

GOING TRICK OR TREATING ...

LESSONS FROM THE ALSTOM CASE

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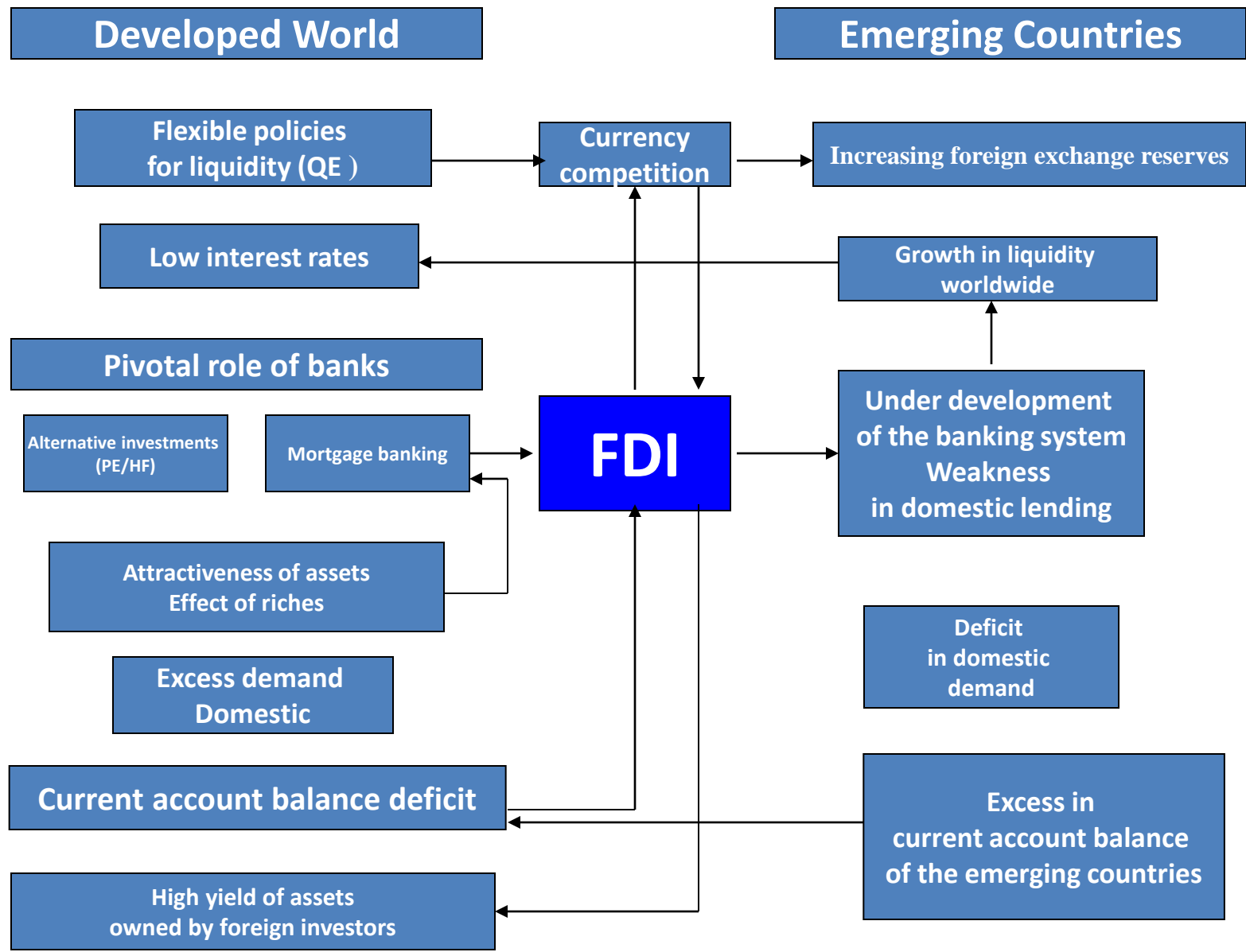
Purpose of this Paper

- A “two-face” State (like a “two-face market”) or a “schizophrenic” State: the State as Stakeholder (“Going Trick”) or the State as Shareholder (“Treating”)
- Note: this distinction does not exist in European law
- Test for modeling the role of the Stakeholder State (as compared to the Shareholder State):
 - Based on the example of the French State's behavior in the Alstom case
 - Through the prism of rules in European law (namely competition)
- Work by: Frison-Roche M-A. (1998), (2013), (2014) ; Idot L., (2003) ; Polares-Maduro M. , (2006) ; Ritleng D. , (2008) ; Dubout E. , (2013) ; Rapp L. (2011), (2014)

