further shows China’s willingness to introduce diverse foreign investment modes. This means that foreign investors have more choices regarding investment modes, which are equally encouraged by the government.

Second, two advantages of cooperating with Chinese partners in FC-JV, which are getting cheap labor force and low price of raw materials, has been fading away, as the prices for labor force and raw materials have increased gradually in recent years. Thus, there are fewer interests for foreign investors to invest in China or cooperate with Chinese investors.

Third, many preferential treatments for FC-JV, for example

---


62 Wei, et al., *supra* note 60.

63 See also Li, *supra* note 60. For example, joint ventures can be incorporated as stock corporations. 关于设立外商投资股份有限公司若干问题的暂行规定 [Provisional Regulations on the Establishment of Sino-Foreign Joint Stock Corporations] (promulgated by the Ministry of Commerce, Jan. 10, 1995, effective Jan. 10, 1995) art. 1–2, CLI.4.11496 CHINALAWINFO. Since 2010, foreign investors are also allowed to invest in partnership enterprises. 外国企业或者个人在中国境内设立合伙企业管理办法 [The Administrative Measures for the Establishment of Partnership Enterprises by Foreign Enterprises or Individuals within China] (promulgated by the State Council, Aug. 19, 2009, effective March 1, 2010) art. 1–2, CLI.2.124206 CHINALAWINFO. It is argued that this Measures are passed to attract foreign investors, see Samuel H. Shaddow, *China’s Foreign Invested Partnership Enterprise Law: the Lifeless or Sleeping Dragon?*, 22 Pac. Rim L. & Pol’y J. 469, 470 (2013).


65 Ye, et al., *supra* note 45.

66 *Id.*
the preferential tax treatment\(^{67}\), which are beneficial for foreign investors\(^{68}\), have been abolished gradually in the recent years.\(^{69}\) In fact, the abolishment of the preferential treatments for FC-JV is an irreversible trend in the field of foreign investment. Domestically, the preferential treatments for FC-JV have been criticized a lot, since such “super-national treatment” is detriment to China’s interest.\(^{70}\) More importantly, the current policies have adopted such critics. For example, the Eleventh Five-Year Plan for Business Development announced in 2006 points out that a fair market should be established and the policies should be the same toward domestic companies and foreign invested enterprises.\(^{71}\) Thus, the preferential treatments are no longer important factors that affect the choice of foreign investment.

\(^{67}\) Li, supra note 60. It may be argued that because such preferential treatments are also available to WFOE, they could choose WFOE rather than FC-JV to get the competitive advantages. However, the discussion here is not about the choice between FC-JV and WFOE. The key issue is that the preferential treatments increase the expected return of foreign investors, which has positive effects on attracting investment in FC-JV. The comparison between FC-JV and WFOE in terms of advantages and disadvantages is another factor that affects the investment strategy of foreign investors.

\(^{68}\) Such preferential treatments give FC-JV competitive advantages over domestic companies. The result is that FC-JV is more likely to be a profitable company in Chinese market, which increases the expected market return of foreign investors.

\(^{69}\) For example, the adoption of China’s Enterprise Income Tax Law and the annulment of the Foreign Investment Enterprises and Foreign Enterprises Income Tax Law lead to the equal treatment of FC-JV and domestic companies regarding income taxation. Moreover, since 2010, FC-JV is charged for both the urban maintenance and construction tax and the additional education tax. Li, supra note 60.

\(^{70}\) Dí Xu, supra note 70, at 86–88 (2007). It also specifies that FC-JVs should not be entitled to any preferential treatment if the shareholding of foreign investors is less than twenty-five percent. 关于外国投资者并购境内企业的规定 [The Provisions on Mergers and Acquisitions of a Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce, the State-Owned Assets Supervision and Administration Commission, the State Administration of Taxation, the State Administration of Industry and Commerce, the Securities Regulatory Commission and the State Administration of Foreign Exchange, Aug. 8, 2006, effective Sep. 8, 2006) art. 19, CLL4.119571 CHINALAWINFO.
C. The Reactions of Foreign Investors

Generally speaking, foreign investors have two choices facing the liquidity problems in FC-JV. One is to exit Chinese market and the other is to avoid the restrictions that reduce the liquidity of shares. Apparently, the former is contrary to China’s interest.72

The following part then focuses on the reactions of foreign investors who still want to invest in China.

1. Foreign Investors May Make Concealed Investment

In order to avoid strict restrictions on the transfer of shares in FC-JV, many foreign investors choose to make concealed investments in FC-JV.73 Specifically, the transferor and the transferee would enter into a contract that gives the transferee all the benefits enjoyed by a shareholder in FC-JV while still keeps the transferor as the nominal shareholder.74 In this way, the restrictions are avoided because there is no change of ownership on the shares prima facie. The transferor at least could successfully withdraw part of its investment by getting the considerations under the contract. Alternatively, foreign investors may have a contract with a Chinese citizen or legal entity in order to enjoy all the benefits entitled to a shareholder in a domestic company, as the Company Law gives the shareholders in domestic companies much more autonomy regarding the transfer of shares.75 Specifically, the transfer of shares in domestic company only requires majority consent, rather than unanimous consent, from the shareholders and such majority consent rule can be further loosen by the articles of association.76

---

72 In fact, the decrease of foreign investment in China has been observed and expected to be the trend. Samuel H. Shaddox, China’s Foreign Invested Partnership Enterprise Law: the Lifeless or Sleeping Dragon, 22 Pac. RimL. & Pol’y J. 469, 470 (2013). Although such decrease may result from other factors, such as depressed international economy, this Article contends that it is even more important for China to improve its investment environment by increasing the liquidity of shares in FC-JV in order to offset other negative factors affecting foreign investment in China.
73 ZHANG, supra note 53, at 131.
74 Id.
75 INSTITUTE OF COMMERCIAL LAW IN THE SCHOOL OF CIVIC, COMMERCIAL AND ECONOMIC LAW OF CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW, supra note 34, at 84; Liu, supra note 10, at 12.
76 Supra note 64, art. 71.
Also, there is no government approval requirement except for certain regulated industries. Thus foreign investors have great incentives to invest in domestic company as their investment vehicle, especially when many of the preferential treatments of foreign invested enterprises are abolished.

However, as pointed out by some commentators, such concealed investments contradict with the legislative purpose and are detrimental to other shareholders.\(^\text{77}\) Also, such investment structure increases the risk of FC-JV operation.\(^\text{78}\) Moreover, it is difficult for the government to avoid such practices by regulation, since they can only be found after the disputes arise.\(^\text{79}\)

This Article further contends that such concealed investment may increase the risk of the actual investor. Firstly, there is an agency problem between the actual investor and the nominal shareholder. Although the contract between the actual investor and the nominal shareholder may be held valid,\(^\text{80}\) the actual investor cannot claim any shareholder right against the company.\(^\text{81}\) Thus, the actual investor has to rely on the nominal shareholder to realize his shareholder rights through contractual arrangement. Such relationship is similar to the one between a principal and an agent, where the principal faces the problem of how to motivate the agent to act in the best interests of him.\(^\text{82}\) Secondly, it is hard for the investor to be remedied, as it can only have claims against the nominal

\(^{77}\) ZHANG, supra note 53, at 131.

\(^{78}\) Id.

\(^{79}\) Id.

\(^{80}\) Supra note 21, art. 15; 最高法院关于适用中华人民共和国公司法若干问题的规定(三)[Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of People’s Republic of China] (revision in 2014) (promulgated by the Supreme People's Court, Feb.20, 2014, effective Feb. 20, 2014) art. 24, CLI.3.219132 CHINALAWINFO. But, in the case of making concealed investment in a domestic company, the contract between the actual investor and the nominal shareholder is quite likely to be held invalid because of its violation of laws. 中华人民共和国合同法 [Contract Law of the People’s Republic of China] (promulgated by the Nat'l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 52, CLI.1.21651 CHINALAWINFO.

\(^{81}\) Supra note 22, art. 17; supra note 64, art. 33.

\(^{82}\) For a discussion on the principal-agent problem, see generally Stanford J. Grossman & Oliver D. Hart, An Analysis of the Principal-Agent Problem, 51(1) ECONOMETRICA 7, 7–46 (1983).
shareholder who is much likely to pay damages than the company. The result is that, the transferor cannot get full value of his investment because the transferee, who becomes the actual investor after the transaction is closed, understands the risk of such arrangement and will pay a low price for it. This means that the transferor cannot get the full value of its shares in FC-JV.

2. Foreign Investors Tend to Shift Their Investment Mode

Another reaction of foreign investors to the lack of liquidity in FC-JV is to shift their investment mode. As discussed above, foreign investors now have many different choices concerning their investment mode. The most notable change is that more and more foreign investors have shifted their investment mode from FC-JV to WFOE. It is pointed out that one important reason for such shift is to avoid the corporate deadlock in FC-JV. Unlike FC-JV, WFOE does not have the problems of cultural and management conflicts and minority shareholder protection, because it is solely owned by foreign investors. Thus the liquidity of shares in WFOE is not an issue as important as it is in FC-JV. Accordingly, shifting from FC-JV to WFOE could relieve the liquidity problem.

However, in this case, foreign investors give up the benefits they may enjoy in FC-JV. Firstly, there are many advantages of cooperating with Chinese investors. It is widely known that foreigners face a “liability for foreignness” problem, which means they would incur higher costs in a host country due to their nationality. Empirical study shows that this is still the case in China. However, cooperating with a local partner through FC-JV could

---

83 This is because that, comparing with the nominal shareholder, the company usually has more capital.
84 Li, supra note 60.
85 ZHANG, supra note 53, at 138.
86 For more discussions on the choice between FC-JV and WFOE from the perspective of transaction costs, see Erin Anderson & Hubert Gatignon, Mode of Foreign Entry: A Transaction Cost Analysis and Propositions, 17 (3) JOURNAL OF INTERNATIONAL BUSINESS STUDIES 1, 1–26 (1986); Yiu, Daphne & Shige Makino, the Choice between Joint Venture and Wholly Owned Subsidiary: An Institutional Perspective, 13(6) ORGANIZATION SCIENCE 667, 667–83 (2002).
87 Xu, et al., supra note 9, at 263.
88 Id. at 271.
effectively alleviate such “liability for foreignness.”89 In addition, the Chinese investors in FC-JV could provide access to distributional channels and domestic market.90 Also, FC-JV is better suited than WFOE to learn from the local community, which is important for its growth, through its Chinese investors.91 Moreover, Chinese investors may help FC-JV deal with local authorities.92 This is especially important when many activities of FC-JV are subject to government approval93 and when the approval process is not transparent and subject to great discretion.94 Those are especially valuable when there is a big cultural difference between the home country of foreign investors and the host country.95 Further, as Chinese investors have improved their capacities and accumulated experience in the passing years, their contribution to the success of FC-JV has also increased.96

Secondly, foreign investors can have wider investment choices and opportunities if they choose FC-JV rather than WFOE. As mentioned above, some industries require domestic control.97 Thus WFOE is not permitted to enter into such industries, while FC-JV is still allowed. Moreover, WFOE may be easier to trigger the anti-monopoly issues and national security consideration in terms of control, which may block its establishment.

On the other hand, Chinese investors would no longer benefit from foreign investors if they later shifted from FC-JV to WFOE.

89 Id. at 266.
90 Id.; Qingjiang Kong, Towards WTO Compliance: China’s Foreign Investment Regime in Transition, 3 J. WORLD INVESTMENT 859, 867(2002).
91 Xu, et al., supra note 9, at 266;Wei, et al., supra note 60.
92 Xu, et al., supra note 9, at 266.
93 Ye, et al., supra note 45, at 91–92.
94 Vivienne Bath, Foreign Investment, the National Interest and National Security–Foreign Direct Investment in Australian and China, 34 SYDNEY L. REV. 5, 11 (2012)
95 Id.
96 Id. at 271.
97 See also 胡春华(Hu Chunhua), 中外合资企业独资化的若干法律问题 [Legal Issues in the Change of Foreign Investment Mode From Equity Joint Venture into Wholly Owned Enterprise], 成都大学学报社科版, [JOURNAL OF CHENGDU UNIVERSITY (SOCIAL SCIENCE EDITION)], issue 2, at 17 (2007).
Firstly, foreign investors can bring in advanced management service and technology services.\cite{Xu, et al., supra note 9, at 271; Qin, supra note 31, at 138 (2011)} Chinese investors not only can enjoy such services, but also can learn from their foreign partners. Secondly, foreign investors may have goodwill advantage.\cite{Xu, et al., supra note 9, at 271; 江小涓 (Jiang Xiaojuan), 国际贸易 [INTERNATIONAL TRADE], issue 3, at 4–8 (2000).} This may increase the probability of success of FC-JV. Further, Chinese investors can have the chance to learn the international market when the products or services provided by FC-JV are exported to foreign countries as a result of such goodwill advantage. Such learning experience is especially valuable for Chinese investors who want to make outbound investments by themselves. Third, the participation of foreign investors, who are usually multinational corporations that have sufficient financial resources and excellent training programs, can provide access to extra capital and enhance the quality of human resources in FC-JV, which definitely are important for FC-JV’s success. Moreover, Chinese investors can have their own personnel in FC-JV and then rehire them after their leave in order to get the benefits of such trainings indirectly. In this way, the quality of their human resources would be strengthened, which is a long-term interest for Chinese investors and China as a whole.

In brief, the shift from FC-JV to WFOE is neither beneficial for foreign investors nor for Chinese investors if the only reason for such shift is to avoid liquidity problem.

\textit{D. The Problem of Corporate Deadlock}

The foregoing analysis focuses on attracting new investments. This Part further provides that if the liquidity problem is not solved, the existing FC-JV could bring many problems.

As mentioned in Section A of Part III, conflicts of corporate governance could easily arise in FC-JV. It is contended that this usually results in corporate deadlock of FC-JV when an effective exit mechanism is missing.\cite{ZHANG, supra note 72, at 141.} Such corporate deadlock status will generate many negative externalities.\cite{The concept of negative externalities is proposed in the literature of law} First of all, corporate
deadlock status means that although the corporate has not been liq-
uidated, it ceases to conduct any business activities.\textsuperscript{102} One nega-
tive externality is that the interests of FC-JV’s existing credit hold-
ers will be damaged. To be specific, without business activities, FC-JV cannot generate any revenue that should be used to pay off its debt. In this case, the only remedy for credit holder is to get certain compensations through the liquidation process. In fact, the longer from the time of stopping business activities to the time of liquidation, the less remedy credit holders can get. Another negative externality is market distortion. Although a FC-JV is in the status of corporate deadlock, it is still a legal entity. Such legal en-
tity may be manipulated, which leads to market distortion. It would be more problematic when a third party cannot get sufficient information regarding the actual operational situation of FC-JV in mak-
ing their business decisions.

\textit{E. Increasing the Liquidity of Shares in FC-JV Can Relieve the Problems}

This Part has pointed out that the traditional compelling rea-
sons for foreign investors to choose FC-JV as their investment mode may not exist now. Since liquidity of shares in FC-JV has a very high value for foreign investors, the alleviation of the liquidity problems could be a great incentive to set off the loss of advantages. For foreigners who tend to avoid the liquidity problem by making concealed investments or shifting their investment mode, the in-
crease of liquidity reduces their incentives to do so significantly. At last, increasing the liquidity of shares in FC-JV can effectively solve the problem of corporate deadlock.

There is no doubt that foreign investments will continue being very important for China’s economy. Moreover, the liberalization of foreign investment in China can in turn benefit China’s out-
bound investment as a result of reciprocity.\textsuperscript{103}

---

\textsuperscript{102} ZHANG, supra note 72, at 141.

\textsuperscript{103} Li, supra note 60.
Thus, it is clear that increasing the liquidity of shares in FC-JV is consistent with China’s interest. The only thing left is how to increase the liquidity without sacrificing public interests. The next part of this Article thus proposes an approach.

IV. THE PROPOSAL FOR INCREASING THE LIQUIDITY OF SHARES IN FC-JV

As discussed in Part II, there are two restrictions on the transfer of shares in FC-JV. One is the mandatory unanimous consent requirement and the other is the government approval requirement. The former is a restriction imposed from a private law perspective while the latter is a restriction imposed from a public law perspective. This Article contends that they should be addressed simultaneously in order to effectively relieve the liquidity problems.

A. Shift the Unanimous Consent Requirement from a Mandatory Rule to a Default Rule

As discussed in Part II, FC-JV has some special characteristics that distinguish it from domestic company. Thus a more restrictive rule regarding the transfer of shares may be justified. However, such restrictive rule would incur significant costs because it reduces the liquidity of shares in FC-JV. Thus, the key is how to find a way to balance the different considerations. In this Part, it is argued that this can be achieved through changing the structure of the rule regarding the transfer of shares without altering the content of such rule. In other words, it is proposed that the unanimous consent requirement should be shifted from a mandatory rule into a default rule.

First of all, some background information should be introduced. The discussions on mandatory rule and default rule are originated from contract law. Such contractual principles could be applied to the context of corporate law because corporate could be treated as a bunch of contracts. This contractual theory is even more appropriate to be applied to the context of private company

---

than to the context of public company where parties’ autonomy is limited by mandatory listing rules.\textsuperscript{105}

1. The Mandatory Rule and the Default Rule

Corporate rules can be divided into two categories.\textsuperscript{106} One is the default rule, which can be contracted around by parties’ agreement.\textsuperscript{107} As discussed above, the majority consent requirement for the transfer of shares under the PRC Company Law is a default rule, because shareholders can contract around it through the articles of association. The other is the mandatory rule, which cannot be changed through parties’ agreement.\textsuperscript{108} The unanimous consent requirement for FC-JV belongs to this category, because the law leaves no space for parties’ autonomy.

The key characteristic of default rule is that parties have the possibility to negotiate a “transaction-specific” rule governing their relationships.\textsuperscript{109} If they successfully agreed on a tailored express term, such term would apply to the parties instead of the default rule. It is held that such “transaction-specific” rule is especially important for parties who want to have a long-term relationship.\textsuperscript{110} Furthermore, default rule provides flexibility to parties, which is the most needed characteristic in limited liability companies.\textsuperscript{111}

Another important role of default rule is that it can affect the final allocation of legal rights among parties through its carefully

\textsuperscript{105} Gilson, supra note 21, at 152 (“private corporation law leaves room for more specific application of general contract principles, and I left open the possibility that private corporation law is not corporate law at all, but is more appropriately considered a particular application of contract law”). U.S. courts have applied the generally principles of contract law to determine the validity of agreements which restrict the transfer of shares in closed corporations. Stephen J. Leacock, Share Transfer Restrictions in Close Corporations as Mechanisms for Intelligible Corporate Outcomes, 3 Faulkner L. Rev. 109, 113 (2011).

\textsuperscript{106} See Macneil, supra 24, at 107.

\textsuperscript{107} Ayres & Gertner, supra note 26, at 87.

\textsuperscript{108} Id.

\textsuperscript{109} Macneil, supra 4, at 114.

\textsuperscript{110} Id.

designed content. It should be noticed that there would be transaction costs for contracting around the default rule, which in reality are hardly nil.\textsuperscript{112} In fact, only if the benefits of having a tailored express term exceed the costs of contracting around the default rule, the parties will finally opt out of the default rule.\textsuperscript{113} Such benefits equal to the increased utility for the parties resulting from replacing the default rule by the tailored express term. Because the utility of the default rule is determined by the content of the rule, it can be said that the content of default rule may affect the final decisions made by the parties regarding whether they will actually contract around the default rule. Based on this rationale, it is argued that the state can interfere with private ordering by including public policy in the default rule if such rule is acceptable by many parties.\textsuperscript{114} In other words, if there were no clear strong preference as between the default rule and a tailored rule, the “good” default rule would not be contracted around.\textsuperscript{115}

At last, it should be pointed out that even if parties fail to opt out of the default rule, the default rule still has significant impacts on the transactions between parties. The key is that it provides incentives for parties to negotiate. It is argued that through the process of negotiation, more information will be revealed.\textsuperscript{116} Also, the negotiation will provide parties with the opportunity to consider the issues addressed by the default rule thoroughly.

In contrast, the mandatory law does not allow parties to have “transaction-specific” rules, which in turn makes the negotiation useless. It is a strong tool for government to regulate private activities.\textsuperscript{117} From the perspective of private law, such intervention must have compelling justifications in terms of public interests,\textsuperscript{118} such as the problem of negative externalities\textsuperscript{119} and the protection

\textsuperscript{113} \textit{Id.} at 15–16.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} Ayres & Gertner, \textit{supra} note 26, at 94.
\textsuperscript{117} Macneil, \textit{supra} note 24, at 117.
\textsuperscript{119} Macneil, \textit{supra} note 24, at 123; 赵旭东 (Zhao Xudong), 公司法修订的基
of non-shareholders’ interests.\textsuperscript{120}

It is held that internal issues of a company are better to be addressed by the default rule.\textsuperscript{121} This is especially true when the public interests considerations are much less involved in limited liability companies than in public companies.\textsuperscript{122} In fact, Chinese legislators already accepted such arguments when they addressed the issue of share transfer in limited liability companies, which can be shown by the amendment of the PRC Company Law in 2005. Before the amendment, the rule governing the transfer of shares is a mandatory rule.\textsuperscript{123} The new PRC Company Law changes it into a default rule. This change is considered as an important development of Chinese corporate law because it shows a shift of emphasis from government regulation to parties’ autonomy in the philosophy of Chinese corporate law.\textsuperscript{124} Such parties’ autonomy can facilitate the development of corporate system because the parties investing in the corporation are best suited to adapt efficient rules governing their relationships.\textsuperscript{125}
As many commentators have contended, there is no significant difference between the transfer of shares in FC-JV and that in The courts had held that such agreements were valid unless they are too restrictive. See e.g., Model Clothing Co. v. Dickinson, 178 N.W. 957, 146 Minn. 367 (1920); Casper v. Kalt-Zimmer Mfg. Co., 159 Wis. 517, 149 N.W. 754 (1914). It is also worth to notice that such agreement can even be a private contract between the shareholders rather than the articles of association or the by-law of the company. Oppenheim Collins & Co. v. Beir, 187 Misc. 428, 64 N.Y.S.2d 19 (1946). It is seems that U.S. law allows great party autonomy regarding the issue of share transfer in closed corporation. Meanwhile, public interests, such as fairness or protection of creditors, can be safeguarded by the judicial scrutiny ex post. For example, in a recent case, the Supreme Court of Indiana had considered the effects of such restrictions on the creditors and held that “such restrictions may not prevent a creditor from foreclosing a lien on the shares.” FBI Farms, Inc. v. Moore, 798 N.E.2d 440, 440 (Ind. 2003).

In fact, the key aspect of the U.S. law is that the validity of such agreement depends on the “reasonableness of the restraint in the light of the needs of the corporation” which is decided by courts ex post. Notes, Restrictions on the Alienation of Shares of Stock, 25 Ind L.J. 56, 56 (1949). See also Harwell Wells, The Rise of the Close Corporation and the Making of Corporate Law, 5 Berkeley Bus. L.J. 263, 307 (2008) (“Courts generally imposed a test of ‘reasonableness’ on transfer restrictions”); Stephen J. Leacock, Share Transfer Restrictions in Close Corporations as Mechanisms for Intelligible Corporate Outcomes, 3 Faulkner L. Rev. 109, 113 (2011) (“In order to be treated by the courts as legally valid, share transfer restrictions must be judicially determined to be reasonable.”); Witte v. Beverly Lakes Inv. Co., 715 S.W.2d 286, 291 (Mo. Ct. App. 1986) (“It is on the rationale that the essential attribute of a share of stock remains its transferability that only those restrictions on alienation, both reasonable and in good faith, are valid and enforceable.”); Baur v. Baur Farms, 823 N.W.2d 663, 671–73 (Iowa 2013).