World Economic Context

- A basic principle : the “*Free Movement of Capital*” (WTO Treaty, 1994 ; Treaty of Lisbon, TFEU, 2007)
- Recent evolution in the conditions of Emerging Countries: *until present, they were investment recipients, they are becoming capital exporters* (see next slide)
- Currency competition within the Developed World (while in the emerging markets, currency should appreciate)
- Attractiveness of developed countries' assets: e.g. reasons behind Chinese investments in France (4.2 billion Euros in 2012, that being 16 times higher than in 2005): (i) Guarantees points of entry into French territory for exports (Toulouse-Blagnac Airport); (ii) Pay low prices to acquire French enterprises on the verge of bankruptcy to develop new business in Asia (Fosun-Club Med), (iii) Realize capital gains (real estate) and participate in real estate speculation (Beaugrenelle Shopping Centre in Paris); (iv) Buy in France, the Rule of Law which is lacking in China (consumer protection versus food production scandals: e.g. 100 million euros investment by Synutra in the Breton dairy cooperative Sodiaal)
- Certain assets are strategic for the host country; patriotic reflex (regulation versus nationalization)

FINANCIAL INTERDEPENDENCE FOR THE MID-2010's



The Alstom Case in a Nutshell

- In 2014, Alstom and General Electric (GE) announced that a US\$17 billion (€12.4 billion) bid for the company's power and grid divisions had been made and provisionally accepted
- The proposed takeover became a political issue, with the French state intervening, enacting a decree, nicknamed the “*Alstom decree*”, giving the French state additional powers to veto foreign takeovers (4 May 2014)
- GE's bid was later modified, matching elements of a rival offer from Siemens and Mitsubishi Heavy Industries – with proposals to form 50:50 joint ventures in several divisions; the modified bid was also accepted by Alstom's board
- At the same time, the French state took a 20% stake in the company from Bouygues to protect its position. The GE acquisition deal is expected to be finalized by early 2015

Comments about the Alstom Case

- The French State is not an Alstom *shareholder*... (does it mean that it acted as a *stakeholder* ?)
- Alstom presents an interest from the point of view of the French State's sovereignty ("*entreprise de souveraineté*", Rapp, L., (2011) (*enterprise implicating national sovereignty*); "*entreprise cruciale*", Frison-Roche, M-A., (2014) (*a crucial enterprise*))
- The French State used its prerogatives as a regulator to intervene in the discussion between two private operators and influence the final solution.
- The two operators, each independent of the State, would finish by agreeing to the State's presence and bending to its goals

The Alstom Case as Model ? (1/3)

- On 23 July 2012, CNOOC (China) and Nexen Inc (Canada) announced an agreement by which it was planned for the Chinese firm to purchase the Canadian firm for 15.1 billion American dollars, offering shareholders a 61% premium over the closing share price preceding the announcement
- The transaction represented the largest ever Chinese investment in Canada
- It was to be finalized in the fourth quarter of 2012, subject to the approval by the competent authorities (Canadian and foreign)
- In order to have enough cash on hand to allow it to make its investment, CNOOC announced on 21 August, that it would be reducing its distributed dividend by some 40% (-600 million US dollars)
- Control of a significant share of the world market in offshore deposits (213,000 barrels/day, including 114,000 in the United Kingdom, 59,000 in Canada, 20,000 in West Africa, and 14,000 in the United States)
- First Chinese company to control and exploit oil deposits in the Gulf of Mexico (strategic)
- Platform for later acquisitions
- Change in Canada/EU balance of power: sales of Canadian oil to China (to the detriment of the EU); oil pipeline project to the north of Alberta (*Enbridge Project*)

The Alstom Case as Model ? (2/3)

CANADA STRATEGIC INTERESTS

- **Shale gas:** natural gas caused by decomposition of clays rich in organic matter (gas trapped in porous rock which contain it, generally recovered through hydraulic fracturing : “fracking”)
- Play a growing role in gas supplies of many States, particularly the United States: (i) high subsidies (Feed-In Tariffs); (ii) landowner royalties (unlike in France: Art.552, Civil Code, Mining Code)
- Interest many other governments (Canada, Europe, Asia, Australia)
- Might (i) considerably increase world energy resources and (ii) disrupt the world energy market, controlled by the Russians (20% of the world’s natural gas reserves), the Qataris and Iranians (impose higher prices on quantities exported to Europe)
- “Fracking” : Seismic and environmental risks (refusal by the French government in 2011)

CHINA STRATEGIC INTERESTS

- China set itself a production goal of 30 billion m3, corresponding to half of its annual consumption
- In November 2009, the American president, Barack Obama, made a commitment to share shale gas extraction technologies with China and to encourage American investments in the development of Chinese shale gas
- China opened a national research center for shale gas in August 2010 and it appears to wish to accelerate shale gas production with its own technologies to reach the national production goal of 6.5 billion m3 of shale gas in 2015

Note: Offshore drilling in China (i) extremely expensive: 100 million US dollars per well and (ii) politically difficult (principle of territorial continuity versus claims by Vietnam, Philippines)

The Alstom Case as Model ? (3/3)

CNOOC investment authorization in Nexen Inc.