Such “reasonableness” rule regarding the transfer of shares under U.S. laws is categorized as “tailored default rule” which is “based on the specific characteristics and circumstances” of the shareholders. See Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 Cornell L. Rev. 608, 670–71 (1998). In contrast, the default rule under the PRC Company Law is categorized as “untailored default rule,” because it applies to all the shareholders “regardless of the unique characteristics of [them] or [their] circumstances.” Id. The advantages and disadvantages of the tailored default rule and the untailored default rule have been widely discussed. See e.g., Id. This Article argues that it may be better for China to adopt the untailored default rule rather than the tailored default rule. The key value of the tailored default rule is that it “attempts to provide a contract’s parties with ‘what they would have contracted for.’” Michael Whincop, Of Fault and Default: Contractarivism as a Theory of Anglo-Australian Corporate Law, 21 Melb. U. L. Rev. 187, 200–02 (1997). This means the courts have to ex post second-guess what the shareholders intended to have. However, unlike the courts in U.S. that have developed expertise in dealing with corporate law issues, Chinese courts may be incompetent to do so, considering their limited experience and the lack of professionals.
domestic company from the perspective of private law. Although it may be contended that one clear difference is the nationality of the shareholders, this Article argues that such difference should not be the reason for the different treatment from the perspective of private law. In fact, a fair and equitable market is critical for the prosperity of foreign direct investments in China. Accordingly, it is hard to see any compelling reason for adopting a mandatory rule governing the transfer of shares in FC-JV while having a default rule governing the transfer of shares in domestic company.

2. The Positive Analysis of the Default Rule in the Context of FC-JV

Firstly, the default unanimous rule can increase the liquidity of shares in FC-JV. On one hand, parties could agree on a less restrictive rule regarding the transfer of shares. This is especially beneficial to parties who adopted a blank consent clause under the current mandatory law regime. Such parties clearly have a strong preference as between a tailored term and the unanimous requirement. On the other hand, for parties who may not contract around the unanimous rule, they can have detailed considerations on the transfer of shares before any dispute arises. The result is that they may agree on other supplemental mechanism to increase the liquidity of their shares, such as the right of first refusal, to compensate the compromise on the unanimous requirement. In addition, parties tend to be more rational in such ex ante negotiations than in the negotiations after the conflicts arise (which is the case under the mandatory unanimous consent rule). This can increase the liquidity of shares in the sense that they will not have irrational considerations, such as rage, in determining whether they agree to the

126 Wang, supra note 51; 赵旭东 (Zhao Xudong), 公司法修订的基本目标与价值取向 [The Basic Purpose of the Amendment of Corporate Law], 法学论坛 [FORUM OF JURISPRUDENCE], volume 19(6), at 14 (2004); 赵旭东 (Zhao Xudong), 融合还是并行: 外商投资企业法与公司法的立法选择 [Uniformed or Separate: Foreign Invested Enterprise Law and Corporate Law], 法律适用 [JOURNAL OF LAW APPLICATION], issue 3, at 15–18 (2005).

127 Under the mandatory unanimous consent rule, every shareholder has a veto right regarding the transfer of shares. This means the only way to transfer the shares is to have negotiation among all shareholders and to reach an agreement.
transfer of shares.

Second, the special considerations on the close relationship among shareholders could be taken into account through the design of default rule as a unanimous requirement rather than a majority requirement. Specifically, if the parties quite valued the close relationship, they would not contract around the default rule, taking into account the transaction cost. Moreover, according to the theory of behaviorism, parties usually have a cognitive bias called endowment effect. The endowment effect is that individuals tend to give more value to what they already have than to what they do not have. Thus parties would give higher value to the unanimous consent requirement. The result is that only if the value of a tailored term, here a less restrictive rule regarding the transfer of shares, were high enough to exceed the value of the default rule, which is the unanimous consent rule, parties would contract around it. In other words, only if the parties indeed cared about the liquidity of their shares, they would have a different rule. Thus, in many cases, the unanimous consent rule will still be the final rule governing the legal relationships among the parties.

Such result may be further ensured by the “network externalities” promoted by the default rules that analogous to voluntary standards. It is argued that the value of adopting a default rule in a contact will increase when the number of cases in which such default rule is actually adopted increases. This increased value is called “network externalities.” Thus, parties have strong incentives to adopt the unanimous consent rule where the necessity of having a more tailored term is not compelling. Importantly, unlike the standardization function of mandatory law, the default rule of unanimous consent could still allow certain flexibilities to

---

129 Id.
131 Id. at 761.
132 Id. at 774–86.
133 Macneil, supra note 24, at 121.
“avoid locked-in obsolescence.”

To sum up, the underlying policy of a unanimous consent requirement can be achieved through a default rule. As mentioned above, this kind of government interference can be allowed when parties’ preferences as between the unanimous consent requirement and the less restrictive rules are unclear or quite diverse. This probably is the case in the context of FC-JV, because its shareholders have more differences in terms of culture and investment strategies.

In a word, the default unanimous consent rule can increase the liquidity of shares while still take into account the special characteristics of FC-JV. Thus the unanimous consent rule should be shifted from a mandatory rule into a default rule.

B. Change the Approval Requirement into a Filing Requirement

It is commonly contended that the foreign investment laws in China is a mixture of public law regulations and private law regulations. In other words, the relevant laws fail to distinguish the regulations of business associations from the regulations of foreign investments. This is one of the reasons for the employment of government approval procedure, which should only be appropriate for addressing foreign investment issues, such as market entry and foreign exchange, in the regulation of the transfer of shares.

However, the consensus is that private law issues should be distinguished from public law issues, because private law regulations and public law regulations have quite different justifications and functions. Public law regulations, such as the government
approval, can be justified only if the issue would trigger significant public interests, such as national security, economic security and anti-trust considerations. In this Part, it is argued that the approval requirement for the transfer of shares in FC-JV could not be justified on these grounds. Instead, a filling system can relieve the lack of liquidity issue and is enough to protect potential public interests.

1. The Approval Requirement for the Transfer of Shares Cannot be Justified by Public Interests

As mentioned in Part II, the issue of market entry should be distinguished from the issue of exit mechanism, such as the transfer of shares. The key is whether we should regulate the exit activities of foreign investors through the government approval requirement. The answer is no.

It is admitted that the transfer of shares usually will not have material effects on public interests. The transfer of shares is just an internal issue of FC-JV that belongs to private activities. As long as such private activities do not trigger public interests, the private autonomy should not be interfered.

More importantly, there are already relevant public laws that could address the potential public interests. For example, the PRC Anti-Trust Law has been effective in 2008, which applies to any anti-trust activities within the territory of China. Thus even if the transferee of the shares may get market power through acquiring the shares, the potential anti-trust issues can still be addressed by the government. Furthermore, in 2011, the General Office of the State Council issued the Notice on Security Review to address the...
national security issues.\textsuperscript{144} The Ministry of Commerce further clarified that such security review also applies to the acquisition of FC-JV.\textsuperscript{145} To be noticed, the approval authorities are specialized central government authorities under the PRC Anti-Trust Law and the Notice on Security Review.\textsuperscript{146} Such specialization can make sure that the relevant government authorities are competent for their responsibilities. Another concern is that the exit of foreign capital may have adverse effects on Chinese economy. However, in such case, there are foreign exchange regulations to secure such public interests. Moreover, the key for foreign investors is that they can exit the particular problematic FC-JV. This does not necessary result in their exit of Chinese market entirely, because foreign investors can make investments in other FC-JVs. In other words, the loss of interests in the particular problematic FC-JV does not mean the loss of confidence in the foreign investment environment in China as a whole. Thus the general government approval requirement for each transfer of shares becomes unnecessary.

In addition, the government approval requirement is not very effective in terms of addressing public interests. As discussed in Section B of Part II, the relevant local government authority lacks the expertise and personnel. Thus it can hardly discern the authenticity and the integrity of the materials submitted for approval.\textsuperscript{147} In such case, the information in the hand of the government authority may be incomplete. However, the public interests cannot be protected based on incomplete information. In a word, the existence of the general government approval requirement cannot provide additional safeguard to public interests. Actually, it has been already admitted that the function of such general government approval requirement may just be recording the transfer of shares.\textsuperscript{148}


\textsuperscript{146} Supra note 144, art. 9; supra note 146, art. 1.

\textsuperscript{147} Cai, supra note 141, at 74.

\textsuperscript{148} Id. at 74.
2. The Positive Analysis of a Filing System in the Context of FC-JV

This Article proposes that a filing system should be adopted, instead of the approval system under which the substantive issues of all transfers of shares in FC-JV are reviewed by the government authorities. Under such a filing system, as long as the parties submit relevant information to the government authority, their transfer of shares can be closed. Specifically, there are two kinds of information that should be filed. One is the information concerning specialized approvals issued by relevant government authorities under either the PRC Anti-Trust Law or the Notice on Security Review. The other is the general information concerning the transfer of shares. The information should be divided into different categories in a filing form for the purpose of standardization. The failure to file should not affect the validity of share transfer. Instead, administrative law should be used to address the failure. The following positive analysis shows that such filing system can bring benefits to both the investors and the government.

Firstly, the filing system can increase the liquidity of shares in FC-JV. As discussed in Part II, the government approval requirement reduces the liquidity of shares in FC-JV because of two factors. One is that the relevant local governments may lack the ability to deal with complex issues. The other is that the great discretion in the hand of government authority may be manipulated. However, under the filing system, they are no longer the problems, because the government authorities are no longer responsible for examining the substantive issues underlying the transfer of shares in FC-JV. They are only responsible to make sure whether the investors have obtained approvals from specialized government authorities.

Secondly, the filing system reduces the costs of compliance significantly. Under the approval system, the grounds for approving are not transparent, which make it difficult for compliance. However, under the filing system, the rule is a very straightforward one. The only thing for compliance is to provide complete information. In addition, the standardized form can further reduce the cost of compliance. This would give investors incentive to comply with the filing requirement voluntarily.

Third, the costs of government will be reduced significantly as well. In practice, the transfer of shares is very common. The
general government approval procedure has incurred great administrative costs for the government.\footnote{Chen & Tian, supra note 2, at 74.} However, under the filing system, the work of government authorities is simplified which in turn reduces the administrative costs. Also, as mentioned above, investors are willing to comply with the rules, which can also reduce the costs of administration.

Fourth, the key function of the filing system is to gather information. Such function is valuable for the formulation of foreign investment policies. As mentioned earlier, the investors are willing to comply with the filing requirement, thus the accuracy and integrity of information provided by the investors concerning the transfer of shares will be improved. Based on such information, the government can make informed decisions. A related issue is that the failure to satisfy the filing requirement should not lead to the invalidity of share transfer because the filing system is not aiming at interfering private activities. Rather, the appropriate remedy should be the administrative method. In sum, the filing system should replace the approval requirement.

V. THE PROPOSED AMENDMENTS CONFORM TO CURRENT CHINESE POLICIES

In the Opinion on Utilization of Foreign Investment, it is emphasized that foreign investment is very important for Chinese economy.\footnote{Supra note 65, pmbl.} The utilization of foreign investment is a key issue of Chinese Open-door Policy.\footnote{Id.} In other words, how to attract foreign investments is still crucial under current policies. The proposed amendments apparently conform to such policy by making Chinese market more attractive. Moreover, it is pointed out that China should promote diversity in terms of foreign investment model.\footnote{Supra note 65, pt. 3.} As discussed in Part III, the lack of liquidity in FC-JV has forced foreign investors to shift from FC-JV into WFOE. The proposed amendment encourages foreign investors to have diverse investment model through increasing the liquidity of shares in FC-JV.

\footnote{Chen & Tian, supra note 2, at 74.}
\footnote{Supra note 65, pmbl.}
\footnote{Id.}
\footnote{Supra note 65, pt. 3.}
Moreover, nowadays, the reduction of government interference in private activities is the dominant policy in China. In the Bulletin of the Third Plenary Session of the Eighteenth Central Committee, it is emphasized that the economic reform should mainly rely on the market function.\textsuperscript{153} The shift from mandatory rule to default rule regarding the transfer of shares is exactly a special application of such market freedom policy.

In addition, the abolishment of the government approval requirement on the transfer of shares is consistent with the current administrative reform. It is pointed out that the abolishment or reduction of administrative approval is the current trend in the field of foreign investment, which can be evidenced by the adjustments of approval system in China and the self-reform conducted by the Ministry of Commerce.\textsuperscript{154} For example, the 2013 version of Catalogue of Investment Project Subjecting to Governmental Approval expressly replaces the governmental approval with a filing system regarding the establishments of certain projects.\textsuperscript{155} Although this Catalogue does not address foreign direct investment, it nevertheless evidences the change of regulatory philosophy adopted by the Chinese government.

A more significant development in the field of foreign direct investment is the establishment of Shanghai Pilot Free Trade Zone. According to the Pilot Free Trade Zone Decision, many issues regarding foreign investment are no longer subject to government

\textsuperscript{153} 中国共产党十八届中央委员会第三次全体会议公报 [The Bulletin of the Third Plenary Session of the Eighteenth Central Committee] (promulgated by the Central Comm. of the Communist Party of China, Nov. 12, 2013, effective Nov. 12, 2013) paras. 7–9, CLI.5.213228 CHINALAWINFO.

\textsuperscript{154} Ye et al., supra note 45, at 91.

At last, the abolishment of approval requirement regarding share transfer is the current trend in the world.\textsuperscript{161} There is an issue of reciprocity when China wants to develop its outbound investment.\textsuperscript{162} If China does not meet the international standard, other countries may treat Chinese investments differently basing on the reciprocity principle.\textsuperscript{163} This will definitely harm the interests of Chinese investor.

In a word, the amendment of current restrictions on the transfer of shares is imperative. Luckily, the government has already

\textsuperscript{156} 全国人民代表大会常务委员会关于授权国务院在中国（上海）自由贸易试验区暂时调整有关法律规定行政审批的决定 [Decision of the Standing Committee of the National People’s Congress on Authorizing the State Council to Temporarily Adjust the Relevant Administrative Approval Items Prescribed in Laws in China (Shanghai) Pilot Free Trade Zone] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 30, 2013, effective Oct. 1, 2013) arts. 1–11, CHINALAWINFO.

\textsuperscript{157} Id.

\textsuperscript{158} Id. arts. 4 & 7. Other important issues regarding FC-JV are also regulated under the filing system: the extension of the joint venture contract (arts. 5 & 11), the termination of the joint venture contract (art. 6), and the amendment of the joint venture contract (art. 9).

\textsuperscript{159} Id. art. 9.

\textsuperscript{160} Both the assignment of contractual right and the transfer of shares would result in a change of ownership structure of the joint venture.

\textsuperscript{161} 余劲松 (XU JINSONG), 国际投资法 [INTERNATIONAL INVESTMENT LAW], at 191 (1997).

\textsuperscript{162} Li, supra note 60, at 48.

\textsuperscript{163} Id.
shown its willingness to do so. The proposal in this Article should be adopted because it conforms to the current policies.

VI. CONCLUSION

This Article argues that the current restrictions on the transfer of shares have unduly reduced the liquidity of shares in FC-JV. Firstly, from the perspective of private law, the mandatory unanimous consent requirement gives each shareholder in FC-JV a veto right regarding the transfer of shares, which makes the transfer of shares very difficult. Secondly, from the public law perspective, the government approval requirement causes great uncertainty regarding whether the transfer of shares can be valid even when a unanimous consent is reached among the shareholders in FC-JV.

However, the liquidity of shares in FC-JV is a very important consideration for foreign investors in making their investment decisions. Some foreign investors may be driven out of the Chinese market due to a lack of liquidity. Those who still want to invest in China have great incentives to avoid the restrictions by having concealed investment or shifting their investment mode, when the other factors that have positive effects on the profitability of FC-JV have become less important. These reactions of foreign investors are detrimental to Chinese investors and Chinese economy as a whole. Thus there is an urge to solve the liquidity problem.

This Article contends that current legal discussions fail to present any effective solution to such liquidity problem in FC-JV, because they did not take into account the respective interests of different parties who have a stake in the transfer of shares in FC-JV. Accordingly, this Article tries to fill in the gap of current commentaries by providing a positive analysis of the current legal restrictions on the transfer of shares in FC-JV and considering the incentives of different parties. Further, a proposal to amend such legal restrictions is made and analyzed in this Article. It is concluded that the shift of the unanimous consent requirement from a mandatory rule to a default rule can increase the liquidity of shares in FC-JV while still take into account the special internal relationships in FC-JV. It is also concluded that the replacement of the government approval requirement with a filing system is not detrimental to public interests but can increase the liquidity of shares significantly. Moreover, it is argued that the proposed amendment
conforms to the current policies. Thus, the restrictions on the transfer of shares should be amended considering the costs of liquidity problem.
The Return of VIE-Structured Enterprise to China’s Domestic Capital Market
—A Brief Legal Analysis and Other Factors to be Considered

WU Guohua & PENG Jun & WANG Mingkai & WANG Biyu

I. INTRODUCTION

From January to June 24 in 2015, 24 out of nearly 200 China-based firms with American listings have initiated go-private deals. After reconsidering the financing channels, many Chinese enterprises that originally plan to be listed offshore are returning to China’s domestic capital market by dismantling their contractual control structure—that is, the so-called “variable interest entity structure” (the “VIE structure”). The returning of enterprises with the VIE structure to the domestic capital market has become a topical issue among investors.

The first part of this article explores the compliance issues in the course of enterprises’ dismantlement of their VIE structures and returning to the domestic capital market. Specifically, it discusses the nature of the remaining enterprise (which is planned

* Ms. Wu Guohua, Senior Partner at JT&N; J.D., Cornell University Law School; LL.B, Jilin University. Ms. Wu leads JT&N’s outbound investment practice. She has been nominated as the PRC Deal Maker of the Year by Asian Legal Business (ALB) in 2013 and 2015. She has been continuously nominated as the Most Admired Legal Expert in M&A practice by Asialaw Leading Lawyers since 2014. The author can be reached at gwu@jtnfa.com.

Mr. Peng Jun, Senior Partner at JT&N; LL.M and LL.B, China Foreign Affairs University. Mr. Peng leads JT&N’s venture capital and private equity investment practice. He specializes in private equity/venture capital investment, M&A, restructuring and IPO, FDI, international trade and WTO trade policy. The author can be reached at pengjun@jtnfa.com.

Mr. Wang Mingkai, Partner at JT&N; LL.M, Liaoning University; B.A., Harbin Institute of Technology. Mr. Wang’s practice is focused on private equity and financing. He has extensive experience representing various funds and financial advisors. The author can be reached at wangmingkai@jtnfa.com.

Mr. Wang Biyu, Summer Intern at JT&N; Class of 2017, J.D. and J.M. candidate, Peking University School of Transnational Law; B.A., Fudan University. The author can be reached at wbybill@sz.pku.edu.cn.

to be listed in China), choice of dismantling methods, equity compensation for employees and executives, tax planning, forex regulation and compliance with domestic listing rules, etc. All of these legal issues might emerge during the dismantling process. The second part analyzes the relevant factors that enterprises need to consider while returning to China, including changes in China’s national policy, the trends of industry development, the status of enterprise development, and the personal factors of the founders.

II. A BRIEF LEGAL ANALYSIS OF THE DISMANTLEMENT OF A VIE STRUCTURE

In order to return to China’s stock market, offshore-listed companies normally need to go through three steps: (1) to be delisted from offshore stock exchanges and go private; (2) to sort out the ownership structure; and (3) to be listed on domestic stock exchanges. In practice, many enterprises have established VIE structures for their offshore listing. Therefore, to sort out the ownership structure entails these enterprises dismantling their existing VIE structures. During this process, many issues need to be considered, such as the choice of dismantling methods, equity compensation for employees and executives, tax planning, forex regulation and compliance with domestic listing rules.

A. The basic legal relationship of a VIE structure and its dismantlement

Under a typical VIE structure, founders of a domestic operating company (“OpCo”) and offshore investors would first set up an offshore company (“ListCo”) in places like the Cayman Islands for the purpose of financing and eventually listing on an offshore stock exchange. Then this ListCo would form a new wholly foreign-owned enterprise (“WFOE”) in China. The WFOE would make a series of contractual agreements with the OpCo and its shareholders. As a result of these agreements, the ListCo would be able to control, receive economic benefits and consolidate the financial statements of the OpCo into its overall financial statements. In practice, for taxation or other business concerns, founders of the OpCo would usually set up an offshore special purpose vehicle (“SPV”) as the holding company of the ListCo; then the ListCo would indirectly hold equities of the
WFOE through companies incorporated in Hong Kong or somewhere else. Additionally, founders of the OpCo may form another management/employee-owned company as a shareholder of the ListCo, as a means to set up an equity compensation scheme for employees and executives.

With regard to dismantling a VIE structure, the foreign investment access limitations in certain industry sectors will influence the specific removing process. In a sector without restrictions on foreign investment, if the remaining enterprise is planning to be listed as an equity joint venture, then a typical dismantling process includes: (1) terminating the multi-level non-equity control structure including the ListCo by restructuring the WFOE and the OpCo, which could result in domestic founders’ and offshore investors’ direct control of the remaining enterprise (the WFOE or the OpCo) after restructuring; and (2) transforming the remaining enterprise to an equity joint venture. However, in a sector with restrictions on foreign investment, the dismantling process generally adopted is: (1) the OpCo along with new investors purchase stock or assets of the WFOE that controls the OpCo; (2) the ListCo repurchases all the offshore investors’ equities and the repurchasing capital comes from the share transfer transactions which eventually flows back to the ListCo; and (3) finally the ListCo terminates all the agreements concerning the VIE structure. In practice, enterprises may make some adjustments based on its specific circumstances. But the core idea is to pay considerations to offshore investors to terminate all the agreements relating to the VIE structure. Depending on the different restrictions imposed on foreign investment, the consideration could be the OpCo’s equity or cash.
Illustration: this diagram is used only for basic introduction, which significantly simplifies the situation in reality. The black lines represent the structure during the existence of a VIE. The dotted lines reflect the legal relationship existing in the process of dismantling a VIE structure. The main presuppositions are: (1) this enterprise does not have public shareholders (due to having achieved the privatization by delisting or having not been listed offshore yet); (2) the main purpose of dismantling the VIE structure is to go back to the domestic capital market; and (3) the main operating method adopted by the enterprise to remove the VIE structure is keeping OpCo as the entity to be listed in China.

With respect to dismantling a VIE structure, the following legal issues deserve attention:

- Nature of the remaining enterprise and choice of dismantling methods

The nature of the remaining enterprise planning to be listed in China could be equity joint venture or solely domestic owned enterprise. The nature of the remaining enterprise should be determined by a series of factors, including foreign investment access limitation on specific sectors, qualification requirements of administrative license, enterprises’ ownership structure, and both current situation and development trend of the main business. Based on the chosen nature, the overall aim of dismantling the VIE structure should then be decided. For example, the Catalogue of Industries for Guiding Foreign Investment (“Catalogue”)
is the main basis for classifying some sectors as restricted or prohibited for foreign investment. So with several amendments of the Catalogue, the categories of foreign investment access have had some changes. Taking the pharmaceutical industry as an example, at first, it was a restricted sector and many companies used to set up a VIE structure to circumvent this restriction. However, after the amendment of the Catalogue in 2015, the restriction on the pharmaceutical industry has been generally released. Thus, these companies could take the form of joint venture as the overall aim. Using this method, the companies could skirt the complex withdrawal issue of offshore investors by introducing offshore investors to take equity of the remaining enterprise in the same ratio as they take in the ListCo. On the contrary, because more restriction has been imposed up foreign investment in the education industry, when offshore listed companies in this industry plan to remove their VIE structure, generally the focus should be on ensuring the domestically-owned nature of the enterprises to be listed in the domestic capital market.

In addition, China is in the process of deepening its reform and both laws and regulations are updated frequently. Therefore, in determining the overall aim of the return, enterprises should keep close contact with the concerned departments, fully consult the professionals and make predictions about policy change. For instance, based on the pilot study in the Shanghai Pilot Free Trade Zone, restrictions on foreign equity ratios in operating E-commerce have been removed nationwide from June 19, 2015. Therefore, the enterprise could consider its business circumstances and choose more flexibly the overall aim of its VIE structure dismantlement.²

² Notice on Removing the Restrictions on Foreign Equity Ratios in Online Data Processing and Transaction Processing (Operating E-commerce) Business (Notice No. 196 [2015] of Ministry of Industry and Information Technology) (the “Notice”), was promulgated and came into force on June 19, 2015. It should be noted, however, that according to Notice, other license requirements should still be fulfilled in accordance with Provisions on the Administration of Foreign-funded Telecommunications Enterprises, such as registered capital and operating experience. With regard to the withdrawal issue of offshore investors, it needs to be further analyzed based on investors’ own situations and the approval process of concerned departments.
Considering the concrete operating method, dismantling a VIE structure is usually achieved through several stages, such as alteration of the shareholding and business restructuring. Different modes of acquisition and re-organization may also have different impacts on the compliance issue of future domestic listing. Thus, in order not to delay the listing, enterprises should design transaction structures one by one in conformity with compliance requirement of listing, handle taxation and foreign currency issues properly and reconstruct a clear ownership structure. In practice, matters that regulatory authorities mainly concerned with include: whether VIE agreements have been actually fulfilled; during the reporting period, whether the de facto controller has changed due to removing the VIE structure; and whether the asset ratio of business reengineering is so high that the company should be concluded as it has changed its main business.