- **25 February 2013: the acquisition of Nexen Inc. by CNOOC Limited is complete**
- **CNOOC Limited, a Chinese company based in Hong Kong, became owner of 100% of the capital in Nexen Inc.**
- **Nexen Inc.'s board of directors was reconfigured**
- **Nexen Inc has a Chinese CEO, Lee Fanrong**
- **14 January 2014: start of production of the Lihua 19-5 (Chinese Sea) gas site**

Minor amendments made to the Canadian law governing foreign investment

- **i) Foreign investments in new companies are limited to joint ventures under Canadian control**
- **ii) Acquisition of an existing company under Canadian control by a non-Canadian will no longer be authorized (excepting extraordinary circumstances)**
- **iii) If a non-Canadian wishes to sell an existing Canadian company, independently of any other transaction, that party must make sure that potential Canadian investors have had a full and fair opportunity to buy it**
- **iv) Indirect acquisitions shall be examined in order to determine whether they constitute a net advantage for Canada**

Going back to the State's Dilemma

- Shareholder State and Stakeholder State distinction (first L&E approach):
 - *The Shareholder State is subject to the laws of the marketplace,*
 - *The Stakeholder State is tasked with making sure the laws of the marketplace are followed*
- Question: Are these alternative and well-delineated forms of intervention? For example, do these forms apply to the Alstom case? Does the scope of competition rules applicable in Europe allow a border to be drawn?
- L&E issues (behind the questions): (i). Determine the scope of legal rules applicable to a *Shareholder State*; (ii). Guarantee the impartiality (*neutrality*) of the *Stakeholder State*

Differentiating Elements

Notes: (i) in European competition law; (ii) goals : avoiding closing off the single market and protecting the consumer or improve the condition thereof

The Shareholder State (as opposed to the Stakeholder State) can be recognized with three (four?) criteria:

- ***Organic criterion: "any entity engaging in economic activity independently of its legal status or its method of financing";***
- ***Functional criterion: economic activity (e.g. "any activity that consists in offering goods or services in a given market")***
- ***Purpose-driven criterion: private interest pursued***
- ***Test of the private investor in a market economy (behavioral criterion?)***

Border Problems

Ex. *Compass Data Bank* (Case C-138/11, 12 July 2012)

- **Legislation** respecting the administration of the trades and companies registry which requires **payment of a fee** and compliance with intellectual property rights in order access the data contained therein (compared to Art. 102, TFEU)
- The Court found that the State was not acting as an "*enterprise*" (*undertaking*) as understood by European competition law, notwithstanding the fact that "*the making available of data from a database is remunerated*"
- Grounds: (i) the State was pursuing **a public purpose** (e.g. making commercial information secure); (ii) the State was relying upon **the *sui generis* protection granted to it as maker of the database** pursuant to Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

Directions

In the Alstom Case,

- **Hyp.1: *The French government acted as a regulator (stakeholder):*** it could escape from the application of the competition rules so long as it can be demonstrated that it was acting as a *regulator* and not as an *operator*
- **Hyp.2: *The French government acted as an operator (shareholder):*** it could avoid the competition rules so long as it can be demonstrated that it is pursuing a *public interest* or making use of public power prerogatives

Directions (2/2)

- **Hyp.3. *The State made use of its prerogatives (e.g. protection of national interests), in favor of a national operator (e.g. private interest) of which it is - or it is called to become - the shareholder : the private investor test criterion could be applicable***

Ex. *Commission v/ EDF, caseC-124/10, 5 June 2012 :*

- **The Commission complained that the French State had converted an amount owed into capital by failing to assess the tax owed by EDF, and then allocated the proceeds of this tax to increase EDF's capital.**
- **Solution: "*When a member state confers an economic advantage to a company belonging to it, the fiscal nature of the process used for purposes of granting said advantage will not automatically set aside the applicability of the private investor criterion. Accordingly, the precise process chosen by the Member state in question lacks all relevance for purposes of assessing the applicability of said criterion*"**

Model (exemption scheme)

<i>Exemption from Applicability and/or Application of the Competition Rules</i>	STATE AIMING AT A PUBLIC INTEREST	STATE AIMING AT A PRIVATE INTEREST
STATE ACTING AS A SHAREHOLDER	YES (e.g. State acting as a Stakeholder)	<ul style="list-style-type: none"> - NO - YES (e.g. State acting as a Stakeholder), if the State may be considered to be acting as a public regulator ...
STATE ACTING AS A STAKEHOLDER	YES (e.g. State acting as a Stakeholder)	<ul style="list-style-type: none"> - NO - YES (e.g. State acting as a Stakeholder), if the State may not be considered to be acting as a public shareholder

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