- **Equity Compensation for Employee and Executive**

  Typically, the dismantling of VIE involves a reconstruction of Equity Compensation for Employee/Executive. It is common that plans of Equity Compensation are integrated into a VIE structure. Where the ListCo-intended ceases to be a qualified entity for oversea IPO, the plans of Equity Compensation which become unenforceable need to be reconstructed within the OpCo. Being an incorporate entity domestically, however, the OpCo must comply with domestic statutes, in particular, the provision of the Company Law which mandates a 200-person upper limit for incorporators. In practice, the management/employees will set up a limited partnership or a limited liability company to maintain beneficiary equity ownership of the OpCo.

- **Tax Planning**

  Tax planning is essential in the process of dismantling a VIE structure. As multiple equity or assets transfers occur during the process, the corresponding income taxes will be incurred. In addition, after the dismantlement of VIE structure, the OpCo and WFOE might face risks of paying back taxes due to transfer pricing and change of enterprise nature.

  In the event of an equity transfer, the overall tax cost should be at the center of the discussion. For example, typically in a dismantling, the OpCo acquires the WFOE to make payment to the shareholder of the WFOE, namely, the ListCo. According to
the PRC Enterprise Income Tax Law as well as other applicable bilateral taxation agreement/arrangement, the ListCo, albeit being a non-resident enterprise, is subject to 10% withholding tax, which is directly withheld by the income source. In short, the pricing of the equity transfer will have a substantial impact on the taxable income of the ListCo. Yet the pricing will also affect the taxable income of the OpCo in the event of a further transfer as the amount being levied is the difference between the two transfers. Being a resident enterprise, the OpCo is subject to a 25% income tax. Therefore, from the perspective of tax, the pricing for equity transfer should be determined after a comprehensive evaluation of the overall tax cost, the practice of government enforcement, and the special adjustment of the tax authorities.

The following repurchase by the ListCo from its foreign investors will incur tax liability under PRC law notwithstanding the fact that such a transaction is between two non-resident enterprises. The Announcement on Several Issues Concerning the Enterprise Income Tax on Income from the Indirect Transfer of Assets by Non-Resident Enterprises provides that a non-resident enterprise is subject to PRC’s taxation if the transaction between two non-resident enterprises is tantamount to a commercially unreasonable transfer of equity-like interest of a Chinese resident enterprise. In the context of VIE structure, a ListCo which usually does not operate any business may have a substantial risk to be held liable for withholding tax due to the likely conclusion of being “commercially unreasonable,” particularly in light of the broad wording of “all arrangements.”

Another tax-planning consideration is the tax collection issues during the VIE structure. Take tax discount as an example. The tax discount was a legacy of the dual tax rate for foreign and

---

5 关于非居民企业间接转让财产企业所得税若干问题的公告[Announcement on the Income Taxation of Indirect Transfer between Non-resident Enterprises] (promulgated by the State Admin. of Taxation, Feb. 3, 2015, effective Feb. 3, 2015), CLI.4.242968, CHINALAWINFO.
domestic entities. In a VIE Structure where the agreements for transferring profits have been effectively performed, the profits have been levied at a discounted tax rate for the WFOE before 2008 and in the five transitional years ensued. The dismantling, however, will convert a WFOE into a purely domestic entity. The disqualified entity may be ordered to return all those discounts if the WFOE exists for less than 10 years.\(^6\)

Transfer pricing is another issue that may give rise to tax liabilities. In a typical VIE structure, the OpCo transfers all profits to the WFOE via a series of contracts, including consultancy, licensing and service agreements. The transaction between two related parties may be subject to a further adjustment by taxation authorities, if the transfer pricing between two related parties fails to satisfy the arm’s length requirement.\(^7\) The recent *Announcement on Income Tax of Enterprises Making Payment to Foreign Related Entities* has further tightened the issue as it provides that payment to an overseas related party who has not functioned or has not operated will not be qualified as cost deductible for taxable income.\(^8\) In the context of VIE where the ListCo normally has no business other than being established for financing purposes, such payment under VIE agreements, if performed, will be exposed to a 25% income tax for a resident enterprise.

- Forex Regulation

Forex registration and management issues might arise during the dismantling of VIE structure. The multiple equity transfers and restructures that appear during the process are accompanied by fluxes of foreign currencies. Whereas the forex regulation in China has been largely loosened, the existing rules may necessitate registration, supplement registration and deregistration for the purpose of compliance examination in future IPO. An example is the *Notice of Several Issues Concerning Oversea Financing, Investment and Return Investment by Domestic Residents*, in

---

\(^6\) In addition to tax discount for foreign enterprises, there might have been other categories of tax discount that may be subject to collection as well following the dismantlement of the VIE Structure.

\(^7\) See note 3, art. 41.

\(^8\) 关于企业向境外关联方支付费用有关企业所得税问题的公告 [Announcement on Income Tax of Enterprises Making Payment to Foreign Related Entities] (promulgated by the State Admin. of Taxation, Mar. 18, 2015, effective Mar. 18, 2015), CLI.4.245840, CHINALAWINFO.
which a domestic resident is required to deregister if his ownership interest of a SPV ceases to exist.\(^9\)

- Compliance with Domestic Listing Rules

A transparent shareholding structure is at the core of compliance evaluation. The reality is that certain complicated VIE structures may nonetheless encounter barriers in the domestic listings. While the domestic capital markets have been on the fast pace to satisfy varied demands, and it is widely expected that certain profit requirement will be eliminated as reflected in the latest revision draft of the *PRC Securities Law*, the statutory requirement for IPO remains effective for the moment and it is likely that similar requirement such as business continuation and disclosure will remain effective even after the IPO registration reform. Thus, many VIE dismantling will eventually be examined by the caliber of current effective rules, one of which is the profit requirement. In the context of VIE, however, if those agreements that oblige the performance of a transfer of profits, the domestic ListCo-intended may not be able to provide profits that satisfy the requirement. In addition, the dismantling of VIE usually involves a series of restructuring of related parties. The complicated VIE arrangements may lead to a change of business conclusion that will postpone IPO for at least another financial year because the assets being restructured are tantamount to or in excess of the assets of the entity that launches the restructuring.\(^10\) Therefore, a carefully crafted plan should be put in place by the enterprises based on their own circumstances in order to avoid compliance risks in IPO applications. In an extreme case where historical issues make it unfeasible to circumvent certain requirement, such enterprises should reevaluate the scheduled return to domestic capital market.

---

\(^9\) 关于境内居民通过特殊目的公司境外投融资及返程投资外汇管理有关问题的通知 [Notice of Several Issues Concerning Oversea Financing, Investment and Return Investment by Domestic Residents](promulgated by State Admin. of Foreign Exchange, July 4, 2015, effective July 4, 2015) CLI.4.229243, CHINALAWINFO.

\(^10\) 首次公开发行股票并上市管理办法》第十二条发行人最近 3 年内主营业务没有发生重大变化的适用意见——证券期货法律适用意见第 3 号 [Interpretation of Section 12 of the Administrative Measures of IPO Concerning the Issuer's Change of Business in Recent Three Years—Application of Securities and Futures Regulations No. 3] (promulgated by China Securities Regulatory Comm., May 19, 2015, effective May 19, 2015) CLI.4.106834, CHINALAWINFO.
III. CONSIDERATIONS FOR COMPANIES RETURNING TO DOMESTIC CAPITAL MARKET

The companies planning to dismantle the VIE structure should focus on the legal issues mentioned above. It is also crucial that when deciding whether to return to the domestic capital market, the companies who have already had VIE structure should have a comprehensive analysis about China’s national policy changes, the trends of industry development, the condition of foreign investors, the status of enterprise development and the personal factors of the founders.

- Changes of China’s National Policy

From the policy perspective, the trend of changes of a series of laws and regulations and industrial policies is conductive to encourage Chinese companies, especially Internet companies, to return to the domestic capital market for financing. On the one hand, the expansion of the NEEQ and the appropriate loosening of the issuance conditions of GEM (China Growth Enterprise Market) provide multi-level choices for the companies’ return to the domestic capital market. The reform of securities issuance system resulted from the amendment of Securities Law is expected to make it easier for these corporations to go public, and the financing needs of the relevant companies are expected to be met in the domestic capital market.\(^{11}\) On the other hand, from the macro policy level, the State Council continues to introduce policies encouraging high-tech and innovative industries. For example, the prime minister, Li Keqiang, proposed to draw up “Internet+” Action Plan in the government work report;\(^{12}\) the State Council issued relevant opinions on promoting innovation, and has been positively researching about the IPO system for Internet and high-tech companies that have not yet profit, expediting the establishment of Strategic Emerging Industries Board,


and promoting companies with special equity structure to go public in China.\textsuperscript{13} With more specific measures coming out, the above policy changes are expected to further promote the willingness of companies to return back to domestic capital market.

We also noticed the potential impact of the Foreign Investment Law (Draft) on the VIE structure. Foreign Investment Law (Draft) clearly put the Variable Interest Entities (VIE) structure under the supervision of foreign investment, which indicates that, after the enactment of the Foreign Investment Law, VIE structure may no longer avoid foreign investment restrictions. But how to deal with the existing VIE structure is not yet decided.\textsuperscript{14}

- Industry Trends and Preferences of Investors

From the industry development perspective, the characteristics and developing trend of the industry should be important factors for companies to consider when deciding whether to return or not. For example, currently there are not many high-quality Internet companies in China’s capital market, and there are many national policies encouraging the development of Internet industry. Therefore, for the Internet companies listed abroad with high quality business, it is very likely for them to get attention from investors after their return.

\textsuperscript{13} 国务院关于大力推进大众创业万众创新若干政策措施的意见（国发\textsuperscript{[2015]32号}） [Opinions of State Council on the Policies and Measures for Promoting Public Innovation and Entrepreneurship (2015)] (promulgated by the State Council, June 11, 2015, effective June 11, 2015), CHINALAWINFO.

\textsuperscript{14} See 外国投资法（征求意见稿）[Foreign Investment Law (Draft)] (promulgated by the Ministry of Commerce, Jan. 19, 2015) art. 149. For the existing VIE-structured companies, according to Rule 3, Section 3 of Instructions of Foreign Investment Law (Draft) issued by Ministry of Commerce, there are three opinions: (1) The foreign investment companies of VIE Structure, which report to the Foreign Investment Department of the State Council that they are actually controlled by Chinese investors, can remain the VIE Structure and the relevant entities can continue to carry out business activities; (2) The foreign investment companies of VIE structure should apply to Foreign Investment Department of the State Council for the confirmation that they are actually controlled by Chinese investors; after Foreign Investment Department of the State Council has confirmed that they were actually controlled by Chinese investors, they can remain the VIE structure and the relevant entities can continue to carry out business activities; (3) The foreign investment companies of VIE structure should apply to Foreign Investment Department of the State Council for admittance license. Foreign Investment Department of the State Council shall, in conjunction with the relevant departments, make a decision based on factors such as the actual controller.
From the view of investors, domestic and foreign investors have significantly different understandings and preferences for certain industries. For example, industries with distinct Chinese characteristics, like game and traditional Chinese medicine, are difficult to get foreign investors’ attention due to the lack of comparable companies of the same type in the overseas market. However, they are more likely to get investors’ recognition in the domestic market. While, in the fields such as taxi-hailing apps, domestic and foreign companies have similar business models, and regional differences result in little influence on the investors’ interest.

- Removing Foreign Investors

For the foreign investment prohibited industries, the exit of foreign investors is the key point in the process of dismantling the VIE structure. According to the limits of existing laws and regulations, for the foreign investment prohibited industries such as network audio-visual service and press and publication industries, the companies who want to go public in the domestic market must be wholly owned by domestic investors. The original foreign investors can no longer hold the enterprise’s equities, and their equities in ListCo shall be acquired by OpCo or other domestic investors. Considering the potential high valuations after the return of companies, the price paid to foreign investors for their exit becomes the focus of negotiations among companies, the original foreign investors and the new domestic investors who have different interests.

For those industries that foreign investment are prohibited, if foreign investors intend to maintain their interest in the OpCo after the dismantlement of the VIE structure, they may exit by selling their equities to a RMB fund. The RMB fund should be a pure domestic RMB fund that the foreign investors set up in China.\(^\text{15}\) Although the problem of pricing resulting from dis-

\(^{15}\) We are of the opinion that an RMB fund with all the limited partners being domestic entities is not a pure domestic RMB fund, if its managing partner remains a foreign institution. According to 国家发展改革委办公厅关于外资股权投资企业有关问题的复函（发改办法资[2012]023号）[Letter of Reply of National Development and Reform Commission about Foreign Share Investment Companies] (promulgated by the General Office of National Dev. and Reform Comm. ’n), a fund management company with foreign nature set up by the foreign investors is still subject to admission restrictions against
crepancy of limited partners between the domestic fund and the foreign fund maintains, the overlapping of the managing partner facilitates the negotiation on pricing.

- Company’s Status Quo and Future Development

As to the company’s status quo, the company should consider the ratio of its client base and foreign business and take into consideration its development stage. For example, some companies perform well in the foreign market and their principal client bases are overseas. As to development stage, some companies are under a critical stage of growth. They need continuous financing in order to facilitate their growth in heated competition. The dismantlement of VIE structure involves multi-round negotiations, funding raisings, designing capital increase strategies and methods of acquisition, tax planning, and other plans. It often costs a considerable amount of capital and takes a long period of time.\(^{16}\)

Besides, if the company enters into the stage of maturity and establishes a leading position in the industry, valuation in the foreign market might be on the high side and thus the total amount might become so large that the scale of the domestic capital market is currently unable to accommodate. Therefore, the abovementioned two types of companies should prudently consider the timing of dismantling the VIE structure.

In the long run, if the company devotes itself to the international market or its future development requires more overseas M&A transactions, foreign capital markets are more advantageous. In cross-border M&A transactions, overseas-listed companies may freely choose their payment methods for the consideration of the transaction because their stocks enjoy higher liquidity. For example, in the recent deal where 58.com acquired Ganji, 58.com used 400 million U.S. dollars cash plus 3.4 million com-

---

\(^{16}\) Publicly available information shows that it took nearly 3 years for Focus Media from its announcement of the privatization plan in 2012 to its announcement of the assets restructure plan in June 2015.
mon stocks as its consideration of the deal.\textsuperscript{17} Besides, the transparent regulation and disclosure requirements of the foreign capital market provide guarantees for fair competition.

- Personal Factors of the Founder

The nationality, need of asset allocation and other factors of the company founder should also be considered. Not a few company founders have already obtained foreign residencies or foreign nationalities. According to the current \textit{Interim Provisions on the Takeover of Domestic Companies by Foreign Investors}, if the nationality of a natural person shareholder of the domestic company is changed, the nature of the company will not be affected accordingly.\textsuperscript{18} Nevertheless, the \textit{Foreign Investment Law (Draft)} provides that if a Chinese national obtains a foreign nationality, his investment in Chinese territory, happened before or after this law comes into force, is foreign investment.\textsuperscript{19} Therefore, company founder’s nationality has the potential to substantially affect the nature of the company and thus results in obstacles on the admission of foreign capital when dismantling the VIE structure so as to return to domestic capital market. Besides, if the founder and his/her family have certain needs on the globalization of asset allocation, the company may accordingly alter its plan on returning to domestic capital market.

IV. CONCLUSION

The development of the domestic capital market and China’s national policy changes incentivize those companies that are listed overseas and seek to return to the domestic capital market. As a critical step for the companies coming back home, we should consider admission of foreign investment, tax planning,


\textsuperscript{18} 商务部关于外国投资者并购境内企业的规定（2009）[Provisions of the Ministry of Commerce on M&A of a Domestic Enterprise by Foreign Investors] (promulgated by the Ministry of Commerce, June 22, 2009, effective June 22, 2009) art. 55, CLL4.119571 CHINALAWINFO.

\textsuperscript{19} Supra note 14, art. 159. \textit{See also} art. 160, which provides that those who obtained permanent residential right shall be prescribed by other laws and regulations.
forex regulations, and other legal factors in order to avoid future substantial obstacles in the stage of issuance verification during the dismantlement of VIE structure. Besides, the company should decide whether to come back to the domestic capital market according to national policies, original investors’ status, the company’s development stages, and other factors. From national policy perspective, the abovementioned Foreign Investment Law (Draft), Securities Law and relevant laws and regulations are under legislative process. It is expected that a set of specific measures implementing the national encouraging industrial policy will be adopted. China’s gradual fulfillment of its promises upon entering the WTO will also have its effect. In short, companies should consider the abovementioned factors as a whole and prudently make the decision of coming back.

Note: This article was originally published in Chinese on China Legal Review, a LexisNexis product.

Disclaimer: This English version is translated by editors at the Peking University Transnational Law Review without the authors’ review. The Law Review is solely responsible for the translated work.
Policy Above Law: VIE and Foreign Investment Regulation in China

Thomas Y. MAN*

Public policy is an essential source of law. It provides not only some fundamental principles underlying the spirit and basic contours of legislation, but also the rationale and practical considerations guiding the enforcement and adjudication of law by the administrative and judicial branches of a national government. The dynamic interplay between policy and law, to a large extent, displays the central characteristics of a legal system. In a system where law is (relatively) more uniformly and strictly interpreted and enforced, policy will generally stay at the background in favor of published statutes, regulations and rules, which gives market participants an enhanced sense of certainty and predictability when relying on established rules to enter into commercial contracts and conduct business activities. By contrast, in a system where policy frequently takes precedence over established rules, strict compliance with law tends to become an option, instead of an obligation, thus creating a sense of (relatively) lesser degree of certainty and predictability of law for market participants. The colorful and elusive life of Variable Interest Entity (VIE) in China in the last 15 years has afforded us a fertile test field to observe the dynamics between policy and law in China’s foreign investment regulatory regime.

For anyone who is interested in learning about the latest development of VIE in China, I highly recommend the preceding note by the JT&N lawyers who are true experts in this fast moving area. This note provides lucid, comprehensive summary of the issues and practical solutions to execute a VIE dismantling exercise. While questions remain with respect to some practical tips offered by the note,¹ its observations are perceptive and its advice is practical, balanced and firmly based on rich practical experience. For

* Professor from Practice, Peking University School of Transnational Law, Shenzhen, P. R. China.

¹ One example relates to the interesting suggestion that foreign investors wishing to continue to hold interests in an onshore OpCo after dismantlement of the VIE structure may set up a pure domestic Renminbi fund (纯内资人民币基金) to hold such interests. If the definition of “control” used in the Draft Foreign

© 2015 Peking University School of Transnational Law
my purposes, it also provides an excellent starting point to peek into the policy drives that define the paradigmatic changes of VIE over the past 15 years.

Like its immediate prototype, the now infamous “Chinese-Chinese-Foreign” (C-C-F) structure, the VIE structure in various forms emerged in the early 2000s to tackle the seemingly irreconcilable contradiction between two policy objectives. On the one hand, it is the national policy to prohibit or restrict foreign participation in certain industrial sectors (e.g., value-added and basic telecom services, broadcast radio or TV networks, news websites, networked audio-visual programming services or Internet cafes) that are deemed to be sensitive, thus off limits to foreign investment. This policy has been proclaimed in many government documents, most notably the Catalogue Guiding Foreign Investment in Industries, a list of industrial sectors divided into different categories for foreign investment (i.e., prohibited, restricted, permitted and encouraged). On the other hand, it is the national policy to jump start China’s nascent Internet and telecom services industries. When it became clear that the domestic capital market and other financial infrastructure were incapable of providing the financing badly needed by the burgeoning Internet and telecom services companies, the founders of these companies, mostly individual entrepreneurs, turned to foreign capital. Faced with the legal restrictions on foreign involvement in these industries, the Chinese founders adopted the VIE vehicle which, as described in detail in the preceding note, enabled foreign investors to invest in these in-

Investment Law is to be adopted, it is difficult to understand how this pure domestic Renminbi fund set up by the foreign investor would not be treated as “foreign investment,” thus not being subject to applicable PRC legal restriction or prohibition in the related sectors.

2 China Unicom adopted the C-C-F structure in the 1990s to circumvent legal prohibition of foreign investment in the telecommunications sector. It was abandoned by market participants after it was officially declared “irregular” in 1998.


© 2015 Peking University School of Transnational Law
dustries by way of contractual arrangements, instead of direct equity ownership. The Internet portal Sina was one of the first Chinese companies to use the VIE structure to attract foreign investment and complete its listing on NASDAQ in 2000. Although this structure was not officially or publicly blessed by the Chinese government, Sina and other pioneering Chinese Internet companies were able to obtain enough unofficial comfort from the Chinese regulators in order to satisfy the listing requirements of the foreign stock exchanges, mainly in the U.S. and Hong Kong. As a result, this structure has been widely adopted by other Chinese companies to execute their IPOs and listings in foreign stock markets. Within 10 years, about half of the more than 200 Chinese companies listed in the U.S., including most of China’s well-established Internet companies, used VIE structures.4

From a strict legal analysis, the VIE structure, no matter how elaborate in its form, is clearly a vehicle used by the Chinese founders to circumvent the proclaimed legal prohibition or restriction against foreign participation in the relevant industrial sectors. First, under the Catalogue Guiding Foreign Investment in Industries and related government regulations, there is no distinction between foreign participation by equity investment resulting in equity ownership and foreign participation by contractual arrangement resulting in effective control. Thus, it is illogical to conclude that a prohibition or restriction against foreign participation will apply only to equity investment by foreign investors, but not to foreign investment by contractual arrangement that gives effect control of the company to the foreign investors. Second, the PRC Contract Law, which governs many of the onshore agreements under a VIE arrangement, invalidates a contract if this contract is held to “conceal illegal purposes with a lawful form.”5 If the PRC Contract Law, the Catalogue Guiding Foreign Investment in Industries and other relevant statutes and regulations are to be properly interpreted and enforced, it is not difficult to detect the non-compliance

elements embedded in the VIE structure. At the minimum, the arguments against the VIE as inherently non-compliant would easily overwhelm any arguments in favor of its compliance and legal validity.

However, faced with these legal difficulties, the VIE structure has not only survived, but also become more and more commonplace. The multitude of risks—legal, regulatory and contractual—noted by lawyers, accountants and other professionals in connection with VIE based foreign listing and other financing projects, have never manifested in any meaningful fashion to discourage foreign investors, institutional as well as individual, from investing in these projects. The most important reason for the VIE’s survival and even expansion is that the Chinese government, mainly the Ministry of Commerce (“MOFCOM,” the foreign investment regulator), the Ministry of Industry and Information Technology (“MIT,” the Internet and telecom market regulator), the State Administration of Foreign Exchange (“SAFE,” the foreign exchange regulator) and the China Securities Regulatory Commission (“CSRC,” the securities market regulator), has not explicitly challenged the legality of VIE structures. Market participants appeared to have interpreted this tacit acceptance by these key regulators as a gesture of permissibility. Although there has never been any official recognition, it is highly possible that individual officials of these regulators have given oral assurance or even encouragement to market participants in informal consultation sessions which take place frequently in the Chinese regulatory process. It is reported that some individual regulators have credited

6 The following disclaimer is typical of this type of warning against VIE risks: “The People’s Republic of China government may not agree that these arrangements comply with PRC licensing, registration or other regulatory requirements, with existing policies or with requirements or policies that may be adopted in the future.” Alibaba’s Prospectus, at 40, quoted in Rivers Lan, VIE Structures in China: An Updated Overview (revised Feb. 9, 2015), EGER (Feb. 11, 2015 12:00 AM), http://www.eigerlaw.com/de/nachrichten/314-qvie-structures-in-china-an-updated-overviewq-now-available-for-download (last visited July 30, 2015).

7 There have been a few isolated occasions in which one or more individual regulators attempted to restrict or curtail the use of VIE structures within a specific industry or a specified scope, but none of them has mounted to a general attack on VIEs as legally impermissible instruments. See David Roberts & Thomas Hall, VIE Structures in China: What You Need to Know, TOPICS IN CHINESE LAW, Oct. 2011, available at http://www.docin.com/p-288038261.html (last visited July 30, 2015).
the VIE structure for fostering China’s Internet boom, which is probably factually accurate. These same regulators and their colleagues might also take pride, albeit covertly, in themselves for their pragmatism in enforcing the laws and regulations affecting the VIE structure. At the same time, these regulatory agencies have preserved wide discretion in disallowing VIEs when and where they choose to by maintaining official silence on the legality of VIE structures.

The posting for public comment of MOFCOM’s draft PRC Foreign Investment Law (“Draft FIL”) in January 2015 signified that the Chinese regulators are prepared to break their silence on the VIE structure. The Draft FIL provides that a domestic entity established in China that is “controlled” by a foreign investor will be deemed to be a foreign-invested enterprise, even if the domestic entity is directly owned by Chinese shareholders. Specifically, “control” is defined to mean, among others, “the ability to exercise decisive influence over a company by way of contractual or trust arrangements.” If the Draft FIL were to be enacted in the current form, it would potentially affect the hundreds of companies with a VIE structure, especially those operating in a sector in which foreign participation (not only by equity ownership, but also by control through contractual or trust arrangements) is either prohibited or restricted. While MOFCOM has declined to grant grandfather treatment or a grace period to the companies with VIE arrangements, it has no intent to wreak havoc in the market by invalidating all existing VIE structures. An explanatory note (“Explanatory Note”) accompanying the Draft FIL MOFCOM indicates that it contemplates three possible approaches to the companies using a VIE structure in a restricted or prohibited sector, all pointing to

---

8 “My point of view is that VIE is very good and without the VIE structure, China’s Internet industry would not develop so fast,” said one MOFCOM source involved in the industry’s international VIE discussion. Another MOFCOM source said, “Currently MOFCOM doesn’t require all the VIE companies to notify their ongoing M&A deals with MOFCOM under the foreign investment policy.” Quoted in Shaw, Chow & Wang, supra note 5.


the direction of possibly preserving the VIE structure as long as foreign control, as defined in the Draft FIL, is eliminated.

Although it is still not certain if and when the Draft FIL will be enacted into law, the market has taken the cue from the MOFCOM attitude towards VIE structures, which in turn fueled the rush to dismantle the VIE structures and/or delist from the foreign stock markets. Some of these companies will seek listing in the more developed and capital-rich domestic capital market. Whether by design or pure chance, MOFCOM’s newly revealed official position on VIE structures is conveniently coinciding with the maturity of the domestic capital market, which makes it possible for the Chinese Internet and e-commerce companies that have been relying on foreign capital via a VIE arrangement to switch to the domestic capital market to satisfy their financing needs.

For the Chinese regulators and market participants, this appears to be a win-win scenario. The companies (especially their Chinese founders) win because the VIE structure enabled them to utilize foreign capital when domestic financing was not available, and they can now “return home” when domestic financing becomes adequate. The regulators win because, by exercising flexibility and pragmatism, they have been able to fulfill two contradictory policy objectives with different emphases at different times. Their “salutary” neglect of the VIE structures’ non-compliance with PRC laws and regulations since 2000 provided vital regulatory support, albeit tacitly, to the start-up Chinese companies thirsty for foreign financing, fueling their phenomenal growth. With the maturity of the domestic capital market, by adopting a newly crafted definition of “control” in the foreign investment regime, the MOFCOM has shifted regulatory emphasis to strict enforcement, thus shutting down the door for foreign participation, direct or indirect, by equity investment or contractual arrangement, in the sectors in which foreign investment is prohibited or restricted, without invalidating most of the VIE structures already in place.

But this win-win outcome has not been achieved without victims. On the surface, foreign investors, individual or institutional, who have participated in the VIE game and, if lucky, have made

good returns on their investment (for example, through buying Chinese Internet companies’ stock at deeply discounted prices in a foreign stock exchange), are poised to lose as they aren’t likely able to continue this game much longer. However, their loss, if any, would not be real in the sense that they shouldn't have been given the opportunity to invest in these companies in the first place, if the Chinese regulators had done their job to strictly enforce, as they should have, the applicable PRC laws and regulations.

The real victim, in my view, is the dignity and credibility of PRC law. MOFCOM and other Chinese regulatory agencies, as gatekeepers of the Chinese foreign investment regulatory regime, have chosen to ignore those VIE structures that are problematic in complying with proclaimed statutes and government regulations restricting or prohibiting foreign participation in enumerated sectors. They did this apparently for a policy reason—launching China’s Internet sector onto a fast track. But in the process, they have discredited the authority of the very laws and regulations they are charged with the responsibility to strictly enforce in a uniform and consistent manner, taking policy above the law. While administrative discretion is necessary, it must be confined within reasonable and legally permissible limits. Pursuing policy objectives at the expense of manifested legal requirements should not be a reasonable and legally permissible way to exercise administrative discretion. These legal requirements, once proclaimed in published form, must be strictly observed by market participants and regulatory agencies alike. The official authority to enforce legal requirements is not a ticket to ignore or selectively enforce these requirements. In dealing with the VIE structure, the Chinese regulatory agencies should have taken one of the following two courses of action: (1) strictly enforcing the laws and regulations prohibiting or restricting foreign investment by disallowing non-compliant VIE structures in the related sectors; or (2) seeking to amend these laws and regulations to eliminate the relevant prohibition or restriction so as to make VIE structures compliant. Instead, these agencies have taken policy over established rules, resulting in diminished respect for black letter law and, more seriously, deeper distrust of the Chinese legal system by market participants, domestic and foreign.

From a more practical policy perspective, diminished respect
for black letter law, coupled with unprincipled exercise of administrative discretion, will induce a weakened sense of certainty and predictability of law and law enforcement, creating long-lasting negative impact on the market participants’ perception of the China market as a desirable place to conduct business. Thus, a present policy gain in promoting the development of China’s Internet industry may produce long-term loss in the market’s confidence in China’s foreign investment regulatory framework. Hopefully this lesson will not be easily overlooked by the Chinese regulatory agencies.
“Theory Without Practice Is Lifeless; Practice Without Theory Is Thoughtless”: A Conversation with Harold Koh

Transcribed and edited by Helen JIANG

Professor Harold Koh visited Peking University School of Transnational Law on 14 March 2015 and gave a talk titled *U.S. Engagement Through the Respect for the Rule of Law and Use of “Smart Power,”* where he shared insider stories about the Obama Administration’s foreign policies based on respect for the rule of law and the use of “smart power.” Professor Koh is the Dean and the Sterling Professor of International Law at Yale Law School. He previously served as Legal Advisor to the United States Department of State and as Assistant Secretary of State for Democracy, Human Rights and Labor. Transnational Law Review editors thereby took the opportunity and spoke with this world’s leading scholar on a variety of issues.

You have steadfast belief on sticking to first principles such as human rights. How did you form this belief? Does any person or any life event have an influence on what you believe in?

My father grew up in a small village in Jeju Island in Korea, and was the first person to study law there in 1949 under Japanese rule. He later gained the scholarship to go to Harvard. So he was the first person to go to Harvard and the first Korean to study law in America. That’s how I was born in America. My mother is a sociologist. She is from a very wealthy family in Seoul and came to America during the same period as my father. In fact, if they were in Korea they could have never got married since my father was so poor. They have six children. Two of my brothers are doctors; one of them is the Assistant Secretary of Health, one of the top ranking high officials in America.

My father was only 35 years old when the government of South Korea collapsed. They had the first free election. My father campaigned for a friend of his to be Prime Minister and he was elected. Suddenly my father was asked to be the Ambassador to the United States, which was the most important diplomatic position
in the Korean government. This was the time when JFK became the President. So we moved to Washington. My father had a great time. He was going to the White House and met all these people from National Security Council, and they are all his friends from Harvard. Then one day one of his friends said, “I have some very bad news. The government you are serving will be overthrown by military coup d’état in the next few days.” My father was afraid this would happen. So he went to Seoul. During the Cabinet meeting, my father told them this was going to happen. And they said, “No, no, no, General Park Chung-Hee will prevent this from happening.” It turned out the General did the coup d’état and became the President. My father came back to America, discouraged. They had a meeting with twenty senior people. My father said to everyone, “I don’t know the rest of you. But I cannot serve a military government.” Everybody else then said, “I can’t serve a military government either.” So they rolled down a piece of paper with words “I will not serve a military government” on it and passed around the table. Everybody signed it. But one year later, every single person broke his promise, except my father. The people in the room became Ambassador to Japan, Ambassador to the United Nations . . . My father was unemployed, and he had six children. Many years later, I asked him, “Did you regret this decision because you could have been the Prime Minister of Korea?” He said, “Who wants to be the Prime Minister of a military government? They have no principle. I don’t care.” He said, “I am a teacher and a teacher is the best thing you can be.”

At the time his friend, the Prime Minister, was under house arrest. There was a rumor that the military government would execute him. So my father went to the U.S. National Security Advisor, “Is there anything you can do to save the life of the Prime Minister elected by the Korean people?” The Deputy National Security Advisor said, “We know where he is and I guarantee you he will not be harmed.” My father was amazed that this guy in Washington could make this kind of promise. At the end of the meeting, this Advisor asked my father, “So what are you going to do next?” My father said, “I have no job. I have six children.” The advisor asked, “Can you teach law?” My father said yes. “My brother is the Dean of Yale law school in Connecticut. Let me call him.” So he picked up the phone and talked for a few minutes. Meanwhile my father was sitting there, and he thought there was no way that anything could happen because of such a short telephone call. My father
then said, “So there is no opportunity for me in Connecticut?” The Advisor said, “Oh no, my brother asked, ‘Can you get there in one week?’” One week later, he took off with one suitcase, got on the train. And forty years later, I am the Dean of Yale Law School. That’s America. That’s one reason I love America. Many people don’t like things about America but it’s a land of tremendous opportunities, and save people’s lives from around the world.

In College I went to Korea and got invitation from the Korean Ambassador to Japan to come to his house for lunch. He had a beautiful house, a driver, and a beautiful car. I didn’t know why he invited me. He said, “You know your father is my friend.” I said, “You know my father would be impressed by your house.” And he said, “Your father is everything. I am nothing.” I was surprised by this, so I called my father, “What does he mean?” My father said, “That guy was my best friend. He was the one who I thought would never break the promise. He was the last one to give in. And he felt guilty forever.”

So finally in 2000, I went to Pyongyang and met with Kim Jong II and on the way back, we went to Seoul and we met the Kim Dae-Jung, who was the President of Korea. I was with the Secretary of State Madeleine Albright. As the meeting began, he said, “Before the meeting, I want to say in the room sit the son of my hero who stood up for democracy.”

So why do I tell you these stories? Because the principle is more important than the political position.

You talked about sticking to the principles based on your father’s and your personal experience. But as a legal advisor of State Department, is there any situation where you have to compromise the principles so as to be pragmatic or to better serve the national or social interests?

I don’t feel like I have to compromise anything. First of all, I have a lifetime job at Yale. (Laugh.) I never defended anything or said anything I didn’t believe. Why should I? But in meeting when I’m arguing with someone, sometimes they try to threaten you. When you are the Legal Advisor of the State Department, there are legal opinions written just like any opinions of the judges. You step into this role and have to defend these opinions. They don’t care what I wrote as a law professor. But if I write an opinion, it is an
opinion from the Office. That is what counts. The clients have the free will to do what they want and my job is to tell them whether it’s legal or not. They have the right to do it even if that’s not my choice. When you are a professor, you say whatever you feel like; it’s a lot easier to be a professor. The interesting thing is that I wrote a lot so people can find later and asked, “Is this sentence inconsistent with that one?” The problem is that many people are lazy; they don’t read your whole articles.

Here is a funny story concerning U.S. ratification of CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women. In Belarus, a country ran in a Soviet style, there is a holiday called “Mother’s Day.” But on this day they show women can only work in the home instead of working in the market place. So this Mother’s Day is a celebration of the traditional gender role and the CEDAW Committee sees this holiday as discrimination against women. When I was testifying in the hearing, a guy said, “I see you support the CEDAW that opposes the Mother’s Day. But I love my mother.” (Laugh.) It’s too easy to take one line and twist it around for your own purpose.

A guy once came to me and said, “I want to read to you what you wrote in 1990, which was inconsistent with what you say now.” I said, “So you think you should trust that as opposed to what I am saying now? This is 25 years later. I have a lifetime of experience. Believe me now. Don’t play ‘gotcha.’ Grow up.”

How is it like to be the Dean of the best law school in the United States?

I started in Yale from 1985. I clerked for Justice White in the Supreme Court. Then I worked for a big international law firm and did international arbitration and dispute resolution. I started to teach a class called Transnational Law, now called Transnational Business Problems, also a book where I am the co-author. I taught international business transactions, international arbitration, civil procedure, international organizations, WTO law, U.S. foreign relations and then human rights. In 1998, I was asked to join the Clinton Administration as Assistant Secretary of Human Rights and did that for 3 years. I went back to Yale and became the Dean for 5 years. When Hilary became the Secretary of State, she asked me to be her Legal Advisor.
It’s a great experiment to see you all doing this transnational law—now a global enterprise. When I was the Dean, we are debating the question whether to offer courses in transnational law. One professor said, “I think we should stick to what we do best.” I said, “Yale in 1835 was the best law school in the State of Connecticut. The faculty and the Dean made the decision, ‘we will teach U.S. law.’ We are in the exact same moment now. We will teach transnational law. Because Yale is the best law school in America.”

Yale is ranked the best law school 30 years in a row now. I’m very happy about that. I was happy that when I was Dean, we never went to number two. (Laugh.)

*It’s said that Hilary Clinton took you from law school to Washington D.C. Can you share with us some interesting stories about you and the Secretary of State?*

Hilary Clinton is a very wonderful person. She is incredibly smart, and an incredibly nice person, too. I’ll tell you two stories. I was going to the United Nations when I was her legal advisor. I took the train from Washington to New York and got off at Penn Station and I had to get across town. There was no taxicab. But there are a number of people driving this minicab—they are like bicycles where you can sit on the back seat. There is a woman asking me where I was going. I said United Nations. She said it was only 20 minutes. So I said OK. She was driving very fast. There was a huge screen showing Hilary Clinton. She said, “Oh I love Hilary Clinton. I love Hilary Clinton.” I shouted, “Why you love Hilary Clinton?” She went, “She is a woman, I am a woman; she is strong, I am strong. She is my hero.” She kept talking about her. When we got to the UN, I went out, and said, “Barbara, so you really like Hilary Clinton. You know, I work for Hilary Clinton.” She said, “No!” and then said, “Give her my card. Tell her, she’s strong; I’m strong.” Next day at the end of the meeting, I talked to Hilary Clinton, “I want to give you this card.” I told her the story and said, “You know what, she really loves you.” So Hilary Clinton wrote her a long email. She wrote, “You are strong, I am strong.” Nobody does this. This is the kind of thing she does very best.

Here is the other story. United States did not ratify the *Convention on the Law of the Sea*. But there have been many attempts. Hilary Clinton is supposed to testify before the Senate at 9 a.m. on
Monday. She’s coming back from China on Sunday at 5 p.m. She asked me to prepare the materials for the Law of the Sea. We composed five big books with everything one needs to know about the Treaty. She had from 6:30 p.m. to 9 a.m. to study. The guys from her office called me and said, “This is too much. The plane is going to be late so you need to reduce the size.” We outlined everything and reduced it to about one-tenth as much as the original version. Obviously the plane was even later and finally landed at midnight. I was sleeping and the guy in her office called me up, “Do you have any more information about the Law of the Sea?” “What do you mean?” He said, “She asked, ‘Is this all that is? I know there should be more stuff.’” I said, “You have 5 notebooks.” It’s 2 in the morning. She was testifying in 7 hours. Next morning at 9, I went to the hearing. She came in and her assistants were carrying the notebooks. In every single one, there were pages with yellow tab. She highlighted every single page and for 7 hours she knew everything, one hundred percent. Senator in the hearing asked her questions and she responded “if you look up on Page 270 . . .” It was the most astonishing performance I ever saw.

What are the teeth of the international law compared with the traditional power relations?

The story of the 21st century is the dispersion of power. Individuals have power. Corporations have great power. What is the 30th largest economy in the world? Walmart. International law is an important tool for guiding conducts. Now, many people including some people in the U.S. Congress think international law is a strict “jacket,” and is constraining. But I say international law frees us. When I was your age and wanted to come to China, first—I couldn’t come! After normalization, it takes years to get a visa. If I made a trip, I had to get travelers’ cheques. There are only certain airlines that I can fly. A few days ago, I went to New York and New Jersey; I showed my visa; I went to an ATM machine; I drew out Yuan; I came down to Shenzhen; I’m speaking to you; I leave tomorrow through Hong Kong. International law made that possible—there is so much freedom that didn’t exist before. When I was a college student I travelled from London to Paris to Rome to Athens. Every single stop I had to show my passport. It took forever. International law opens up the whole states. Europe now is an open economy. So we make international law serve our purposes. Some
people say the strong countries can violate international law and get away with it. Like Russia can violate the international law in Ukraine. I’ll tell you what, countries that screw with international law have to pay the price, huge price, like Russia is right now in deep trouble—anctions are being imposed.

My point on this is international law is a very powerful factor no matter you like it or not. It makes us independent and interdependent. There are many ways to which you can react to a violation. There are so many more powerful entities to restrain even the most powerful country on earth. Secondly, there are some problems you cannot address environmental problems without international law. Powerful nations may have the capacity to influence the system but no one should believe, they certainly don’t believe it, that they are free of its influence.

Do you think there is a conflict between rule of law and the “smart power” including human rights? The former one is “hard law” under which everyone should abide by whereas the smart power often means utilizing all resource possible to achieve certain aims.

I disagree that on one side there is rule of law and on the other side there is human rights. I think the two are connected. Rule of law in the U.S. can mean due process of law, and equal protection of the laws; that’s human rights. I don’t see there is a dichotomy. There is a difference between hard power and other kinds of power. No country can live on military might alone. How can country generate solutions to problems? The answer is pretty simple: coalitions, multilateral frameworks, the agreed-upon rules, which mean international law, and then you combine those tools with tools of development, you combine them with initiatives from public entities, and you leverage those legal rules into a solution. That’s smart power.

There is a tendency to exaggerate the hard power. You cannot defeat terrorism by hard power alone. You ought to persuade a lot of people that their future is better if they do something else other than killing lives of others. That means education, cross-cultural relationships, collective actions and private investment. That’s smart power. Smart power means using international law. Smart power is not just a good strategy; it is the only strategy for us to go
forward.

On the recent joint efforts between U.S. and Iran against the ISIS, do you think there is any international law available to regulate the war against such a non-traditional force, which has no sense of abiding by the jus in bello?

The alternative to making a deal with Iran is to use nuclear weapons to take out their nuclear reactors, and that will start a war. If that’s the alternative, why don’t you want a deal? I’m an international lawyer and I believe when there is no civilization, we use force, for everything. The advance is that we use laws instead of force. And part of the law is to make agreements and abide by them. Syria agreed to the law and removed its chemical weapons. It is possible to have more control by legal agreements, and then monitor it.

We have an expression, “The enemy of my enemy is not my friend.” ISIS is terrible and crazy, cutting off innocent people’s heads, including the journalists. I had a moment testifying before the Senate. One Senator started with, “Professor,” you know in Washington if they call you “professor”, it means they think you don’t know anything other than what’s in the ivory tower, and is disrespectful, so he continued, “Last time I checked, terrorists didn’t sign the Geneva Conventions.” I said, “Senator, last time I checked, the whales didn’t sign the Whaling Convention.” “What’s your point?” “My point is this is not a contract. This is a minimum standard of treatment. It is not about who they are. It is about us and who we are.” We don’t torture ISIS. It’s not about a deal. I think same thing applies here.

Now here is the catch. We have the international armed conflicts such as between the U.S. and Germany. We also have guerilla groups fighting inside the territory of Colombia—a non-international armed conflict. But what about U.S. versus ISIS? This is a state against a non-state. The Court held when a state is fighting a non-state, it is a non-international armed conflict because being international means having two nations. But the rules apply to both cases. They are not 100% the same. What we need to do is TRANSLATE.

Technology changes faster than bomb. If I clicked a button on a computer, I destroyed the cyber-system of several countries.
Is that controlled by *Geneva Convention*? In 1949, they didn’t think about cyber war. How about I clicked the button that opened the dam, which flooded and killed a million people? Why is that different from bombing the place? Exactly the same thing. 21st century’s problem, 20th century’s law. There are two ways to think about this. One is there is no law. Law does not apply. It is a black hole. But the other approach I call “translation.” Now what’s the difference? We have to figure out what the rules are and translate the past principles to the new situation. You can argue about translation. Two people can translate the exact same text differently. But at least they are trying to capture the spirit of the law. One is the rule of law approach; the other one is anti-rule-of-law. People can disagree. But at least we are making good faith efforts. If you don’t agree, come up with something else. If you don’t think that is the right translation, what is the right one? We can have a legal debate.

*Why the US did not ratify the Rome Statute that established the International Criminal Court (ICC) in 1998?*

There are two reasons. How many votes does it take to ratify a treaty in the Senate? 67 out of 100. How many votes does Obama have? 48. 48 is less than 67. I think it has nothing to do with what the American people favor. We have the system that requires supermajority. So many people misunderstand this—getting 67 votes is almost impossible, and that’s why US ratified so few treaties. But this doesn’t mean the U.S. is not trying to follow the treaty. Some countries ratify and they never comply. Other countries comply but never ratify. I’d rather be in the second group.

The other reason, which I think we need to be realistic about, is that the U.S. has 200,000 troops outside the United States. There are worries that the guys will be charged before the ICC. Some of the soldiers got prosecuted. The issue is that we need to change the position, not to change the law. When I came in, the U.S. opposed every prosecution. And now U.S. is supporting the prosecution. The transformation was 180 degrees. It is a long process. One thing is because of the U.S. system, which is very slow to ratify international courts. It takes years to ratify the International Court of Justice. It will take a long time to ratify the ICC.
You are serving very sophisticated clients such as Clinton. How does it different form serving common clients? How to deal with them when they have strong views on a matter that contradicts your opinions on what is best?

There are two things you always ask, “Is it lawful, and is it wise?” There are things that are lawful but not wise. What does “lawful” mean? If client wants to do something unlawful, I’ll tell them and show my disapproval. I’ll quit if they do that. But when my clients want to go for a different but lawful way, I’ll tell them that’s “lawful but awful.” But you have to defend it if your client wants to do it. So the idea here is, “never say no when the law and your conscience say yes. But never say yes when the law says no.”

How do you think of the doubts and criticism that the United States is intervening into other countries’ domestic affairs in the name of universal principle of human rights?

First of all, human rights are universal. There is no other standard. I always heard some officials saying, “Asia has a different standard for human rights.” I don’t think so. Second, the sovereignty of a country is not absolute when it comes to the rights of its own citizens. The Nazis killed 8 million Jews. Is that protected by sovereignty? No. There is a limit of what you can do. If you are protecting an individual when its own state does not, it is not illegal in my view. It’s a matter of international concern.

The issue of human rights is one of the national interests of the United States. If there is no human rights in a country, people will flee. Why don’t you deal with the issue as a source rather than deal with the symptom? My view is America is a nation founded on human rights.

I’ll tell you a great story. In 1999, I went to Istanbul, Turkey, to attend a meeting of OSCE, which is a human rights body joined by some 40 countries. This was the time when Chechnya was being pounded by Russia, and Boris Yeltsin kept saying it was an internal affair. Bill Clinton was supposed to make a speech, and he started, “I’d like to say a few words about our friend Boris. The most exciting moment of my political life was when you stood on the tank in Russia and said ‘they have to kill me if they want to take democracy from my people’. The authority at that time came to arrest you; nobody on this table says that is an internal affair. And I think the
Another very important thing: the most impressive human rights people I know are so happy and funny, all the time. They are never defeated. You never know they had had tough days in their lives. When in 2000, Nelson Mandela came to the UN, an ambassador asked him, “Isn’t it incredible that you spent 26 years in prison? Didn’t you ever get deeply discouraged?” Mandela said, “You know, in those days, I’ve got a lot of reading done. Today my life is so busy and sometimes I miss those happy times.” (Laugh.) At that moment, I knew this is how this guy survived, and became the President of the country.